Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Campaign Finance

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)

The First National Bank of Boston and other business corporations opposed a proposed referendum that would amend the constitution of Massachusetts to permit an income tax. They could not spend money during the political campaign, however, because that would violate a state law forbidding business corporations from spending money "for the purpose of . . . influencing or affect the vote on any question submitted to the voters, other than one materially affecting . . . the corporation." The First National Bank filed a lawsuit against Francis Bellotti, the attorney general of Massachusetts, in an effort to have the Massachusetts law declared unconstitutional. The Supreme Judicial Court of Massachusetts ruled the restriction on spending constitutional. First National Bank appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote declared the Massachusetts law unconstitutional. Justice Powell's majority decision held that corporations have the power to spend money to influence referenda and related elections. Why did Powell believe that corporations had a First Amendment right to spend money in elections (given that corporations do not have a right to run for office)? Why did the dissents disagree? How did Powell distinguish this case from Buckley v. Valeo *(1976) which limited contributions to political candidates? Is that distinction sound? Note that Justice Rehnquist voted with the dissenters. What explains that vote? Does* Bellotti *improve the marketplace of ideas or give corporations a privileged political position?*

JUSTICE POWELL delivered the opinion of the Court.

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The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

The speech proposed by appellants is at the heart of the First Amendment's protection. . . . In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. . . . The importance of the referendum issue to the people and government of Massachusetts is not disputed. . . .

As the Court said in *Mills v. Alabama* (1966), ... "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes 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.

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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. . . .

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We . . . find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

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In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, 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, the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests.

The constitutionality of § 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," . . . Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . . ."

. . . Appellee . . . . advances two principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition in § 8.

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. . . .

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. . . . But 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 government. . . .

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it:

Finally, appellee argues that § 8 protects corporate shareholders, an interest that is both legitimate and traditionally within the province of state law. . . . The statute is said to serve this interest by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.

The underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted . . . , even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates . . . that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduated income tax amendment." . . .

The overinclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. . . .

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CHIEF JUSTICE BURGER, concurring.

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The meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions. The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such. . . .

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

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By holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda involving issues having no material connection with the corporate business, the Court not only invalidates a statute which has 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, as well as upon the Federal Corrupt Practice Act. . . . 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., the one which it would have chosen, between competing First Amendment interests. Although in my view the choice made by the State would survive even the most exacting scrutiny, perhaps a rational argument might be made to the contrary. 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. Moreover, the result reached today in critical respects marks a drastic departure from the Court's prior decisions which have protected against governmental infringement the very First Amendment interests which the Court now deems inadequate to justify the Massachusetts statute.

There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, 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, is not at all furthered by corporate speech. . . . Undoubtedly, as this Court has recognized, . . . there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. . . .

Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation's business may be viewed as a means of furthering the desires of individual shareholders. This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. . . .

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. . . . [T]he restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. . . .

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The governmental interest in regulating corporate political communications, especially those relating to electoral matters, also raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. . . . It has long been recognized however, 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. Although *Buckley v. Valeo* (1976). . . provides support for the position that the desire to equalize the financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails, the interest of Massachusetts and the many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. . . .

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There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business, property, or other affairs of the corporation. . . . In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.

This is not only a policy which a State may adopt consistent with the First Amendment but one which protects the very freedoms that this Court has held to be guaranteed by the First Amendment. In *West Virginia Board of Education v. Barnette* (1943), . . . the Court struck down a West Virginia statute which compelled children enrolled in public school to salute the flag and pledge allegiance to it on the ground that the First Amendment prohibits public authorities from requiring an individual to express support for or agreement with a cause with which he disagrees or concerning which he prefers to remain silent. . . . Last Term, in *Abood v. Detroit Board of Education* (1977), we . . . held that a State may not, even indirectly, require an individual to contribute to the support of an ideological cause he may oppose as a condition of employment. . . .

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. . . In most contexts, of course, the views of the dissenting shareholder have little, if any, First Amendment significance. By purchasing interests in corporations shareholders accept the fact that corporations are going to make decisions concerning matters such as advertising integrally related to their business operations according to the procedures set forth in their charters and bylaws. Otherwise, corporations could not function. First Amendment concerns of stockholders are directly implicated, however, when a corporation chooses to use its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support. Once again, we are provided no explanation whatsoever by the Court as to why the State's interest is of less constitutional weight than that of corporations to participate financially in the electoral process and as to why the balance between two First Amendment interests should be struck by this Court. Moreover, the Court offers no reason whatsoever for constitutionally imposing its choice of means to achieve a legitimate goal and invalidating those chosen by the State.

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In my view, the interests in protecting a system of freedom of expression . . . are sufficient to justify any incremental curtailment in the volume of expression which the Massachusetts statute might produce. I would hold that apart from corporate activities . . . which are integrally related to corporate business operations, a State may prohibit corporate expenditures for political or ideological purposes. There can be no doubt that corporate expenditures in connection with referenda immaterial to corporate business affairs fall clearly into the category of corporate activities which may be barred. The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.

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JUSTICE REHNQUIST, dissenting.

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The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically

desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. . . .

. . . The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by state law. Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, . . . our inquiry must seek to determine which constitutional protections are "incidental to its very existence." . . .

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There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business. . . .

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. . . .

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I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid.

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