Memorandum to Mr. Justice Powell

FROM: Nancy
RE: Bellotti draft Jan. 25, 1978

This is a very rough draft. It is a very basic and unrefined skeleton for the opinion. I don't mean that the ultimate opinion will be any longer than this; I intend to cut and streamline it, if anything. But I just had time to set out the main ideas, and even they need much more work.

Ordinarily I would be hesitant about giving you an opinion in this form, but I know you want to take it with you to Richmond. This isn't false modesty--I am aware of significant flaws in the opinion as it's presently drafted and I would rather have remedied them before you had to struggle with them. I'll just mention the main problems of which I'm presently aware.
1. **Style.** I intend to do substantial editing and polishing of the way things are said. Right now it reads roughly. I've not had time to take care of transitions and things like that. Also cites, quotations, and the like will be polished up.

2. Because I was trying to work in a lot of different ideas, the opinion lacks a coherent thesis. This is true even in the several sections of the draft. There's also some substantive tension between Part III, where I explain why this is classic First Amendment speech, regardless of the fact that it's spoken by a corporation, and Part IV, where I discuss the State's interests. You would think there would be little need for Part IV if the protected nature of this speech were so clear from Part III. I think this indicates some confusion in my thinking, which I'll have to work out. Parts III and IV also are somewhat redundant.

3. There are two ideas I have not included at all, and the more I think about it, the more I think they should be included. The first is that even if the "materially affecting" requirement in theory were a permissible limit on corporate speech, it still would be impermissible because of the chilling effect it would have. Corporations would not want to take the chance that certain speech might be held not to meet the "materially affecting" requirement, so they would forego it. At first I didn't include this section because it would seem to undercut the major premise of the opinion—that the
materially affecting requirement is not permissible in the first instance. But we might want to include this as an alternative point. The second point is that the materially affecting requirement really is a classic form of content regulation. It tells corporations what they can say and what they can't say.

I think I might include these points at the end of Part III.C., as I've indicated in the text.

3. The fact statement needs work. We could relegate the discussion of the past court challenges to the statute to a footnote; same with part of the discussion of the holding of the court below on other than First Amendment grounds.

4. The introduction to Part III may be too abstract, and I'm considering dropping it.

5. I intend to write a better discussion of Buckley in note 19.

6. I did not mention that this statute is neither a prior restraint (as appellants contend) nor a regulation of time, place, or manner (as appellee contends). The points seem obvious. But if you'd like me to include these, I can write a simple two-paragraph footnote.

7. It might be advisable to include a discussion of the availability of ultra vires actions in Part IV.B.

8. I will improve the discussion of the difference between contributions to candidates and
Or, we might include it as a footnote. It just seems unnecessary to discuss why we're not reaching the presumption issue when appellants challenge the very *fax* requirement of the fact presumed. And, in view of the SJC's holding that the statute does not create a presumption at all (but rather two separate crimes), I would rather not get into the presumption issue.
expenditures to express ideas, since this really is the core of the decision.

9. I've consciously avoided citing the cases on the Federal Corrupt Practices Act (except at one point), the language of the dissents or concurrences in those cases, and law review articles on those cases. There is a lot of useful language and ideas in those sources on freedom of speech and corporations, but I thought it better not to cite them, to avoid conveying the impression that we are endorsing the view that the Corrupt Practices Act is unconstitutional. (I just thought you might have wondered about the dearth of scholarly citations.)

* * * *

I hope you don't have too much trouble with this. I'll give you an improved draft early next week, unless you'd like to offer some suggestions or criticisms before then. (I also need to step back from it for a few days.)

Have a pleasant trip to Richmond,

Nancy

P.S. I forgot to mention: Originally, I wrote a section of the opinion (to go after the mootness section) explaining why we are not addressing the irrebuttable presumption issue. But when I wrote it, it sounded so obvious as not to require discussion. Instead, I've attached the discussion after the footnotes, in case you want to use it (or something like it) as a memo to the other Justices to accompany the opinion.
MEMORANDUM TO Mr. JUSTICE POWELL

FROM: Nancy       DATE: Dec. 29, 1977
RE: No. 76-1172, First Nat'l Bank of Boston v. Bellotti

This is a very sketchy rendition of my thoughts about how to approach this opinion. I am not very good at working out ideas ahead of time; I usually work from a very broad outline and alter my thinking substantially as I write. I'll try to set out the basic topics I plan to cover; theme of the opinion; open questions that I believe need not be addressed; and some thoughts on the implications of this decision for the Federal Corrupt Practices Act (FCPA). This will be a combination memo/outline.

*   *   *   *

Basically, the theme of the opinion should be that although corporations obviously differ from individuals in many ways, the speech at issue here is "core" of the First Amendment and therefore presumptively is protected; and the State has not advanced sufficiently weighty interests to deprive these corporations of their right to engage in the proposed speech through expenditures. The opinion need not
address whether corporations' First Amendment rights are "coextensive" with those of individuals. It may be that certain activities could be forbidden to corporations while they could not be forbidden to individuals. For example, a total ban on political contributions (as in the FCPA, if you ignore the loophole of segregated funds) might be permissible as to corporations but not as to individuals. I would not go into this, but the opinion should state that it is not necessary to explore the outer limits of corporate First Amendment rights in a case where the proposed speech is at the core of First Amendment protection.

My conception of the "core" of the First Amendment, at least for purposes of this decision, resembles the Meiklejohn theory but certainly need not endorse that theory explicitly. The Meiklejohn theory, simplistically stated, considers that speech which helps the citizenry govern itself as most worthy of First Amendment protection. This need not necessarily be political speech (because other forms of speech also educate the people and teach them to deal with freedom), but here in fact we do have an instance of speech related to one of the most basic aspects of self-government: a referendum on an important social and economic question. Thus the focus should not be on the question "Do corporations have First Amendment rights?" but on the question whether this speech is the type eligible for First Amendment protections, in light of the ideals expressed in the Amendment.

An outline and discussion of the contents of the opinion follow:
I. MOOTNESS

This is easy and will be dealt with briefly. I will state the basic principles and then note some or all of the following factors in support of the proposition that this case meets the "capable of repetition, yet evading review" standard: (1) This is an election case, and here the parties moved to trial and through appeal as quickly as possible, because the facts were stipulated. They would never have more time to have the question litigated between the time an amendment was proposed and the referendum was held. (Do you want me to go into all the dates, etc., disputed by the parties? I thought I'd just satisfy myself that appellants' dates are accurate.) (2) The history of this proposed amendment indicates that there is a great likelihood that the legislature will propose the amendment again. (Indeed, this is supported by appellee's statement that a majority of states have graduated income taxes; it is not the kind of thing the legislature would drop after three attempts to have one passed.) (3) Appellants intend to spend money in the future and appellee intends to prosecute for violations of § 8. Indeed, one of appellants has been threatened with prosecution on an unrelated proposed expenditure.

II. THE STATUTE

A. Description

B. History of the Mass. prohibition of corporate expenditures on ballot questions, and particularly of the three amendments of present § 8 in order to keep corporate money out of the referendum process
Although the Court might not want to inquire into the legislative motive—which clearly was to keep corporate money out of the referenda on the graduated income tax because the corporations are opposed to the tax and the legislature is its main proponent—I think it's important to set out the genesis of § 8. It is important in order to understand the discussion of the "materially affecting" requirement, see infra, and its inclusion in the opinion will be an implicit way of letting readers know what really was going on here. This will be helpful, too, if the Court later wants to limit the decision.

C. The SJC's construction of the statute

1. The court's limiting construction in order to avoid vagueness and overbreadth problems

2. Two possible interpretations of what the court held is prohibited by § 8
   (a) any corporate expenditure, regardless of whether it materially affects the corporation's interests
   (b) if corporation could prove that the expenditure would materially affect its interests, it could make the expenditure legally, either because
      (i) this would make the statutory irrebuttable presumption irrational, and the Presumption would invalidate it, or because
      (ii) such a construction would violate the First Amendment. In order to construe the statute not to violate the First Amendment, the court construes the presumption to be rebuttable.

3. Which interpretation to choose?
   (a) Some First Amendment cases suggest that the state statute should be construed by this Court at its broadest (contrary to normal
statutory construction), so that the statute won't get this Court's approval and then later get applied more broadly by the state court

(b) **Adopt** Take the opinion below at face value and assume that the Mass. courts will **rebut** construe the statute to avoid First Amendment problems and will allow corporations to spend money (even on a ballot question involving a personal G/I) if they can prove material effect.

[I would prefer to write the opinion adopting the latter approach. The Mass. SJC has recognized that corps have First Amendment rights when the proposed speech meets the materially affecting requirement. Although the construction of this statute in the opinion below is unclear, the Mass. SJC made clear in its earlier opinions construing the predecessors of § 8 that a statute prohibiting a corporations from spending money when the ballot question would materially affect their interests would violate the First Amendment. I therefore think it safe to assume, as have appellants, that the court below construed the presumption in the second sentence of § 8 as a "rebuttable" presumption.]

D. **Appellants' challenge to the statute**

1. To § 8 on its face (I think this is their challenge to the "materially affecting" limitation

2. As applied (I think this is appellants' contention that they did prove material effect or at least the reasonable, good faith belief of management that the referendum would materially affect the corp.'s business
Appellants address the invalidity of the "materially affecting" requirement in two separate ways. Their main attack on it is that it is an impermissible limitation of corporate freedom under the First Amendment. But they also attack it under the due process clause, either because it is an irrebuttable presumption (see Viandis v. Kline, 412 U.S. 441) or because it is an invalid rebuttable presumption. The latter attack is based on the strict standard for presumptions in criminal statutes, coupled with the fact that this is a criminal statute implicating First Amendment rights.

I think the opinion of the Mass. SJC, opaque though it is, states that the presumption is not irrebuttable. There are intimations in the opinion that the second sentence of § 8 states a separate crime, as to which materiality is not a relevant factor, but other parts of the opinion (especially when considered in light of the Mass. SJC's earlier opinions, mentioned above) indicate that a corporation solely that could prove that a ballot question on a personal GIT would materially affect its interests would be allowed. (On the other hand, the fact that the SJC did not find the presumption rebutted on the facts of this case indicates that the chilling effect of even a rebuttable presumption would be great.)

Thus the most the Court should address is the permissibility of the rebuttable presumption. But I think that would be an unnecessary exercise. Even if the Court should say that the
presumption is invalid, so that corporations can spend money on a ballot question involving a personal GIT if it materially affects them, appellants still insist that they cannot be limited to speaking about things that materially affect them. Even if the prosecutor had to prove lack of material effect, corporations x still would be chilled in their exercise of First Amendment rights because a jury might conclude that the issue did not materially affect the corporation. Thus if the Court is going to hold the materially affecting limitation invalid, I see no reason for addressing the question whether certain issues can be presumed not to materially affect the corporation. If material effect is irrelevant, then the presumption is irrelevant. I would ignore the due process challenges to the presumption.

IV. FIRST AMENDMENT

As a preliminary matter, it is arguable that § 8 infringes on the right to freedom of association as well as the right to freedom of speech. I would prefer not to discuss this. Although it could be argued that § 8 abridges the rights of shareholders to express views they hold in common qua shareholders, the analogy to cases like NAACP v. Button and NAACP v. Alabama is quite attenuated. & Shareholders in a corporation do not usually share political and social goals even as much as members of a union. Indeed, one of the state's asserted interests is in protecting shareholders who disagree with management's expression of views. Thus I think it would
be better not to discuss this at all.

In discussing the freedom of speech issue, I would cover the following:

A. Argument that corporations have no First Amendment rights (put forth by appellee but rejected by the court below)

1. Although corporations may not be "citizens" for purposes of the privileges and immunities clause, they have been held to be "persons" within the meaning of the due process and equal protection clauses

2. Corporations have been afforded First Amendment rights in many cases, and the Court has said that a profit motive does not take away First Amendment protection (Crosier, Joseph, Burstyn, Kinsley; cases affording employers First Amendment rights; commercial speech cases)

B. Are the First Amendment rights of corporations limited to issues "materially affecting" the corporations' interests (business, property, assets)

1. Sources of this theory, put forth by appellee

(a) Although the Court has afforded protection to corporations in the communications business, communication is their business and therefore materially affects them

(b) In the commercial speech cases, the proposed advertising or other form of speech also had a material effect on the corporation's business (and the same probably can be said of the pornography cases)

(c) Theoretical basis for this proposition: since the First Amendment applies to the states through the due process clause of the Fourteenth Amendment, and since it has been held that corporations do not possess "liberty" as do natural persons, the First Amendment protection must come through the "property" clause of the 14th Amendment. Therefore First Amendment protection of a corporation is limited to issues that affect the corporation's business or property (Pierce v. Society of Sisters)
2. Rebuttal

(a) If appellee were right in its theoretical assumption, there would have to be a difference between the protection afforded corporate speech against infringement by the State and federal governments, because the First Amendment itself is not tied to "liberty" or "property". This cannot be. Besides, the cases holding that corporations do not have an interest in "liberty" were decided during the era of substantive due process, when the concept of liberty was not tied to specific constitutional guarantees. In any event, those cases are distinguishable. The Hague case, in particular (which held that the ACLU, as a corporation, had no rights to freedom of speech under the 14th Amendment), probably has been overruled by subsequent cases.

(b) In a more practical sense, the theory would allow a State to restrict religious corporations to speech about religion, charitable corporations to speech about charity, etc. Wholly untenable concept.

(c) It is antithetical to the First Amendment to judge whether speech is protected by looking to its source. This may be why there is little discussion in the cases of whether corporations "have" First Amendment rights, even when those rights have been afforded corporations. Speech presumptively is protected; only look to the source if relevant to the state's asserted interest (see infra, Part C).

(d) Central meaning of the First Amendment—protection of discussion of social issues, especially with respect to self-government. Meiklejohn, Kalven, New York Times v. Sullivan. Relate to commercial speech cases; but here, not just a question of the public's right to receive information, but importance of criticism of the government and the expression of views different from the governing authorities. Corporations can provide this kind of information and criticism as much as individuals. Since the relevant component of the First Amendment in this context is the need for open
discussion and debate, and not the value of self-expression (the individualist component), the identity of the speaker is not significant.

e) the suggested compromise: good faith belief of management that the issue materially affects the corporation. I would prefer not to discuss this, since it was suggested by appellants, not appellee, and does not seem to be sufficient protection of the First Amendment interests at stake.

C. The state's interest

[This is the section where I'll set down principles by which the FCPA can be distinguished. The major difference between the two statutes is that the FCPA prohibits spending in order to get a candidate elected (which may or may not involve socially beneficial expression entitled to absolute protection) whereas § 8 prohibits spending to express ideas.]

1. Prevention of corruption. This interest is irrelevant here, because no candidate is getting money. It is also antithetical, in this context, to the self-government theory of the First Amendment. It's acknowledged (by the State and in this Court's decisions) that corporations have the right to petition the government for redress of grievances (including the legislature, the courts, and administrative agencies). Mass. allows lobbying. But § 8 prohibits corporations from taking their case to the people, who ultimately are sovereign.

2. Preventing the influence of money in elections. This usually means preventing wealthy candidates from having an edge over others. The state does not assert it as an interest here, so it need not be discussed. But it could be rebutted by noting that it's not clear that this is a sufficient interest for curtailing speech even when political candidates are involved; it certainly is not sufficient when just the expression of views is involved. The result would be that the public would have less information on which to base its decisions. [This point should not be discussed, because it isn't raised by the State and it's one
of the areas in which a corporation's First Amendment rights might be more limited than an individual's.

3. Protection of minority shareholders.
   (a) Poke holes in the statutory scheme to show that this really isn't the State's interest here.
   (b) There are less restrictive ways of doing this.
   (c) Leave open question whether state could require a majority vote for expenditures on ballot questions if it didn't require majority vote either for other expenditures in general or for other expenditures to express a point of view to the public.

* * * * *

Rather than detail right now some of the questions I think need to be left open, I'll mention them to you when we talk about this or after the draft is written. If any (or much) of this is unclear, I'd be happy to explain it better in person.

Nancy
MEMORANDUM

TO: Nancy
FROM: Lewis F. Powell, Jr.

76-172 First National Bank v. Bellotti

In Richmond over the weekend I reviewed, with more than ordinary interest, your draft of 1/19/78 of the opinion in this case. It follows rather faithfully the outline we agreed upon. Although your transmittal memo of January 25 expressed concern as to the quality of the draft, I found your misgivings quite unjustified. To be sure, the draft requires additional work. But this is true of all first drafts, especially when the case is one of first impression requiring - as this one certainly does - meticulous analysis and writing.

I believe your analysis is sound, and am quite pleased with what you modestly call an "unrefined skeleton for the opinion". Your memo of January 25 identifies some of the areas requiring additional attention. Without attempting now to address all of these, I will - instead comment generally on the various sections (Parts) of the draft.

At the outset, I would like to frame the introductory paragraph in a way that minimizes the repetition that follows in Part I. I appreciate the difficulty, and have submitted a rider that is not particularly informative but it will alert the reader
to the subject matter. Feel free to change or revise it.

Part I

This is a rather full statement of the case, history of the effort to approve the constitutional amendment, and the decisions of the Massachusetts Court. It is longer (eight pages) than one would wish. Perhaps, as you suggest, the history portion could be summarized and relegated to a note. Perhaps also there could be tightening up throughout. Give this a try, but defer work on it until you have a second draft of Parts III and IV - the critical portions of the opinion. I could accept Part I virtually as written, especially if you are able to shorten by three to five pages the remainder of the opinion.

Part II

This deals adequately with the issue of mootness.

Part III

I see no reason to rewrite pages 13-16, down to subpart A. You have reformulated the question quite skillfully.

Subpart A

This is a critical section of the opinion. Your thinking is sound, but I think some revisions and rearrangement will strengthen subpart A (p. 16-20). The
opening paragraph seems a bit weak. I suggest, in a marginal comment at the top of page 17, that you might start this subpart with the quotation from Thornhill now located in the middle of page 17. I also would omit the second paragraph on page 18, although the good quote from Garrison deserves some place in the opinion. The last two paragraphs on page 19 are good strong ones.

Subpart B

Although I will give this subpart further thought, my initial reaction is that you are right on target. If you have accurately stated the position of the Massachusetts Court (and my recollection is that you have), I think you thoroughly demolish that Court's line of reasoning.

Your paragraph on the libel cases (pp. 24, 25) could be made somewhat clearer, I think. The business of the media corporations was, in one sense, "materially affected". Their "product" is news, and the common law of libel was held to affect that business, i.e., reporting of the news. Your answer to this is correct: the Court's concern as to this "business" was not the corporate identity of the speaker but the effect on speech itself. The point is important enough to elaborate to the extent of amplifying the last three sentences.
Subpart C

I would limit this to the first sentence, which is excellent.

Part IV

This also is a critical section of the opinion. Despite the absence of any showing by appellee as to exactly what the state interests are, or how they would be affected, I anticipate that my dissenting Brothers will attack at this point. They also will argue that corporations, being the creatures of the state, may be subjected to virtually any regulation desired by the state. This latter point may not be easy to handle, but you are correct in not anticipating what the dissent may say. Let us see it before trying to rebut it.

I do agree that Part IV is necessary and, for the most part, your arguments are both resourceful and persuasive.

Subpart A

Some of the language and thoughts in this subpart require refinement. I had rather not say flatly that a state cannot limit expenditures by a nondiscriminatory statute that regulated rather than shut off all First
Amendment expression. Buckley - and its language - should be our guide here.

I am dictating off the cuff a suggested revision commencing on page 30. I wanted to make the point that where state interests are sufficiently important or compelling they may be weighed against First Amendment rights, as we did in Buckley. In this case - as you demonstrate - there has been little or no showing of any genuine state interests.

I am afraid I got a bit lost in my dictation. I wanted to incorporate most of your good points, and hope that you will use my draft merely as a source of a suggested approach, and then try your artful hand at rewriting this sensitive portion of subpart A.

One thought that I intended to include is the importance of "disclosure". As Buckley makes clear, the single most effective means of preventing corruption or undue influence through campaign expenditures is to assure "openness" or visibility of the conduct. Absent disclosure laws, and even with the loopholes that existed in prior federal laws, the principal evil of campaign contributions - and expenditures - was that the public rarely knew who was giving what to whom. This problem is de minimis - if not nonexistent - where advertising is concerned so long as the source of the ad is disclosed. This would be a far
less restrictive means of preventing the evils perceived in this case than foreclosing First Amendment rights entirely.

**Subpart B**

You demolish the state's argument that its interest is in protecting shareholders. Although I have not had time to review this subpart with any care, I think you have made the principal points. Perhaps they can be stated somewhat more briefly, and with better transition. In addition - as your memo suggests - we should mention ultra vires. Also, the stockholders derivative action always is available. Then, too, there is corporate democracy and federal and state laws designed to make it effective. As you mention, protective provisions could be added to a corporate charter by amendment; directors could be ousted at annual meetings of stockholders; protests could be made at such meetings. It is unlikely that corporate funds could be spent effectively in public opposition to a referendum issue without stockholders knowing about it. In short, this purported state interest is frivolous.

**Miscellaneous Comments**

You will, of course, add a concluding paragraph.
I agree with you that transitions - the relating of one paragraph to the preceding one or the parts and subparts to each other - require some polishing.

I also agree that we need not address the "irrebuttable presumption issue", as it simply washes out.

Although you have referred to the critical distinction between candidates and referenda issues, I think we must find some appropriate way to emphasize that our opinion does not undercut the Federal Corrupt Practices Act. John Stevens, among others, wondered whether we could write an opinion that did not do this. Take a look at the footnote in Buckley on this subject.

I make no further comments, as your memo of January 25 pretty well covers all possible means of improving the draft. Indeed, as indicated above, I am considerably more positive about the draft than you are.

My suggestion is that you take a couple of days to review and edit the draft with your usual care and deft pen. Then give me another shot at it. Meanwhile, I am happy to discuss any aspect of it.

I do appreciate your producing it under pressure so that I could have it with me in Richmond.

L.F.P., Jr.
I reviewed with some care the revised draft of our opinion delivered to me on February 4. I have marked it, for identification purposes, as the "second draft", including - however - only Parts I, II and III. (Nancy, please keep my working drafts in the file until we have completed the process to the point of a circulation printed draft).

You have materially improved a good first draft, and your further work reflects an enormous amount of research and a broad grasp of the authorities. I continue to be comfortable with the general line of analysis that both of us have endorsed.

You will not be surprised that my principal concern now is the length of our opinion, both text and notes. This concern is reflected in some of my editing. The problem is not merely the number of pages. As often happens with a long opinion at the draft stage, we still have a good deal of repetition.

Part I still seems long and a bit tedious. But I have identified no specific material to be omitted. We both might give some further thought to this.
Part II (Mootness) remains satisfactory. I suppose, however, that in the end—if eliminating a couple of pages prevents our opinion from seeming to be inordinately long, we could reduce the mootness question to a footnote. The principles are well settled, and this is clearly a classic example of "evading review".

Our problems begin with critical Part III. The introduction (page 13 to the middle of page 16) is exceptionally good, and—subject to my editing—I would leave it about "as is".

Subpart A does afford an opportunity for considerable condensing. The content of this subpart is the cornerstone of our analysis, but what we say also is quite elementary. As indicated, I think we can omit some of the more obvious statements and repetitious quotations. In short, I have tried to tighten this up. I leave it to you to "polish" and be sure it hangs together.

Subpart B presents an even more challenging problem of condensation. It now embraces about a dozen typewritten pages. To be sure, it addresses the ultimate question in the case (whether the corporate identity of a speaker deprives this speech of protection). I have had difficulty, therefore, in suggesting any single element of the discussion that can be eliminated. The best bet is to ask, with respect to each paragraph, whether it can be expressed in more conclusory terms or whether some of the
cases cited are marginal and cumulative, and therefore may be eliminated.

We must, I suppose, meet head on – as you have – the argument that a corporation's speech rights are derived from the Property Clause of the Fourteenth Amendment. I would have thought this argument so unsound as to require little refutation. But apparently this was the linchpin of the Massachusetts court's decision, and is now defended by appellee. Again, I am working at home without my books or briefs. I assume we have not exaggerated the extent to which appellee relies on this argument.

I believe the best opportunity for a more summary treatment commences with the discussion at the bottom of page 24. There, and for a number of succeeding pages, you meet appellee's effort to show that many, if not all, of the corporate First Amendment cases can be explained on the "materially affecting" theory. Your lead paragraph into the refutation of this argument (commencing at the bottom of page 24) is fine. Commencing with the last paragraph on page 25, I suggest that you try some reduction in length by being more conclusory, and feeling less of a necessity to document by elaboration. The discussion proceeding from that point would be excellent in a Law Review, but a Court opinion need not be so expansive.

I doubt that many of our readers (Brothers on the Court or others who will read this landmark case) will take seriously appellee's argument as to the Fourteenth Amendment property
right analysis, and the conclusion therefrom that states have
greater latitude to restrict speech than the federal government.
Nor will many be impressed by appellee's view that Sullivan and
similar cases turned on a "business" interest analysis. Linmark
and Virginia State Board of Pharmacy also the question whether
business interest, rather than societal concerns, entitle
commercial advertising to First Amendment protection.

The best opportunity for condensation extends from the
paragraph mentioned at the bottom of page 25 through 26 (with
your various 25a, 25b, etc., and riders). I think pages 27, 27a
and 27b are splendid.

I have not done any careful editing on footnotes
throughout the draft. We should eliminate marginal material in
these, although I do not view the notes generally as being
excessive.

One formalistic thought: we might subdivide Subpart B
(of Part III) into arabic 1, 2 and 3. One of the problems, in
terms of readability, is that Subpart B will appear as a rather
forbidding mass of unbroken text.

* * * * *

This week, and through the next weekend, will be my best
opportunity to work on this opinion. We have a Conference Feb.
17th, with 7 or 8 cert lists, that will require a good deal of
preparation. Then we move into two weeks of argument followed by
the assignment of further opinions to write.
I therefore suggest that you continue to give this priority over bench memos, long or short. I remain enthusiastic about the opinion.

L.F.F., Jr.
Feb. 16, 1978

Justice Powell,

Here is Bellotti again, this time edited by Bob. I've gone over the edited version with him, and I think he's been especially helpful in cutting out unnecessary material in Part III. Where I disagreed with his changes I either went back to my original (when only style was involved or he had misunderstood something), or pointed out why I'd do it differently. Certain portions of the text have been moved to footnotes and parts of the footnotes have been moved around. I hope you can follow it. (I didn't want to make the changes on the Wang, so that you could see what had been changed.) I'll also have to renumber footnotes after you've gone over it.

I feel pretty strongly that the footnote adverting to the Federal Corrupt Practices Act (and comparable state laws) should be cut down to the minimum, and that instead we should circulate a memo with the opinion explaining why this case is so different. Is it still too premature for me to draft something for you to look at?

Nancy
MEMORANDUM TO MR. JUSTICE POWELL

FROM: Nancy                     DATE: Feb. 9, 1978
RE: Bellotti, third draft

I am still troubled by certain aspects of this opinion, and can't quite figure out why. I think maybe my co-clerks will be able to pin me down on fuzzy points when the opinion gets edited and put into a chambers draft. For now, I'll explain certain changes I made and point out certain ideas that you might still want to include. Basically, I think they are ones that can wait for rebuttal once we've seen the dissent.

I. Changes

1. Upon rereading appellee's brief a final time, I realized that I had improved upon his arguments, in stating them, and that what he argues really makes so little sense that it isn't worth rebutting in the opinion. For example, appellee still contends, as he did before the SJC, that corporations not in the business of communications have no First Amendment rights. Alternatively, he argues that those rights are limited to those materially affecting the corporation's
business. I've now acknowledged the fact that appellee still argues the more extreme position, in fn. 12a. (Footnotes will be renumbered, of course.) Because the SJC did not accept this view, I originally wrote the whole opinion addressing the SJC's contention, not appellee's more extreme contention. Is this all right? Appellee's arguments in support of his position are (1) that the press is special; (2) some non-press corporations have been accorded First Amendment rights because they facilitate the expression of their individual members; and (3) Linmark is explained as a "right to hear" case, and appellee says (without explanation) that this is not such a case. Because I address all these arguments as rebuttals to the "materially affecting" limitation, I've said in n. 12a that the points in the text apply a fortiori to appellee's more extreme position. I've also amended relevant portions of the text.

Similarly, appellee seizes on the "property" position of the SJC and turns it around completely. Appellee says that because a corporation holds property by virtue of the authority granted by the State, the State can do anything to the corporation. Again, this is such a silly argument that I did not address it in the first drafts. In case you think we should, I've added n. 14a to explain this. I think it's unnecessary, but thought you might want to look at a shot at it.

Finally, my final reading of the SJC's opinion convinced me that the court was even more ambiguous than I had thought. The court seems to say that whether a corporation's rights are denominated "liberty" or "property", they are tied to the
corporation's property rights. I do not understand that at all; but I've now quoted the court verbatim so we won't be accused of setting up a straw man.

2. Part III.C. I think this analysis is correct, but we may have some trouble with some of your Brethren. JPS, in particular, has pointed out (in Young v. American Mini Theatres) that content sometimes is the basis for differential First Amendment treatment. Obscenity, for example, is in a class by itself. But I think we are right that we've already identified the category of this speech—pure speech on an issue of public importance—and it's a category entitled to protection. Within that category, the State has imposed a content and speaker restriction.

Your Brethren also might point out, in anticipating a restriction on a challenge to the Federal Corrupt Practices Act, that speech by corporations with respect to candidates also would be a restriction on content, under our theory. They might be right, and that's what makes that case a difficult one. Therefore I've concluded Part III.C. with a sort of equivocal comment, rather than the absolute statement I'd written before about content restrictions being absolutely impermissible. That also leads into Part IV. better; otherwise we'd stated our conclusion before assessing the State's interests.

3. Footnote 11: I'm afraid to specify exact numbers, because the charts I have are a little hard to follow. It looks like 38 states have graduated personal income taxes, but that includes states that take a fixed percentage of the federal tax, which, of course, is graduated. It looks like 10 or 12 states have graduated corporate taxes, but some of
them only have 2 gradations.

4. Footnote 18: I think this is an important addition. It keeps coming back to me that a good argument could be made that even in terms of our theory (provision of valuable information and discussion to the public), a legislature might reasonably conclude that even that interest is served only when the corporation speaks about something it's familiar with, i.e., matters directly pertaining to its business. What does a corporation know about other things? I thought it important, therefore, to acknowledge that this might be true in practice, but that as a matter of constitutional law, it's not up to the Legislature to make this determination. I didn't say it, but the same could be said about individuals. I've also added a rider stating that the same could be said about all sorts of specialized corporations (religious, charitable, etc.).

The second paragraph of this footnote says that even if the materially affecting limitation otherwise were unobjectionable, it would impermissibly chill protected speech. I've spoken explicitly of "chilling effect" because this is the context in which it properly is used.

5. Part IV. I think I've improved this section by making it reflect more accurately what appellee claims the State's interests to be. The paragraph on true corruption could be omitted; it's there simply to distinguish the Federal CPA. I've made clearer that the State's declared concern with corporate money "drowning out" other views is related, supposedly, to its concern with lack of confidence in
government. This is silly, of course, and I'm still a little wary of saying there may be situations where such a concern would be legitimate. I've cited Red Lion, however, to communicate something of the notion that the government has an interest in keeping channels of communication open, and if a situation arises where people truly can't here what other citizens think because the corporations have taken over so much, then regulation might be permissible. Is this consistent with what you were thinking?

If you like, I can add some figures on relative corporate expenditures in the last referendum (provided by appellants). I didn't include them before because they are inconclusive. Appellee had argued that the coordinating committee to which appellants contributed to oppose the referendum proposal raised over $100,000, while the committee in support of it raised only $7000. This does indicate that the corporate expenditures were much higher. But appellants point out that it's not clear that all the contributions to the opposition committee came from corporations; and there is no indication of how much money was spend by individuals and other proponents of the graduated tax apart from this one committee. I thought it better not to get into all this, and to state in the text that none of this come close to showing disillusionment of the voters, which is the conceded end concern.

II. Issues not addressed

1. Would you like note 4 expanded, to state in appellants' words all their concerns about how a grad. tax would affect them?
2. Should I mention that no one has threatened to apply § 8 to the institutional press, so the court below declined to consider that question?

3. As I've scribbled in the margin at n. 6, I think our discussion of why we're not distinguishing between the first and second sentences of § 8 might be included here. Perhaps in our transmittal memo to the Conference, we can include the explanation separately and ask if anyone would like it included in the opinion.

4. As of now, there's nothing in the opinion about the fact that the legislature has ignored the fact that some corporations may feel differently about the graduated tax than the monolithic view the legislature has imagined. I think that observation is correct, but I'm not sure how to say it without undercutting Part III.C., where we say the legislature was attempting to suppress a particular point of view. We might add a note explaining that the Legislature not only is not entitled to do this, but that it was misguided as well.

5. I've still omitted any discussion of the points that this is not a prior restraint or a time, place, or manner restriction. These points seem obvious. Would you like a footnote on either point? No

6. I've ignored appellee's contention that § 8 is only an incidental restriction on speech. Appellee says it's only incidental because corporate management and employees still are free to speak on these issues as individuals. This seems silly to me once you've recognized that a corporation has an independent legal existence.
I don't think we need to address the point unless the dissent does.

7. If the dissent relies heavily on the right of a state to regulate its creatures, I'll expand the point about the national banks not being creatures of the state. That's a peripheral point, however.

* * * * *

Good luck with this draft!

Nancy

P.S. Of course I'll make all the citations correct, etc. (Putzel does use "App. to Jurisdictional Statement"—but all those cites will be changed anyway to the Mass. Reports and N.E.2d.)
Justice Powell,

I'll be back in time to discuss the Bellotti changes, but I thought I'd mention two problems I have with your proposed riders.

I think the point in the rider for p. 28 contains a very good point about the media, and I've added a cite to Tornillo which I think is supportive. But I see problems in the rest of the rider. You are right, of course, that corporations, like individuals, range from the Mom-and-Pop operation to the corporate giant. But BRW's point is a double one: it's not only that corporations are wealthy, but that whatever wealth they have has been generated under the auspices of favorable treatment from the State—e.g., limited liability, continuous life, etc. Thus BRW would distinguish between all corporations and all individuals and associations. In addition, this rider might undercut what we have said in n. 24 about the possibility that Congress might be able to prove a greater danger of corruption and the appearance of corruption with respect to corporate expenditures in connection with a federal election than it did with respect to individuals and groups in Buckley. If we add your proposed rider, BRW will have better grounds for attack. If the Corrupt Practices Act is to be upheld, it will have to be on the basis that Congress is entitled to enact a prophylactic rule that bars political expenditures by all corporations, not just the wealthy and powerful.
multinationals. (It is for this reason that I am not as certain as your Brethren that the Act should be upheld in its entirety, and why I think the resolution will depend on the particular facts of who is making an expenditure and for what purpose.) In order to leave the Corrupt Practices Act question as open as possible, and in order not to contradict our statement that it is an open question, I do not think we should add a statement that denies that there are distinctions between corporate wealth and individual wealth.

If it's agreeable to you, I will find an appropriate point for the point about the press.

Anyway, we do cite to the statement in Buckley that it is impermissible to silence a segment of society on the basis of its perceived wealth or power, and I could elevate this to text.

On the second paragraph of the rider, dealing with the shareholders, I think this point is made in the addition I've made to n. 33. Also, while there is no record of shareholders objection to this expenditure or the expenditure in 1972, the 1962 suit (Lustwerk v. Lytron) was a shareholder derivative suit.

As for the rider dealing with BRW's distinction between profit and non-profit corporations, I think you and BRW are addressing yourselves to different points. Your point would make a good rebuttal to BRW's shareholder protection argument, because you are right that members of
certain of the NAACP or ACLU may object to the corporation's programs or views. I tried to suggest this point in n. 33, where I mention the members of any voluntary association.

BRW uses his point in a different context: he is saying that the organization itself has an interest in self-expression because it was formed partly for that purpose, whereas a business corporation is formed to do certain business, and its shareholders invest in it for that reason, not for the advancement of certain political or social views. Here I think he has a valid point, because cases like NAACP v. Alabama afford First Amendment rights to that kind of corporation (BRW calls it a "membership" corporation) because of the guarantee of freedom of association. I do not think we have to get into a discussion, which would be lengthy and also dictum, of the circumstances under which corporate investors also have such a right.

Your point about the Chamber of Commerce really is one step removed from the shareholder protection problem addressed by BRW. The Chamber of Commerce might express views that are not shared by its corporate or individual members; but the right of a member corporation to contribute to the Chamber of Commerce really is not different from the right at issue in this case (to purchase advertising space by contributing to a coordinating committee). I am not sure, therefore, why use of the Chamber of Commerce as an example gets us any farther. ❓ Because, if the right to associate protects NAACP, Common Cause, etc., why would it not protect the C+C (to further cause of undertaking system?)
I would suggest that we might add a sentence at the right point in n. 33 to make more clear the point about the NAACP's members possibly objecting to expenditures, and the point that the appropriate remedy for an objection is to withdraw membership, just as in the corporate context the remedy is to withdraw the investment.

Nancy
Justice Powell,

Here is a marked-up copy of the Third Draft. There are 2 problems. The first is HAB's request that we delete references to the concept of "least restrictive means". I do not really understand why he finds this objectionable; it is one of the basic, and usually unquestioned, tenets of First Amendment law. I understand the substance of the objection, as stated in HAB's letter, but it just seems a little late to be questioning this kind of reasoning. In any event, I don't think it would do harm to take out the sentence on p. 25 to which HAB refers (it used to be on p. 24). The phrase on p. 21 is a little more difficult to delete, since § 8 does serve to protect shareholders, but not in the least restrictive manner. But its protection of shareholders haphazard, and seems like an afterthought or post hoc justification by the State. Therefore I've substituted the words "in a haphazard manner" on p. 21. I know you wanted that phrase removed when we had it in a different place in the opinion, but it really does convey the problem with the State's justifications for § 8. Perhaps there's another word you'd prefer.

The second problem is the one I mentioned to you on your way to meet the Yalies. As printed, the sentence suggests that we agree with the Mass. legislature that all corporations will be lined up on one side of the referendum issue, while all individuals will...
be lined up on the other side. We expressly disclaim this assumption in n. 20. The point we want to make is that it looks like this is what the legislature was trying to do. But JPS is concerned lest we suggest that even when a legislature is trying to suppress one side of a debate, the suppression might be permissible if the State has strong enough interests. This is contrary to basic First Amendment principles, and is contrary to JPS favorite formulation of the First Amendment's prohibition meaning: the State cannot depart from neutrality as to different points of view. Stewart Baker and I rewrote the paragraph in a way that is acceptable to both of us, and Stew told JPS about the change. According to Stew, JPS will find the new wording acceptable. I also took out the quote from Buckley that used to be in the first paragraph of Part IV (on p. 19). The phrase "exacting scrutiny" is still there, but the quote was taken out so as not to convey the impression that the holding on expenditures in Buckley necessarily would mean invalidation of the expenditure prohibition in the Corrupt Practices Act. The quoted phrase from Buckley appears in the section invalidating the expenditure limits, and I thought it would be more cautious to avoid that connection in readers' minds.

In the interests of avoiding undue delay, I took suggested the changes on pp. 18-19 down to the print shop. If they're all right with you, I'll be able to insert the
corrected pages into the rest of the printed Third Draft before circulating it.

Nancy
There are the 2 pages to be substituted. The pencilled-in changes are stylistic and can be made in our next circulation.

N.
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, 408 U. S. 92, 96 (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. 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 what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right.


The dissent of Mr. Justice White would limit a profit corporation's First Amendment rights to speech "integral to corporate business operations." Post, at 16. Even more explicitly than the opinion of the Massachusetts court, the dissent would allow a State to proscribe corporate speech as all "political issues"; it also would approve the forbidding of such speech on "ideological" issues, and—indeed—on questions of general concern." Post, at --, --, and --.

Our observation about the apparent purpose of the Massachusetts Legislature is not an endorsement of the legislature's factual assumptions about
plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these interests.

IV

The constitutionality of § 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive exacting scrutiny. 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. City of Little Rock, 361 U. S. 516, 524 (1960); see NAACP v. Button, 371 U. S. 415, 436-439 (1963); NAACP v. Alabama ex rel. Patterson, 357 U. S., at 463; Thomas v. Collins, 323 U. S. 516, 530 (1945), "and the burden is on the government the views of corporations. We know of no documentation of the apparent view of the Massachusetts Legislature that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax. Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family. It is arguable that small or medium-size corporations might welcome imposition of a graduated personal income tax that might shift a greater share of the tax burden on wealthy individuals. See Brief for New England Council as amicus curiae 23-24.

§ 8 is an "attempt directly to control speech... rather [than] to protect, from an evil shown to be grave, some interest clearly within the sphere of legislative power." Speiser v. Randall, 357 U. S. 513, 527 (1958). Compare United States v. O'Brien, 391 U. S. 367 (1968).
Outline of Part III

Preamble (p. 9-11)

1. Recap of
2. Restates G on p. 11
   (Do not a comprehensive
   restatement. The ultimate
   G is stated on p. 14.)

Sub-Part A (11-14)

Pure speech - heart of 1st Amm

Sub-Part B (14-)

Do not identity define
pure speech or its protection (14)

Cases can prevail.

There would need also deny
them, but argue that several of
cases might in "pope" clause
of 1443 A.D. (16-17)

But cases refute this 14-
assert argument (17)
Justice Powell,

Here's the corrected copy of *Bellotti*. I think the changes, prompted by PS and Bob, are improvements. I have added 2 riders (on p. 6) and 2 footnotes (on p. 14); they are typed and stapled into the opinion following the page where they are indicated.

The only change that I think may not be a good one appears on pp. 10 and 13. You will notice that those sections of text have been numbered (1) and (2). There used to be no subdivision. The ideas are distinct, and I am glad that Bob picked that up. He suggested making that even clearer by creating separate sections. The unifying theme of the whole section B is the "materially affecting" theory is not derived from the Constitution (either the First Amendment or the Fourteenth) or this Court's precedents. Then part C goes on to explain why it is an impermissible legislative creation. The division into sections (1) and (2) makes clearer the distinction between appellee's argument based on the language of the Constitution and his argument based on this Court's precedents. I think you suggested a division at one point. I really don't oppose the division, but it's sort of clumsy that there's no introduction to part B preceding the new subsections; and the text in each section is fairly short. I don't think I'd want to divide it into parts B & C, to be followed by D, because that departs from the thematic structure stated above. I'll leave this up to you!
Bob also suggested adding a footnote on p. 16, where we mention the realm of "protected" speech, explaining that of course this does not preclude the legislature from dictating things in the realm of obscenity, libel, fighting words, and shouting "fire" in a crowded theatre. But all of that would seem to be excluded by the word "protected". (He/had made a valid objection to my original use of the word "pure" speech, which wouldn't/exclude some obscenity, libel, etc.) I did not think we needed a footnote to explain use of the word "protected", but I'd be happy to add one if you think it necessary.

Otherwise, I think we're ready to take on the dissent!
April 1, 1978

Re: 76-1172 - First National Bank of Boston v. Bellotti

Dear Lewis,

It seems to me that we are close to being at issue, if not already there. In response to your 5th draft, I plan only the following changes which have been sent to the printer:

1. In the 2d sentence on page 1, the words following "Massachusetts" in the 7th line will be changed to read "and is not disapproved by this Court today."

2. In the 3d sentence on page 1, the words "as this case comes to us" will be inserted after the word "Hence".

3. On page 20 in the 2d and 3d lines, the words "concerning the advisability of a personal income tax" will be changed to read "irrelevant to its business affairs".

Sincerely yours,

[Signature]

Mr. Justice Powell

Copies to the Conference
TO: Mr. Justice Powell  
FROM: Nancy  
RE: Bellotti  
April 4, 1978

I've suggested two changes on pp. 6 & 16. The change on p. 6 responds to BRW's change in language on p. 1 of the dissent. I've chosen the new words because while BRW's statement (that we have not "disapproved" the legislative judgment expressed in the second sentence of § 8) is not inaccurate, it conveys a false impression of what we have decided. The change on p. 16 is for purposes of clarification.

There are several other points in the dissent that deserve mention, although they probably do not warrant changes in our opinion.

(1) Page 7 of the dissent: This is the paragraph that you pointed out about the possibility of directors' making expenditures (from their own personal funds) in support of a view that the corporation would support. This paragraph does not make sense. Why would a corporation hold a view on something irrelevant to corporate business? It seems like a contradiction in terms. In addition, BRW assumes that the corporate officer, director, or shareholder would have the same financial incentive (and means) to publicize the view as would the corporation. I think this only confirms BRW's view that management really is only expressing its own views, not the corporation's.

I do not think we should make the above point, however, because it should be obvious to any discerning reader. On
the other hand, we might point out that BRW's theory is an extension of the theory that there are alternative means of communicating the same ideas. I say "an extension" because usually that concept means that the same speaker can express his views elsewhere. BRW is saying that this speech by this speaker can be prohibited entirely because someone else can make the same statements. This would be awfully radical First Amendment theory if applied in other contexts. Even the more limited notion that speech can be suppressed in a certain context, if alternative means of communication are available, has not been accepted outside of the context of true "time, place, or manner" regulations. There is a good discussion of this point in Linmark Associates, and also in Southeastern Promotions and Virginia Pharmacy. I would like to draft a brief note to make this point, citing those cases.

(2) On p. 15, n. 13, the dissent charges that our continued opinion makes untenable the availability of an ultra vires action to challenge expenditures not in the corporation's interest. I think this charge is unfounded, but I am not sure why. Do you think we need to respond to this?

(3) The third paragraph of n. 13 is amazing in that it turns things upside down by using our n. 3 (chronicling the history of § 8 and the legislature's efforts to silence corporations on this graduated tax issue) against us! I do not think this requires a response; but it is clearly wrong.
(4) BRW's use of the Corrupt Practices Act precedent is quite shabby. On p. 18 he quotes at length from the limiting construction adopted in the CIO case to suggest that it is only communications within the corporate family that are protected under the First Amendment. This, of course, is all that CIO was concerned with; the opinion did not discuss other potential (and potentially unconstitutional) applications of the Corrupt Practices Act. BRW completely ignores the fact that the Court also attempted to limit the reach of the Act in the United Auto. Workers case, where the union had expended funds to make available radio time to present broadcasts advocated the election of certain candidates. The Court remanded the case to the trial court along with a set of questions that might be dispositive in the constitutional analysis. See 352 U.S., at 592. One of those questions was: "Did [the broadcast] constitute active electioneering or simply state the record of particular candidates on economic issues?" Id. This suggests that the distinction between active electioneering and the objective presentation of information and commentary might be dispositive, on particular facts, in any challenge to the Corrupt Practices Act. BRW completely ignores the UAW case while devoting much attention to the CIO case. Again, I do not think we should respond, because I would not want to intimate that the above-quoted question necessarily is critical or even is one the Court today would think relevant. And the Court might not want to endorse the other three questions posed in UAW. (The dissent in that
case thought the questions were irrelevant because the suppression of speech was completely unconstitutional regardless of the answers to the questions.) But BRW's use of precedent certainly is selective.

(5) Finally, BRW expresses outrage at the fact that the Court "does not choose to explain or even suggest . . . why the state interests which it so cursorily dismisses are less worthy than the interest in preventing corruption or the appearance of it." First of all, I thought we did explain why the state interests in this case are insubstantial. But secondly, I think BRW's position is silly—he almost seems to say that any rational state interest would be sufficient, and the Court should not weight it. His position in this case simply cannot be reconciled with his having joined the Court's opinion in Linmark Associates, where the Court found the community's interest in maintaining integrated housing to be insufficient to override the interest in the free flow of information about the availability of real estate. We have already said that it turns the First Amendment upside down to give more weight to society's interest in obtaining information about goods and services than to its interest in information relevant to the process of governing, so we need not say it again. But it might be useful to make the comparison between the societal interest found insufficient in Linmark and the societal interest in protecting shareholders. BRW accuses the Court of being overly pro-corporation; but he is willing to say that the protection of shareholders is a more weighty concern than
promotion and maintenance of integrated housing.

* * * * *

The only points I would add to the opinion, of those discussed above, would be point (5) and the second paragraph of point (1). I'll wait to hear whether you'd rather leave the opinion as is before drafting riders. If you'd like to see the proposed riders before deciding, I'll do that today.
April 6, 1978

No. 76-1172 Bellotti

Dear Bill:

Although I do have a Court in Bellotti I would like to talk to you before you circulate an opinion.

I view this as one of the most important cases to come before the Court since you and I took our seats. As you are a man of reason (especially when you agree with me), I would like to have about a ten-minute "shot" at you to amplify my arguments.

Sincerely,

Mr. Justice Rehnquist

1fp/ss
Bellotti

Justice White's dissent, p. 15, n. 13, states that my opinion would render unavailable an ultra vires action to challenge expenditures viewed by a stockholder as not being in the corporation's interest.

This point is not readily answered in a few words. In view of modern corporate laws, allowing the widest scope for corporate activities (including contributions), the use of ultra vires - meaning that the corporation has acted beyond the scope of its lawful authority - has become a seldom used antique of corporation law.

Perhaps we should omit the reference on page 23 to ultra vires. A suit would rarely be brought under that rationale. Rather, a complaining stockholder would sue management, in a derivative action, for an alleged breach of duty for wasting or misusing corporate assets. For example, if a corporation engaged only in the restaurant business in Butte, Montana, contributed to the CIA's covert operation against Allende in Chile, I have no doubt that a disapproving shareholder could compel management to replenish the corporate treasury. The test, stated generally, would be whether management had breached its
duty to conduct affairs of the corporation with reasonable care in the best interests of the stockholders. For many years corporate officers and directors were viewed as "trustees" in the management of corporate affairs for the owners, i.e., the shareholders. But more recent corporate law - at least the last time I looked into it some years ago - applies a 'prudent man' rather than a fiduciary test to management conduct. In such a suit, management could not defend on the ground that it was exercising the First Amendment rights of the corporation. There would have been no state action. As "agents" of the shareholders, officers and directors are subject to oversight by - and are required to exercise ordinary prudence on behalf of - their principals. Thus, I have no doubt that the shareholders of one of the appellant corporations could, by a majority vote, instruct management not to spend money opposing the income tax amendment.

This type of discussion leads one to the question we have discussed here in our Chambers, namely, what if Massachusetts amended its corporation law to say simply that no corporation chartered in or doing business in Massachusetts should have any First Amendment rights except corporations engaged solely in news media businesses. Under our view, a state could not impose upon individuals - as a condition of doing business in the corporate form - a
limitation on the exercise of constitutional rights. I take it that Justice White thinks otherwise, at least as to the First Amendment. I wonder what he would say as to the Fourth and Fifth Amendments? A partial answer could be that when these Amendments are invoked they protect corporate assets in a way that would be approved by all stockholders. But if, by virtue of its power to create and impose conditions on corporations, a state could forbid the exercise of First Amendment rights, it is not clear to me why a state also could not say - for example - that no corporation should be entitled to just compensation for the taking of its property. It could be argued, as indeed it has, that wealthy corporations have acquired too much land that should have been reserved as parks and recreational areas for the benefit of the public generally.

We need not get into all of this. I dictate this memorandum merely to record these thoughts. I am inclined to eliminate from my opinion the reference to ultra vires. Its relevance is minimal.

L.F.P., Jr.

ss

[April —, 1978]

Mr. Chief Justice Burger, concurring.

I join the opinion and judgment of the Court but write separately to raise some questions likely to arise in this area in the future.

A disquieting aspect of Massachusetts' position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as most do—to carry on the business of mass communications, particularly the large media conglomerates. This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants in this case.

Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many other activities, some directly related—and some not—to their publishing and broadcasting activities. See Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241, 248-254 (1974). Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or worldwide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timber lands to insure an adequate, continuing supply of news.
print and to trucking and steamship lines for the purpose of
transporting the newspaper to the presses. Such activities
would be natural auxiliaries to publishing. Corporate owner-
ship also may extend beyond to business activities generally
unrelated to the task of publishing newspapers and magazines
or broadcasting radio and television programs. Obviously,
such far-reaching ownership would not be possible without
the state-provided corporate form and its "special rules relating
to such matters as limited liability, perpetual life, and the
accumulation, distribution, and taxation of assets...." Post,
at 6 (dissenting opinion).

In terms of "unfair advantage in the political process" and
"corporate domination of the electoral process," id., at 7, such
media conglomerates as I describe arguably pose a much more
realistic threat to valid interests than do appellants and simi-
lar entities not regularly concerned with shaping popular
opinion on public issues. See Miami Herald Publishing Co. v.
Tornillo, supra; ante, at 24 n. 29. In Tornillo, for example,
we noted the serious contentions advanced that a result of the
growth of modern media empires "has been to place in a few
hands the power to inform the American people and shape
public opinion." 418 U.S. at 250. In terms of Massachu-
setts' other concern, the interests of minority shareholders, I
perceive no basis for saying that the managers and directors of
the media conglomerates are more or less sensitive to the
views and desires of minority shareholders than are corporate
officers generally. 1 Nor can it be said, even if relevant to First
Amendment analysis—which it is not—that the former are

1 It may be that a nonmedia corporation, because of its nature, is subject
to more limitations on political expression than a media corporation whose
very existence is aimed at political expression. For example, the charter
of a nonmedia corporation may be so framed as to render such activity or
expression ultra vires; or its shareholders may be much less inclined to
permit expenditure for corporate speech. Moreover, a nonmedia corpora-
tion may find it more difficult to characterize its expenditures as ordinary
and necessary business expenses for tax purposes.
more virtuous, wise or restrained in the exercise of corporate power than are the latter. Cf. Columbia Broadcasting System v. Democratic National Committee, 412 U. S. 94, 124-125 (1973); XIV The Writings of Thomas Jefferson 46 (A. Libescomb ed. 1904) (letter to Walter Jones, Jan. 2, 1814). Thus, no factual distinction has been identified as yet that would justify government restraints on the right of appellants to express their views without, at the same time, opening the door to similar restraints on media conglomerates with their vastly greater influence.

Accordingly, to limit the potentially damaging impact of the Commonwealth's position on traditional free expression values, one must fall back to the argument that somehow the Press Clause confers a "special" privilege or status on the "institutional press" over and above what the Speech Clause confers on the public generally. The issue presented by this argument is one of great importance, which the Court has not yet squarely addressed. 2

I perceive two fundamental difficulties with construing the Press Clause as conferring upon the "institutional press" any special privilege or any freedom from government restraint not enjoyed by all others. First, although certainty on this point is not possible, it seems reasonably clear that a "special" or "institutional" privilege was not contemplated by the Framers. See Lange, The Speech and Press Clauses, 23 U. C. L. A. L. Rev. 77, 88-90 (1975). The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman. In

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defining the nature of the liberty, he did not limit it to a particular group:

"But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Country, and of applying for the Repeal of such, as he Judges pernicious . . . .

"This is the Liberty of the Press, the great Palladium of all our other Liberties, which I hope the good People of this Province, will forever enjoy . . . ." A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41-42 (1965) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, April 25, 1734).


Those interpreting the Press Clause as extending protection only to, or creating a special role for, the "institutional press" must either (a) assert such an intention on the part of the Framers for which no supporting evidence is available, cf. Lange, supra, at 89-91; (b) argue that events after 1791 somehow operated to "constitutionalize" this interpretation, see Benzanson, The New Free Press Guarantee, 63 Va. L. Rev. 731, 788 (1977); or (c) candidly acknowledging the absence of historical support, suggest that the intent of the Framers is not important today. See Nimmer, Is Freedom of the Press a Redundancy: What Does It Add To Freedom of Speech?, 26 Hastings L. J. 639, 640-641 (1975).

To conclude that the Framers did not intend to limit the
freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. For me, the Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. Griffin, 303 U. S. 444, 452 (1938). Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order--political and religious--devised restraints, such as licensing, censors, indices of pro-

The simplest explanation of the Speech and Press Clauses might be that the former protects oral communications; the latter, written. But the historical evidence does not strongly support this explanation. The first draft of what became the free expression provisions of the First Amendment, one proposed by Madison on May 5, 1789, as an addition to Art. 1, § 9, read:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Cong. 451 (1789) (published as 1 Debates of Congress).

The language was changed to its current form, "freedom of speech, or of the press," by the Committee of Eleven to which Madison's amendments referred. (There is no explanation for the change and the language was not altered thereafter.) It seems likely that the Committee shortened Madison's language providing the semicolon in his draft to "freedom of speech," without intending to diminish the scope of protection contemplated by Madison's phrase; in short, it was a stylistic change.

Cf. Kilbourn v. Thompson, 103 U. S. 165 (1881); Doe v. McMillen, 412 U. S. 306 (1973) (Speech or Debate Clause extends to both spoken and written expression within the legislative function).
hibited books, and prosecutions for seditious libel, which generally were unknown in the preprinting press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. See Lange, supra, at 100-107. The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this Nation. Lovell v. Griffin, supra, at 451-452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

"Freedom of the press is a 'fundamental personal right' which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. . . . The information function asserted by

The information function asserted by

It is not strange that "press," the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience. Changes wrought by 20th century technology, of course, have rendered the printing press as it existed in 1791 as obsolete as Watt's copying or letter press. It is the core meaning of "press" as used in the constitutional text which must govern.
representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." \textit{Branzburg v. Hayes}, 408 U. S. 665, 704-705 (1972), quoting \textit{Lovell v. Griffin}, supra, at 450, 452.

The meaning of the \textit{Press Clause}, as a provision separate and apart from the \textit{Speech Clause}, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions and merits at least this brief exploratory inquiry. These tentative probings are wholly consistent, I think, with the Court's refusal to sustain § 8's serious and potentially dangerous restriction on the freedom of political speech.

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of one who seeks to disseminate ideas by way of a newspaper and one who gives a lecture or speech—and possibly, causes copies to be made—in order to enlarge his audience.

In short, the First Amendment does not "belong" to any definable category of persons or entities: it belongs to all who exercise its freedoms.
TO: Mr. Justice Powell  
FROM: Nancy  
April 14, 1978  
RE: WHR's dissent in Bellotti

This dissent takes liberties with precedent, purports to question or overrule settled cases, and would demolish the First Amendment in large part. Because WHR's position is so extreme, I doubt that there is any way to talk him out of it. He seems to be using this case to announce a very restrictive view of the First Amendment, simply because it presents a novel question and he is not as hamstrung as he would be in a more traditional First Amendment case.

I will not go into all the ways in which this opinion is irreconcilable with precedent or distorts the cases it does cite. The discussion of Riggs is deceptive, as is the discussion of the Dartmouth College case. The latter, for example, deals with the powers of a corporation (and in an age when those powers were much more strictly limited than they are today), not the constitutional rights of corporations. Yet WHR uses the language from Dartmouth College to define the constitutional rights of corporations (those "incidental to its very existence"). As for Riggs, it dealt with the power of a state to regulate a corporation's business transactions, a subject very different from the one in this case. In addition, the
language cited from Riggs was repeated, in the more relevant context of the associational and free speech rights of the AFL-CIO, in Hague v. CIO, but that discussion was implicitly overruled in NAACP v. Alabama and NAACP v. Button. (Note that WHR also attempts to cast doubt on the validity of the holding in NAACP v. Alabama that membership corporations may assert the rights of their members. WJB and TM certainly will not like that.)

WHR says that the only departures from the view expressed in Riggs have been press cases and cases involving political associations. (But later in the opinion he even suggests that political associations could be prohibited from speaking on anything other than politics.) This is wrong. What about Linmark Associates, Inc.? True, there also was an individual plaintiff (the real estate broker) in that case, but I do not think the case would have come out any differently if the only party had been the corporate owner who wanted to put out a "For Sale" sign.

The question that WHR says is the question presented in this case is misstated. This case does not deal with all "political" activity; it deals only with a non-partisan referendum vote. WHR also makes the same misleading statement made by BRW about the 30 other statutes, some of which do not deal with referendum votes.

WHR also casts grave doubt on the Noerr, Pennington, and Harriss cases by suggesting that
corporations do not have the right to petition the legislative or executive branches for redress of grievances. This is an extreme view. In addition, what rights would corporations have left to be enforced in the courts if they could not petition the legislative and executive branches in the making and carrying out of laws?

WHR does not stick to corporations. He also would limit the First Amendment rights of associations, unions, partnerships, and, I assume—although it is not stated—non-profit corporations other than political membership corporations such as the NAACP. At least in this regard WHR is more logically consistent than BRW, who insists that his view is limited to profit corporations; but it shows the extreme to which both dissenting opinions would lead as a matter of logical consistency. Also, unlike BRW, WHR concedes that his view is unrelated to the gravity of the state interests. The state can do whatever it wants to all of these state-created artificial entities.

WHR attempts to say that it follows necessarily that when a state creates a corporation with the power to hold property, "it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law." Dissent at 4. This is by no means clear. As a matter of fact, it is inconsistent with WHR's theory in Arnett v. Kennedy, where WHR said the bitter must be taken with the sweet. In other words, when
the state confers a benefit, it can condition that benefit however it wants to. You might point this out to WHR.

Two final points deserve comment: WHR says he can see no way of disagreeing with the finding of the court below that this tax referendum would have no material effect on appellants' business. I would ask him if he really believes this. It seems incredible. Second, WHR gives short shrift to the public interest in complete and informed debate. It seems to me that basing a corporation's right to speak on the corporation's self-interest is far more a reification of corporations than is contained in our opinion. We avoid having to say that corporations, like individuals, have an interest in self-expression. This view is necessary to both BRW's and WHR's conceptions, however.

I think WHR's position is so extreme that no rational argument would persuade him to change his mind. But you might point out to him the extreme nature of his position and ask him three questions:

1) Why is there no material effect here?

2) Does he really think his position, which would allow government to silence all artificial entities completely, is what the First Amendment requires? Is this not censorship and government control of what is thought and debated in society? As a practical matter, do we really want a world with no public interest or informational communication by corporations, considering
the critical role they play in our society and our economy? And finally, as a conservative, can WHR really sanction such enormous power in government over the people when they join together in any of these artificial entities?

(3) Has WHR ignored the facts of this case? What does he say to the undeniable facts that the legislature wanted to pass this tax, it perceived the corporations to be opposed to its point of view, and in order to obtain its objective it silenced its opposition? Again, even apart from this blatant contravention of the First Amendment's prohibition of censorship based on the speaker's point of view, how can WHR, as a conservative and a believer not only in state sovereignty but limited government, abide this?

I do not think WHR will abandon his position, but I would like to hear him answer these last 3 questions.
April 17, 1978

76-1172 Bellotti

Dear Bill:

I am grateful to you for sharing with me your draft of 4/13/78 of a possible dissent in this case.

If I read it correctly, your view would empower state governments (and possibly the federal government) to exercise what to me would be a shocking degree of control over expression and debate in our country. All artificial entities - corporations, partnerships, unions and associations - could be prohibited from exercising First Amendment rights except "to protect [their respective] interest in [their] property" or to perform the specific function for which they were chartered. Not only that, but the government would determine whether the speech served that permissible end. And the State would not even be required to show adverse effect or any state interest to justify the suppression.

This would be a most disquieting power for government to possess, especially as politicians naturally prefer a minimum of criticism or resistance to achieving ends they espouse, through legislation or otherwise. In this case, for example, it is perfectly evident that the Massachusetts legislature - fed up with having its wishes frustrated by votes of the people - decided to throttle the speech of those believed responsible for this frustration. As it turned out, this was a misjudgment of the situation - as the people voted down the most recently proposed amendment when corporations were not allowed to speak.

As evidence of what could lie ahead, I enclose herewith a full page advertisement addressing a move presently underway in the Congress to throttle corporate expression.
Even if one assumed that all restrictive efforts were limited to what a legislature defines as "political activity with regard to matters having no material effect on its business" (your memo p. 8), the definitional problems would be intractable. No corporate management could know in advance, exactly what would be deemed "political" or what some court would conclude had no "material effect on its business". In Massachusetts one can be sent to jail or fined up to $10,000 for a miscalculation in this respect. And speaking of what constitutes "political activity," what about the Mobil advertisements with which you are familiar. In modern society, almost any subject can be viewed as "political".

I will not get into the case authority, beyond a couple of observations. Although no prior decision has expressly recognized corporate speech generally as explicitly as my opinion does, I view the trend of our decisions over the past century as supporting the proposition that artificial entities are treated as "persons" for purposes of exercising and relying upon constitutional rights. There are a few exceptions, but all of these are quite narrow. It certainly is not necessary to read our cases as restrictively as your draft would read them. I therefore question whether it is in the public interest - particularly the greater overall interest in freedom - now to reverse the trend of constitutional decision in this area.

Indeed, while you suggest in your draft that a corporation's right to due process would remain safe because the state confers the property right, this seems to me somewhat inconsistent with your basic premise that a corporation may be deprived of freedom of speech because it is a creature of the State. If the State intends not to confer a right to due process when it confers the right to hold property, would that be unconstitutional? If so, then why is freedom of speech different, especially when management believes the corporation must speak out to protect the long term viability of its business or the system that enables private business to function.

I conclude by repeating that, in my view, the values we have deemed important in our country will be less secure if public interest and informational communication by corporations (which almost always can be labeled "political" or not in furtherance of a short term
"business interest") were proscribed. In this connection, it is well to remember that under the free enterprise system corporations by the thousands, large and small, play a critical role not merely in our economy, but in our educational, cultural and - yes - even political affairs. And, as a Jeffersonian from Virginia, I view with increasing concern the ever burgeoning power of government over the lives of people. I would prefer not to extend this power to authorize censorship of what is said by those who join together in artificial entities.

Sincerely,

Mr. Justice Rehnquist

1fp/as
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. Southern Pacific R. Co., 118 U.S. 394, 396 (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, 169 U.S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that amendment "is the liberty of natural, not artificial persons." Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (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.,
297 U.S. 233, 244 (1936), and that a corporation organized for political purposes enjoys certain liberties of political expression. NAACP v. Button, 371 U.S. 415, 428-429 (1963).

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 thirty 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. I think it quite probable that their judgment may properly be reconciled with our controlling precedents, but I am certain that under my views of the limited application of the First Amendment on the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.
Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819).

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, 322 U.S. 694, 698-701 (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." Dartmouth College, supra, at 636.

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. Grosjean so held, and our subsequent cases have so assumed. E.g., Time, Inc. v. Firestone, 424 U.S. 448 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-770 (1976). Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

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. So long as the judicial branches of the State and federal governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed. I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.
One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of the Supreme Judicial Court in this case. That court reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expression by a corporation "when a general political issue materially affects a corporation's business, property or assets." ___ Mass. ____ 359 N.E. 2d , 1270 (1977).

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.
It is true, as the Court points out, ante, at 15-16, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. 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, 432 U.S. 464, 474 (1977).

I would affirm the judgment of the Supreme Judicial Court.
Our earlier cases, mostly of recent vintage, have discussed the boundaries of protected speech without distinguishing between artificial and natural persons. See, e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Buckley v. Valeo, 424 U.S. 1 (1976). Nevertheless, the Court does not suggest today that the failure of those cases to draw distinctions between artificial and natural persons means that no such distinctions may be drawn. Indeed, the Court explicitly suggests that corporations may not enjoy all the political liberties of natural persons, although it fails to articulate the basis of its suggested distinction. Ante at 21 n. 25.

Appellants Wyman-Gordon Company and Digital Equipment Corp. are incorporated in Massachusetts. The Gillette Company is incorporated in Delaware, but does business in Massachusetts. It is absolutely clear that a State may impose the same restrictions upon foreign corporations doing business within its borders as it imposes upon its own corporations. Northwestern Nat'l Life, supra at 254-255.

Appellants First National Bank of Boston and New England Merchants National Bank are organized under the laws of the United States. In providing for the chartering of national banks, Congress has not purported to empower them to take part in the political activities of the States in which they do business. Indeed, it has explicitly forbidden them to make any "contribution or expenditure in connection with any election to any political office." 2 U.S.C. § 44lb (1976). Thus, there is no occasion to consider whether Congress would have the power to require the States to permit national banks to participate in political affairs. Cf. M'Culloch v. Maryland, 4 Wheat. 316 (1819).
fn. - 2 -

3/ The Court concedes, ante at 14, that, for this reason, this statute poses no threat to the ordinary operations of corporations in the communications business.

4/ It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate's campaign. Such a right is no more "incidental to its very existence" than it is to any other business corporation.

5/ However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. Button, supra at 428-429 (1963). The fact that the author of that opinion, my Brother Brennan, has joined my Brother White's dissent in this case strengthens my conclusion that nothing in Button requires that similar protection be extended to ordinary business corporations.

It should not escape notice that the rule established in Button was only an alternative holding, since the Court also ruled that the NAACP had standing to assert the personal rights of its members. Ibid., citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-460 (1958). The holding, which has never been repeated, was directly contrary to an earlier decision of this Court holding that another political corporation, the American Civil Liberties Union, did not enjoy freedom of speech and assembly. Hague v. CIO, 307 U.S. 496, 514 (1939) (Opinion of Roberts, J.); id. at 527 (Opinion of Stone, J.).

6/ My Brother White raises substantially these same arguments in his dissent, ante, at 7-8. However, his heavy emphasis on the need to protect minority shareholders at least suggests that "the governmental interest in regulating corporate political communications," ante, at 7, might not prove sufficiently weighty in the absence of such concerns. Because of my conclusion that the Fourteenth Amendment does not require a State to endow a business corporation with the power of political speech, I do not find it necessary to join his assessment of the interests of the Commonwealth supporting this legislation.
The question of whether such restrictions are politically desirable is exclusively for decision by the political branches of the federal government and by the States, and may not be reviewed here. My Brother White, in his dissenting opinion, puts the legislative determination in its most appealing light when he says, ante, at page 8:

"[T]he interest of Massachusetts and the many other States which have restricted corporate political activity . . . 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 . . . ."

As I indicate in the text, supra, I agree that this is a rational basis for sustaining the legislation here in question. But I cannot agree with my Brother White's intimation that this is in fact the reason that the Massachusetts General Court enacted this legislation. If inquiry into legislative motives were to determine the outcome of cases such as this, I think a very persuasive argument could be made that the General Court, desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.

If one believes, as my Brother White apparently does, see ante, at 5, that a function of the First Amendment is to protect the interchange of ideas, he cannot readily subscribe to the idea that, if the desire to muzzle corporations played a part in the enactment of this legislation, the General Court was simply
engaged in deciding which First Amendment values to promote. Thomas Jefferson in his First Inaugural Address made the now familiar observation:

"If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." The Writings of Thomas Jefferson (H.A. Washington ed. 1853) VII, 1-5.

One may entertain a healthy skepticism as to whether the General Court left reason free to combat error by their legislation; and it most assuredly did not leave undisturbed corporations which opposed its proposed personal income tax as "monuments to the safety with which error of opinion may be tolerated." But I think the Supreme Judicial Court was correct in concluding that, whatever may have been the motive of the General Court, the law thus challenged did not violate the United States Constitution.
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. Southern Pacific R. Co., 118 U.S. 394, 396 (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, 169 U.S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that amendment "is the liberty of natural, not artificial persons." Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (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.
297 U.S. 233, 244 (1936), and that a corporation organized for political purposes enjoys certain liberties of political expression. NAACP v. Button, 371 U.S. 415, 428-429 (1963).

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Our earlier cases, mostly of recent vintage, have discussed the boundaries of protected speech without distinguishing between artificial and natural persons. See, e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Buckley v. Valeo, 424 U.S. 1 (1976). Nevertheless, the Court does not suggest today that the failure of those cases to draw distinctions between artificial and natural persons means that no such distinctions may be drawn. Indeed, the Court explicitly suggests that corporations may not enjoy all the political liberties of natural persons, although it fails to articulate the basis of its suggested distinction. Ante at 21 n. 25.
of the First Amendment on the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, that the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819).

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

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Appellants Wyman-Gordon Company and Digital Equipment Corp. are incorporated in Massachusetts. The Gillette Company is incorporated in Delaware, but does business in Massachusetts. It is absolutely clear that a State may impose the same restrictions upon foreign corporations doing business within its borders as it imposes upon its own corporations. Northwestern Nat'l Life, supra at 254-255. (continued)
does not invest it with all the liberties enjoyed by natural persons, United States v. White, 322 U.S. 694, 698-701 (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." Dartmouth College, supra, at 636.

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

(footnote 2 continued)

Appellants First National Bank of Boston and New England Merchants National Bank are organized under the laws of the United States. In providing for the chartering of national banks, Congress has not purported to empower them to take part in the political activities of the States in which they do business. Indeed, it has explicitly forbidden them to make any "contribution or expenditure in connection with any election to any political office." 2 U.S.C. § 441b (1976). Thus, there is no occasion to consider whether Congress would have the power to require the States to permit national banks to participate in political affairs. Cf. M'Culloch v. Maryland, 4 Wheat. 316 (1819).

Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-770 (1976). Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out

The Court concedes, ante at 14, that, for this reason, this statute poses no threat to the ordinary operations of corporations in the communications business.

It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate's campaign. Such a right is no more "incidental to its very existence" than it is to any other business corporation.
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. So long as the judicial branches of the State and federal governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States

5/ However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. Button, supra at 428-429 (1963). The fact that the author of that opinion, my Brother Brennan, has joined my Brother White's dissent in this case strengthens my conclusion that nothing in Button requires that similar protection be extended to ordinary business corporations.

It should not escape notice that the rule established in Button was only an alternative holding, since the Court also ruled that the NAACP had standing to assert the personal rights of its members, ibid., citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-460 (1958). The holding, which has never been repeated, was directly contrary to an earlier decision of this Court holding that another political corporation, the American Civil Liberties Union, did not enjoy freedom of speech and assembly. Hague v. CIO, 307 U.S. 496, 514 (1939) (Opinion of Roberts, J.); id., at 527 (Opinion of Stone, J.).
might reasonably fear that the corporation would use its
economic power to obtain further benefits beyond those already
bestowed. I would think that any particular form of organization
upon which the State confers special privileges or immunities
different from those of natural persons would be subject to like
regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.

One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of
the Supreme Judicial Court in this case. That court reasoned
that this Court's decisions entitling the property of a
corporation to constitutional protection should be construed as
recognizing the liberty of a corporation to express itself on
political matters concerning that property. Thus, the Court
construed the statute in question not to forbid political expression
by a corporation "when a general political issue materially

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6/ My Brother White raises substantially these same arguments in
his dissent, ante, at 7-8. However, his heavy emphasis on the
need to protect minority shareholders at least suggests that
"[t]he governmental interest in regulating corporate political
communications," ante, at 7, might not prove sufficiently
weighty in the absence of such concerns. Because of my conclusion
that the Fourteenth Amendment does not require a State to endow
a business corporation with the power of political speech, I
do not find it necessary to join his assessment of the interests
of the Commonwealth supporting this legislation.

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.

It is true, as the Court points out, ante, at 15-16, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. 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, 432 U.S. 464, 474 (1977). The Fourteenth Amendment only requires the States not to deny to corporations that component of Fourteenth Amendment liberty which corresponds to the freedom of speech and of the press in the First Amendment.

I would affirm the judgment of the Supreme Judicial Court.
This case, here on appeal from the Supreme Judicial Court of Massachusetts, involves the right of corporations to express their views on an issue submitted to a referendum vote.

Appellants are banks and business corporations doing business in Massachusetts. A state statute makes it illegal for a bank or business corporation to spend money in favor of or against a referendum question. The only exception is where the corporation can prove that the issue materially affects its business or property.

The statute also expressly provides that any question related to individual taxation shall not be deemed to affect materially a corporation's business.

This provision was added to prevent corporations from taking any part in a referendum proposal that would authorize the legislature to enact a graduated personal income tax.

Appellants, believing such a tax would have adverse economic consequences for the state, challenged the statute.

The Massachusetts Court rejected the challenge. It concluded that the only right of free speech enjoyed by corporations is incidental to protection of their property. The court sustained the validity of the statute.
advertisements or otherwise - on all matters of general public interest.

We view the Massachusetts Court's decision as seriously restricting public access to a major source of ideas and educational information. No state interests have been identified of sufficient importance to justify this restriction on corporate speech and the consequent curtailment of information to the public.

If a state has the power to confine corporate speech to issues found by a court to affect its business or property, it would be difficult not to recognize an equal power to curtail the speech of other forms of organizations authorized or regulated by law: such as, for example, nonprofit corporations, Massachusetts trusts, associations and labor unions.

We conclude, for the reasons set forth more fully in the opinion filed with the Clerk, that the Massachusetts statute violates the First and Fourteenth Amendments, and reverse the judgment of the Supreme Judicial Court.

The Chief Justice has filed a concurring opinion. Mr. Justice White has filed a dissenting opinion, in which Mr. Justice Brennan and Mr. Justice Marshall join. Mr. Justice Rehnquist has filed a separate dissenting opinion.
The case thus presents an important question as to the speech rights of corporations under the First and Fourteenth Amendments. Although the provisions of the Fourteenth Amendment speak of "persons" - both private and municipal - have been held to be "persons" under its provisions for nearly a century.

This Court has repeatedly sustained the speech rights of corporations engaged in the media business, and - more recently - the right to engage in commercial advertising.

The rationale of these decisions has not been based on the business interests of the speaker. The First Amendment's primary concern and therefore the Court's concern always has been the preserving of free and uninhibited dissemination of information and ideas.

If the restrictive view of corporate speech taken by the Massachusetts Court were accepted, government would have the power to deprive society of the views of corporations on all issues other than those that could be proved to affect their business or property. Corporations thus could be prohibited from expressing views - by
April 19, 1978

Re: No. 76-1172 - First National Bank of Boston v. Bellotti

Dear Lewis:

I hope my addition to my footnote 6 will give some public indication of my feelings expressed in our private correspondence. I realize that a footnote is not the same as a "join".

Sincerely,

Mr. Justice Powell
April 20, 1978

No. 76-1172 First National Bank v. Bellotti

MEMORANDUM TO THE CONFERENCE:

In light of Bill Rehnquist's dissent circulated yesterday, I am adding the following at the end of present footnote 16 (p. 14):

"The dissenting opinion of Mr. Justice Rehnquist, post at ___, is predicated on the view that the First Amendment has only a "limited application .. on the states". Although advanced forcefully by Mr. Justice Jackson in 1952, and repeated by Mr. Justice Harlan in 1957, this view has never been accepted by any majority of this Court."

I propose no further changes in this opinion beyond formalistic ones that may result from the final cite checking now in progress.

L.F.P., Jr.
April 24, 1978

Dear Lewis:

Re: 76-1172 First National Bank of Boston v. Bellotti

Except for the following insert (underscored here but not in the printer's copy) in the first full paragraph on page 7, my "essay" on corporate conglomerates in the First Amendment area is now closed:

"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. Thus, the tentative probings of this brief inquiry are wholly consistent ...."

Regards,

Mr. Justice Powell

cc: The Conference
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**7-6-117 First National v. Bellotti**