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 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
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 relevancy is minimal.

L.F.P., Jr.
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 newsprint to the presses. Such activities would be natural auxiliaries to publishing. Corporate ownership 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 similar 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 Massachusetts' 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

¹It 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 corporation 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. Lribcomb 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. 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

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." I Annals of Cong. 481 (1789) (published as 1 Debates of Congress). The language was changed to its current form, "freedom of speech, 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 preceding 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. 166 (1881); Doe v. McMillan, 412 U. S. 306 (1973) (Speech or Debate Clause extends to both spoken and written expressions within the legislative function).
hhibited 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

4 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 Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions 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.

Nancy
April 17, 1978

74-1172 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 on 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 view 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.,
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. 5/

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 Ditigal Equipment Corp. are incorporated in Massachusetts. The Gilette 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. § 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).
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.

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.).

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.
fn - 3 -

(footnote 6, continued)

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.

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

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of 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 ob­
ject 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 Ditigal Equipment Corp.
are incorporated in Massachusetts. The Gilette Company is incor­
porated in Delaware, but does business in Massachusetts. It is ab­
solutely 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 chartered 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).

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

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.
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

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

5/ 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.
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"/corporations - 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,

[Signature]

Mr. Justice Powell
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.
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