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FREE SPEECH AND CORPORATE FREEDOM: A COMMENT ON *FIRST NATIONAL BANK OF BOSTON v. BELLOTTI*

CARL E. SCHNEIDER*

The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being. Therefore, neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men.

— Felix Frankfurter¹

I. THE OPINIONS

The corporation was born in chains but is everywhere free. That freedom was recently affirmed by the United States Supreme Court in *First National Bank of Boston v. Bellotti*.² In *Bellotti*, the Court overturned a Massachusetts criminal statute forbidding banks and business corporations to make expenditures intended to influence referenda concerning issues not “materially affecting” the corporation’s “property, business, or assets.”³ In doing so, the Court confirmed its discovery that commercial speech is not unprotected by the first amendment and announced a novel doctrine that corporate speech is not unprotected by the first amendment.

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1. *Martin v. Struthers*, 319 U.S. 141, 152 (1943) (Frankfurter, J., dissenting).

2. 435 U.S. 765 (1978). I will for the sake of convenience refer to this case as “*Bellotti*.”

3. *Id.* at 767.

Although several years have passed since *Bellotti* was decided, the case has received less attention than it deserves. As the Court's leading consideration of the speech rights of corporations, it is a landmark in first amendment law. *Bellotti's* significance is enhanced by the unusually direct judicial comments about, and indeed reliance on, theories of the first amendment. Because the case addresses for the first time an important constitutional problem, it presents with unusual clarity intriguing questions about styles in judicial reasoning. Finally, *Bellotti* is an event in the continuing debate over the power of the corporation, as well as in the continuing struggle against the corruption of politics. I seek in this Article to give the case the attention it merits on its own terms, as a problem in styles of constitutional reasoning, and as a chapter in the history of the uneasy relationship between the corporation and the law.

A. THE MAJORITY OPINIONS

Until April 1978, chapter 55, section 8 of the Massachusetts General Laws forbade banks and business corporations to make 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."⁴ Section 8 also provided 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."⁵ In 1976, two national banking associations and three business corporations which opposed a referendum to enact a constitutional amendment levying a graduated individual income tax sought to have section 8 declared unconstitutional.⁶ The Supreme Judicial Court of Massachusetts upheld the statute.⁷ The Supreme Court of the United States, by a vote of five to four, reversed.⁸

Writing for the majority, Justice Powell⁹ said the Massachusetts Supreme Judicial Court had erred when it "framed the principal question in this case as whether and to what extent corporations have First

4. MASS. GEN. LAW ANN. ch. 55, § 8 (West. Supp. 1977) (quoted in *Bellotti*, 435 U.S. at 768.)

5. *Id.*

6. *Bellotti*, 435 U.S. at 769; see also *First Nat'l Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 776-77 n.6, 359 N.E.2d 1262, 1265-66 n.6 (1977) (text of unprinted order).

7. *First Nat'l Bank of Boston*, 371 Mass. 773, 359 N.E.2d 1262 (1977).

8. By the time the United States Supreme Court heard the case, the election had been held and the referendum had been rejected. The case was nevertheless not moot, since it dealt with a controversy capable of repetition, yet evading review. *Bellotti*, 435 U.S. at 774-75.

9. He was joined by the Chief Justice and Justices Stewart, Blackmun, and Stevens.

Amendment rights.”¹⁰ Since “[t]he Constitution often protects interests broader than those of the party seeking their vindication,” and since “[t]he First Amendment, in particular, serves significant societal interest,” the “proper question” was whether the statute “abridges expression that the First Amendment was meant to protect.”¹¹ Justice Powell observed that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source”¹² and that, since the regulated speech was clearly political, it was just as clearly protected by the first amendment.¹³ The Court had only to inquire, therefore, “whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”¹⁴

The Court rejected the Massachusetts court’s conclusion that a corporation’s first amendment rights derive only from its fourteenth amendment *property* rights. “Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, . . . and the Court has not identified a separate source for the right when it has been asserted by corporations.”¹⁵ Thus the first amendment, via the fourteenth, can protect interests beyond those “materially affecting” the business of the corporation. Justice Powell then cited the Court’s commercial speech cases to show that “the First Amendment goes beyond protection . . . of the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹⁶ Because the “information” spoke to an electoral issue, it was at the core of the first amendment’s scope and was thus protected.

The Court next applied the compelling state interest test, noting that the burden was on the government to show that the test had been met and that the means used were narrowly drawn.¹⁷ The Court found insufficient evidence in the record that the law was necessary to preserve “the State’s interest in sustaining the active role of the individual citizen in the

10. *Bellotti*, 435 U.S. at 775-76.

11. *Id.* at 776.

12. *Id.* at 777.

13. *Id.*

14. *Id.* at 778.

15. *Id.* at 780.

16. *Id.* at 783.

17. *Id.* at 786.

electoral process and thereby preventing diminution of the citizen's confidence in government."¹⁸ The Court cited the under- and over-inclusiveness of the statute to show that it did not serve "the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."¹⁹ The Court concluded that "[b]ecause . . . [section] 8 . . . prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated."²⁰

Chief Justice Burger joined the Court's opinion, but wrote a concurrence to express his fear that, were the position of the state court accepted, freedom of the press would be endangered. "This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants in this case."²¹

B. THE DISSENTS

Justice White wrote an emphatic dissent in which he was joined by Justice Brennan and Justice Marshall. He began by pointing out that the Court had not disapproved the Massachusetts court's conclusion that the income tax referendum had no material effect on the "business, property or assets" of the corporations.²² He therefore stated the issue as "whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business."²³ The speech of business corporations, he wrote, does not serve "what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization and self-fulfillment."²⁴ And while corporate speech may serve the other first amendment function of protecting "the interchange of ideas,"²⁵ such speech lacks "the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech."²⁶ In any event, restriction of such speech "impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech."²⁷ Furthermore, in

18. *Id.*

19. *Id.* at 787.

20. *Id.* at 795.

21. *Id.* at 796 (Burger, C.J., concurring).

22. *Id.* at 802-03 (White, J., dissenting).

23. *Id.* at 803.

24. *Id.* at 804.

25. *Id.* at 806.

26. *Id.* at 807.

27. *Id.*

enacting section 8, Massachusetts had not simply abridged the first amendment interests of corporations. Rather, it had balanced competing first amendment interests, some of which had to be abridged if the others were to be effectuated. This accommodation of conflicting first amendment interests was of two kinds. First, since the state had endowed the corporation with advantages which allowed the corporation to accumulate great sums of money, the state might be thought to be allowing the corporation unfair advantages over other participants if it permitted the corporation to compete freely in the political process.²⁸ Second, the state had a first amendment interest in "assuring that shareholders are not compelled to support and financially further beliefs with which they disagree."²⁹ In short, Justice White's dissent disagreed fundamentally with the Court's formulation of the first amendment interests and its weighing of the state interests in the case.

Dissenting separately, Justice Rehnquist reiterated his view "of the limited application of the First Amendment to the States"³⁰ and argued that the fourteenth amendment protects the "property" but not the "liberty" of business corporations.³¹ He cited *Dartmouth College v. Woodward*: "Being the mere creature of law, [a corporation] possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."³² He could not readily conclude "that the right of political expression is . . . necessary to carry out the functions of a corporation organized for commercial purposes," especially where that political activity was directed at matters having no material effect on the corporation.³³ For these reasons, and because "the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed,"³⁴ Justice Rehnquist thought the statute constitutional.

II. THE NEW FORMALISM: *BELLOTTI* AS A PROBLEM IN JUDICIAL STYLES

As even this brief summary of the Court's opinion in *Bellotti* should suggest, its judicial style is curiously formalistic. Formalism—"the notion that social controversies could be resolved by deductions drawn

28. *Id.* at 809.

29. *Id.* at 812.

30. *Id.* at 823 (Rehnquist, J., dissenting).

31. *Id.* at 822.

32. *Id.* at 823 (quoting 17 U.S. (4 Wheat.) 518, 636 (1819)).

33. *Id.* at 825.

34. *Id.* at 826.

from first principles on which all men agreed or by inductions drawn from the 'evidence' of past decisions"³⁵—is widely thought to have flourished from sometime after the Civil War until it was denounced and renounced by the Supreme Court in 1937. Courts under its influence are said to have conceived of the law in terms of "disembodied logical interrelationships"³⁶ and to have ignored or mishandled facts inconvenient to legal analysis and social preconceptions. The critics of formalism employ cases like *Lochner v. New York*³⁷ to symbolize the misuse and disregard of facts which conflict with legal categories and logic. Finally, and *Lochner* is again the exemplar, formalism often masked the use of law to serve the economically powerful in general and the corporation in particular; a service often consistent with the judges' "intuitions of public policy, avowed or unconscious."³⁸

The Court's opinion in *Bellotti* fits, if not neatly, at least recognizably, into this tradition. In *Bellotti*, the Court considered and rejected a legislative attempt to govern the political and social power of the business corporation. The opinion has a quality of abstraction, of disembodiment, of remoteness from social reality, that makes it formalistic. It reasons from highly abstract first amendment principles. It supports its reasoning with arguments provable only through empirical investigation, but substitutes logic for evidence. It treats the corporation in ways perhaps consistent with the logic of corporate law, but surely inconsistent with the reality of corporate life.

Yet it will hardly do to pretend that the *Bellotti* Court is the *Lochner* Court. Speaking generally, never has the Court been as solicitous of individual liberty as in the last thirty years. Never has the Court so readily countenanced, sustained, and even amplified legislative regulation of economic and corporate life. Speaking more particularly and practically of *Bellotti*, any facile political interpretation must cope with the simultaneous presence in dissent of the Court's two most liberal members—Justice Brennan and Justice Marshall—and its most conservative member—Justice Rehnquist.³⁹

35. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 566 (1974).

36. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

37. 198 U.S. 45 (1905).

38. O. W. HOLMES, *THE COMMON LAW* 5 (1881); see also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 455-56 (1973); M. HORWITZ, *supra* note 36, at 253-66; K. LLEWELLYN, *THE COMMON LAW TRADITION* 40 (1960).

39. Of course, political extremes sometimes meet. But even if the two wings of the present Court are extremes, one must still cope with the fact that the fourth dissenter—Justice White—is one of the steadiest members of the Court's center.

If all this is true—if today's Court would repudiate any charge of formalism—why does the opinion in *Bellotti* seem so formalistic? I will argue that it exemplifies what might be called the new formalism. The new formalism has two sources. First, it arises from a renewed tendency to rationalize law through the use of theory. This tendency itself has numerous sources,⁴⁰ and it has been particularly pronounced in first amendment law.⁴¹ I am far from suggesting that theory is useless or even unneeded in interpreting law in general or the Constitution in particular.⁴² I do suggest that theory conduces to both over-simplification and over-ambition—it is easy to convince oneself that the first amendment (to take the relevant example) has a single purpose,⁴³ that that purpose is broad enough to address a grand range of the problems the twentieth century has presented democracy, and that particular rules of decision can be inferred simply by reasoning from that purpose.⁴⁴ The danger of theory can be stated in another way: It conduces to a deductive approach to social problems which American law does little to equip courts to perform, which creates many possibilities for judicial activity but gives courts scant guidance in choosing from them.⁴⁵

The second, and probably related, source of the new formalism comes from the Court's response to an increasingly severe problem. Constitutional litigation, although phrased in terms of principle, raises social issues of stunning and forbidding complexity. No appellate court has the time, the skill, or the wish to master the empirical realities that underlie most questions of constitutional rights. And even if appellate courts were willing, lawyers often would be unable to supply them with satisfactory empirical studies of the issues to be resolved, since social science has left many such issues unexplored and has left many others unexplained. Further, as society becomes more complex, this problem

40. See, e.g., Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039, 1041-48 (1985). For a stimulating discussion of the actual social effects of first amendment jurisprudence, see Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

41. See Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983).

42. Quite the contrary, I have argued elsewhere that American family law has been impoverished by its resistance to theory. Schneider, *supra* note 40.

43. For a statement of and an attack on that conviction, see Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983).

44. See J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

45. For a somewhat similar statement of this aspect of the new formalism, see Nagel, Book Review, 127 U. PENN. L. REV. 1174 (1979) (reviewing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*).

becomes more severe. The consequence is that courts increasingly rely on logical inferences about how things *must* work instead of on investigations of how they *do* work. Thus a considerable part of constitutional jurisprudence, particularly state-interest analysis in fourteenth amendment law, has come to consist of devices for simplifying questions about social effects of legislation.⁴⁶

In this Article, I argue that the Court's opinion in *Bellotti* suffers from a formalism that arises from both these sources. I begin by suggesting that the Court's theory of the first amendment is stated at such a level of abstraction that it cannot resolve particular questions and that the Court's theory thus needs to be disciplined by consulting historical experience and judicial doctrine. I amplify this point by discussing the Court's theory in the historical and doctrinal context of the two first amendment areas most central to the Court's opinion in *Bellotti*—the commercial-speech doctrine and the right-to-receive doctrine. Next, I suggest that the Court's use of theory is impaired by the Court's problems in understanding social reality. I amplify this point by suggesting that our historical experience with the corporation justifies special restrictions on it and that the nature of corporate governance justifies special doubts about the first amendment significance of corporate speech. I argue that a further defect of the Court's theory is that it ignores the first amendment values served by limiting corporate political speech. I amplify this point by proposing that a necessary, though not sufficient, condition for resolving such a conflict between first amendment values is empirical evidence about how well those values are served by alternative rules. Finally, I argue that because it analyzes *Bellotti* only in terms of first amendment theory, the Court overlooks the other elements of constitutional jurisprudence which speak to the place of corporate power in a democracy.

III. THE COURT'S THEORY OF THE FIRST AMENDMENT

A. THE COURT'S STATEMENT OF ITS THEORY OF THE FIRST AMENDMENT

In *Bellotti*, the Massachusetts Supreme Judicial Court had sought, but not found, evidence that corporations have first amendment rights.

46. For a fascinating collection of studies of how complicated social-policy questions are simplified by courts, see R. MNOOKIN, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* (1985). I comment on those simplifying devices in Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 MICH. L. REV. (1986) (forthcoming).

The United States Supreme Court reached the opposite result by abandoning the direct search for corporate first amendment rights in favor of an abstract and aggressively simple theory of free speech: more is more. The more speech and information circulating, the better off society is and the better the first amendment is served. Thus the Court treats *speech*, not the speaker, as the beneficiary of the first amendment's protection: "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."⁴⁷

On its face, this approach to the first amendment is a little incongruous. By its terms, the amendment protects "freedom of speech," not freedom to hear. The Court, of course, reasoned that the latter freedom is necessarily implied by the former. But in the *Bellotti* situation that reasoning seems circular: whether the corporation has a right to speak depends on the listener's right to receive; but a listener presumably has a right to receive only what the speaker has a right to say. Moreover, the incongruity of *Bellotti's* theory is intensified by its distance from the general public's understanding of law and rights: in everyday language, rights protect people, not corporations; in everyday thought, the first amendment is needed for the unpopular few, not the powerful many.

The incongruity also may be understood in a somewhat different way. "The people," acting through their government, have prohibited certain entities from speaking about certain questions. Does the first amendment prevent the people from doing so? Ordinarily, the answer would be simple, because all people have a right to speak, either as part of their right to govern or as part of their right of self-expression. But here the would-be speaker is not a person and cannot benefit from the right to speak because it has no right to govern and needs no right of self-expression. The Court's argument is that a right resides in the people to have the information they need to govern.⁴⁸ Yet in the statute at issue "the people" expressly decided not only that this information is not needed to govern, but that allowing the corporation to speak corrupts the electoral process and thus interferes with the people's effective exercise of their right to govern.

How, then, does the Court seek to eliminate the apparent incongruities in *Bellotti's* reasoning? As so often, Alexander Meiklejohn is the

47. *Bellotti*, 435 U.S. at 778.

48. *Id.* at 791-92.

deus ex machina.⁴⁹ Meiklejohn deduced the meaning of the first amendment from the fact that the Constitution established a democracy. If the people are sovereign, if they are the governors, they must have all the information they need to govern. The government may not deprive the governors of such information. Thus the Court in *Bellotti* cited Meiklejohn for the proposition that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."⁵⁰ As Meiklejohn himself said in a familiar passage:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.⁵¹

There is much to be said for this argument. Indeed, much has been said for it. But let us restate it in simpler terms as it applies to *Bellotti*. The corporation may have no right to speak. Should it have one? To find out, we consult the first amendment's purpose. That purpose is to promote democratic government by making sure the citizenry is well-informed. Giving the corporation the right to speak increases the quantum of information in circulation and thereby makes it easier for citizens to have more information. Giving the corporation a right to speak thus serves the purpose of the first amendment and is therefore required by the amendment. *Quod erat demonstrandum*. The difficulty with this argument, though, is that it articulates a purpose for the first amendment so broad that it comprehends many things which we doubt the first amendment includes.⁵² To put the point slightly differently, the first amendment may serve the larger goal of promoting democratic government, but not everything that promotes democratic government is within the scope of the first amendment.

49. See, e.g., Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209-11.

50. *Bellotti*, 435 U.S. at 791 (footnote omitted).

51. A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960) (emphasis in original).

52. See Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 662-63 (1982); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 527 (1979).

At this point, then, the Court's first amendment theory is too general and too simple to be effective in resolving particular issues. To use its theory, the Court must be able to identify those things that both promote democratic government and are within the scope of the first amendment. Trying to do so through reasoning alone would set intolerable demands on any court's (or any person's) time, intellect, imagination, and anticipation. This, of course, is one of the problems traditionally associated with formalism—that its generally high level of abstraction makes its doctrines specially manipulable. One antidote to this fault of formalism is to temper theory with an appreciation of the particular, to interpret theory with an understanding of the historical and social circumstances of the specific issue at hand. Another, related, antidote is to develop theory incrementally and inductively by consulting the teaching of earlier cases. These antidotes, of course, cannot make theory precise and dispositive, but they can provide a basis for criticizing and disciplining theory. One of the purposes of this Article is to apply these antidotes to see what can be learned about the *Bellotti* Court's technique and result.

We begin by looking at two bodies of precedent the Court does consult—the commercial speech cases and the right-to-receive cases. The Court concludes from those cases that a right to receive information would promote democratic government and is within the scope of the amendment and that nothing about commercial speech makes it irrelevant to democratic government or takes it outside the scope of the first amendment. I make two kinds of continuing arguments. First, I argue that neither line of cases is as well-considered or as conclusive as the Court implies. I make this argument not out of any simple-hearted belief in the determinism of legal doctrine, but because the fragility and tentativeness of both lines of cases suggest we should be cautious in extending them. Second, I argue that both lines are themselves problematic and that the Court's reliance on them in formulating its first amendment theory is for this reason unwise.

B. LINES OF PRECEDENT: THE COMMERCIAL SPEECH CASES

The *Bellotti* Court's most direct source for its "more is more" principle is its line of commercial speech cases, where the Court had shortly before faced similar issues regarding the right of free speech in advertising. Those cases are cited in *Bellotti* to show that the first amendment "prohibit[s] government from limiting the stock of information from

which members of the public may draw."⁵³ Advertisements are constitutionally protected not so much because they materially affect the seller's business, but because they further the social "interest in the 'free flow of commercial information.'"⁵⁴ *Bellotti* makes an implicit *a fortiori* argument from the commercial speech cases: if advertisements, which contribute only to the flow of *commercial* information, are protected, so must be expenditures to affect referenda, since they enhance the flow of *political* information, which is closer to the first amendment's core than commercial information.

The commercial speech cases cited in *Bellotti* are in fact more limited than their centrality in the opinion implies. First, the commercial speech cases, unlike *Bellotti*, generally assure access to information for which there is a genuine demand from a relatively identifiable group of people and which would be unavailable were a company forbidden to advertise. Indeed, one set of these cases, far from securing the right of commercial enterprises to speak, had the effect of pressuring them to speak when they were (collectively, at any rate) reluctant to do so. This set of cases might be said to rely more heavily on consumer-protection and antitrust principles than first amendment principles, since those cases involved professions which had evidently solicited the laws that prohibited their members from advertising.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,⁵⁵ for example, rejected a law forbidding pharmacists to advertise prices. The plaintiffs were users of prescription drugs who complained of astonishingly disparate prices and, presumably, artificially high profits. Similarly, *Bates v. State Bar of Arizona*⁵⁶ invalidated a state bar's disciplinary rule prohibiting lawyers from advertising at all. The offending advertisement in *Bates* was for a legal "clinic" whose proprietors explicitly intended to offer inexpensive legal services to people ordinarily unable to afford them.⁵⁷ *Bates* was preceded by years of criticism of the bar's rules against advertising, criticism which included charges that the rules helped sustain monopoly prices.⁵⁸

53. *Bellotti*, 435 U.S. at 783.

54. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976)).

55. 425 U.S. 748 (1976).

56. 433 U.S. 350 (1977).

57. *Id.* at 354.

58. *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (bar association's enforcement of a minimum fee schedule for home title examinations by attorneys constituted price fixing).

*Bigelow v. Virginia*⁵⁹ can be seen in a somewhat similar light. That decision invalidated a statute that made it a misdemeanor to circulate any publication which encouraged or prompted the procuring of an abortion.⁶⁰ The challenged advertisement had been published when New York was almost the only place in the country where one could readily obtain a legal abortion and when many women were going there for that purpose. As the presence of the challenged advertisement suggests, though, practical information about receiving an abortion in New York could be hard for someone from out-of-state to obtain. There was thus a genuine demand for the information, and it would otherwise have been, if not unavailable, at least elusive. Given the notorious danger of illegal abortions, calling *Bigelow's* result a work of consumer protection seems apt. In addition, the decision itself relied, as the Court later conceded, on the view that the statute infringed the right to an abortion.⁶¹ Finally, the decision's rationale was further clouded by the possible impairment of free press rights such a state law might pose if enforced against national publications.⁶²

*Linmark Associates v. Township of Willingboro*⁶³ does not fit this consumer-protection model, but neither is it convincing authority for the proposition that, because speech provides "information," that speech is constitutionally protected, or for the proposition that commercial speech *simpliciter* is constitutionally significant. In *Linmark*, the Court disapproved a local ordinance which, in an effort to prevent "white flight," prohibited placing "For Sale" and "Sold" signs in front of homes. The suit thus involved the freedom of individuals to express their confidence in or distress with their community and to state their reactions to an important political issue—racial integration. As the fact of the ordinance implies, there was apparently considerable interest in the community in knowing how citizens were responding to that question, and citizens communicated those responses—in the strongest terms—through these signs.

This brief survey of the pre-*Bellotti* commercial speech cases thus reveals a leading characteristic of those cases—in each there could usefully be said to be an actual, reasonably specific, "audience" for the speech at issue. Those cases, then, may suggest that speech, not the speaker, is protected, but they also suggest that where the speaker is not

59. 421 U.S. 809 (1975).

60. *Id.* at 829.

61. See *Virginia Pharmacy*, 425 U.S. at 760 (1976).

62. *Bigelow*, 421 U.S. at 828-29.

63. 431 U.S. 85 (1977).

protected, there must be a plausibly identifiable audience which can plausibly be said to be interested in the speech. Let me put the point another way. The *Bellotti* Court's theory is that speech is protected because of its social value even where the "speaker" is not a human being with human rights. That theory has some force in the context of the early commercial speech cases, because in them an audience could be identified whose need for the speech was demonstrable and not readily satisfied through other channels. Only in a painfully weak sense can this be said of the speech at issue in *Bellotti*. As I will argue at greater length below, that distinction, though not dispositive, is significant.

The first limitation of the commercial speech cases, then, relates to the audience to whom the speech is addressed. The second limitation relates to the speech itself. Although the Court in *Virginia Pharmacy* lauded commercial speech as "indispensable to the formation of intelligent opinions as to how [a free enterprise] system ought to be regulated or altered,"⁶⁴ the Court also conceded that "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction,' . . . and other varieties."⁶⁵ The main commonsense difference, apparently, is that commercial speech is more objective and hardier than other varieties and therefore can withstand more regulation; the speech that these cases freed dealt only in "facts." Thus the commercial speech cases do not "prohibit government from limiting the stock of *information* from which members of the public may draw."⁶⁶ Rather, they prohibit limiting the stock of *fact*, of "concededly truthful information."⁶⁷ But one opposite of concededly truthful information is the kind of political opinion the Court protected in *Bellotti*. As Justice Stewart's concurring opinion in *Virginia Pharmacy* noted, "[T]he Court's determination that commercial advertising of the kind at issue here is not 'wholly outside the protection of' the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other."⁶⁸ Yet despite the centrality of the commercial speech cases to *Bellotti*, and despite *Bellotti*'s reliance on the "informational purpose of the First Amendment," the opinion in *Bellotti* does not discuss this basic difference between the two kinds of speech. Ordinarily,

64. *Virginia Pharmacy*, 425 U.S. at 748, 765.

65. *Id.* at 771 n.24 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

66. *Bellotti*, 435 U.S. at 783 (emphasis added).

67. *Virginia Pharmacy*, 425 U.S. at 773.

68. *Id.* at 779.

of course, political speech is protected however unreliable we may think it is. But I will argue that the peculiar unreliability of corporate speech combines with other factors to take it outside the protection of the first amendment.

Not only was the line of commercial speech cases quite limited, those cases themselves are unwise in ways that speak to the wisdom of the *Bellotti* Court's free-speech theory. Although this is not the place for a full-scale treatment of those cases, we will explore several relevant problems with them. The first such problem is the Court's attack on "paternalism." In *Virginia Pharmacy*, the Court scrutinized the state's justifications for banning pharmaceutical advertisements and concluded that the prohibition might indeed serve some of the state's purposes. But that success would be "based in large part on public ignorance."⁶⁹ That basis was unacceptable:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.⁷⁰

The Court may well have been correct that overturning Virginia's statute would raise the quality and lower the cost of pharmaceutical services. But the portion of the opinion which this quotation climaxes displays a formalism—a lack of interest in any genuine investigation of how rules really work—so pronounced as to make us skeptical of the Court's correctness. For example, as Professor Coase points out, "[n]o attention was given to the possibility that greater price competition might reduce the willingness, indeed ability, of the pharmacists to supply services such as advice on the proper use of drugs or the interaction of drugs taken on prescriptions from different doctors."⁷¹ For another example, the Court's conclusion rests on the assumption that "high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject."⁷² No empirical evidence (no evidence at all) is cited for this sanguine proposition. Nor is any empirical evidence cited to demonstrate that people *will* perceive their own best

69. *Id.* at 769.

70. *Id.* at 770.

71. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 31 (1977).

72. *Virginia Pharmacy*, 425 U.S. at 768.

interests if well informed. There surely are some issues about which one's best interests are, for the non-expert, impossibly obscure. *Virginia Pharmacy* might well present just such an issue—a choice between, on one hand, a cheap pharmacist and, on the other, one who keeps full records and an attentive watch on his customers and his field. I, at least, have no idea which pharmacist the economically and medically rational man would choose. I probably *cannot* be well enough informed—even the experts may disagree, and even if they agree, it would surely take some public education, not self-interested advertisements, to communicate their views. Finally, even if I can educate myself about one of these issues, I will be a diligent consumer indeed if I can summon the time and energy—to say nothing of the desire—to learn about all of them. In the meantime, I might make serious mistakes.

In short, paternalism is not all bad. Furthermore, it is not easy to know just what “paternalism” means in a democratic society. While most first amendment law assumes that “the people” and “government” are in natural opposition, at some level the government is the agent of the people. And what the previous paragraph suggests is that the people may sometimes choose to have the government do some of their work for them by regulating businesses and professions. Has the first amendment really “made the choice for us” that we cannot do so? Indeed, is it not paternalistic even for the Court to advance the best interest of society to justify striking down such democratically authorized regulations?

Furthermore, we (quite properly) expect government to make paternalistic choices for us continually. Consider, for example, the FDA's regulation of food additives. Some prohibited additives are thought to be harmful only in large quantities, and many of those additives have properties—they are preservatives, they help keep down calories—that an informed consumer might conclude made their use sensible for him, even if not for other consumers. Yet we have the government make this choice for all of us because, in our complex society, few of us have the time, ability, or wish to decide for ourselves. This may be paternalism, but by relieving us of numerous and often trivial choices, it is a paternalism that frees us to make choices that matter.

Consider another form of paternalism. Suppose, for instance, that the government banned cigarette advertising in order to end the present extravagant campaign to induce people to injure their own health. Here people would be using government to help them resist their own weaknesses. Yet the goal of helping people stop smoking (or not start smoking) is so surely in each individual's own best interest, and in society's,

that it would be a harsh and foolish Constitution which prohibited such a law.

By now the alert reader will have observed that we are talking much more about economic policy than about speech. Economic policy, as the Court has repeatedly said, is essentially within the purview of the legislature, and the Court in *Virginia Pharmacy* expressly acknowledged that, in interpreting the fourteenth amendment, it had regularly sustained justifications of the kind asserted by the Virginia Pharmacy Board.⁷³ The Court in that case found that such justifications violated the first amendment, however, because “[i]t is a matter of public interest that [consumer purchasing] . . . decisions . . . be intelligent and well informed”⁷⁴ and because “the particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”⁷⁵ This may be so, but the public interest in the nature of consumer purchasing decisions is an interest in the proper functioning of the economic system, and questions about the functioning of that system belong to the legislature, not only for constitutional reasons, but because the legislature and the administrative agencies it creates are better equipped than courts to deal with the empirical and technical issues economic problems present.⁷⁶ The fact that an individual’s interest is “keen” does not by itself bring that interest within the scope of the first amendment, for it is the nature, not the strength, of the interest that is controlling.⁷⁷

The irony of the Court’s position is that the consumer’s increment of first amendment freedom is bought at the price of a diminution in economic freedom. There is no doubt that the state may, for instance, ban the *sale* of air conditioners as a means of compelling energy conservation. Yet the state apparently may not limit *advertising* of air conditioners in

73. 425 U.S. at 769. The Board’s economic justifications were maintaining the high degree of professionalism among licensed pharmacists, promoting the health of consumers, and preventing price wars among pharmacists. *Id.* at 766-68.

74. *Id.* at 765.

75. *Id.* at 763.

76. For a fuller exposition of this argument, see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). The technical nature of many of the questions in the commercial speech cases is suggested by the frequency with which the regulation at issue in them has been promulgated by an administrative agency.

77. The Court also believes that advertising is constitutionally protected because it provides information necessary to formulate views on how the economic system should be regulated. See *Virginia Pharmacy*, 425 U.S. at 765. This seems to me a makeweight argument. For that purpose, what the citizen needs is systematic evidence about price structure and the quality of products, evidence which even numerous and frequent advertisements would present only randomly and unreliably.

the service of the same goal without encountering first amendment difficulties.⁷⁸ This is anomalous, for in the name of personal freedom it inhibits the state from promoting its goals through the means least restrictive of personal freedom.

In short, the second problem with the commercial speech cases we have seen is that commercial speech is part of commerce and therefore within the scope of legislative regulation. The third problem is that commercial speech is constitutionally inferior speech. This was, of course, long the historical position of the Court, and even today commercial speech has a "subordinate position in the scale of First Amendment values."⁷⁹ As Professors Jackson and Jeffries suggest, "[M]easured in terms of traditional first amendment principles, commercial speech is remarkable for its insignificance. It neither contributes to self-government nor nurtures the realization of the individual personality."⁸⁰

In response to this argument it is often said that commercial speech must nevertheless be protected because no satisfactory line can be drawn between commercial and non-commercial speech. Professors Jackson and Jeffries note, however, that such a line existed and worked tolerably well until *Virginia Pharmacy* and that, because commercial speech is even now less protected than most other speech, such a line is in fact still needed.⁸¹ Indeed, the new commercial speech doctrine necessitates drawing many troubling new lines. For example, the Court does not deny the need to regulate fraudulent and misleading advertising. Yet not only is the line between regulable and non-regulable advertising uncertain, it is not clear why the Court's "market-theory" of speech does not apply to *all* kinds of advertising. Why isn't it just as paternalistic for the state to distinguish between false and true ideas in economics as in politics? Worse, the distinction between regulable and non-regulable speech will have to turn on the content of the speech, precisely the ground for regulation the Court ordinarily finds most offensive.

The fourth and final difficulty with the commercial speech cases is not just that they commit the Court to a daunting task of linedrawing; they also commit it to a probably endless series of case-by-case resolutions of exactly the kind of issues which a court is least equipped to deal

78. Cf. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566-71 (1980) (New York Public Service Commission's ban of promotional advertising by a public utility violates first and fourteenth amendment protection of free speech).

79. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

80. Jackson & Jeffries, *supra* note 76, at 14; see also BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 353-55 (1978).

81. Jackson & Jeffries, *supra* note 76, at 24.

with—issues raising complicated empirical questions and technical problems regarding economic and social policy. In *Friedman v. Rogers*,⁸² for instance, the Court struggled to decide, not the nature of a constitutional right, but the economic and social effects of a law which prohibited optometrists from practicing under a trade name. Here, as in most of the commercial speech cases and in *Bellotti*, the empirical evidence the Court could intelligently assimilate was minimal, and the majority and minority had to be content with equally plausible *a priori* arguments. Thus the majority concluded: "Rather than stifling commercial speech, [section] 5.13(d) ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name."⁸³ The minority, just as persuasively, just as speculatively, wrote:

As a result of these and other rules, the Rogers organization is able to offer and enforce a degree of uniformity in care at all its offices along with other consumer benefits, namely, sales on credit, adjustment of frames and lenses without costs, one-stop care, and transferability of patient records among Texas State Optical offices.

. . . For those who need them, eyeglasses are one of the "basic necessities" of life in which a consumer's interest "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."⁸⁴

In sum, our review of the commercial speech cases suggests that they are both limited and unwise in ways that speak to the soundness of the *Bellotti* Court's first amendment theory. Those cases seem directed toward speech for which there is a demand for relatively factual information from a reasonably identifiable group of people. These limits raise doubts about extending the commercial speech cases to the situation in *Bellotti*, where there was no evidence of any demand for the proposed speech, where the proposed speech was opinion rather than fact, and where the proposed audience was the public at large. Further, the commercial speech cases rest on a view of paternalism which is unduly critical, which overemphasizes the distinction between the people and their government, and which scants the principle that decisions about the ordering of economic life and social power are properly confided to the

82. 440 U.S. 1 (1979).

83. *Id.* at 16.

84. *Id.* at 21-22 (Blackmun, J., concurring in part and dissenting in part) (footnote omitted) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-64 (1976)).

legislature. Each of these criticisms can plausibly be applied to *Bellotti*. But before I develop them further, we need to look at the other set of cases the Court uses to give particularity and authority to its first amendment theory.

C. LINES OF PRECEDENT: THE "RIGHT TO RECEIVE"

The *Bellotti* Court's second line of precedent is composed of those cases which may imply that there is a "right to hear" independent of a right to speak and which consequently are employed to justify protecting speech independently of speakers. The Court is indeed willing to say that there is such a right. Some commentators insist that the right is an important one.⁸⁵ The Court in *Virginia Pharmacy* said, "Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases."⁸⁶ Yet the right-to-hear cases cited in *Virginia Pharmacy* are hardly so definite. The right to hear has been used, where it has been used at all, primarily to garnish more conventional first amendment arguments. In the two cases where the right to hear has apparently *created* a right to speak, the scope, the terms, and possibly even the fact, of that creation are vague.⁸⁷

Modern courts would probably explain the early right-to-hear cases in other terms, and even the courts which considered them, treated the right to hear as peripheral. *Martin v. Struthers*⁸⁸ was a leafletting case in which a city contended that many of its residents worked at night, slept

85. See, e.g., Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1; Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979); Comment, *The Right to Receive and the Commercial Speech Doctrine*, 63 GEO. L.J. 775 (1975); Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

86. *Virginia Pharmacy*, 425 U.S. at 756.

87. Here, as elsewhere, I direct my discussion only to the cases relied on in *Bellotti*. I thus pretermit the relatively recent line of cases treating access of the press to criminal trials. In any event, I believe a useful distinction might be drawn between, on one hand, cases (like the press-access cases) that deal with the public's right to know what the government is doing and, on the other hand, cases that deal with the public's interest in hearing what a private citizen (or entity) wants to say. I would argue that the former category of cases is more central to the interests the first amendment protects, since information about what the government is doing is likely both to speak more directly to what the government should be doing (and who should be elected or reelected to office) and to be harder to obtain through alternative means than information about private citizens or entities. Of course, the state interest in preventing the publication of information about the government also may be stronger than the state interest in regulating information from nongovernmental sources. Cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (lower court decision that government failed to show justification for impositions and prior restraints on articles affecting United States security in Vietnam affirmed).

88. 319 U.S. 141 (1943).

during the day, and therefore did not want to be disturbed by leafletters.⁸⁹ Part of the Court's riposte to that contention was that other citizens *would* want to receive the leaflet and had a right to decide for themselves.⁹⁰ Nevertheless, it was the leafletters' right to speak which was central to the holding.⁹¹ *Thomas v. Collins*⁹² was what now seems a straightforward free speech and free assembly case of a union representative's right to make an organizing speech without being licensed by the state. It is cited as precedent for the right to receive because the Court said that the workers had a right to organize, and that right "included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly."⁹³ *Marsh v. Alabama*⁹⁴ held that a Jehovah's Witness had a first amendment right to distribute literature in the business district of a town wholly owned by one company. The Court may well have been influenced by concern for the residents' ability to obtain information, but *Marsh* is probably best understood as responding to the special history and circumstances of the Southern company town. In any event, *Lloyd Corp. v. Tanner*⁹⁵ and *Hudgens v. NLRB*⁹⁶ seem to limit sharply *Marsh's* relevance and to cast doubt on the present status of the right to receive.⁹⁷

Two later right-to-hear cases also have failed to become convincing precedents. The first, *Griswold v. Connecticut*,⁹⁸ overturned the conviction of officers of a Planned Parenthood clinic for informing married couples about contraception. Justice Douglas' imaginative opinion cites *Martin v. Struthers* for the right "to receive" and "to read"; builds a broad view of the first amendment; adds the (inferred) right of association; recruits the third, fourth, fifth, and ninth amendments; and detects

89. *Id.* at 44.

90. *Id.*

91. *Id.* at 146-47.

92. 323 U.S. 516 (1945).

93. *Id.* at 534.

94. 326 U.S. 601 (1946).

95. 407 U.S. 551 (1972).

96. 424 U.S. 507 (1976).

97. In *Hudgens*, the warehouse employees of a shoe company which had a store in a large shopping mall went on strike and picketed the store. The situation seemed to present an unusually favorable case for the right to hear. The shopping center was large enough (60 stores, a parking lot for 2640 cars) to be the functional equivalent of the business district in *Marsh*. *Hudgens*, 424 U.S. at 509. As potential customers of the picketed store, the audience in *Hudgens* presumably had a special interest in the information the strikers wished to communicate, those potential customers were probably the only audience the speakers were interested in reaching, and the store was the most effective place for the audience to learn about the strike. Nevertheless, *Hudgens* held that the strikers had no constitutional right to picket, nor, inferentially, did the audience have a right to hear. *Id.* at 521.

98. 381 U.S. 479 (1965).

emanations from these amendments that form penumbras which create zones of privacy which protect the marital relationship from intrusions into its intimate decisions. Under these circumstances, the right to hear in *Griswold* sinks dangerously close to dictum. In any event, Douglas' opinion, while often quoted, has not been widely relied on by the Court.⁹⁹ In the second case, *Stanley v. Georgia*,¹⁰⁰ the Court announced a right to possess pornography in the privacy of one's home. Subsequent decisions, however, have established that *Stanley* is a sport;¹⁰¹ it certainly has fostered no right to produce or distribute pornography.

In a class by itself among the right-to-hear cases cited in *Bellotti v. Red Lion Broadcasting Co. v. FCC*.¹⁰² While *Red Lion* contains language about the public's right to hear, it is pervaded by those special problems caused by what the Supreme Court is convinced are the limited number of usable broadcasting channels and the consequent need to regulate broadcasters. Its analysis also is affected by the applicability of the free press clause, which I will suggest has a rather different scope from the free speech clause.¹⁰³

Three other cases relied on in *Bellotti* provide somewhat more convincing—yet still cloudy—evidence for the right to receive. In *Lamont v. Postmaster General*,¹⁰⁴ the Court invalidated a statute which permitted the Post Office to hold any mail from abroad which the Secretary of the Treasury had determined to be "communist political propaganda" until the addressee specifically requested it.¹⁰⁵ Justice Brennan, with whom Justice Goldberg joined, concurred to argue that the Court had relied on the addressee's right to receive the mail, since the Court had discussed neither the first amendment rights of the senders (who were foreign governments) nor the addressee's standing to raise the sender's rights.¹⁰⁶ Justice Brennan went on to analyze and justify the right to receive.¹⁰⁷ How much of this analysis the Court accepted is unclear. The majority's most explicit statement was:

99. See Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 255-56 (1978).

100. 394 U.S. 557 (1969).

101. E.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-68 (1973) (state may regulate the exhibition of obscene materials shown in a constitutionally unprotected setting).

102. 395 U.S. 367 (1969).

103. See *infra* notes 189-92 and accompanying text.

104. 381 U.S. 301 (1965).

105. *Id.* at 305.

106. *Id.* at 307-10 (Brennan, J., concurring).

107. *Id.* at 308-09.

We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions.¹⁰⁸

This sounds something like a right to receive, but if the Court meant to establish such a right, why did Justice Brennan feel that he had to write separately, and why didn't the majority respond to Justice Brennan by acknowledging that it had established that right? Furthermore, the Court cited none of the standard right-to-receive cases except one of the weakest—*Thomas v. Collins*¹⁰⁹—and cited it only to show the impropriety of a “registration requirement imposed on a labor union organizer before making a speech.”¹¹⁰ All the other cases the Court cited were likewise “licensing” cases—*Murdock v. Pennsylvania*,¹¹¹ *Lovell v. Griffin*,¹¹² and *Harman v. Forssenius*.¹¹³ The citation of these cases and the emphasis in *Lamont* on the significance of the mails and on the fact that “[t]he Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail”¹¹⁴ might suggest that it is government interference with a special, governmentally administered, near-monopoly form of communication—the mails—which is offensive. The same evidence, and the express language of the passage quoted above, also might indicate that it is being required to draw attention to one's association with an (unpopular) idea that is offensive.

The specialness of the mails also seemed to influence the second of the stronger right-to-hear cases. In *Procunier v. Martinez*,¹¹⁵ the Court overturned rules restricting prisoners' personal correspondence but declined to do so in terms of “prisoners' rights,” since “a narrower basis of decision is at hand.”¹¹⁶ The Court then explained why “mail censorship

108. *Id.* at 307.

109. 323 U.S. 516 (1945). See *supra* note 92 and accompanying text.

110. *Lamont*, 381 U.S. at 306.

111. 319 U.S. 105 (1943) (license tax on Jehovah's Witness' distribution and sale of pamphlets held unconstitutional).

112. 303 U.S. 444 (1938) (requirement of municipal license for distributors of literature held unconstitutional).

113. 380 U.S. 528 (1965) (registration requirement for federal electors who did not pay state poll tax held unconstitutional).

114. *Lamont*, 381 U.S. at 306.

115. 416 U.S. 396 (1974).

116. *Id.* at 408.

implicates more than the right of prisoners":¹¹⁷

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. . . . [T]he addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.¹¹⁸

On one hand, this sounds much like a right to receive. The emphasis is on letters, but is not *all* "communication" left unaccomplished by simply writing or speaking? On the other hand, do the special circumstances of letters give their recipients a special interest in receiving them? Is it important that "personal correspondence" is addressed to a particular person? That suggestion is reinforced by the sentences which follow the above quotation:

We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.¹¹⁹

In short, seen as precedent for a right to receive, *Lamont* and *Procunier* are swathed in ambiguity. Both cases, however, involved the mails, both cases involved particular individuals, and both cases involved the continuing intervention of a government agency in the communicative affairs of those individuals. It is at least a distance from these two cases to a right to receive vested in the public at large.

The third of the stronger right-to-receive case—*Kleindienst v. Mandel*¹²⁰—is strong in its dictum only, for its result runs directly counter to a right to hear. In *Mandel*, the Attorney General, relying on a statute permitting him to deny visas to aliens publishing the "doctrines of

117. *Id.*

118. *Id.* at 408-09 (citing *Lamont*, 381 U.S. at 301).

119. *Id.* at 409. One may also infer from the Court's opinion that it was anxious to avoid setting a "prisoner's rights" precedent.

120. 408 U.S. 753 (1972).

world communism or the establishment in the United States of a totalitarian dictatorship,"¹²¹ had excluded a Belgian Marxist scholar from the country. Several American scholars sued to have that decision reversed. The case, the Court wrote, came down "to the narrow issue whether the First Amendment confers upon the . . . professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country."¹²²

The Court began by quoting *Stanley v. Georgia* to the effect that "[i]t is now well established that the Constitution protects the right to receive information and ideas. This freedom [of speech and press] . . . necessarily protects the right to receive. . . ." *Martin v. City of Struthers*. . . ."¹²³ But as the Court pointed out, "appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under [the statute], there are probably those who would wish to meet and speak with him."¹²⁴ The Court, therefore, after invoking the extensive powers of Congress and the President in dealing with foreign affairs and the entry of aliens, upheld the Attorney General's decision. One cannot tell from the opinion how significant that invocation was, but any attempt to interpret the case as dispositive evidence of the right to receive must be tempered by the outcome of the case and the Court's identification of one of the weaknesses of the right-to-receive argument—namely, its uncertain, and possibly distant, limits.¹²⁵

If the question is whether there *is* a right to receive, the answer must be that, after the commercial speech cases and *Bellotti*, there is at least something like it. But the point of this discussion has been to investigate the foundations of those cases to determine their solidity. Each right-to-receive case builds largely on dicta from earlier right-to-receive cases. The Court has never examined carefully the origin or the implications of such a right, and until recently it has in practice been quite cautious about extending the right.¹²⁶

121. 8 U.S.C. § 1182(a)(28)(G)(V) (1982).

122. *Mandel*, 408 U.S. at 762.

123. *Id.* at 762-63 (quoting *Stanley*, 394 U.S. at 564).

124. *Id.* at 768.

125. An example of such a limit is the question whether municipalities have a constitutional right to expend municipal funds to influence the outcome of referenda. For an exposition of that question and a convincing demonstration that it should be answered negatively, see M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 42-50 (1983).

126. Outside the right-to-receive cases cited in the text, the Court has been particularly cautious about extending that right to the "right to know." See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

In this section, then, we have seen that the Court relies on a highly general and abstract view of the first amendment's purpose and gives that view particularity and concreteness through the commercial speech and right-to-hear cases. But, I have argued, those cases do little to amplify and sharpen the Court's first amendment doctrine, and on the contrary, raise doubts about it. Of course, consulting the teaching of precedent is only one way to curb the excesses of the new formalism, and so the doubts generated by these two lines of cases are hardly conclusive. Thus, our next step must be to use these doubts to identify and illumine some of the empirical specifics that the Court is led to overlook by the abstractness of its theory.

IV. THE RELEVANCE OF THE CORPORATE FORM

I have said that, in *Bellotti*, the Court drew much of its theory from Meiklejohn's analysis of the right to know. Meiklejohn himself, however, explicitly excluded from first amendment protection speech motivated by a desire for private profit.¹²⁷ He also followed out the implications of his analogy to a town meeting: "[T]he meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require."¹²⁸ The first amendment thus "is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."¹²⁹ Meiklejohn's caution in this respect highlights the suspicious simplicity of the Court's "more is more" theory.¹³⁰ That simplicity should lead us to ask, in the context of *Bellotti*, whether there is anything about the corporation and its historical, political, economic, or social situation that might justify treating its speech differently from the speech of individuals.

The Court's opinion in *Bellotti* barely discussed what a corporation is, whom it represents, who owns it, who runs it, or who speaks when it speaks. Instead, the Court formalistically accepted the fictions of corporate law. But those questions, along with the question of how much power the corporation has and should have, are surely crucial to the case, for the nature of the corporation makes it an unsuitable candidate for

127. A. MEIKLEJOHN, *supra* note 51, at 79, 83.

128. *Id.* at 24.

129. *Id.* at 26.

130. *See supra* note 47 and accompanying text.

free speech rights, even under the Court's first amendment theory.¹³¹

The Court in *Bellotti* conceded that sometimes "a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities."¹³² And the Court noted that certain "purely personal" guarantees "are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."¹³³ Whether a guarantee is unavailable to a corporation depends "on the nature, history, and purpose of the particular constitutional provision."¹³⁴ These seem to me useful (if incomplete) criteria, ones that would discipline and enrich the Court's theory of the first amendment. But as we will see, the Court does not apply them.

This section argues that it is exactly because the speech comes from a corporation that we are justified in regulating it. It suggests that historically the corporation has been considered to be subject to, and even to require, heightened regulation; that the special relationship between government and the corporation differentiates corporate speech from an individual's speech; that corporate speech is of a different, and less valuable, quality from that of individuals; and that corporate speech cannot be justified as that of an association of individuals.

A. THE HISTORICAL EXPERIENCE

The history of the American corporation is marked by a tension between the need for an entity strong enough to accomplish its economic functions and the need to be able to control it politically. In that history, the courts have played a preeminent part, although they have perhaps better served the former need than the latter.

At first, of course, there was almost no such thing as the corporation; it was, Professor Hurst reminds us, "a rare thing, an unusual grant of special privileges in law for purposes of high policy."¹³⁵ The state

131. This discussion, like the statute in *Bellotti*, is primarily aimed at the large commercial corporation.

132. 435 U.S. at 777-78 n.13.

133. *Id.* at 779 n.14.

134. *Id.*

135. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 15 (1956). For a valuable study of the relationship of the government and the corporation, see also J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970 (1970).

tightly controlled the few early business corporations, sometimes by actual state partnership in the corporate enterprise.¹³⁶ But business found it needed

provision for ordinary use of an organization through which entrepreneurs could better mobilize and release economic energy. Partly this business demand was to get rid of a limiting governmental policy; it sought release of the law's jealously restrictive control over this type of association. . . . [But entrepreneurs also] wanted the positive prestige of the sanction of the state implicit in the charter grant. They wanted the aid of an orderly capital subscription procedure. . . . [T]he grant of the limited liability privilege was sought as a positive aid by law to the enlistment of capital. Entrepreneurs wanted, too, a form of organization which firmly and broadly delegated power over mobilized capital to managers and directors.¹³⁷

It was thus recognized early that corporations, as state-promoted concentrations of power and wealth, posed dangers and that, in the words of the Massachusetts Attorney General of 1802, "[t]he creation of a great variety of corporate interests . . . must have a direct tendency to weaken the power of government."¹³⁸ A number of states, anticipating that corporate interests might corrupt state legislatures, constitutionally required two-thirds majorities for bills creating or altering corporations.¹³⁹ When, in its most prominent act in the early development of the corporation—*Dartmouth College v. Woodward*¹⁴⁰—the Supreme Court decided that, since a corporate charter was a contract, its terms could not be changed by the legislature during the charter's term,¹⁴¹ legislatures responded by requiring that corporate charters expressly preserve the state's right to change or repeal them.

This pattern of conflict between legislature and court over the corporation (although "pattern" is too simple a word for so complex a relationship) became more pronounced toward the end of the nineteenth century, when the "general trend was for law to allow corporations to do whatever they wished, to exercise any power, and to build up the freedom of the corporate management. In counter attack, powers of specific corporations or industries were increasingly and unevenly circumscribed,

136. L. FRIEDMAN, *supra* note 38, at 169 (1973).

137. J. HURST, *LAW AND THE CONDITIONS OF FREEDOM*, *supra* note 135, at 17.

138. James Sullivan, Attorney General of Massachusetts, *quoted in* L. FRIEDMAN, *supra* note 38, at 173.

139. L. FRIEDMAN, *supra* note 38, at 173.

140. 17 U.S. (4 Wheat.) 518 (1819). The Court's other major corporation case, however, demanded strict construction of corporate charters. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 496 (1837).

141. *Dartmouth College*, 17 U.S. (4 Wheat.) at 650.

primarily by statute."¹⁴² Private and public law cases expanded dramatically the power of the corporation. The *ultra vires* doctrine was circumvented. The business-judgment rule liberated corporate managers. Finally, as Professor McCloskey notes, a central feature of the judicial response to legislative limits on the corporation grew from the fact that

the [Supreme Court] had conceded, rather offhandedly, that corporations were "persons" within the meaning of the [Fourteenth] Amendment, and that concession was now seen to be of epic importance and of incalculable value to the business community. Combined with the now accepted idea of due process as a substantive limit on "arbitrary" laws, it meant that business, whether incorporated or not, was no longer wholly at the mercy of the popular will.¹⁴³

A central problem of modern law continues to be the search for ways to control the corporation.¹⁴⁴ That search has encompassed, for instance, direct attempts to limit the corporation's influence over elections, the creation of numerous and various regulatory agencies, elaborate regulation of securities markets, efforts to prevent foreign bribery, essays at assigning responsibility to boards of directors for effective corporate governance, the deployment of existing and the creation of new criminal law to control corporate acts, the expansion of consumer's remedies, the attempt of the antitrust laws to bring corporations under the discipline of competition, and encouragement of labor unions as a "countervailing force" to the corporation. Yet as the wealth and size of corporations has grown, so has the recognition that regulation of the corporation must encounter great difficulties.

Those difficulties are of at least two essential kinds. First, since large corporations are such basic parts of society, they cannot be punished without punishing society in general and the innocent constituents of the corporation in particular. Even the market often cannot be allowed to punish losers in corporate competition, as the government's response to Lockheed's and Chrysler's troubles suggests. Second, the power of the corporation has permitted it to regulate the regulators, as Gabriel Kolko, among many, has argued:

[T]he crucial factor in the American experience was the nature of economic power which required political tools to rationalize the economic process, and that resulted in a synthesis of politics and economics.

142. L. FRIEDMAN, *supra* note 38, at 446-47.

143. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 132 (1960).

144. *See, e.g.*, C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

This integration is the dominant fact of American society in the twentieth century. . . .

The object of . . . [the combination of the technological, economic, and political spheres] was not merely capital accumulation, . . . but a desire to defend and exercise power through new media more appropriate to the structural conditions of the new century: the destructive potential of growing competition and the dangerous possibilities of a formal political democracy that might lead to a radical alteration of the distribution of wealth. . . . Behind the economy, resting on new foundations in which effective collusion and price stability is now the rule, stands the organized power of the national government.¹⁴⁵

In short, the Court in *Bellotti* was wrestling with the problem of an institution—the corporation—which to all intents and purposes did not exist when the Constitution was written and whose economic, political, social, and legal position is a crucial question of our time. Yet that institution and that question have hardly gone unaddressed in constitutional law: the New Deal compromise was directed exactly to them. That compromise, of course, authorizes the legislature to regulate economic and social life and acknowledges that the distribution of wealth and of the power wealth imports, is a question for democratic decision. The New Deal compromise draws on many justifications. One of them is that the Court must rely on constitutional principle and that no constitutional principle has historically proved itself an adequate guide to questions about the distribution of wealth and economic power. Indeed, two attempts to develop such a principle failed conspicuously. In the era of substantive due process, the Court attempted to restrict the state's control of corporate power and of the redistribution of wealth, and that attempt had, by the time of the New Deal, been discredited. Subsequently, the Court considered constitutionally mandating the redistribution of wealth, and, in the face of acute difficulties in practice and principle, retreated.¹⁴⁶ In sum, after the New Deal compromise, the Court lacked both the authority and the doctrine with which to supervene legislative decisions about the corporation and its economic and political power.

This brief history of the contest between the judiciary and the legislature over the regulation of the corporation likewise indicates the importance of the category through which the Court chooses to analyze a problem. Had *Bellotti* been categorized as a problem in the regulation of the corporation, one supposes that the statute would have been readily

145. G. KOLKO, *THE TRIUMPH OF CONSERVATISM* 301-02 (1963).

146. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *James v. Valtierra*, 402 U.S. 137 (1971).

sustained. Because it was categorized as a first amendment problem, the statute was overturned. Analyzing a constitutional problem that falls between (or within) two different standard categories is always difficult. But we can at least observe about *Bellotti* that the Court's first amendment theory, by drawing attention from the speaker to the speech, allowed the Court to avoid dealing with the crucial fact that the case raised questions about the economic and political power of the corporation.

B. THE CORPORATION AND THE STATE

Having described the historical justification for regulating corporations and their acts with special stringency, I will next argue that the corporation has a special relationship with the state which justifies treating corporate speech differently from an individual's speech. This special relationship was central to Justice White's dissent in *Bellotti*, and properly so. It inheres first in the fact that the corporate form is, in a useful if somewhat metaphorical sense, the creature of the state. As such its powers are defined by the state. The state may presumably decline to make the corporate form available, and it is hard to see why the corporate form's ability to produce speech ought to constrain the state's authority to define the corporate form's limits. The state's need to specify the uses to which the corporate form may be devoted is amplified by the state's having endowed the corporation with an array of powers and privileges generally beyond those of the other associational forms the state makes possible. Justice White listed a few of the "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets."¹⁴⁷ He argued that these special rules almost obliged the state to consider the political consequences of corporate power:

Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.¹⁴⁸

In other words, when the state created the corporate form, as when the state created nuclear power, it created something with power to do both great good and great evil. In both cases, the state was obligated to ensure

147. *Bellotti*, 435 U.S. at 809.

148. *Id.* at 809-10.

that the power was exercised for the former and not the latter purpose. And in the case of the corporation, there was a further danger. As Justice Rehnquist (beguilingly enough) put it, "the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed."¹⁴⁹

The second aspect of the corporation's special relationship with the state might be described in "entanglement" terms. The state is so involved in so many of a corporation's activities that it is hard to think of corporations as meaningfully independent of the state which authorizes them, nurtures them, regulates them, and trades with them.¹⁵⁰ Particularly in the case of closely regulated corporations like banks and public utilities, logic might even lead us to find state action in much of their behavior, and it is probably only fear of the slippery slope which keeps us from doing so.¹⁵¹ Given such entanglement, the considerations described in the preceding paragraph become all the more acute.¹⁵²

In looking at the historical experience with the corporation and at its present relationship with the state, we have identified reasons for the state to regulate the corporation with special strictness and have seen that those reasons have long been validated by practice. We need now to

149. *Id.* at 826.

150. This entanglement theory received intriguing judicial statement in the New York Court of Appeals' opinion in the Grand Central Terminal case, *Penn Cent. Transp. Co. v. New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (N.Y. App. Div. 1977), which held that, in calculating whether a landmark-preservation ordinance unconstitutionally deprived a corporation of a reasonable return on its property, courts should consider that part of the value of the property had been created by society. The court observed that

railroads have always been a franchised and regulated public utility, favored monopolies at public expense, subsidy, and with limited powers of eminent domain. . . . [R]ailroads were dependent on government granted monopolies for their rights of way, government grants for their land, and government assistance for such projects as grade crossing eliminations. Railroads were given franchise to use city streets without charge. . . . Today, government influence is even more pervasive, extending even to the real estate exemption enjoyed by Grand Central Terminal itself. . . .

Without the assistance of the city's transit system, now municipally owned and subsidized, the property . . . would be of considerably decreased value.

Id. at 332, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 919.

151. *Cf.* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (state action existed where a city leased space in a parking structure to a cafe but did not include anti-discrimination condition in the lease). *But see* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (action of privately owned and operated but publicly licensed and regulated utility corporation not state action).

152. The Court has not been persuaded by this reasoning. *See generally* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (New York regulation prohibiting utility from advertising to promote use of electricity held unconstitutional); *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530 (1980) (utility's insertion of monthly bill inserts discussing controversial public policy is protected by Constitution).

shift our focus from the general social and political situation of the corporation to the particular situation of the corporation as a first amendment actor. We need, in other words, to look at the corporation as a speaker.

C. CORPORATE SPEECH AND HUMAN SPEECH

Corporate speech is not human speech, and it differs from human speech in ways that make it less valuable for first amendment purposes. Of course, humans decide how the corporation will speak, but those humans both are constrained in formulating their speech in ways that may make the speech less "true" and are simultaneously freed from some of the constraints that ordinarily prevent human speech from being false.

First, corporate speech is the speech of agents, the speech of managers running the corporation on behalf of shareholders. Those agents are constrained by law in one major way: they must devote their efforts to profiting their stockholders.¹⁵³ Other activities are *ultra vires*.¹⁵⁴ This being so, all permissible corporate speech is "commercial speech," speech in aid (ultimately, at least) of effectuating a commercial transaction. The corporation is thus in a peculiarly difficult position to speak "truthfully," for it is legally obliged to maximize its profits and to represent its own economic self-interest. True, no corporation is legally obliged to lie. But even leaving aside the pressure to deceive created by a legal duty to make profits, a felt obligation to represent someone else's interests often conduces to behavior one would reject in serving oneself. When we add to these considerations the criticisms made above of the Court's commercial speech doctrine, we begin to approach the Court's classic definition of less-valued speech: utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

153. See *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (Sup. Ct. 1919).

154. Thus charitable contributions are commonly justified in terms of their ultimate benefit to the corporation. *E.g.*, *A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A.2d 58 (1953). Corporation law, of course, increasingly has loosened the constraints of the *ultra vires* doctrine. As Professor Brudney notes, after the Second World War,

although public fear of corporate political influence did not appear to lessen, and indeed, legislation tightened restrictions on corporate expenditures for such purposes, developing notions of corporate responsibility altered the direction of corporate law. . . . This movement led to authorization and encouragement of corporate participation in public affairs, including politics, in ways that are often only remotely connected with the corporation's profit-making function.

Brudney, *Business Corporation and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 235-36 (1981) (footnotes omitted).

interest in order and morality."¹⁵⁵ That commercial speech is inherently less reliable and more in need of regulation than most other kinds of speech is in fact implied by the Court's care in *Virginia Pharmacy*¹⁵⁶ to protect only factual, readily verifiable commercial speech. This view accords with common experience, to say nothing of the FTC's experience.¹⁵⁷

This argument is open to the criticism I make of the Court's arguments—that it is formalistic, since it assumes corporations and their managers will mechanically obey the law's requirements. One may, I suppose, legitimately refute a formalistic argument in formalistic terms. But the more significant response to this criticism is that, in the real world, managers' reputations often are affected (directly and indirectly) by their corporations' profits, and managers generally believe their first and overriding duty is to win a profit for their shareholders. It is of course true that, in the real world, managers are motivated by a good many things besides profits, notably including, for example, the desire to run a large, a prestigious, an innovative, a tightly controlled, or a peaceful organization. But these motives are akin to the profit motive in their capacity to seduce managers from disinterest, dispassion, and accuracy.

To put the point somewhat differently, corporate speech—and here again it is significant that corporate speech is the speech of the corporation's managers, and not its owners—should be understood in terms of how making decisions in any large organization distances people from the effects of their decisions and thus reduces the sense of personal obligation that helps keep people truthful. In his concurrence in *Bell v. Maryland*,¹⁵⁸ Justice Douglas quoted Thorstein Veblen as saying that the corporation is "immune from neighborly personalities and from sentimental considerations and scruples."¹⁵⁹ Douglas continued quoting:

It takes effect through the colorless and impersonal channels of corporation management, at the hands of businesslike officials whose discretion and responsibility extend no further than the procuring of a reasonably large—that is to say the largest obtainable—net gain in terms of price. . . . Personalities and tangible consequences are eliminated and the business of governing the rate and volume of the output goes forward in terms of funds, prices, and percentages.¹⁶⁰

155. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

156. 425 U.S. 748 (1976).

157. *See Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

158. 378 U.S. 226 (1964).

159. *Id.* at 264 (Douglas, J., concurring) (quoting T. VEBLÉN, *ABSENTEE OWNERSHIP* 215 (1923)).

160. *Id.* at 264-65 (quoting T. VEBLÉN, *ABSENTEE OWNERSHIP* 215-16 (1923)).

This concern is an old one in American history. Professor Friedman writes of the early nineteenth century: "The word 'soulless' constantly recurs in the debates on corporations. . . . Corporations, it was feared, could concentrate the worst urges of whole groups of men; the economic power of a corporation would not be tempered by the mentality of any one man, or by considerations of family or morality."¹⁶¹ The point, of course, is not that corporate executives are wicked. On the contrary, the point is that even good people operating in large organizations work under circumstances that can be uncondusive to seeing and telling truth. To make the point less invidiously, we might remind ourselves how readily quite honorable lawyers come to see justice in terms of their clients' interests. There are, in short, pressures on the managers of large corporations which have nothing to do with the telling of truth, and these pressures are institutionalized and strong far beyond those on most individuals. And these are pressures which the law may properly take into account.

I began this section on the relevance of the corporate form by noting that even Meiklejohn excluded commercial speech from first amendment protection and was more concerned that everything worth saying be said than that everyone should be able to speak. Subsequently, I have argued that corporate speech differs from human speech in ways that make it less worthy of first amendment protection. It might seem to be a weakness of both Meiklejohn's argument and mine that, relying on them, anyone's speech could too easily be restricted on the ground that his speaker's information had already been made available or was sullied by self-interest. But it is exactly the fact that the speech is the speech of a corporation and not a human being that keeps this slippery slope from being problematic. A person's speech can ordinarily not be limited on those grounds because the speech effectuates his right to participate in governing and, arguably, his right to self-expression. A corporation's speech can be so limited because a corporation has neither of those two rights.¹⁶²

161. L. FRIEDMAN, *supra* note 38, at 171-72.

162. The criticism which I am rejecting here could be phrased somewhat differently, but not, I think, more successfully. Thus it might be contended that my argument proves too much, that there are situations in which individuals speaking for themselves are operating under disincentives to truth-telling quite as great as those in the corporation, that voluntary associations are sometimes so large that they have the same effect on their leadership as the corporation, and that freedom of speech should be denied neither an individual nor a voluntary association. But the instrumentalist argument for regulating the speech of corporations is limited by the argument from democracy (or Meiklejohn, or Scanlon): individuals have a right to speak as inanely (or to a considerable extent, as untruly) as they wish, because they have a first amendment right to join in governing society, and

D. THE CORPORATION AS AN ASSOCIATION

I have argued that the history of the corporation, its relationship with the state, and its own character combine to justify special regulation of corporate speech. One might respond to these arguments that the corporation is simply an association of people, that once the state has created an association of people, they have associational rights, and that preeminent among those rights is the right to speech.¹⁶³ Indeed, one kind of case frequently cited to demonstrate that the first amendment applies to corporations is the kind typified by *NAACP v. Button*.¹⁶⁴ In that case the NAACP, a nonprofit membership corporation, had sued to enjoin Virginia from enforcing a statute limiting the NAACP's ability to "solicit" legal business. The Court held that the NAACP could assert constitutional claims on its own behalf "though a corporation."¹⁶⁵ As the last clause implies, *NAACP v. Button* hardly stands for any broad position that corporations have first amendment rights. But we need not rely on the language of *Button* to see the weakness of the "association" argument for corporate free speech. Consider first that the NAACP was a nonprofit corporation. The availability of such non-commercial associational forms speaks directly to the question whether shareholders of corporations need to be accorded associational rights: If the state provides such alternative organizational forms, it need not, I suggest, give full-scale associational rights to corporations. Further, since these alternative forms are nonprofit, underlying worries about commercial speech and the malign influence of the cash nexus become irrelevant.

Consider second that the NAACP was a membership corporation—it was in a useful, albeit limited, sense the collective voice of its individual members, not the artificial entity which is the commercial corporation. As the Court wrote in an earlier NAACP case, the NAACP "is the appropriate party to assert [its members'] rights, because it and its members

voluntary associations are groups of individuals acting together to exercise that right. Corporations, however, cannot usefully be so described, as I argue in the next section.

163. One comment on *Bellotti* attempts to build on this association argument:

The majority's primary reliance on the importance of corporate political speech in informing the public neglected a stronger argument: corporate political expressions should be protected as the speech and associational activity of the individual owners. Ultimately, corporations are individuals organized . . . by the state. . . . Corporate political expression is simply shareholder speech or the product of shareholder associational activity.

The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 165-66 (1978) (footnotes omitted); see also Comment, *Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 155-56 (1974) (corporate political speech may express the interests of its members and also may be motivated by purely economic concerns).

164. 371 U.S. 415 (1963).

165. *Id.* at 428.

are in every practical sense identical.”¹⁶⁶ But only in the most attenuated sense is the kind of corporation at which the Massachusetts statute was directed an association of individuals. As this section tries to demonstrate, the chain of ownership is too long, and corporations are too ungovernable, for corporations legitimately to claim to represent the thoughts of their owners. Thus, corporations are in this respect readily distinguishable from voluntary associations like the NAACP and, to take a slightly harder case, unions.

Unions, to take the harder case, are made up of members all of whom made a direct (if sometimes coerced) decision to join and all of whom have an equal role in governing the union (within the usual confines of running a large organization). In contrast, many of the people who own corporations do not even know they own them, and not only is it a cliché of modern scholarship that shareholders have little control over the company, many of the “owners” of corporations are not even able to vote, much less to have one vote per person. In short, a union may plausibly be called a group of people who have joined together and who share in the management of their group and whose group thus speaks for them; the same cannot plausibly be said of owners of a large, publicly held corporation.

The remoteness of a large corporation from its owners is not easily exaggerated. There are, of course, individuals who directly own shares of stock. But some stock does not even give these owners voting rights, and the holder of convertible debt may be an owner of the corporation in a truer sense than the holder of nonvoting stock. In any event, most stock is not held directly by individuals. Some stock is held for individuals in a mutual fund, but it is the rare investor in a mutual fund who can say at any one point what stocks he owns through the fund. Most stock is held by institutions like pension funds and thus is highly remote from the control of its ultimate beneficiaries. And of course much stock is held by corporations, so that tracing “ownership” is a dizzying and impossible task.

This remoteness of the corporation from its owners is intensified by (and itself intensifies) the ungovernability of the corporation, an ungovernability of which Berle and Means began to convince us half a century ago.¹⁶⁷ The usual fact of corporate life is that management runs the

166. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958); *accord Bell v. Maryland*, 378 U.S. 226, 267 (1963) (separate opinion of Douglas, J., Appendix I).

167. See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). As the biographer of the nineteenth-century student of management Henry Poor wrote, “By

corporation—it controls the proxies and the board of directors, and even where it doesn't, almost all those involved would rather bear those ills they have than fly to others they know not of.¹⁶⁸ Neither is there “review by the company’s salaried employees, wage earners, and customers—other groups on whose behalf corporate officers are said to administer corporate assets. As a result, the opinions of the corporation tend to be the personal opinions of its management.”¹⁶⁹ Nor do the devices that are supposed to ensure corporate democracy—the shareholder proposal and the derivative suit—give shareholders anything like the kind of influence which would allow us to think of the corporation as reflecting the will of its “members.”¹⁷⁰

The inaccuracy of equating a corporation with an association in order that the first amendment rights of its owners be secured for the corporation has been expressed in terms by Justice Douglas. *Bell v. Maryland*¹⁷¹ is one of the sit-in cases in which the Court reversed the judgment against the demonstrators but was at pains to avoid the difficult constitutional issues involved. Justice Douglas was at no such pains, however, and his concurring opinion attacked the argument that a “privacy” interest of the lunch counter’s owner—a corporation—could be weighed against the interests of the demonstrators. “In the simple agricultural economy that Jefferson extolled,” Justice Douglas wrote, “the conflicts posed were highly personal. But how is a ‘personal’ right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races?”¹⁷² He pointed out the many kinds of people who may control a corporation: “when corporate

the end of the 1850’s Poor was tracing nearly all the problems of the railroads to the underlying fact that their managers did not own and their owners did not manage.” Chandler, *Henry Varnum Poor*, in *MEN IN BUSINESS* 256 (W. Miller ed. 1953), *quoted in* T. COCHRAN, *CHALLENGES TO AMERICAN VALUES* 66 (1985); *see also* J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION*, *supra* note 135, at 75-111.

168. *See* Solomon, *Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise?*, 76 *MICH. L. REV.* 581 (1978).

169. Comment, *Corporate Political Affairs Programs*, 70 *YALE L.J.* 821, 833 (1961).

170. Dissatisfied shareholders in endocratic corporations sell their securities rather than fight management. Research has failed to uncover a single shareholder proposal that has been adopted over the opposition of the management of an endocratic corporation. Indeed, stockholders taking advantage of section 14-A-8 have had difficulty mustering more than 10% of the votes cast at an annual meeting.

Id. at 849 (footnotes omitted).

171. 378 U.S. 226 (1963).

172. *Id.* at 263 (separate opinion of Douglas J., Appendix I).

restauranters are involved, whose 'personal prejudices' are being protected? The stockholders'? The directors'? The officers'? The managers'?"¹⁷³ In sum, "[t]he corporation that owns this restaurant did not refuse service to these Negroes because 'it' did not like Negroes. The reason 'it' refused service was because 'it' thought 'it' could make more money by running a segregated restaurant."¹⁷⁴

From the uncontrollability of the corporation Justice White builds one of his justifications for the Massachusetts statute tested in *Bellotti*—that it protects the interests of minority shareholders. But this argument, like so many in that case, seems to me essentially formalistic, for it too treats the corporation as though it genuinely were an association of stockholders. Justice White is able to point to the Court's repeated recognition that "one of the purposes of the [federal] Corrupt Practices Act was . . . to protect minority interests from domination by corporate or union leadership."¹⁷⁵ But the Court also has noted that "the protection of ordinary stockholders was at best a secondary concern" of the Act.¹⁷⁶

The basic problem with Justice White's approach—and, inferentially, with the Court's—may be discovered by examining the cases he used to demonstrate that stockholders have a first amendment interest in not being affiliated with the expression of opinions with which they may disagree. In each of those three cases—*Board of Education v. Barnette*,¹⁷⁷ *Machinists v. Street*,¹⁷⁸ and *Abood v. Detroit Board of Education*¹⁷⁹—a person was affiliated with a viewpoint more coercively and more personally than in *Bellotti*. The coercive element was strong in each case. *Barnette*, which held that a student cannot be required to salute the flag and recite the pledge of allegiance in school, occurred during wartime and involved coercion having the force of law directed at a young person in a milieu expressly designed for socialization. *Abood* and *Street* forbade unions which had agency-shop agreements from spending compulsorily collected dues to support political expression. Loss of one's job was the penalty for refusing to affiliate oneself with another's expression. The sacrifice, and hence the coercive force, of foregoing an investment in a particular company is clearly slighter in almost every sense and circumstance than the sacrifice of one's conscience or one's job. Further,

173. *Id.* at 246 (separate opinion of Douglas J.).

174. *Id.* at 245.

175. *Bellotti*, 435 U.S. at 819 (White, J., dissenting).

176. *Cort v. Ash*, 422 U.S. 66, 81 (1974).

177. 319 U.S. 624 (1942).

178. 367 U.S. 740 (1960).

179. 431 U.S. 209 (1977).

these cases involved a more direct and personal affiliation with expression than in *Bellotti*. The students in *Barnett* were made to rise publicly and regularly to affirm a belief contrary to their religious faith. The employees in *Street* and *Abood* were regularly forced to pay money to an organization which crucially affected many aspects of their lives and whose members were their daily associates. In contrast, the stockholder is likely never to hear the political opinions expressed by his corporation, never to see an officer or even an employee of it, never to feel a special attachment or susceptibility to it, and never to be perceived as represented by it.¹⁸⁰

In the light of these contrasts, it seems exaggerated to say, as Justice White does, that "the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities."¹⁸¹ True, Justice White adds that the state has an interest in ensuring that the corporation's economic functions are not inhibited by the intrusion of investors' political proclivities into their business decisions.¹⁸² But simply as a matter of fact, it seems unlikely that many investors would be so affected.¹⁸³

Nevertheless, this criticism of Justice White is overly harsh, and it ignores a more persuasive corollary of his argument. As he points out, the realities of corporate life dictate that the views the corporation will express are, at least to a significant degree, the views of management, not the views of "the corporation."¹⁸⁴ Society may legitimately try to prevent a few people from mobilizing the resources of a corporation to amplify their own speech. Corporate management, in other words, is using

180. For a defense of Justice White's position and a stirring attack on the *Bellotti* majority's view of corporate law, see Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

181. 435 U.S. at 818 (White, J., dissenting).

182. *Id.*

183. Professor Brudney notes that institutional investors like universities and pension funds are increasingly inclined to take social and political factors into account in making their investments and in making decisions about the stock they own. Brudney, *supra* note 180, at 236-38. This development certainly lends credibility to the state's interest in protecting minority shareholders. On the other hand, such shareholders (and such prospective purchasers of stock) seem much likelier to be concerned with the actual policies pursued by corporations (e.g., investments in South Africa) than with their contributions to referendum campaigns.

184. Justice White's opinion leans heavily on the logic of the statute:

The Massachusetts statute challenged here forbids the use of corporate funds to publish views about referenda issues having no material effect on the business, property, or assets of the corporation. The legislative judgment that the personal income tax issue, which is the subject of the referendum out of which this case arose, has no such effect was sustained by the Supreme Judicial Court of Massachusetts and is not disapproved by this Court today.

something that it does not own and that cannot wholly be ceded to it to express views which can too easily be personal to it.¹⁸⁵

The argument that a corporation is a kind of association and thus should have an association's first amendment rights is not without superficial appeal. But a realistic look at the large corporation indicates that it is too much an artificial entity, too distant from its owners, to be usefully assimilated with the association. This is not to say that the largest associations (unions come most quickly to mind) will not take on some of the characteristics of the corporation, or that small corporations may not look something like associations. But the core differences are great enough to make the distinction not only useful, but necessary.

E. A NOTE ON *GROSJEAN V. AMERICAN PRESS*

*Grosjean v. American Press Co.*¹⁸⁶ was cited in *Bellotti* for the proposition that corporate speech may come within the first amendment's protection.¹⁸⁷ *Grosjean* declared unconstitutional a Louisiana (read Huey Long) tax on newspapers with a circulation of more than 20,000 copies

Hence, as this case comes to us, the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business.

435 U.S. at 802-03. Justice White relies enthusiastically on this reasoning. Nonetheless, whatever the Supreme Judicial Court may have held, it is too easy to believe not only that the adoption of an income tax would affect the economy of Massachusetts, the corporation's business, and eventually the corporate tax structure, but also that the adoption of almost any significant economic or social program would have similar consequences. Indeed, many corporations are now so large that very few programs of social, economic, or political importance do not affect them. What is good for General Motors may not be good for the country, but what affects General Motors affects the country, and vice-versa. The expansion in the last three decades of the kinds of corporate charitable contributions that are *intra vires* reflects this interrelationship. As early as 1896, a leading case held that a corporation's contribution to a local church was *intra vires*, since a better community would attract better workers. *Steinway v. Steinway & Sons*, 17 Misc. 43, 40 N.Y.S. 718 (N.Y. Sup. Ct. 1896). Compare appellants' claim in *Bellotti* that the graduated income tax would "discourag[e] highly qualified executives and highly skilled professional personnel from settling, working or remaining in Massachusetts." 435 U.S. at 770 n.4.

185. See Comment, *supra* note 169, at 833. It is difficult to credit the Court's response to Justice White that

[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. . . . [M]inority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

435 U.S. at 794-95 (footnote omitted). For reasons discussed *supra*, notes 167-70 and accompanying text, this argument seems painfully distant from corporate reality.

186. 297 U.S. 233 (1935).

187. *E.g.*, *Bellotti*, 435 U.S. at 780. See also Comment, *supra* note 169, at 856-57.

per week. The constitutional point, the Court said, "presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."¹⁸⁸ The issue of the corporation's (i.e., newspaper's) rights was dealt with in one paragraph, the third (and last) sentence of which read: "[A] corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here."¹⁸⁹ The most sensible way to read this case, however, is not to emphasize the corporate nature of the speaker, which the court dealt with summarily, but to notice that the speaker was a newspaper. As the Court said, "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information."¹⁹⁰ As Justice White noted in dissent in *Bellotti*, "newspapers and other forms of literature obviously do not lose their First Amendment protection simply because they are produced or distributed by corporations."¹⁹¹ In short, *Grosjean* may be seen as a product of the free press clause and not determinative of a corporation's free speech rights. In view of the necessity of the corporate form for the modern press, this interpretation is sensible.¹⁹² The press plainly exists in large part to inform the citizenry, and the press clause can usefully be understood as protecting it in doing so.

Chief Justice Burger's concurrence was written to stress the impossibility of distinguishing "the press" from any other speaker. Of course there will be line-drawing problems, but two considerations make those problems tolerable. First, the presence of borderline cases does not make the distinction between "the press" and "corporations" meaningless. Second, the press was quite adequately protected even before corporate speech received explicit first amendment protection. In short, while we may find it difficult to articulate an entirely satisfactory theoretical distinction between "the press" and "corporations," such difficulties are hardly novel and ought not to be dispositive. In this context, as in so many others, we may legitimately employ our historical understanding of

188. 297 U.S. at 243.

189. *Id.* at 244. The due process clause was involved because it was through it that the free speech clause applied to the states.

190. *Id.* at 250.

191. *Bellotti*, 435 U.S. at 808 n.8 (White, J., dissenting).

192. The Court, of course, disapproves of this reasoning: "If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment." 435 U.S. at 782 n.18.

differences between the two in building up, incrementally and inductively, such a distinction.

V. THE STATE'S INTERESTS

First amendment jurisprudence, we should recall at this point, asks whether there is a right to speak and then asks whether the right is overridden by the interests the government asserts. Thus far, we have been looking at the first question. I have contended that the two relevant lines of cases raise doubts about the wisdom of a corporate right to speak, and I have argued that the history, power, and nature of the corporation counsel against the right. The arguments I have made all, in different ways, attempt to offset the Court's new formalism and to give discipline and direction to its very abstract theory. I now address the second question of first amendment jurisprudence—the state interests. Once again we will observe the limitations of the Court's reliance on a simple, abstract, and empirically uninformed theory. And we will observe that the Court's theory is put under particular stresses here, for *Bellotti* presents not the usual balance between an individual right and a government interest, but a balance in which first amendment interests are present on both sides. To the difficulties this creates for the Court and its theory we now turn.

At this point, we need to recall that the Court's theory of the first amendment required it to draw inferences about the first amendment from the basic nature of democratic government. That technique is undoubtedly appealing.¹⁹³ It is, however, a highly instrumentalist approach, and as such it requires asking which of the many conceivable first amendment doctrines actually promote democratic government in principle and in practice and to devise a ranking of those doctrines to use when they conflict. The Court in *Bellotti*, we may recall, recruited Meiklejohn's explanation that the first amendment serves the people's interest in having the information which they need in order to govern. However, even this version of the first amendment's purpose can be articulated in many forms, and each form requires a somewhat different measurement of the extent to which any particular statute will serve the interest in democratic government. Professor Scanlon, for instance, suggests that "[t]he central audience interest in expression . . . is the interest in having a good environment for the formation of one's beliefs and

193. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 5-6 (1969).

desires."¹⁹⁴ Professor Bickel suggests that the amendment "should protect and indeed encourage speech so long as it serves to make the political process work, seeking to achieve objectives through the political process by persuading a majority of voters; but *not* when it amounts to an effort to supplant, disrupt, or coerce the process."¹⁹⁵

Both Professor Scanlon's and Professor Bickel's versions of the first amendment's purpose, it is important to note, leave room for the argument that the first amendment is best served by limiting speech. If it can be empirically shown, for instance, that a particular kind of speech deserves the interest in having a good environment for the formation of one's beliefs (Professor Scanlon adduces the example of subliminal communication),¹⁹⁶ then, in the interest of the first amendment, such speech may be regulated. If it can be empirically shown, for instance, that a particular kind of speech "supplant[s], disrupt[s], or coerce[s]"¹⁹⁷ politics (Professor Bickel adduces the example of speech that amounts to violence),¹⁹⁸ then, again in the interest of the first amendment, such speech may be regulated.

The first amendment's purpose can also be persuasively formulated in terms quite different from those the Court uses. For example, I would suggest that a more powerful inference from the nature of democratic government is not that we protect people's right to speak because they may say something useful, but that we protect their right to speak because they have a right to govern. That is, in a democracy people have a right to participate in governing the country however useless their ideas are. What democratic government requires, more urgently than information, is a workable means for individual citizens—the governors—to express and effectuate their opinions. It thus requires, among other things, an electoral process free of "distorting" influences.¹⁹⁹ Under this version of the first amendment's purpose, if it can be empirically shown that a particular kind of speech interferes with the ability of citizens to participate fully in government, then, in the interest of the first amendment, such speech may be regulated.

194. Scanlon, *supra* note 52, at 527.

195. A. BICKEL, *THE MORALITY OF CONSENT* 62-63 (1975) (emphasis in original).

196. See Scanlon, *supra* note 52, at 525-26.

197. A. BICKEL, *supra* note 195, at 63.

198. *Id.* at 62-63.

199. Meiklejohn himself can be read as reaching much this same result. Professor Bickel, for instance, understood Meiklejohn (and Professor Bork) to have emphasized that "[t]he social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may be able better to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth." *Id.* at 62.

A central argument of Justice White's dissent in *Bellotti* is exactly that the Court fails to confront the several possible first amendment interests involved. Justice White wrote:

The Court's fundamental error is its failure to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The question posed by this case, as approached by the Court, is whether the State has struck the best possible balance, *i.e.*, that one which it would have chosen, between competing First Amendment interests.²⁰⁰

Justice White's argument that *Bellotti* involves not one, but rather two competing first amendment interests, is crucial to understanding the case and to appreciating the theoretical problems it presents. This section considers first the general problem of conflicting first amendment interests and then the particular problem of determining whether the first amendment principles at issue in *Bellotti* actually serve those larger first amendment interests.

A. THE PROBLEM OF CONFLICTING FIRST AMENDMENT INTERESTS

The crucial fact about *Bellotti*, I have said, is that it does not present simply a conflict between citizens' first amendment interests and the state's nonconstitutional interests. Rather, it presents a conflict between first amendment interests. On one hand is the citizenry's interest in being well enough informed to govern wisely. On the other hand is the citizenry's interest in what we might call access to government, the interest in public debate not dominated by corporate wealth. That interest has two aspects—the interest of the citizen as participant in the debate, whose ability to be heard depends in part on the volume of the other participants, and the interest of the citizen as listener to the debate, whose ability to learn from the debate depends in part on its quality.²⁰¹ This set of first amendment interests in access to government might be rephrased as an interest in political equality, in having an equal voice in governing. The town-meeting model is popular in first amendment thought partly because every citizen has an equal opportunity to influence the meeting's decision. Of course, political equality, for a variety of practical and constitutional reasons, cannot be enforced by limiting the

200. *Bellotti*, 435 U.S. at 803-04 (White, J., dissenting).

201. A less powerful, but still discernible, first amendment interest in inhibiting corporate speech is the interest in preserving people's sense of political efficacy. That is, people are unlikely to feel they can affect politics if they sense that politics is dominated by large corporations, and that feeling of inefficacy is likely to deter people from political activity.

power of wealthy individuals to influence politics.²⁰² But it is possible, and I believe legitimate, to limit the power of individuals to use their ownership or management of a corporation to influence politics.

As I have suggested elsewhere,²⁰³ the ways we ordinarily think about rights are channeled by the paradigm of competition between an individual (who has rights) and the government (which has interests). In that paradigm, the meaning of the individual's right is that the government must show that its reasons for infringing the right are particularly pressing. This weighting of the issue against the government is tolerable partly because the government—or society at large—can bear better than the individual whatever risks might be imposed by an incorrect resolution of the conflict between the individual and the government. In the last several decades, however, as the number and scope of constitutional rights have increased, we increasingly confront situations which do not match the paradigm. Statutes requiring minors to obtain their parents' consent to an abortion typify one kind of non-paradigmatic rights conflict: the minor has a right to an abortion, the parents have a right to make medical decisions for their child, no hierarchy of rights exists that would allow us to choose between the competing rights, and the presumption against the government ordinarily created by the presence of a right cannot apply because there are conflicting rights. The statute in *Bellotti* presents another kind of non-paradigmatic rights conflict, one in which both the "individual" (here a corporation) and the state claim justification in terms of the same right. How should such conflict be approached?

First, it becomes inappropriate to scrutinize the state interest in the intense way we use when the state interest conflicts with a constitutional interest. That heightened scrutiny is justified by the preferred status of rights over state interests and by our desire that society rather than the individual bear the risk of error. But when the state interest is the protection of the very kind of right being exercised by the individual, and when there is no "individual" (but only a corporation) in the case, that justification cannot apply.

This elimination of strict scrutiny, however, leaves us (in one sense) farther than ever from resolving our conflict, since strict scrutiny is one of the Court's most convenient techniques for vaporizing state interests. Or, to put our position less tendentiously, we are farther than before

202. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

203. Schneider, *Rights Discourse and Neonatal Euthanasia*, 30 LAW QUADRANGLE NOTES 33 (Winter 1986).

from a resolution because we have a tie between competing versions of a right and we have eliminated the presumption (in favor of the individual) ordinarily used to resolve ties between individuals and the government. One approach to this problem is to say that, since both sides claim to be serving the same right, that side should win which serves it best. This approach might work where the right involved has a single purpose and meaning and where it is possible to determine how well each side's victory would serve the right. I am, for example, tempted to argue that in *Bellotti* the electorate's interests in access to effective means of political speech and in an uncorrupted electoral process are weightier than the electorate's interest in the information to be had from corporate speech. I am tempted in this direction because the former interests seem to me closer to the basic interests democratic government serves. But the right to speak has *several* purposes and meanings which cannot readily be ranked, and we know little about how well the various rules of decision would serve the various purposes and meanings. Thus we have no way of choosing, for example, between a rule that served one of the first amendment's weak purposes well and a rule that served one of the amendment's strong purposes poorly.

So difficult a general problem cannot be resolved here. But we can make some progress toward solving the particular version of the problem which *Bellotti* presents. *Bellotti* seems to me a case in which there is no satisfactory way of identifying the side whose victory would best serve the first amendment. That being so, the legislature's resolution of the conflict should prevail. There is no reason to believe a judicial resolution of the conflict between first amendment principles will be categorically superior to a legislative resolution, and democratic principles suggest that, *ceteris paribus*, a legislative resolution is preferable. That is, when first amendment values conflict, the best judges of what will "promote democracy" may be "the people," speaking through the legislature. No doubt they are speaking imperfectly, but they are speaking in the only way they can. The Court in *Bellotti*, of course, cannot regard the law in this way, but that is because the Court views the legislature and the people as separate entities. That view can be useful, as when the interests of legislators and the public systematically conflict or when a majority uses its control of the legislature to suppress the speech of a minority. But the Court does not contend that *Bellotti* presents either of these situations. In short, I am suggesting that in the absence of evidence to the contrary, we generally ought to act as though the theory of our democracy were true.

This preference for a legislative solution is enhanced when the legislature has explicitly considered the first amendment problems, as is arguably, though not certainly, true here. The legislature's claim is particularly strong where a correct choice between competing first amendment interests cannot be reached solely by applying legal principles, but depends on an intricate understanding of how things really are. *Bellotti* is such a case, for, as I have argued, its outcome should depend on a series of intractable empirical questions: How do corporations actually work? What factors affect popular debate on political questions? Does corporate wealth affect referendum elections? And so on. As to some of these questions, the legislature can legitimately claim some special knowledge; as to others, the legislature is at least better situated than the Court to acquire special knowledge.

In this section, we have seen that several central indeterminacies plague the Court's first amendment theory. Does a commitment to democratic government lead us to maximize information or to order debate, to maximize information or to promote political equality? We also have seen that the theory provides no principled means of resolving those indeterminacies. But even if we resolve those indeterminacies, we still will confront many questions (often difficult empirical questions) about what policies will actually serve the principles we have chosen. We must move next to a consideration of how the *Bellotti* Court grappled with these indeterminacies and uncertainties.

I will argue that the Court's treatment of the state's interests is inadequate on its own terms. The Court dismisses the proffered justifications for the Massachusetts statute with a disappointingly slight examination of the evidence. The Court has forsworn any genuine investigation of what actually promotes free and open expression (not to say democratic government) and has contented itself with its slogan, more is more. It employs some of the standard devices of first and fourteenth amendment state-interest analysis in order to avoid grappling with the empirical difficulties which in fact are central to its reasoning. These weaknesses in the Court's handling of the state interests, further, must be understood in light of our discussion of non-paradigmatic rights problems. These weaknesses might be understandable if the paradigmatic presumption in favor of the individual applied, for that presumption permits us to resolve all empirical doubts against the state. Since it does not, since the empirical questions instead go to the very rationale for according corporations speech rights, these weaknesses reach significant proportions.

B. POLITICAL CORRUPTION AND THE CORPORATION

A basic disagreement between the Massachusetts Legislature and the United States Supreme Court is whether corporate participation in referenda can corrupt politics. The legislature, presumably drawing on its immediate experience with the question and on the history of referenda, decided that it can. Once again, a look at history illuminates the legislature's concern. As the Court recognized in *United States v. UAW*,²⁰⁴ there was by the end of the nineteenth century a lively "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption."²⁰⁵ Even basically conservative politicians began to see virtue in prohibitions of corporate political contributions. The Court in *UAW* quoted Elihu Root's advocacy of such a ban:

The Idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.²⁰⁶

A committee of the New York Legislature which was guided by Charles Evans Hughes (later Republican presidential candidate, eventually Chief Justice) concluded: "Contributions by insurance corporations for political purposes should be strictly forbidden. Neither executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates or platforms."²⁰⁷

It was against this background that the referendum appeared in the Midwest and West:

Programs to establish direct lines of influence from the ordinary citizen to his government . . . appeal[ed] to most of those who wanted business controlled. . . . [M]any believed that spoilsmen, corporation agents, and mediocre lawyers had made politics their private domain. . . . When corrupt or indifferent politicians refused to enact "the people's reforms," the reformers planned to streamline the government in order to facilitate action and fix responsibility, then let the people reward and punish their political servants.²⁰⁸

204. 352 U.S. 567 (1956).

205. *Id.* at 570.

206. *Id.* at 571 (quoting Elihu Root, *Hearings Before House Comm. on Elections*, 59th Cong., 1st Sess. 12).

207. *Id.* at 572 (quoting REPORT OF THE JOINT COMM. OF THE NEW YORK LEGISLATURE (1906)).

208. R. WIEBE, *BUSINESSMEN AND REFORM* 7 (1962).

As Professor Mowry suggests, then, a leading objective of the movement to establish referenda "was the better regulation of railroads and the control of the great industrial combines, popularly called trusts."²⁰⁹ But it was not enough to control business, for business had corrupted politicians. One solution the federal government and the states adopted was a statutory prohibition of corporate contributions to political candidates.²¹⁰ In addition, states sought to circumvent corrupt politicians altogether through the referendum and the initiative. "Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government."²¹¹ Despite the opposition of business and the better sort,²¹² such laws were established in twenty states by 1932.²¹³ In other words, referenda were widely adopted after decades of experience and considerable agreement that American states faced two serious problems: corrupting business and corrupted politicians. The referendum, bypassing both groups so that the people could speak directly, would, it was hoped, overcome those problems. That the referendum's very purpose was to end the corporation's domination of politics does not alone make that purpose constitutional, but it is some indication of how, for three-quarters of a century, we have by our actions and laws tried to interpret the Constitution and identify threats to it.

In *Bellotti*, however, the Court, while conceding that corporate funds might be used to bribe politicians, was not convinced that a corporation could pose any constitutionally cognizable danger to a referendum.²¹⁴ Here, too, history suggests that the legislature may well have been aware of dangers the Court did not apprehend.

Confronted by an array of technical questions, often phrased in legal language, the voters shrank from the responsibilities the new system attempted to put upon them. Small and highly organized groups with plenty of funds and skillful publicity could make use of these devices,

209. G. MOWRY, *THE ERA OF THEODORE ROOSEVELT* 82 (1958).

210. *E.g.*, Act of Jan. 26, 1907, Pub. L. No. 36-36, 34 Stat. 864:

That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

211. R. HOFSTADTER, *THE AGE OF REFORM* 255 (1955).

212. R. WIEBE, *supra* note 208, at 181; Radin, *Popular Legislation in California*, 23 MINN. L. REV. 559, 560 (1939).

213. Radin, *supra* note 212, at 561.

214. 435 U.S. at 790.

but such were not the results the proponents of initiative and referendum sought; nor was the additional derationalization of politics that came with propaganda campaigns demanded by referendums.²¹⁵

Aware that corporations could be important elements in those "small and highly organized groups," and aware of the history of the referendum as an attempt to escape corporate domination of a state's political life, ten of the twenty-three states allowing initiatives or referenda prohibit corporate contributions of any kind to ballot-measure campaigns, and fifteen of those twenty-three apply campaign-finance statutes to such campaigns.²¹⁶

The legislative and judicial history of the particular statute at issue in *Bellotti* likewise reveals that the law was no caprice, but was a considered and repeated decision of the legislature. After the Massachusetts Supreme Judicial Court held that, under the legislature's first attempt at such a statute, a referendum on a graduated income tax "materially affected" a corporation's property, business, or assets,²¹⁷ the legislature amended the statute to read: "No question submitted to the voters 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."²¹⁸ After the Supreme Judicial Court held that the statute did not apply where the referendum concerned a corporate as well as a personal income tax,²¹⁹ the legislature again amended the law several times,²²⁰ and the next referendum dealt only with a personal income tax. As the Massachusetts court conceded, "[T]he statutory amendment to [section] 8 makes it clear that the Legislature has specifically proscribed corporate expenditures of money relative to this proposed amendment."²²¹

215. R. HOFSTADTER, *supra* note 211, at 266.

216. Note, *Corporate Contributions to Ballot-Measure Campaigns*, 6 MICH. J.L. REFORM 781, 782-88 (1973).

217. *Lustwerk v. Lytrou, Inc.*, 344 Mass. 647, 650, 183 N.E.2d 871, 874 (1962).

218. Act of June 20, 1972, Stat. 1972, Ch. 458 (current version at MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1975)).

219. *First Nat'l Bank of Boston v. Attorney Gen.*, 362 Mass. 570, 576, 290 N.E.2d 526, 534 (1972).

220. In particular, the legislature amended the previously quoted sentence by adding "solely" before "concerning." Act of June 1, 1973, Stat. 1973, Ch. 348 (current version at MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1975)).

221. *First Nat'l Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 780, 359 N.E.2d 1252, 1268 (1977). In *Bellotti*, the Supreme Court concluded that "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people. . . ." 435 U.S. at 785 (footnote omitted). There is something to be said for this conclusion. The legislature had plainly wished to secure a constitutional amendment permitting a progressive income tax. It needed approval of such a change through a referendum. The statute at

The Court in *Bellotti*, however, passed lightly over both the national history of the referendum and the Massachusetts Legislature's understanding of its experience with this particular referendum. In doing so, the Court explained that there had been "no showing that the relative voice of corporations had been overwhelming or even significant in influencing referenda in Massachusetts. . . ." ²²²

In this passage, the Court seems to acknowledge the importance of an accurate empirical understanding of the actual effect of corporate efforts to influence referenda. But what the Court does not acknowledge—perhaps does not recognize—is how difficult achievement of such an understanding must be. As Professor Yudof writes, "At the present stage of research, the effects of mass communications are largely unknown or indeterminate—at least insofar as one seeks to disaggregate complex variables and to fashion general theories."²²³ The specific question of the effect of spending on referenda has proved difficult to study, and, perhaps in consequence, "with the exception of a handful of very recent studies, there have been virtually no systematic and reliable examinations of the effects of campaign spending in ballot measure elections."²²⁴ And as one might expect, there is some evidence that much mass communication and much spending to affect the outcome of referenda can be ineffectual. All this raises the question of how a court should respond to a legislature's empirical understandings in an area of empirical uncertainty. That question is of considerable interest across a wide range of constitutional law, but here I can only observe that two factors ought to have made the *Bellotti* Court less demanding in its request that the legislature substantiate its judgment. First, there is evidence that large-scale spending can affect referenda. Indeed one of the most careful studies seems to speak directly to the situation in *Bellotti*: "there emerges a strong pattern indicating that one-sided spending has been ineffective when it is in support of the proposition but has been almost invariably successful when it is in opposition."²²⁵ Second, if legislators are expert about anything, it should

issue in *Bellotti* was a direct response to failures to secure that approval. Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 497. The statute thus was aimed with unpleasant directness at a particular political decision. On the other hand, the statute was born of direct experience with what the legislature believed was the corruption of that decision by corporations. *Id.* It is hard to see why the legislative reforms born of direct and immediate experience should be disfavored for that reason.

222. 435 U.S. at 789.

223. M. YUDOF, *supra* note 125, at 72. For a helpful survey of research on mass communications from the perspective of a first amendment scholar, see *id.* at 71-89.

224. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 509-10 (1982) (footnote omitted).

225. *Id.* at 511.

be about the effectiveness of campaign spending, and judicial deference to that expertise seems well-placed.²²⁶

Whatever weaknesses may have affected the legislature's understanding of the empirical questions in *Bellotti*—and it is quite possible that the legislature made no more effort than the Court to assimilate the best research—the technique the Court adopted for analyzing those questions was painfully limited, for the Court relied solely on inferences drawn from the outcome of the earlier referendum on the income tax.²²⁷ It is, however, flatly impossible to use unaided logic to infer from an electoral outcome the effect of corporate contributions on a referendum; that question can only be settled (and even settled is too strong a word) with empirical studies. The Court's reasoning illustrates the impossibility of the task. Justice White pointed out in his dissent that when the graduated income tax was unsuccessfully presented to the Massachusetts voters in 1972, a political committee against the proposal had spent \$120,000, while the only group in favor of the proposal had spent \$7000.²²⁸ The Court responded that "any inference that corporate contributions 'dominated' the [1972] electoral process on this issue is refuted by the 1976 election. There the voters again rejected the proposed constitutional amendment even in the absence of any corporate spending."²²⁹ But the fact that the corporate position won when corporate expenditures were banned does not prove that the corporate expenditures in the earlier election had no effect. The 1976 referendum might have been even more soundly defeated had corporate contributions been allowed, the corporate contributions in the 1972 referendum might have fixed the public's mind against a graduated income tax, and corporate "domination" of politics may simply be irrelevant where public opinion is already resolved in favor of the corporate position.²³⁰

226. As Justice White said of the legislation in *Buckley v. Valeo*, "Those [in Congress] supporting the bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." 424 U.S. 1, 261 (1976) (White, J., concurring in part and dissenting in part).

227. *Bellotti*, 435 U.S. at 789 n.28.

228. *Id.* at 811 (White, J., dissenting). Justice White also noted that three of the appellant corporations had contributed \$3000 to the political committee which had opposed the amendment, and that committee had been supported primarily through large corporate contributions. *Id.*

229. *Id.* at 789-90 n.28. Note the absolute and confident terms in which the Court phrases its proposition: "dominated," "refuted."

230. The Court also might have been given pause by the appellant's eagerness to be allowed to make expenditures.

C. IS MORE MORE? THE PROBLEM REVISITED

It is now time for us to return to the heart of the Court's first amendment theory, its belief that increases in the quantum of speech always deserve constitutional protection. In this section, I suggest that there are times when that is not true and that the situation the Massachusetts statute addressed is such a time.

The *Bellotti* Court doubted that "corruption" is a notion that is at all applicable to referenda—you can bribe a politician with a large contribution, but you cannot usefully be said to bribe the public by advertising. The Court concluded that, "far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for "the widest possible dissemination of information from diverse and antagonistic sources" ' '231 But large sums of money can distort the debate about a referendum, and perhaps can do so even more easily than when the debate is about a candidate for major office. Candidates, at least, tend to be fairly well known and are the main issue in their elections. Referendum provisions, however, are often complex, anonymous, easily misunderstood, and quickly forgotten. Extensive propaganda can give a greatly inaccurate impression of the extent of public enthusiasm for a proposal (making the bandwagon effect possible). What is more important, a large expenditure can often secure completely disproportionate presentation of the issues, so that there is not a fair competition of ideas. As Judge Bazelon wrote in sustaining the Federal Communication Commission's ban on cigarette advertising on television:

Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal. . . .

[W]here, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.²³²

It is hard to relate the kind of election the framers of the first amendment envisioned and the kind we, perforce, have now. The Constitution originally contemplated elections in which there might be some opportunity for each voter to see the candidate. Where the size of an

231. *Bellotti*, 435 U.S. at 790 n.29 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

232. *Banzhaf v. FCC*, 405 F.2d 1082, 1102-03 (D.C. Cir. 1968) (footnotes omitted).

electoral district precluded that, an intermediary was chosen to select the official—legislatures picked senators, electors picked presidents. There was also a tradition of quite substantial political speeches. The Court assumes we still have this homey kind of election, in which there is time, and apparently inclination, for probing debates before live audiences. But elections now rely on large cadres of workers, on avoiding speeches of any substance, and most importantly, on expensive media campaigns designed more to convert than to persuade. For this kind of campaign corporations are well equipped:

Endocratic corporations can place enormous power behind political programs, bringing to bear all the organized resources of money and talent which underlie their commercial success. Their programs may be particularly effective because of the skill and experience acquired by these corporations in the use of new techniques of mass persuasion.²³³

It is thus difficult to escape a sense of unreliability about the argument in both *Bellotti* and *Buckley* that the more money contenders spend, the more *information* voters will have. What contenders are most likely to do with their money is buy short spots which convey no information at all. As the Court approvingly remarked in turning down the Democratic party's suit to compel CBS to accept the party's advertising: "[T]he licensee's policy against editorial spot ads is expressly based on a journalistic judgment that 10- to 60-second spot announcements are ill-suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form."²³⁴

One wonders just what "information" the Court is referring to when it says that much "valuable information which a corporation might be able to provide would remain unpublished."²³⁵ The statute does not prevent the corporation from holding press conferences to announce factual

233. Comment, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 822 (1961) (footnote omitted). "The danger is that corporate managers, given enormous resources at their command, could effectively flood the market place [of ideas] and thus stifle any genuine attempt at effective debate." *Id.* at 860 (footnote omitted).

234. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 118 (1973). As Judge Wright commented about the Court's decision in *Buckley*, "[B]y forcing candidates to put more emphasis on local organizing or leafletting or door-to-door canvassing and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised." Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1012 (1976) (footnote omitted). See generally E. DIAMOND & S. BATES, *THE SPOT: THE RISE OF POLITICAL ADVERTISING ON TELEVISION* (1984).

235. *Bellotti*, 435 U.S. at 785 n.21.

information (or opinions, for that matter), and almost all factual information about any major corporation is regularly revealed to the Securities and Exchange Commission. If such information is genuinely of interest, one would suppose the press would publish it. If the "information" is the opinion of the corporation on the issue to be voted on, we are driven to ask again, who speaks when the corporation speaks? And we are driven to ask, if the corporation doesn't speak, will its opinions really go unexpressed? After all, corporate officers are both apt to share the corporation's view and likely to have the resources to make their opinions heard and felt. In short, it is difficult not to conclude that what the Court has done is not to protect the governors' right to information, but rather to protect the corporations' right to be one of the governors.

To this general discussion, two considerations specific to *Bellotti* should be added, for they illustrate the narrowest application of the Massachusetts statute and the reach of the Court's opinion. The first consideration is that the statute does not prohibit corporate expenditures to influence *all* referenda; rather, it prohibits corporate expenditures to influence referenda not "materially affecting any of the property, business or assets of the corporation."²³⁶ "Materially affecting" is no doubt susceptible of many interpretations.²³⁷ But insofar as the standard is well applied, it preserves speech the corporation might be specially suited to provide—information about its business and the things that affect it—and filters out speech which is not within the corporation's special knowledge or competence. The point can be put slightly differently. The Court argues that citizens need all points of view when they make a political decision. The statute lets a corporation speak when it is likely to provide a point of view that would not otherwise be expressed. But when the corporation's interest is engaged only in the same sense that the general public's interest is engaged, the corporation has nothing to add to the debate that is not likely to be said equally well by others.²³⁸

236. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977), quoted in *Bellotti*, 435 U.S. at 768.

237. See *supra* note 184. But recall that the Massachusetts Supreme Judicial Court accepted the legislature's provision 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." MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977), quoted in *Bellotti*, 435 U.S. at 768.

238. Compare the general principle that a citizen or taxpayer lacks standing to challenge a federal statute unless he can show "some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488-89 (1923). See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3531.10 (1984).

The second point specific to the statute in *Bellotti* is that, in a useful sense, the statute does not prevent a corporation from *speaking* about *any* referendum subject. A corporation may *speak* to influence even a referendum that has zilch to do with its property, business, or assets. What a corporation may not do is make *expenditures* to influence referenda (unless, of course, they materially affect the corporation). As the Supreme Court noted, the Massachusetts court had

stated that [section] 8 would not prohibit the publication of "in-house" newspapers or communications to stockholders containing the corporation's view on a graduated personal income tax; the participation by corporate employees, at corporate expense, in discussions or legislative hearings on the issue; the participation of corporate officers, directors, stockholders, or employees in public discussion of the issue on radio or television, at news conferences, or through statements to the press or "similar means not involving contributions or expenditure of corporate funds"; or speeches or comments by employees or officers, on working hours, to the press or a chamber of commerce.²³⁹

This provision has two consequences for our discussion. First, it means that, even if—despite the discussion in the preceding paragraphs—the corporation should have important information to communicate, it will be able to do so. Second, it means that the kind of corporate "expression" most likely to be eliminated is exactly the kind of corporate "expression" least likely to contribute to informed and rational debate on public issues—namely, advertising. The primary purchase made with large expenditures in political campaigns is, after all, the "spot" advertisement, which is too short to communicate more than the barest idea, which is often non-verbal, and which rarely even attempts to trade in the marketplace of ideas.

D. RECONCILING *BUCKLEY V. VALEO*

Before concluding this line of argument, I wish to put at rest any suggestion that it was foreclosed by the Court in *Buckley v. Valeo*.²⁴⁰ In *Buckley*, the Court upheld statutory limits on contributions to candidates in federal elections, but overturned limits on expenditures by candidates or by their supporters. It might be argued that the statutory limits on expenditures forbidden in *Bellotti* are analogous to the statutory limits on expenditures forbidden in *Buckley*:

239. 435 U.S. at 773 n.7 (quoting *First Nat'l Bank of Boston*, 371 Mass. at 787, 359 N.E.2d at 1272).

240. 424 U.S. 1 (1976).

The Court noted that corporate expenditure bans might be necessary to prevent the danger of real or apparent corruption in candidate elections. While this interest may be sufficient to justify limitations on corporate *contributions* to candidates, it fails to justify similar limitations on independent corporate political *expenditures*. In *Buckley v. Valeo*, this interest was found insufficient to support limitations on individual and group political *expenditures*.²⁴¹

Furthermore, the underlying reasoning of *Buckley* might necessitate the result of *Bellotti*. As Professor Polsby analyzes *Buckley*,²⁴² it, like *Bellotti*, presented a conflict between two first amendment values: on one hand, the individual's right to speak through contributions to political candidates, and on the other, the public's need for elections free of the possibility of corruption through large contributions to political candidates. Professor Polsby suggests that the case thus means that "[t]he First Amendment secures rights to be exercised by each citizen *in propria persona* and not *in communi*. Governmental abridgments that are aimed at enlarging the collective interest by suppressing individual expression, even in the presence of massive documentation that the two interests are in hopeless conflict, are unconstitutional."²⁴³ But even if Professor Polsby is correct, *Bellotti* may still be wrongly decided, since *both* sides of the argument in *Bellotti* rely on a "communal" theory of first amendment rights. The Court's view is that the corporation's right to speak is protected because the community needs the information the corporation will provide. The dissent relies on the community's need for elections not dominated by corporations. Or, to put the point another way, in *Bellotti*, there are no rights to be exercised by citizens *in propria persona*, since there is no "citizen" in *Bellotti*.

Furthermore, *Bellotti* and *Buckley* are distinguishable, and the reasoning of *Buckley* does not necessitate the result in *Bellotti*. First, where the statute in *Buckley* tried to equalize voters by equalizing the contributions they could make to campaigns, the statute in *Bellotti* tried to protect all voters from attempts by "non-voters" to influence the election. Second, the gravamen of the charge against the two laws is different. In *Buckley*, the law was held unconstitutional because it prevented candidates and citizens from disseminating their views; in *Bellotti*, the law was held unconstitutional because the law prevented those with rights to information from obtaining it. The fault of the Massachusetts statute is not logically inferable from the fault of the federal statute. Third, the

241. *The Supreme Court, 1977 Term, supra* note 163, at 171-72 (emphasis in original).

242. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.

243. *Id.* at 20.

Court in *Buckley* held that limitations on contributions are not serious restrictions of speech, since “[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”²⁴⁴ The corporation’s shareholders can individually express themselves without stint, but there may constitutionally be limits on their expression through their corporation, just as there are limits on expression through contributions to one’s candidate.

E. THE FIRST AMENDMENT AND MINORITY SHAREHOLDERS

Massachusetts’ second justification of the statute in *Bellotti* was that it prevented minority shareholders from being unwillingly affiliated with ideas they disliked. The Court’s treatment of that purpose was characteristically insensitive to the difficult empirical questions involved. The Court dismissed those questions by stating that the purpose of protecting shareholders was “belied” by the under- and over-inclusiveness of the statute.²⁴⁵ It is hard to believe that much can reliably be inferred about the genuineness of the legislature’s intent from the under- or over-inclusiveness of a statute. The theory as to under-inclusion is apparently that if the legislature *really* wanted to do something, it would do it all the way. As to over-inclusion, the theory is apparently that the legislature wanted to do something too much, since in taking care to prevent every instance of the evil to be prevented, it prevented some things that were not part of the evil. But as Professor Nagel’s celebrated student note demonstrated, under- and over-inclusion have to be understood in terms of the multiple and often conflicting purposes most statutes seek to achieve.²⁴⁶ Furthermore, the Court’s use of inclusiveness in *Bellotti* is particularly perplexing. Recall that the Court argued that the legislative intent to protect minority stockholders was belied by the over- and under-inclusiveness of the statute. But only *under*-inclusion suggests lack of commitment to the legislative goal; *over*-inclusion suggests too zealous a commitment to it.

In any event, the statute was at least under-inclusive in that corporations were not prevented from lobbying and could spend money to express their views on any subject until it became the subject of a

244. *Buckley*, 424 U.S. at 21. The Court’s theory is not altogether comprehensible, since it seems to deny that a person can speak through an intermediary, and the logic of the more-information theory would seem to suggest that the more money a candidate has, the more he can spread information, and thus the more information the electorate will have.

245. *Bellotti*, 435 U.S. at 792-93.

246. See Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

referendum. But this under-inclusiveness is justifiable. First, it is common learning that the state may attack part of a harm, and, as Justice White contended, the state might well have decided that it was regulating first that part of the harm which was most menacing.²⁴⁷ Perhaps, as Dean Yudof suggests, "legislatures consider elections and referenda to be more at the heart of the democratic process than legislative lobbying."²⁴⁸ Second, the legislature might have believed that it is harder to regulate lobbying than expenditures for advertising and that regulating the latter is worth the cost, but regulating the former is not. Third, the harm to the minority shareholders from expenditures for advertising may be greater than the harm from lobbying, if the harm to be prevented is public affiliation with ideas which one disbelieves. Fourth, and most important, the regulation of corporate expenditures for advertising, on the Court's own view, interferes with first amendment interests. It seems perverse to attack the statute on the grounds that it does not interfere with the first amendment as broadly as it might. For example, the Court objects that the legislature limits corporate speech only after the topic had become the subject of a referendum, but this provision is exactly what the Court ordinarily insists on in first amendment adjudication—a statute drawn so as to interfere with first amendment interests as narrowly as possible.

Nor does the Court's criticism of the over-inclusiveness of the statute bear examination. In rejecting the argument that the statute was necessary to protect minority stockholders, the Court observed that corporate contributions would be impermissible under the statute even if the stockholders unanimously approved the expenditure. But a genuine, fully-considered unanimous vote is unlikely to the point of absurdity for those large corporations at which the statute was plainly aimed; such corporations have far too many shareholders to bring them together for informed discussion, much less to persuade them to agree.²⁴⁹ Further, while the statute is over-inclusive in the respect described by the Court, it *must* be if it is to achieve its first purpose of preserving the integrity of the electoral process.

247. *Bellotti*, 435 U.S. at 820 (White, J., dissenting).

248. M. YUDOF, *supra* note 125, at 49.

249. The Court also contends that "shareholder democracy" offers adequate security for minority shareholders and that they may also use the derivative suit. *Bellotti*, 435 U.S. at 794-95. As my discussion of the realities of corporate life argues, the former is not a realistic suggestion. As to the latter, Professor Brudney acidulously asks why it is unconstitutional for the legislature to protect minority shareholders by statutorily prohibiting expenditures that are *ultra vires*, but constitutional to protect minority shareholders by providing for a derivative suit attacking the same expenditures on the same grounds. Brudney, *supra* note 180, at 242-43.

CONCLUSION

What is perhaps most remarkable about the Court's opinion in *Bellotti* is the virtual absence of the corporation from it. Yet the corporation is a central fact of American law and life.²⁵⁰ As Justice White wrote: "It has long been recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."²⁵¹ The power of government to regulate the power of the corporation was established by the New Deal compromise, and it is in light of that fact that the statute in *Bellotti* and the inadequacy of the Court's first amendment theory are best understood.

The Court's first amendment analysis is repeatedly impaired by the Court's unwillingness to acknowledge that large institutions controlling large agglomerations of wealth are problematic in a democracy. The commercial speech cases themselves conspicuously represent a failure to recognize the centrality of economic issues in a first amendment context.²⁵² The Court's right-to-receive analysis fails to ask whether the right to receive corporate information is what is at stake in the cases or problematic in actual practice. The Court's more-is-more theory of the first amendment ignores the ways corporate contributions to referendum campaigns might lower the usefulness, even though raising the volume, of debate. The Court's focus on the right to hear allows it to ignore the realities of how corporate speech is formulated and expressed. But to ignore the reality of the corporation here is as unwise as ignoring the reality of the employer's economic power was in *Lochner*.²⁵³

I have stressed the Court's preference for theory over history and logic over empirical inquiry. In doing so, I do not mean to suggest that theory has no role in interpreting the first amendment. Obviously it does. But the Court's use of theory is a kind particularly vulnerable, for the Court's technique is to state an uncommonly abstract view of what the first amendment intends and then to offer an uncommonly simple view of how that intent might be served. Even if the Court's technique

250. See J. COLEMAN, *THE ASYMMETRIC SOCIETY* 9-15 (1982) (referring to extensive growth of corporations in United States and structural change in society).

251. See *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

252. See *supra* notes 47-126 and accompanying text. See generally Jackson & Jeffries, *supra* note 76, at 25-40 (commercial speech and economic liberty).

253. 198 U.S. 45 (1905).

were subtler, though, its attempt to deduce specific principles from a theory of the first amendment might not be the best, and certainly ought not be the only, way of approaching free speech.²⁵⁴ Much of the justification of the first amendment is found not in *a priori* theory, but in the fact that history suggests that it is practical. The reasons we need to keep speech free, and the kinds of attacks which are made on speech, present themselves in such varying and unexpected forms that they are hard to explain theoretically, and a theory can rigidify our first amendment thinking so that we fail to notice historical experiences which should inform free speech doctrine.²⁵⁵

In addition to the constitutional arguments I have adumbrated, several more practical considerations ought to ease our minds as to suppressing corporate political speech. First, the limits the government has placed on corporate and commercial speech have generally been quite circumscribed. The statute in *Bellotti*, for example, did not limit corporate speech, only corporate expenditures. It did not regulate corporate expenditures except those intended to affect the outcome of a referendum. It did not limit corporate expenditures intended to affect referenda except where the subject of the referendum did not materially affect the corporation. The statute in *Virginia Pharmacy*, to take another example, did not bar *Consumer Reports* from publishing a price list of drugs, nor did it bar pharmacists from telling customers the price of drugs in person or over the phone. Since these statutes were written when regulation of corporate and commercial speech seemed constitutionally permissible, they are appropriate (if not conclusive) evidence of the likelihood that government might abuse its power over commercial and corporate speech.

We ordinarily deny government the power to regulate speech because we are afraid of the government's biases.²⁵⁶ Those biases are less likely to be present in the regulation of commercial and corporate speech than in the regulation of most other kinds of speech, especially political and religious speech. Even were such biases present, as they may have been in *Bellotti*,²⁵⁷ corporations as a class are perhaps uniquely well-

254. *But see* BeVier, *supra* note 80, at 301.

255. "The rights which the First Amendment creates cannot be established by any theoretical definition, as Burke said of the rights of man, but are 'in balance between differences of good, in compromises sometimes between good and evil, and sometimes between evil and good.'" A. BICKEL, *supra* note 195, at 57. For a developed argument for an "eclectic" approach to the first amendment, see Shiffrin, *supra* note 43.

256. *See* F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80-85 (1982).

257. *See supra* note 221.

sued to defend their own interests. Indeed, corporations may be *too* well able to defend their own interests and even to compel the government to regulate speech in ways that serve their own interests, as arguably occurred in the *Virginia Pharmacy* statute.

We also need to ask why Meiklejohn (or to take another possible source, John Stuart Mill) might approve of the right to receive. They emphasize that the hearer needs to receive heterodox opinion. It is hard to believe that this is what the court is ensuring in *Bellotti*. Indeed, corporations already have such power to shape our national life that no information in which they are interested, and, more important, no attitudes which they wish to foster, are likely to be long secret.

These considerations are not easy to write into first amendment jurisprudence. But they should reassure us that when we see no ultimate constitutional difficulty with prohibiting corporate participation in politics, when we are willing to walk toward one first amendment good while walking away from another, we act within the traditions of constitutional interpretation and good sense.²⁵⁸

258. See Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

POSTSCRIPT

As this Article was being prepared for the printer, Professor Meir Dan-Cohen published *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society*. This book is so significant a contribution to legal thinking about the corporation that it commands mention even at this late hour. Professor Dan-Cohen observes:

America today . . . is a society of organizations. . . . [t]his central societal feature has not been fully integrated into social and specifically legal thinking. . . . Concepts, institutions, doctrines, and attitudes that originated in an individualistic context, and whose applicability to organizations is at best questionable, are frequently used indiscriminately and unreflectively to deal with organizations as well.

Id. at 5.

Professor Dan-Cohen rejects both conventional views of the corporation: the holistic view (which “fully acknowledges the reality of collective entities and denies the possibility of completely reducing that reality to a description of individuals and their interrelations”) and the atomistic view (which holds “that collective entities are constituted by and are therefore reducible without loss into individuals and their interrelations”). *Id.* at 15. Relying on organizational theory, he proposes a useful middle view of the corporation which is too complex and subtle to be summarized readily but which emphasizes the ways in which the corporation can usefully be said to act as an entity and in which the corporation’s acts are the product not of a single hierarchy or of a few managers, but rather of a complex, dynamic, and interacting set of factors.

Drawing on this approach, Professor Dan-Cohen analyzes *Bellotti*. He first discounts the argument that corporate speech is simply the speech of the corporation’s managers and that therefore its suppression causes no loss in the number of facts or ideas in circulation. He suggests that speech can be a corporate product, a

global, nondistributive phenomenon, emanating from the corporation without being traceable or reducible to individual utterances. . . . The gathering, filtering, channeling, decoding, and combining of information by different components and actors result in statements with cognitive content (i.e., speech) which are at the same time distinctively and irreducibly organizational.

Id. at 107. I think there is something to be said for the argument that, in principle, corporate speech is something different from the speech of any of the individuals who are part of the corporation. But I also find it hard to believe that in practice the corporate viewpoint will not often coincide

quite closely with the viewpoints of many individuals who will be well-placed to make their ideas known.

Second, Professor Dan-Cohen dismisses the argument that corporate speech must be protected to preserve the first amendment rights of dissenting shareholders. He does so for reasons quite close to mine.

Professor Dan-Cohen thus defends the Court against two criticisms of *Bellotti*. However, he attacks the Court's rejection of the argument that corporate speech can be regulated in the interest of preventing corporate speech from drowning out individual speech. The Court, he observes, equates regulating corporate speech with suppressing the voices of some elements of society in order that the voices of other elements may be heard. But, he cautions,

[N]otice that what would make this argument cogent is an assumption that those "elements of our society" whose speech may not thus be restricted have themselves an original autonomy right to speak. . . .

This, however, is not the case in the *Bellotti* situation. Since the Court rightly refrained from ascribing to the corporation an active speech right, there is nothing to protect corporate speech against limitations whose purpose is to promote the listeners' First Amendment interests, from which the corporation's rights are themselves derived. *Id.* at 110 (footnote omitted). Consequently, Professor Dan-Cohen argues, strict scrutiny is an inappropriate standard to apply in *Bellotti*.