B. Money and Politics: Regulation of Expenditures by Corporations

"[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."—Justice POWELL

"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."—Justice WHITE

First National Bank of Boston v. Bellotti

435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

Chapter 55, § 8 of the Massachusetts General Laws forbade certain kinds of corporations, including banks, trusts, insurance companies, and public power firms, to contribute to candidates for public office or to campaigns for or against public referenda. In 1976, two banks and three other corporations covered by § 8 announced they were going to spend money to publicize their opposition to a proposal for a graduated income tax, scheduled for a referendum that year. The state attorney general warned he would proceed against the corporations under § 8 if they carried out their plan. They then sued in a state court to have the statute declared unconstitutional as a violation of the First Amendment. Eventually, the Supreme Judicial Court of Massachusetts sustained § 8, and the corporations appealed to the U.S. Supreme Court.

Mr. Justice **POWELL** delivered the opinion of the Court. ...

III ...

A

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. Its merits, however, are the subject of sharp disagreement.

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. ...

... 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. We turn now to that question.

B

The court below ... concluded that a corporation's First Amendment rights must derive from its property rights under the Fourteenth. This is an artificial mode of analysis, untenable under decisions of this Court. ... 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, see Gitlow v. New York (1925); NAACP v. Alabama (1958); Stromberg v. California (1931); DeJonge v. Oregon (1937); [Charles] Warren, The New "Liberty" Under the Fourteenth Amendment, 39 *Harv.L.Rev.* 431 (1926), and the Court has not identified a separate source for the right when it has been asserted by corporations. ...

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills*. But the press does not have a monopoly on either the First Amendment or the ability to enlighten. Cf. Buckley v. Valeo [1976]; Red Lion Broadcasting Co. v. FCC (1969); New York Times v. Sullivan (1964); AP v. United States (1945). Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.[1] See *Red Lion;* Stanley v. Georgia (1969); Time v. Hill (1967). Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. Winters v. New York (1948).

Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (1976); see Linmark Asso's v. Willingboro [1977]. ...

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[1]The suggestion in Mr. Justice White's dissent that the First Amendment affords less protection to ideas that are not the product of "individual choice" would seem to apply to newspaper editorials and every other form of speech created under the auspices of a corporate body. No decision of this Court lends support to such a restrictive notion. [Footnote by the Court.]

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. Police Dept. of Chicago v. Mosley (1972). 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. ...

IV

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," Bates v. Little Rock (1960), "and the burden is on the government to show the existence of such an interest." Elrod v. Burns (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgment. ..." *Buckley*. ...

A

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. *Buckley*; United States v. Automobile Workers (1957); Burroughs v. United States (1934). Preservation of the individual citizen's confidence in government is equally important. *Buckley;* CSC v. Letter Carriers (1973).

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. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes ... these arguments would merit our consideration. Cf. *Red Lion.* 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. ...

... 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: The Constitution "protects expression which is eloquent no less than that which is unconvincing." Kingsley Int'l Pictures Corp. v. Regents [1959]. ... Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First

Amendment. ...

B

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. ... 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. ... Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. ...

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. ...

[*Reversed.*]

Mr. Chief Justice **BURGER** concurring. ...

Mr. Justice **WHITE,** with whom Mr. Justice **BRENNAN** and Mr. Justice **MARSHALL** join, dissenting. ...

... 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. ...

I

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. It is clear that the communications of

profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see NAACP v. Button (1963), 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. In fact ... the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.

... [T]here is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where, as in this case ... [the managers] have not been able to demonstrate that the issue involved has any material connection with the corporate business. ...

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions ... 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. In the first place ... corporate expenditures designed to further political causes lack the connection with individual self-expression. ... Ideas which are not a product of individual choice are entitled to less First Amendment protection. Secondly, the 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. ...

I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. ... None of these considerations, however, are implicated by a prohibition upon corporate expenditures relating to referenda concerning questions of general public concern having no connection with corporate business affairs.

It bears emphasis here that the Massachusetts statute forbids the expenditure of corporate funds in connection with referenda but in no way forbids the board of directors of a corporation from formulating and making public what it represents as the views of the corporation even though the subject addressed has no material effect whatsoever on the business of the

corporation. These views could be publicized at the individual expense of the officers, directors, stockholders, or anyone else interested in circulating the corporate view on matters irrelevant to its business.

The governmental interest in regulating corporate political communications ... 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. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. 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. ... [T]he interest of Massachusetts and the many other States which have restricted corporate political activity is ... 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. ... The State need not permit its own creation to consume it. ...

This Nation has for many years recognized the need for measures designed to prevent corporate domination of the political process. The Corrupt Practices Act, first enacted in 1907, has consistently barred corporate contributions in connection with federal elections. This Court has repeatedly recognized that one of the principal purposes of this prohibition is "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *Automobile Workers.* See Pipefitters v. United States (1972); United States v. CIO [1948]. Although this Court has never adjudicated the constitutionality of the Act, there is no suggestion in its cases construing it, that this purpose is in any sense illegitimate or deserving of other than the utmost respect. ...

II

There is an additional overriding interest related to the prevention of corporate domination ...: 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. The State has not interfered with the prerogatives of corporate management to communicate about matters that have material impact on the business affairs entrusted to them. ... 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 Bd. of Ed. 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 Bd. of Ed. (1977), we confronted these constitutional questions and 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. ...

... The interest which the State wishes to protect here is identical to that which the Court has previously held to be protected by the First Amendment: the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose. ...

Mr. Justice **REHNQUIST**, dissenting.

This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. Santa Clara County v. So. Pac. R. Co. (1886). Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same Amendment. See, e.g., Smyth v. Ames (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that Amendment "is the liberty of natural, not artificial persons." Northwestern Nat. Life Ins. Co. v. Riggs (1906). Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons, Grosjean v. American Press Co. (1936), and that a nonprofit membership corporation organized for the purpose of "achieving ... equality of treatment by all government, federal, state and local, for the members of the Negro community" enjoys certain liberties of political expression. NAACP v. Button (1963). ...

... 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, United States v. White (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence." ...

... 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. ... 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. ...

... The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity. Cf. Maher v. Roe (1977). ...

Editors' Notes

(1) **Query**: The opinions here claim the First Amendment's protection of freedom of communication has three objectives: (i) The public's right to hear or receive information so it can make wise political choices (Powell, White, and Rehnquist); (ii) individual "self-expression, self-realization, and self-fulfillment" (White); and, (iii) implicit in all three opinions, the personal right to influence the political processes (perhaps "self-government" rather than "self-realization" or self-fulfillment). How does each of these objectives apply to corporate expression as distinguished from individual expression?

(2) **Query**: To what extent can it be said that each of these opinions used the approach called *reinforcing representative democracy*? Is corporate expression "the type of speech indispensable to decisionmaking in a democracy"?

(3) **Query:** Is the Court's analysis of the similarities and differences between corporate expression and individual expression persuasive? Should corporations be permitted not only to make expenditures on public referenda but also to make contributions to particular candidates?

(4) **Query:** Was Justice White correct that the majority's "fundamental error is its failure to realize that the state regulatory interests ... are themselves derived from the First Amendment," in particular, from the value of promoting free political discussion by preventing corporate domination? What sort of showing would have been necessary to persuade Justice Powell and the majority that corporations through expressing their views were indeed "drown[ing] out other points of view"?

(5) Does *Bellotti* signal a return to the era of Lochner v. New York (1905; reprinted below, p. 1110)? Consider again the Editors' Notes to *Buckley* asking whether that decision is also part of "*Lochner*'s Legacy."

(6) For analyses of *Bellotti* and corporate speech, *see:* Charles R. O'Kelley, "The Constitutional Rights of Corporations Revisited," 67 *Geo.L.J.* 1347 (1979); Thomas R. Kiley, "PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear after First National Bank of Boston v. Bellotti," 22 *Ariz.L.Rev.* 427 (1980); Comment, "The Corporation and the Constitution," 90 *Yale L.J.* 1883 (1981); Victor Brudney, "Business Corporations and Stockholders' Rights Under the First Amendment," 91 *Yale L.J.* 235 (1981); Brudney, "Association, Advocacy, and the First Amendment," 4 *Wm. & Mary Bill of Rts. J.* 3 (1995); Daniel H. Lowenstein, "Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment," 29 *UCLA L.Rev.* 505 (1982); Mark V. Tushnet, "Corporations and Free Speech," in *The Politics of Law* (David Kairys ed.; New York: Pantheon Books, 1982).