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Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti

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In a recent Supreme Court decision, a statute which prohibited corporate activity in initiatives and referendums not materially affecting the corporation was struck down as a violation of the first amendment. Despite the perceived need to protect against the effect of the power of the aggregate economic wealth of corporations in other contexts, the Court felt that such power had not had a demonstrable effect on voting patterns. This paper examines the impact of this decision. The authors argue that the effect of corporate campaign activity can be demonstrated and may be sufficient to prompt further legislative activity to minimize the effect of corporate wealth in this area or to overrule the Court's decision.

INTRODUCTION

On April 26, 1978, the United States Supreme Court in First National Bank of Boston v. Bellotti1 upheld the right of a corporation to make political expenditures from general corporate funds in connection with a state referendum.2 The Court ruled unconstitutional a Massachusetts statute which prohibited specified banks and business corporations from making contributions or expenditures "for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one

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2. Id. The Court split 5-4. Justice Powell wrote the majority opinion, joined by Justices Stewart, Blackmun, and Stevens. Chief Justice Burger also joined the majority opinion but wrote separately "to raise some questions likely to arise in this area in the future." Id. at 795. Justices Brennan and Marshall joined in a dissenting opinion by Justice White. A separate dissent was filed by Justice Rehnquist.
materially affecting any of the property, business, or assets of the corporation." The Court found that "there was no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts."

The Supreme Court's decision raises the possibility that not only corporations, but also such entities as labor unions, partnerships, associations, and political action committees will become even more financially involved in electoral politics. The Court's decision is particularly significant because more states are putting controversial issues before the voters. Such ballot questions relate, for example, to nuclear power plant construction, nonreturnable bottles, and utility ratemaking rules. In many cases it can be argued that extensive corporate and industry advertising campaigns may directly affect the outcome of the balloting.

The electoral process is, of course, the very heart of our democratic system. The first amendment strives to make the necessary exchange of views vigorous. When political advertising by large corporations for the purpose of influencing state and local referen-


No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, spend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or 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. No 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. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, spend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, . . . shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.

4. 435 U.S. at 789.


7. See notes 61-85 infra and accompanying text.
dums almost totally dominates the marketplace of ideas, such expenditures may seriously threaten that exchange. 8

This paper begins with a discussion of the Bellotti case and the new constitutional principles it represents. 9 The paper then examines the case in the light of longstanding governmental interest in and regulation of corporation influence on the electoral process, 10 an interest prompted by the well-recognized need to guard against corporate domination of the political process. 11 The focus then shifts to the implications of Bellotti on the increasing use of referendums and initiatives on the state and local level. 12 Finally, it examines the various legislative alternatives available to actively preserve and protect the integrity of our political structure. 13

I. THE BELLOTTI DECISION

The Massachusetts statute in Bellotti prohibited corporations from making contributions or expenditures for political advertising in referendums and initiatives involving questions not materially affecting the assets of the corporation. 14 The statute further specified that “no 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.” 15

The specific controversy in Bellotti involved a proposed state constitutional amendment placed before the Massachusetts voters in the 1976 general election, which would have permitted the legislature to impose a graduated tax on individual incomes. 16 Sev-
eral banking associations and business corporations expressed a desire to spend money to publicize their views on the proposed amendment. The Attorney General of Massachusetts informed them that he would enforce the prohibition against them should they attempt any such expenditures. Consequently, they brought an action seeking to have the statute containing the prohibition declared unconstitutional. The Supreme Judicial Court of Massachusetts upheld the constitutionality of the statute, issuing its opinion after the vote on the referendum.

The United States Supreme Court reversed, holding that the case had not been rendered moot, and that the statute was un-

such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.


18. Id. at 769.

19. Id. The action was brought before the vote on the amendment. An order denying declaratory judgment was issued after a decision by the Massachusetts Supreme Judicial Court on September 22, 1976. Two earlier actions had been brought protesting similar prohibitions against corporate spending on referendums and initiatives. First Nat'l Bank of Boston v. Attorney Gen., 352 Mass. 570, 290 N.E.2d 526 (1972) (ruling by two of five justices of the Massachusetts Supreme Judicial Court that a statute similar to the one in Bellotti was unconstitutional); Lustwerk v. Lytron, Inc., 344 Mass. 647, 183 N.E.2d 871 (1962) (allowing corporations to participate in a campaign regarding a graduated income tax on corporations and individuals).

20. First Nat'l Bank of Boston v. Attorney Gen., 371 Mass. 773, 359 N.E.2d 1262 (1977). The plaintiffs made several arguments regarding the unconstitutionality of the statute: 1) that it deprived them of first amendment rights, id. at 781, 359 N.E.2d at 1268; 2) that it was too vague and also overbroad, id.; 3) that it was a denial of equal protection, id. at 793, 359 N.E.2d at 1275; and 4) that the provision prohibiting corporate spending on any vote or a graduated personal income tax was an improper irrebuttable presumption in a criminal case, id. at 794, 359 N.E.2d at 1275. On the first amendment claims, the Massachusetts court held that since corporations were not persons they did not have the same rights of free speech as natural persons but rather had rights to protect corporate property through the fourteenth amendment. By limiting corporate electoral participation to matters materially affecting the assets of the corporation the statute met those fourteenth amendment requirements. Id. at 784-85, 359 N.E.2d at 1270.

21. 435 U.S. at 774-75. Because the 1976 referendum in question had been held, and the proposed constitutional amendment defeated, it was necessary for the Court to confront the issue of mootness. Citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), the Court held that the facts of the case brought it within the mootness exception for cases "capable of repetition, yet evading review." 435 U.S. at 774. There are two elements to this exception: "'(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" Id. at 774.
constitutional on first amendment grounds.  

The Supreme Court explained that the state court had not addressed the proper constitutional issue. The true issue was not whether corporations have first amendment rights and whether those rights are coextensive with those of natural persons, but rather, whether the statute in issue abridged expression protected by the first amendment. The Court said that the nature or identity of the speaker was of little consequence so long as the speech was protected:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech, in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

*Bellotti* is significant with regard to several constitutional principles. First, it reaffirms the Supreme Court's view that the Constitution protects the right to listen as well as the right to speak.

(quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1974)). The first element was met because the time between announcement of the referendum and the election was too short to allow the Court to hear the matter. *Id.* The second element was satisfied because frequency with which the graduated income tax issue had been before the voters (four times) virtually assured that it would again be on the ballot. *Id.* at 775.

One commentator has noted that *Bellotti* may be significant because the Court easily could have avoided deciding the issue by finding the case moot, as it did with cases under the Federal Corrupt Practice Act. Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 Ky. L.J. 75, 86 (1978–1979).

22. For a discussion of the Court's reasoning, see notes 24–35 infra and accompanying text.

23. *See* note 20 *supra*.

24. 435 U.S. at 776.

25. *Id.* at 777. Quoting Mills v. Alabama, 384 U.S. 214, 218 (1966), the Court stated, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 776–77. Whether a state should enact a graduated personal income tax is exactly that type discussion. The Court then addressed the question "whether the corporate identity of the speaker deprives the proposed speech of what otherwise would be its clear entitlement to protection." *Id.* at 778. Rejecting the reasoning of the Massachusetts court, the Court stated that free speech had always been part of the liberty interests protected by the fourteenth amendment and that corporations had been included in that protection. *Id.* at 779–80. Therefore, a corporation's fourteenth amendment rights went beyond protection of property, and the state's limitation of political advertising to only those issues that materially affected corporate property was unconstitutional. 435 U.S. at 784.

26. In refuting the respondent's contention that the materially affecting rationale found full support in Supreme Court cases involving the regulation of the speech rights of media entertainment corporations, *e.g.*, Red Lion Broadcasting Co. v. FCC, 375 U.S. 367
Second, it may reflect the Court’s view that the purposes of the first amendment are better served by allowing uninhibited access to communication media. Further, the Court’s decision may also be important in providing commercial speech with increased first amendment protection.

Writing for the majority, Justice Powell noted that the constitutionality of the Massachusetts statute turned on whether the statute could survive “the exacting scrutiny necessitated by a state-imposed restriction on freedom of speech.” Under this test, “the state may prevail only upon showing a subordinating interest which is compelling.” Massachusetts advanced two such interests. First, the State asserted an interest in keeping individual citizens active in the electoral process and thereby preventing the deterioration of their confidence in that process. Second, it asserted interest in protecting the rights of shareholders who dissent from the views expressed by management on behalf of the corporation. The majority held that neither of these interests was actually served by the ban on corporate political advertising for referendums.

The weakest aspect of the majority opinion, and the one on which this paper shall focus, is that part of the discussion which attempts to refute the State’s contention that corporate participa-

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(1969) (which upheld the fairness doctrine in the face of an attack on it on first amendment grounds), the Court noted that such cases were based “not only on the role of the First Amendment in fostering individual self-expression, but also in its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” 435 U.S. at 783. See also Fox, supra note 21.

27. Fox, supra note 21, at 75.
28. 435 U.S. at 783. See also Fox, supra note 21, at 75–76.
29. 435 U.S. at 786.
30. Id. (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).
31. Id. at 787.
32. Id. See also id. at 802, 805–06 (White, J., dissenting).
33. Id. at 788–95. The majority did not reject the second interest outright but found that the statute was both overinclusive and underinclusive in its attempt to serve that interest. It was overinclusive because it banned corporate political activity even when there was unanimous shareholder approval and underinclusive because the statute allowed corporate financing of legislative lobbying notwithstanding shareholder desires. Id. at 792–95. Justice White challenged the majority’s reasoning and focused the heart of his dissent on the assertion that those interests were compelling enough to subordinate first amendment protections.

What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the state has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.

Id. at 804.
tion in the discussion of a referendum issue may unduly influence the vote on the issue and result in the destruction of confidence in the democratic process and the integrity of government. Justice Powell declined to recognize a compelling state interest in preventing such undue influence, explaining that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in the government."\(^3\)

Notably, Justice Powell left the door open for the decision to be narrowed in the future. He explained that if the Massachusetts Attorney General's arguments "were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."\(^3\) Yet, recent legislative findings regarding the influence of corporate political advocacy\(^3\) and other initial studies\(^3\) indicate that the relative voice of corporations may be overwhelming and thus may be very significant in influencing state and local referendums. This important information is almost certain to come before the Court in future cases regarding corporate political activity. Thus, any conclusions to the effect that Bellotti will make it difficult to impose restrictions on corporate referendum spending may be premature and shortsighted.\(^3\)

**II. The Governmental Interest in Regulating Corporate Political Activity**

Corporate electoral involvement poses important questions of

34. *Id.* at 789–90 (footnotes omitted).
35. *Id.* at 789.
36. See notes 69–85 *infra* and accompanying text.
37. *Id.*
38. *But see* Fox, supra note 21. After discussing the dismissal of the state's claim of interest in seeing its election process avoid any undue influence inherent in corporate campaign activity, the author states, "Such an emphatic rejection of this 'undue influence' purpose [by Bellotti] makes it appear expressly unlikely that a particular record or legislative recitation of spending history would be significantly egregious to warrant the imposition of any limitation on corporate spending." *Id.* at 94. He concludes:

The Court in Bellotti affirmed that that unreasonable burdens could not be placed in the way of prospective corporate speech on political and economic matters. It will be difficult to draft a state statute whose burden will be held to be a reasonable one. It seems likely that the Bellotti case will preclude any statutory restrictions which will impose substantial and discriminatory burdens upon corporate expression of opinion concerning referendum questions.

*Id.* at 101.
abiding concern for American political theory and practice. First, one must examine the very legitimacy of collective political action by concentrated economic interests. Not enough is known about the effects of such action on the quality and effectiveness of political participation by the unorganized individual citizen in the American political process. One must ask whether large economic interests could combine aggregated wealth with massive organizational resources to dominate the selection of public officials and influence the formulation of public policy to the extent that the integrity of the political process could be called into question.

Yet, political involvement of economic interests has been an integral element of our history and development as a nation. The vital importance of governmental policies and decisions to the well-being of virtually every business firm and labor organization in our country ensures activism, no matter how expensive, on the part of these groups. Accordingly, business, labor, and other special interests have used the electoral process to influence the selection of public officials and bring before the public measures designed to benefit their organizational trade. Since the turn of the century, our nation has recognized the need for measures designed to prevent corporate domination of the political process. As Justice White noted in his dissent to Bellotti, government regulation of corporate political spending has consistently been upheld in order "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." In a much earlier case, Justice Frankfurter summarized the important policy considerations involved in such regulation: "Speaking broadly, what is involved here is the integrity of the electoral process and, not less, the responsibility of the individual citizen for the successful functioning of that process . . . . [These are] issues not less than basic to a democratic society."

A brief look at our nation's history confirms the circumstances that have compelled our government to play an increasingly

39. See notes 69-85 infra and accompanying text.
41. For a discussion of the history of regulation of corporate political spending, see United States v. UAW, 352 U.S. 567, 570-84 (1957). See also notes 42-60 infra and accompanying text.
42. 435 U.S. at 812 (quoting United States v. UAW, 352 U.S. 567, 585 (1957)).
43. 352 U.S. at 570.
greater role in the regulation of corporate political activity. The post-Civil War era in America was marked by a national industrial expansion and subsequent concentration of wealth which had profound implications for social, economic, and political values and mores. Such economic concentration enhanced the popular feeling that aggregated capital unduly influenced politics, and that such influence too often manifested itself in the form of outright corruption. As two leading historians noted: "The nation was fabulously rich but its wealth was gravitating rapidly into the hands of a small portion of the population and the power of wealth threatened to undermine the political integrity of the republic."

Before the close of the nineteenth century many states had passed laws requiring political candidates and their support committees to publicize the sources and amounts of campaign contributions and expenditures. These laws were predicated on the theory that publicity would discourage corporations from making inappropriate political contributions and thus end their control over party policies. In 1894 the Constitutional Convention of New York was urged to prohibit political contributions by corporations. Elihu Root told the assembly:

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, . . . [for the] advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country than any other practice which has ever obtained since the foundation of our Government.

It soon became clear that this was an issue of both local and national concern. In his annual message of 1906, President Theodore Roosevelt made legislation against corporate political contributions a top priority. The Tillman Act, which prohibited

44. Id. at 570. Justice Frankfurter discussed the social and political history underlying the Tillman Act, 2 U.S.C. § 4416 (1976). Id. at 570-74. For a description of the Tillman Act, see text accompanying notes 51-53 infra.  
45. Id. at 570.  
47. Id. at 571.  
48. See note 92 infra.  
49. 352 U.S. at 571 (quoting E. Root, Addresses on Government and Citizenship 143 (Bacon & Scott ed. 1916)).  
50. Id. at 572.
corporate contributions in connection with a federal election, was the congressional response to this message. The history of this Act shows that Congress intended it to uphold not only the integrity of the electoral process, but also to revitalize responsible individual participation in the democratic process.52

Congressional involvement in this area has continued and intensified throughout the twentieth century. In 1910 Congress again responded to public pressure by requiring political committees working in more than one state to report all contributions and expenditures and to identify contributors and recipients of large sums.53 In 1925 Congress enacted the Federal Corrupt Practices Act which expanded the coverage of its predecessor by substituting “contribution” for “money contribution.”54 In 1943 Congress extended the prohibition against corporate campaign contributions to labor unions for the duration of World War II.55 This restriction was made permanent by the Labor-Management Relations Act of 1947.56 Further congressional concern produced the Federal Election Campaign Act of 197157 and the Federal Election Campaign Act Amendments of 1974.58 In Buckley v. Valeo,59 the Supreme Court reinforced its endorsement of the underlying congressional policies reflected in these statutes by sustaining the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme.60 Obviously, this outline of legislative activity is not a comprehensive analysis of congressional activity in this area. It is cited merely as evidence of the strong congressional interest in and concern with corporate political activity.

52. 352 U.S. at 575.
53. Id. For extensions of the Act, see id. at 576.
60. Id.
III. CORPORATE INFLUENCE IN STATE AND LOCAL REFERENDUMS

The area of law that will be most immediately affected by *Bellotti* is, of course, state regulation of corporate spending to influence the vote on referendums and initiatives. The *Bellotti* decision has special significance because in an increasing number of states, it is becoming common practice for controversial and very important public policy questions to be put to the voters in the form of ballot questions.\(^{61}\)

It is necessary to define the initiative and referendum procedures and examine their historical origins in order to gain an understanding of the motivating factors behind them. The initiative is a procedure which allows for a direct vote by the citizenry on constitutional or statutory issues.\(^{62}\) In this procedure, proposed constitutional amendments or legislation may be placed on the ballot by petition. The proposal becomes law if it receives a majority vote.\(^{63}\) A referendum differs from the initiative in that the referendum procedure affords voters the opportunity to repeal or veto laws or amendments already passed by a legislative body.\(^{64}\)

While American democracy is characterized by a greater opportunity for direct individual participation in government than most other democracies, the initiative and referendum processes may be viewed as a step towards an even more direct democracy. Members of the electorate, by resorting to such procedures, bypass the two party system. Historically, reformers have viewed these devices as useful tools to circumvent insensitive or corrupt political institutions and officials as well as a means to overcome perceived improper influences generated by the aggregate economic power of corporations or labor unions.\(^{65}\)

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61. *See Newsweek*, *supra* note 5.
65. Price, *supra* note 63, at 243–44. The adoption of initiative and referendum procedures was first advocated in the United States about one hundred years after the formation of the federal government. At the beginning of the twentieth century, the United States was swept by the Progressive reform movement. This movement made the most significant impact on the agrarian, formerly populist sections of the midwestern, southern, and, especially, the western portions of the United States. *Id.* The Progressives were concerned with rampant corruption in the political system. *Id.* To secure a more honest and more popularly responsive government, the Progressives advocated a wide range of political reforms including the direct primary election, the secret ballot, recall, the referendum, and the initiative. *Id.* The basic strategy of the Progressives was to check and control political institu-
Today, as governmental control continues to pervade all aspects of our society, the government seemingly remains unresponsive to a degree that disappoints those citizens who expect democracy in practice to resemble democracy in theory. Many Americans are seeking a means by which they can shape and influence public policy for the public good. Consequently, unprecedented numbers of citizens in every part of the nation are voting on complex questions of state and local policy placed on the ballot through the initiative and referendum procedures. Presently at least twenty-three states and the District of Columbia provide for initiative procedures, and an even greater number of states permit the use of the referendum.66

There were at least 350 statewide proposals voted on in the 1978 elections.67 Forty of them were put on the ballot by citizen petition. Only thirteen states had no statewide propositions on the ballot although, in several of those states, there were local initiatives.68

Although it is still too early to draw firm conclusions about the role played by corporate political activity and the influence it may have had in the 1978 ballot questions, an examination of the campaigns and results of recent ballot questions indicates that, contrary to Justice Powell's statement in *Bellotti*, there is some evidence that heavy corporate involvement has had a significant effect on the outcome of electoral decisions. In testimony presented by Professor John Schockley before the Subcommittee on the Constitution of the Senate Judiciary Committee and the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Government Operations Committee,70 which was


70. This Subcommittee investigated the Internal Revenue Service's administration of
based on a study of initiatives and referendums in Colorado and
eleven other states, a general pattern of the effect of heavy corpo-
rate participation was documented and discussed. There were
three aspects to this pattern. First, early opinion polls on mea-
ures which would adversely affect corporate interests showed that
voters favored these questions. \(^71\) Second, in no state did propo-
nents of these questions even remotely match the amount of funds
spent by opponents. \(^72\) Third, in seventy-five percent of the cases,
voters' attitudes shifted and the questions were defeated. \(^73\)

There are two poignant examples of this pattern. In 1978, Cal-
ifornia voters were asked to vote on a referendum which, if
passed, would ban smoking in public places. Polls three months
before election day indicated that voters favored the referendum
by a fifty-eight percent to thirty-eight percent margin. \(^74\) Oppo-
nents of the referendum (mainly tobacco companies) not only out-
spent referendum supporters tenfold, \(^75\) but outspent candidates
for elective office by a similar proportion as well. \(^76\) California vot-
ers defeated the referendum 54.4 percent to 45.6 percent. \(^77\)

Another example given by Professor Schockley was a 1976
Colorado initiative which would have eliminated a state sales tax
on food and would have replaced lost state revenues by imposing
a tax on mining activity and an increased tax on corpora-
tions. \(^78\) Early polls showed that voters overwhelmingly favored the estab-
lishment of the populist-like tax on big business and the abolish-
ment of the unpopular sales tax. \(^79\) Opponents of the initiative
(financed mainly by large business and mining concerns) spent
over sixteen times more money on the campaign than did the initi-
ative's supporters. \(^80\) The initiative was subsequently defeated. \(^81\)

the tax laws relating to corporate lobbying. See generally IRS Administration of Tax Laws
Relating to Lobbying (Part I): Hearings Before the Subcommittee on Commerce, Consumers,
and Monetary Affairs of the House Committee on Government Operations, 95th Cong., 2d
71. \textit{Id.} at 239 (statement of Professor John Schockley).
72. \textit{Id.}
73. Nine of twelve questions were defeated. \textit{Id.}
75. Opponents of the measure reported contributions of $5,648,462 of which the major
tobacco companies contributed 97 percent. \textit{Id.} Supporters reported receiving $585,791 in
contributions. \textit{Id.}
76. \textit{Id.}
77. \textit{Id.}
78. \textit{1977 Hearings, supra} note 69, at 181 (statement of Professor John Schockley).
79. \textit{Id.} at 182. One local poll showed voters favoring the initiative 55 percent to 27
percent. \textit{Id.} at 179.
80. \textit{Id.} at 178.
From his study, Professor Schockley concluded that "[t]he limited data we have now clearly supports the view that properly directed money is powerful in influencing citizens' attitudes towards initiatives, and in these cases the money came from corporate grass-roots lobbying." Conceivably, an argument that Professor Schockley's study conclusively nullifies the concern of the \textit{Bellotti} majority that there was no record to show significant corporate influence through campaign spending, and that, as such, \textit{Bellotti} should be overruled could be easily rebutted. An accurate measurement of the actual effect of corporate involvement on voters is very likely impossible to obtain, and Schockley's study results could be due to a wide range of variables unrelated to the effect of corporate electioneering. Thus, one may validly argue that corporate participation in initiative and referendum campaigns should not be prohibited (through allowing statutes like the one from Massachusetts in \textit{Bellotti} to stand) because of such speculative evidence on the effect of such activity. This argument is even more potent when one realizes the countervailing interests militating against such prohibition—the rights protected by the first amendment.

Yet, the pattern presented by the Schockley study should be considered somewhat probative on the issue of corporate influence on voter opinion. Disparate financing certainly produced different types of campaigns and differences in media access. Additionally, the special nature of initiative and referendum campaigns should be considered. As Professor Schockley noted:

> Because personality issues may be less important, and partisanship is less clear, money may be all the more crucial. While voters may judge the issues on their merits, they also have fewer defenses or orienting devices to use when massive advertising engulfs them. Especially when no basic philosophical themes or traditional ideological criteria are employed, it is all the harder for voters to be able to withstand powerful media assaults. The result thus can become what happened in Colorado in 1976: those already most powerful, those with the most money, won.

Two important consequences follow from the probative nature of the Schockley study. First, contrary to the argument outlined

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81. \textit{Id.} at 181–85. Polls showed that voters who had previously approved of the initiative 55 percent to 22 percent, \see note 79 \textit{supra}, defeated the initiative by a margin of 61 percent to 39 percent. \textit{1977 Hearings, supra} note 69, at 179.
82. \textit{1978 Hearings, supra} note 70, at 258.
83. \textit{1977 Hearings, supra} note 70, at 189.
above, while the Schockley study is not conclusive as to the effect of corporate campaign activity, it (and studies like it) may be enough for a court to find a satisfactory record on this question and thus uphold statutes like the one in *Bellotti*.

A second consequence of the study is that such probative evidence of corporate influence may serve as the basis of some legislative activity which would not prohibit corporate participation outright but would restrict or minimize the effect of such participation. Such a pattern may have a pronounced effect on the attitude of the public with regard to its role in the election process. The feeling that those with the most money will win may erode citizen confidence in the political system. Indeed, the apparent influence of corporations over initiatives and referendums represents a particular irony since those decisionmaking procedures are popularly perceived as perhaps the most effective tools for direct, democratic participation by the citizenry to influence public policy and to "make a difference." Thus, the pattern presented may doubly erode public confidence in the democratic process—a problem which, as noted above, has been a key factor in the development of statutory restrictions on corporate campaign activity in the past.

IV. THE IMPACT OF *BELLOTTI* ON CORPORATE REFERENDUM AND INITIATIVE SPENDING: LEGISLATIVE RESPONSES

It appears that the *Bellotti* decision will make it very difficult for states to prohibit corporate expenditures or contributions in connection with referendums or initiatives that involve issues which have no material connection with corporate business. As Justice White noted in his dissent, "the Court not only invalidated a statute which had been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity. . . ."
Absent some future Supreme Court decision which narrows the *Bellotti* decision on the basis of a more adequate record supporting the need for regulation of corporate referendum spending, there are several avenues open to the legislative branch. As indicated above, it is not clear whether restrictions on corporate campaign activity, as opposed to an outright ban, would withstand constitutional scrutiny.\(^8\) One type of restriction might impose dollar limits upon expenditures or contributions for corporations. However, as one commentator has explained,\(^9\) if *Bellotti* can be viewed as prohibiting unreasonable burdens on corporate speech on political or economic matters,\(^9\) then such limitations may very well be struck down as unconstitutional since the difference between what limits would be reasonable or unreasonable to a particular court cannot be easily defined.

A. Disclosure

There are other alternatives, such as more useful disclosure requirements which could better withstand constitutional scrutiny while serving an important state interest. It may be argued that since corporations may now spend freely to influence voter behavior on noncandidate ballot issues, it is more important than ever that there be meaningful disclosure requirements regarding those expenditures. Disclosure may be one of the few effective means to guarantee full public awareness of such corporate political activity. Federal legislation might be enacted to deal with this problem, but because the use of the initiative and referendum processes has been confined to the state and local level, it is difficult to define what role, if any, the federal government should play in the promulgation of disclosure requirements.

The governmental interests sought to be vindicated by disclo-

\(^{supra}\) note 69, at 24, introduced by Rep. Vander Jagt and H.J. Res. 658, 95th Cong., 1st Sess. (1977), reprinted in *1977 Hearings, supra* note 69, at 30, introduced by Rep. Jones. This proposal would permit popular decisions to be made on legislation at biennial congressional elections. To get an initiated bill on the ballot would require petition signatures equal to three percent of the total votes cast in the last Presidential election and would have to equal over three percent of such a vote in at least ten states. S.J. Res. 67, 95th Cong., 1st Sess. (1977), reprinted in *1977 Hearings, supra* note 69, at 9. Although not expressly adopted in the Abourezk-Hatfield resolution, any restrictions or procedures on corporate activity in national ballot questions may run counter to *Bellotti* and would possibly allow the perceived undue influence of corporate campaign activity to be magnified to the national level.

88. See note 84 supra and accompanying text.
89. Fox, *Corporate Political Speech, supra* note 21, at 88. See also note 38 supra.
90. *Id.* at 101. See also note 91 infra.
sure requirements, however, are clear, and were perhaps best enunciated by the Supreme Court in *Buckley v. Valeo*.91

First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is being spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes. . . . Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . . .

Legislation such as a bill introduced, but not acted on, in the 95th Congress would take a modest first step towards imposing some disclosure requirements on a wide variety of corporate political activities.93 The bill would have required every licensee of the Federal Communications Commission to keep, and permit public inspection of, requests for broadcast time made on behalf of, or in relation to, any proposition, referendum, or ballot question in any state or local election.94 The bill specified that the public record must include information showing the origin of the request, the disposition made by the licensee and, if the request is granted, the amount charged for the broadcast or broadcasts and the number and time of day of such broadcasts.95 Federal Communications Commission regulations already require every licensee to keep and permit public inspection of advertising contracts relating to electoral candidates.96 Extension of this rule to noncandidate ballot questions is merely the sound and logical next step in efforts to ensure a fair and open political process.

Since radio and television play an important role in state and

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91. 424 U.S. 1 (1976). The Buckley Court upheld new Federal campaign financing disclosure. In analyzing the constitutionality of federal limitations on the amounts that could be spent for contributions and expenditures, the Court distinguished between dollar restrictions and disclosure requirements, concluding that the former directly affected the quantity and quality of the payer's speech, and thus, were unconstitutional.

92. *Id.* at 66-68. *Cf.* BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (ed. 1967) where Mr. Justice Brandeis made the case for disclosure: "Publicity is justly commended as a remedy for social and institutional diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

93. S. 3457, 95th Cong., 2d Sess. (1978). It is expected that this legislation will be reintroduced in the 96th Congress.

94. *Id.*

95. *Id.*

96. 47 C.F.R. § 73, 1940(d) (1978).
local ballot question advertising, the disclosure requirements mandated by this bill would play an important role in guaranteeing to all interested parties the information necessary to examine and respond to the serious imbalance that often exists in access to the media between citizen groups and well-financed industry and corporate interests. The information yielded by these disclosure requirements will enable both the legislative and judicial branches to consider more carefully the impact of disproportionate spending on state and local referendums. Such disclosure may in the future provide the Supreme Court with the information necessary to effectuate the Bellotti caveat and determine whether the relative voice of corporations has been overwhelming in influencing referendums and initiatives.

B. Enforcement of Tax Statutes

The unlimited corporate spending to influence voter behavior on noncandidate ballot questions allowed by Bellotti makes more important than ever government enforcement of not only disclosure, but accounting and tax laws which relate to these expenditures, as well. As state and local referendums have increased in number, corporate political lobbying has mushroomed in scope. More money is being spent as a wider range of activities is being adopted. Strict enforcement of tax and accounting laws may help ensure that an already enormous information gap caused by disparate financial resources does not become wider through the illegal financing of advertising on the corporate side.

Section 162(e) of the Internal Revenue Code provides a tax deduction for certain types of "ordinary and necessary" business expenses incurred in attempting to influence legislation. While direct lobbying expenses, such as those incurred in appearing before, submitting statements to, or sending communications to any legislative body or its members, are deductible, indirect lobbying (also called "grassroots lobbying") expenses are nondeductible. These nondeductible expenditures are statutorily defined as any amount paid or incurred "for participation in, or intervention in, any political campaign on behalf of any candidate

98. Id.
99. Id.; see also notes 69–85 supra and accompanying text.
100. I.R.C. § 162(e).
101. Id. § 162(e)(1).
102. Id. § 162(e)(2).
for public office,"103 or "in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections or referendums."104

The Internal Revenue Service has adopted regulations which lend more certainty to the statutory prohibition of deductions for attempts to influence elections, legislative matters, or referendums.105 Furthermore, the IRS has provided that taxpayers cannot achieve by circumvention that which they were not entitled to directly. Thus, if a taxpayer paid dues or made contributions to an organization such as a trade association which devotes a substantial part of its activities to indirect lobbying, only that portion of the dues or contributions which do not relate to indirect lobbying may be properly deducted as a business expense.

A number of factors explain the compelling governmental interest in the nondeductibility of grassroots lobbying expenses. Harvey Schulman, Executive Director of Media Access Project,106 outlined these factors in testimony before the Commerce, Consumer, and Monetary Affairs Subcommittee of the House Government Operations Committee.107 First, there is the presumption that it is best for the government to maintain a "hands-off" policy where political campaigns are concerned; no taxpayer—whether a corporation, trust, or individual—should expect to receive any governmental assistance in its political efforts through the use of income tax deductions.108

Second, to the extent the government exercises this "hands-off" policy, consumers have a greater opportunity to express their approval or disapproval with the political activities of a corporation by exercising buyer influence in the marketplace.109 If the costs of grassroots activity could be deducted from income, it might be argued that the public would, in effect, be subsidizing the views of the taxpayer.110

Third, to the extent that the government will or should become involved in political campaigns, its involvement should attempt to

103. Id. § 162(e)(2)(A).
104. Id. § 162(e)(2)(B).
106. Media Access Project is a public interest law firm in Washington, D.C., which specializes in communications law and first amendment issues, including the financing of advertising. 1978 Hearings, supra note 69, at 55-59 (statement of Harvey Schulman).
107. Id.
108. Id. at 55.
109. Id. at 56.
110. Id. at 55–58.
decrease the imbalance in access to public forums. As Mr. Schulman testified:

Especially in the multimedia twentieth century, a speaker's ability to influence political affairs is determined not only by the rightness of what he or she says and by the persuasiveness with which it is said, but also by the media campaign that the speaker is able and willing to afford.

In general, businesses are willing and able to spend far more on political campaigns than most individuals could ever match. According to Mr. Schulman, it is precisely because Congress recognized this tremendous inequality between corporate taxpayers and others that it refused to exercise its legislative grace with respect to certain types of lobbying expenses.

In addition to congressional approval, the United States Supreme Court has upheld the nondeductibility of indirect lobbying expenses against attacks on first amendment grounds:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchases so far as the Treasury of the United States is concerned.

In light of the important policies behind section 162(e)(2), its strict enforcement might be expected. However, there is some indication that the IRS has been lax in its enforcement of this law. While the IRS presently utilizes regular auditing procedures in an attempt to ensure compliance with the tax laws, further steps could be taken to ensure a better understanding of, and

111. Id. at 58.
112. Id.
113. Id. at 59.
114. Id. at 59.
116. Harvey Schulman told the House Government Subcommittee: My analysis of the documents obtained by this Subcommittee leads me to the conclusion that there are wholesale violations of the Internal Revenue laws; that the IRS has been grossly negligent in enforcing the laws against the violators; that reform measures must be adopted if there is to be any hope of policing of those who engage in "indirect" or "grassroots" lobbying.
117. See id. at 164-65 (letter from Donald C. Alexander, Commissioner of Internal Revenue).
voluntary compliance with, these tax laws by corporations claiming ordinary and necessary business expense deductions.

Harvey Schulman has suggested several possibilities. Adoption of better guidelines defining section 162(e)(2) advertising and distinguishing it from deductible institutional or goodwill advertising would be an important first step.118 Towards this end, a very simple and helpful reform would be to amend Schedule M of the corporate tax return to provide a specific line for section 162(e)(2) expenses. With this change, not only would the IRS be better able to monitor taxpayer performance, but corporations themselves could be expected to keep a separate account on their books for such activities.119 Labeling of advertisements and their submission to the IRS would be another effective reform towards gaining better IRS enforcement in this area. Presently, even assuming that every ad could be gathered from various sources, there is no way to know of the tax treatment of each advertisement without an audit. The undesirability of spending already limited agency resources on such audits is a serious deterrent to enforcement of the law.120

Mr. Schulman has suggested that these problems could be solved, however, by requiring advertisers to label each advertisement as "IRS deductible" to indicate that it is considered nonpolitical.121 Labeling requirements are not new, as evidenced by FTC and congressional treatment of cigarette advertising.122 Moreover, with its tax return, each advertiser could be required to submit a compendium of all advertising sponsored by it during the year in question, including a list of all costs associated with the dissemination of each advertisement.123

Schulman has also proposed that citizens should be permitted to challenge treatment of political advertising.124 The Federal Power Act and Federal Power Commission regulations permit citizen complaints which must be answered by utilities and provide for the availability of appellate review.125 In sharp contrast, however, the Internal Revenue Code and IRS regulations do not provide for similar procedures. The IRS should adopt an

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118. Id. at 151–53.
119. Id. at 151.
120. Id. at 154.
121. Id.
123. 1978 Hearings, supra note 70, at 154.
124. Id. at 156–58.
125. Id. at 156.
administrative scheme to provide for more meaningful citizen enforcement of the congressional policy against corporate deductions for political advertising. If the IRS claims it does not possess the power to set up that scheme, congressional action may be mer-
ited.126

V. CONCLUSION

The Supreme Court's decision in Bellotti has made it possible for corporate and industrial groups to become even more involved in attempts to influence the vote in state and local referendums. The decision is troubling because corporations are, after all, quite different from human beings. As the Washington Post noted in an editorial following the Supreme Court's decision, corporations are not minds that formulate ideas, or even voices that freely express them. Rather, in a political debate, corporations serve as megaphones for the views of those who own or control them.127 And, as Justice White pointed out in his dissenting opinion in Bellotti:

Corporations are artificial entities created by law for the purpose of furthering certain economic goals. . . . [T]he 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.128

The Court in Bellotti noted that "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving first amendment interests, these arguments would merit our consideration."129 Such a record is now being built, at least in congressional hearings at the national level. If it appears that corporations are indeed exerting undue influence in initiative and referendum campaigning, this may, in turn, prompt legislative action to mitigate such effects. With such enactments and with the ever-increasing use of referendums and initiatives at the state and local level, it may not be very long before the Supreme Court has an opportunity to reassess the appropriate role which corporations should play in the electoral process.

126. Id. at 158.
128. 435 U.S. at 809.
129. Id. at 789.