Advertising, freedom of the press, and the message from Washington.

Advertising and freedom of the press are not mutually exclusive.

With that in mind, the following editorial (reprinted from Barron's, April 3, 1978) should be of interest to all thoughtful Americans.

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**EDITORIAL COMMENTARY**

Getting the Message: Washington Has Launched a Drive Against Corporate Advertising

WASHINGTON — A Senate Subcommittee has just launched a hunting party aimed at corporate advertising which gives corporate views on controversial issues. It also includes ad campaigns designed to improve the corporate image. Specifically, the Senate Subcommittee on Administrative Practice and Procedure has subpoenaed mountains of material, much of it confidential and some involving trade secrets, from four major oil companies, Exxon, Gulf, Mobil and Texaco, and their four advertising agencies, Benton & Bowles; Doyle, Dane, Bernbach; McCaffrey & McCull, and Young & Rubicam. The chief executive officers of the eight firms have been ordered to appear, with the material, before the Subcommittee this Friday.

Stated purpose of the investigation is vague. According to Subcommittee Chairman James Abourezk (D., S.D.), it's to see whether the Internal Revenue Service, Department of Energy, Federal Communications Commission and Federal Trade Commission are carrying out their duties with regard to such advertising and exercising proper coordination in doing so. In fact, it looks like a thinly disguised attempt to see whether the Subcommittee can find anything to pin on the oil companies in their effort to get across to the public their side of issues. On this score, of course, their position tends to differ from that of Chairman Abourezk, who last year cosponsored legislation to break up 18 major oil companies. As a result, the station aired a program against the oil companies. As a result, the station aired a program against the oil companies.

However, more than free speech for advertisers is involved. After all, they pay the piper and keep the public tuned in. To carry out that mission, it needs the financial support of advertisers (who obviously don't control it, or they wouldn't spend their ad money to express contrary views). Taken together, the federal attacks on advertising strike some observers as an attempt to undermine the financial foundations of the free press.

Over on the House side, the Subcommittee on Commerce, Consumer and Monetary Affairs is in the midst of an investigation of advertising; it expects to begin hearings later this month. The House effort is concentrating on evaluating the illegalities of deducting issue and image advertising at a cost of doing business.

Peter Barash, staff director of the House Subcommittee, estimates that corporations spend $1 billion or more a year on advertising and mass mailings aimed at influencing public opinion on legislative matters. He cites particularly the ads of Mobil, the utility and shipping industries and mass mailings which seek to influence stockholders and/or employees. Many companies, he said, don't realize that by doing so they constitute so-called grass roots lobbying, such expenses are not deductible. (Mobil told Barash it takes no tax deductions for its political ads.) Barash adds that the Subcommittee has been dealing with an industry that has found inadequate IRS enforcement and significant non-compliance with the law.

IRS has gotten the message. Commissioner Jerome Kurtz wrote the General Accounting Office last December that the agency will audit half the returns filed by large trade associations (and perhaps larger firms later) if they are violating Section 162 of the Internal Revenue Code on issue and image advertising. Kurtz added: "We recognize our responsibility to audit this area because of its public policy implications, even though its revenue producing potential may be less than Amendment rights are involved!" That is an interesting point; I really haven't thought about it. Tax is a levy on business, because it is bound to have implications, even though its revenue generating capability may be less than Amendment rights are involved!"

Whatever the purpose of the Subcommittee probe, it is bound to have a chilling effect on all issue and image advertising. The specter of subpoena of last year co-sponsored legislation to committee's probe, which seeks to influence stockholders and/or employees. Many companies, he said, don't realize that by doing so they constitute so-called "grass roots" lobbying, such expenses are not deductible. (Mobil told Barash it takes no tax deductions for its political ads.) Barash adds that the Subcommittee has been dealing with an industry that has found inadequate IRS enforcement and significant non-compliance with the law.

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The study was especially concerned about the naiveté of the extremely young. But two- and three-year-olds "don't go shopping on their own." They leave it up to their parents. The staff said, however, that denying requests of babies for candy and such injuries the parent-child relationship. This establishment does the precedent that the government has the obligation to step in to prevent parental discomfort in denying any request of a child, the implications are mind-boggling.

At the Commission meeting in late February, just before it went to proceed with the rule-making, it heard arguments from its staff, liberalizing their conversations with warnings about carcinogenic dangers from sweets, staffing worried emotionally that tooth decay is growing pandemic because most recent surveys indicate that 20 million Americans have full sets of false teeth. What they neglected to mention in the oral presentation is that the "most recent survey" was taken in 1962.

FTC Director of Policy and Planning Robert Reich says that his agency will be doing more to force advertisers to pay for commercials representing contrary viewpoints, as well as "corrections." A case involving whether FTC can force the marketers of Listerine to pay for corrective commercials now is on its way to the U.S. Supreme Court.

Last year the FCC ruled that Washington's WTOP-TV violated the Fairness Doctrine by broadcasting a Texaco commercial against breaking up the oil companies. As a result, the station aired without charge 30 TV spots by Energy Action which not only countered the commercials but also attacked oil industry participation in other forms of energy and equated oil executives with "enemies of the state."
WASHINGTON — A Senate Subcommittee has launched a hunting expedition aimed against advertising which gives corporate views on controversial issues. It also includes ad campaigns designed to improve the corporate image. Specifically, the Senate Subcommittee on Administrative Practice and Procedure has subpoenaed mountains of material from Time, Newsweek and Newsweek, three confidential and some involving trade secrets, from four major oil companies, Exxon, Gulf, Mobil and Texaco, and their four advertising agencies, Benton & Bowles, Doyle, Dane, Bernbach, McCaffrey & McCall, and Young & Rubicam. The chief executive officers of the eight firms have been ordered to appear with the material, before the Subcommittee this Friday.

Stated purpose of the investigation is vague. According to Subcommittee Chairman James Abourezk (D, S.D.), it's whether the Internal Revenue Service, Department of Energy, Federal Communications Commission and Federal Trade Commission are carrying out their duties with regard to such advertising and exercising proper coordination in doing so. In fact, it looks like a thinly disguised attempt to see whether the Subcommittee can find anything to pin on the oil companies in their effort to get access to the public hearings of the Supreme Court. On this score, of course, their position tends to differ from that of Chairman Abourezk, who last week said he was interested in breaking up 18 major oil companies. The Subcommittee reportedly also plans to extend its investigation to such food processors as General Foods, General Mills and Pillsbury.

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Corporate Election Spending OKd

Court’s 5-4 Opinion Says Firms May Pay to Express Views; Doesn’t Reach Direct Political Contributions

By Lyle Denniston
Washington Star Staff Writer

Corporations have a constitutional right to spend money to try to influence the outcome of elections, the Supreme Court ruled today.

The 5-4 decision rejected the argument that the right of free speech is a diluted one when exercised by a major business firm.

Nothing in the Constitution or in prior court decisions supports the idea that political expression loses its protection “simply because its source is a corporation,” the majority said.

Three of the dissenting justices complained that the ruling turns corporations loose to buy election results.

The dissenters also argued that it is only a matter of time until the court extends today’s decision to strike down federal and state laws forbidding corporations to make campaign contributions directly to political candidates.

The majority, however, said in a footnote to the opinion that it was not ruling on direct political contributions by corporations.

That issue was not under review in the case settled today, the majority said.

“Our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office,” the majority declared.

The decision struck down a Massachusetts law barring any corporation from spending money to influence the outcome of elections on referendum questions.

A referendum election involves submitting a proposed government policy to the voters for their reaction.

Such elections do not involve voting for a candidate for office.

Today’s ruling was written by Justice Lewis F. Powell Jr.

Before he joined the court, Powell had argued strongly in favor of businesses becoming involved in public policy. Powell had contended that, as a private lawyer, that the corporate point of view was not getting across because of businessmen’s reluctance to take public stands.

His opinion today involved no such promotion of the idea that businesses should speak out.

Rather, it was based on the court majority’s belief that the Constitution’s First Amendment guarantees of free speech are shared by businesses operating as corporations.

Under the Massachusetts law, a referendum election involves submitting a proposed government policy to the voters for their reaction.

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Under the Massachusetts law, See COURT, A-8.
Continued From A-1

nullified today, a corporation could spend money during a referendum election campaign only if the issue at stake would directly affect the business firm.

The majority said that limitation in the law did not save it from being unconstitutional.

"If a legislature may direct business corporations to 'stick to business,' it may also limit other corporations — religious, charitable or civic — to their respective businesses when addressing the public," the majority commented.

"Such power in government to channel the expression of views is unacceptable under the First Amendment," it said.

The court rejected the argument made by Massachusetts that corporations would use their influence and money to dominate political campaigns.

IT IS UP TO the people of the country, Powell declared, to decide who believes in a political campaign.

"If there be any danger that the people cannot evaluate the information and arguments advanced by corporations, it is a danger contem- plated by the framers of the First Amendment," he said.

The majority also rejected the argument that corporate managers would, in taking political stands in public, suppress the possibly different political views of their stockholders.

Powell's majority opinion was supported by Chief Justice Warren E. Burger and Justices Harry A. Blackmun, John Paul Stevens and Potter Stewart.

Burger also filed a separate opinion of his own to express his worry that if other states did what Massachusetts tried to do, it could limit the operations of newspapers and broadcasters operating as corporations.

Burger said he could see no basis for distinguishing between "media corporations" and other corporations in terms of their rights of free speech. The chief justice denounced the argument made by the state of Massachusetts to the effect that media corporations have some special constitutional protection to speak out because they are covered by the freedom of the press clause of the First Amendment.

Dissenting today were Justices William J. Brennan Jr., Thurgood Marshall, William H. Rehnquist and Byron R. White.

White, joined by Brennan and Marshall, argued that today's ruling will cut corporations loose to engage in "ideological causes" in politics.

Those dissenters also argued that the next step in freeing corporations to take political action would be a decision striking down a federal law and the laws of 31 states which forbid or limit corporate spending directly to help political candidates.

"If the corporate identity of the speaker makes no difference, all the court has done is to reserve the formal referendum of (such) statutes for another day.

As they understood the view upheld by the court today, the dissenters said, "The use of corporate funds, even for causes irrelevant to the corporation's business, may be no more limited than that of individual funds."

Rehnquist, in a separate dissenting opinion, said the court should have given more credit to "a broad consensus of governmental bodies expressed over a period of many decades" in favor of limiting political activity by corporations.

THE MASSACHUSETTS law was challenged by two banks, two technological companies and a consumer goods company doing business in Massachusetts.

The banks were First National of Boston and New England Merchants National. The other companies were Digital Equipment Corp., and Wyman-Gordon Co., the technical firms, and the Gillette Co., a maker of consumer goods.

Massachusetts' law provided criminal penalties for corporations violating it. A corporation could be fined as much as $50,000 and a corporate officer or director could be fined as much as $10,000, sent to prison for up to one year, or both.

The test case arose when the voters of Massachusetts were asked in 1976 to react to a proposal to change the state constitution dealing with individual income taxes.

Under the state constitution, individual incomes could be taxed only at a flat rate. The proposal was to change this to permit a graduated tax rate, one that becomes higher with larger income.

That proposal was put to the voters on Nov. 2, 1976, and they turned it down.
Motherhood, apple pie, and legal aid

An impoverished widow, 84 years old, spends half her meager income on rent. She is entitled to a senior citizen’s rent exemption, but has to wait months before her application is processed.

A mother, temporarily under emotional stress, allows her five-year-old son to be placed in a foster home. When she recovers and wants to resume caring for her child, she faces three years of red tape.

An alien whose legal status is open to dispute needs kidney dialysis. His right to government-supported treatment, the only thing that can keep him alive, is in doubt.

Most people, when confronted with such problems, do the obvious: They get a lawyer. But for the poor, the simple act of getting a lawyer could become still another problem—if it weren’t for The Legal Aid Society.

Since 1876, The Legal Aid Society, Inc. of New York has helped those who could not help themselves. It began modestly by providing free legal help to immigrants who could not speak English, were bewildered by the laws of their new country, and could not afford an attorney. Today, it has a staff of 700 full-time lawyers giving free assistance to more than 200,000 people a year, anywhere in New York’s five boroughs.

Most people know The Legal Aid Society for its work in representing indigent clients in criminal cases. This is a large and important facet of its work—a relatively new facet—and it is funded by government grants for public defender service. There is also a Juvenile Rights Division, financed by government, that represents youngsters before the Family Court.

The Civil Division, on the other hand, represents clients not only in the courtroom, but also before federal, state and city administrative agencies. Many of its lawyers are specialists in housing, welfare, immigration, and other areas of law in which people, particularly the disadvantaged, can become ensnared in trying to cope with a complex world that threatens to engulf them.

Giving little people their day in court involves far more than 24 hours. Appealing adverse decisions to higher courts—often the costliest part of litigation—is an integral part of the Society’s service in both criminal and civil cases.

Today, the work of the Civil Division of The Legal Aid Society depends primarily on contributions from business, industry, and the professions, just as it did 100 years ago, when a group of businessmen and lawyers founded it.

Those early supporters saw it as their civic duty to provide the means for making the American system of justice work equally for everyone, regardless of ability to pay. That’s still the Society’s function; after all, along with motherhood and apple pie, nothing is more American than a fair shake before the law.
Court Eases Bar To Corporations' Political Spending

By Morley Mintz

The Supreme Court ruled 5 to 4 yesterday that a state cannot prevent business executives from spending corporate funds to propagate personal and political views unrelated to their companies' business purposes.

The First Amendment to the Constitution was not meant to abridge "speech indispensable to decision-making in a democracy" simply because "the speech comes from a corporation rather than an individual," Justice Lewis F. Powell Jr. wrote in the opinion for the court.

In the main dissenting opinion, Justice Byron R. White said the decision raises "considerable doubt" that the court would uphold laws in 31 states that restrict corporate political activities. Most of the laws ban corporate contributions to candidates for state offices.

White said the ruling also "clearly raises great doubt" that the court would uphold the 1907 law with which Congress made it a crime for a corporation, a national bank or a labor union to contribute money in connection with congressional or presidential elections.

In an initial reaction, Charles N. Steele, associate general counsel of the Federal Election Commission, told a reporter he didn't share White's pessimism about how the court would rule on the federal law. The majority "reaffirmed" a distinction between corporate spending on election issues and corporate election-campaign contributions, he said.

Common Cause senior vice president Fred Wertheimer expressed a similar view, but said that the court's "just plain wrong" decision "sets the stage for massive corporate expenditures in initiative campaigns throughout the country and seriously undermines the integrity of the initiative process."
money to publicize their opposition to the proposal.

The commonwealth’s highest court unanimously ruled against them, holding that the state legislature “clearly identified . . . the purpose of corporate free speech” when it restricted that speech on general political issues to those that materially affect its business, property or assets.

In the opinion overturning the state court, Justice Powell wrote, “If the speakers here were not corporations, one would suggest that the state could silence their proposed speech . . . The interest worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” He added:

“in the realm of protected speech, the legislature is constitutionally disqualified from deciding the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to ‘stick to business’ when addressing the public,”

The state contended that its restriction on corporate speech was necessitated by compelling governmental interests: sustaining the activity of human persons in the electoral process and protecting the rights of shareholders with views different from management. But the state didn’t show “what the relative voice of corporations has been overwhelming to even significant in influencing referenda in Massachusetts,” Powell said.

As for shareholders, Powell said, “a corporation’s right to express its views may ultimately decide, through the processes of corporate democracy, whether or not its corporation should engage in debate on public issues.”

“But a single shareholder joined the state in defending the law or objected ‘to the right asserted by corporations to make the personal expenditures’ she noted.

In addition to Chief Justice Burger, Powell was joined by Justices Potter Stewart, Harry A. Blackmun and John Paul Stevens.

Justice White, in the principal dissenting opinion, rejected the majority contention that the First Amendment forbids state interference with corporate managers who use not only their own money but also a corporation’s “to circulate text and opinion irrelevant to the business placed in their charge.”

He termed it “irrelevant” that the major premise was “a drastic departure” from prior decisions, substituting its judgment for the state’s “in the context of the political arena where the expertise of legislators is at its peak and that of judges at its lowest.”

Corporate entailments for political causes “lack the distinction with individual self-expression which is one of the principal justifications for the constitutional protection of speech,” White said.

Presenting one of the most important decisions on the status of the corporation since the court decreed it to be a “person” in 1886, White said corporations “control vast amounts of economic power which may, if not regulated, dominate not only the economy, but also the very heart of our democracy, the electoral process.”

He said that Massachusetts was entitled to view corporate political expenditures “as seriously threatening the role of the First Amendment as a guarantee of a free marketplace of ideas.”

In 1976, White noted, a state initiative in Montana to require legislative approval of sites for nuclear plants was opposed by corporations that contributed $144,000, compared with $50 collected by supporters. The measure was defeated.
Corporation's Right to Disseminate View on Political Issues Backed by High Court

Corporations, because of their wealth, could dominate the debate on state ballot questions. One might argue with considerable logic that the state may control the volume of expression by the wealthier, more powerful corporate members of the press in order to silence the voices of smaller and less influential members," he declared.

He added that "the idea that the state is not able to silence these voices because it is easy to finance 'nonprofit' lobbying by corporations..." Justice Powell distinguished that, "Presumably, the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had manifested less confidence in the electorate."

Similarly, the majority dismissed arguments that the Massachusetts law was necessary to prevent the use of corporate resources to further views with which some shareholders might disagree.

"Controls Seen Available

"Ultimately shareholders may decide, through the procedure of corporate democracy, whether their corporation should engage in debate on public issues," Justice Powell reasoned. He added that minority shareholders could resort to derivative suits to challenge corporate expenditures made for improper purposes or merely to further the personal interests of management.

Chief Justice Warren Burger, while joining in Justice Powell's opinion, added separately that Massachusetts' position with regard to the corporate speech issue "in some sense, is a question of 'business judgment'..." He added that he would not see any difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. The First Amendment protection afforded the press is only as great as that given everyone else, he concluded.

Richard Leib, president of the Chamber of Commerce of the U.S., declared that the high court's decision "clears the way for a major clamor of the charge that anyone or possibly of the country will inevitably result if business speaks out on public issues..."

He added that the ruling may have an impact on a pending lawsuit brought by the National Chamber Legal Rights Group, on behalf of trade associations challenging certain provisions of the Massachusetts law that place a limit on political contributions from the associations' corporate members and their employees. He also added that the decision casts doubt on the legality of lobbying reform proposals that would "cure one evil with a new one in the special treatment and regulations..."

On the other hand, Fred Wurtzel, a state vice president of Common Cause, the "citizen's lobby," called the decision "a victory for the principle of corruption..." He lamented that the ruling "sets the stage for massive corporate expenditures in our electoral process in the spirit of the initiative process..."

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**How to Fly South America**

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Free speech for corporations

It was nearly a century ago, in 1886, that the U.S. Supreme Court first endowed corporations with personalities and with the 14th Amendment property rights that accompany them. The nation’s courts have wrestled ever since with the implications of that legal fiction, including the intriguing question of whether corporations also enjoy other personal rights — for instance, a First Amendment right of free speech.

Such an issue arose in Massachusetts a couple of years ago, when a bank and other corporations asked the state’s supreme court to free them from a law inhibiting their right to speak out, as corporations, on the issue of a state personal income tax. The tax was before Massachusetts voters in a referendum for the fourth time. But Massachusetts law, upheld by state courts, barred businesses from spending corporate funds "for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." A referendum on individual taxes, the law said, is not exempt from the ban.

This week, the U.S. Supreme Court decided, 5-4, that the Massachusetts law violates the First Amendment. Justice Powell, writing for the Court, set aside the metaphysical issue of corporate personality. "The proper question," he declared, "... is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether (the Massachusetts law and others like it) abridge expression that the First Amendment was meant to protect."

The focus, in other words, was on the function of free speech, not on who exercised it. Framing the issue thus, Justice Powell argued, persuasively, that even corporate "speech" ("is the type of speech indispensable to decision-making in a democracy and (that) this is no less true because the speech comes from a corporation rather than as individual.

"The inherent worth of the speech in terms of its capacity for informing the public," he continued, "does not depend upon the identity of the source, whether corporation, association, union or individual."

This refreshingly robust view, as two fervent dissents suggest, threatens to blow sky-high the regulationist attitude toward the First Amendment. Many states assume, and have so provided in "corrupt practices" laws, that all sorts of restrictions may be — selectively — imposed on the political speech of businesses and unions. These restrictions are often circumvented, to be sure, by fictitious entities (usually known as "political action committees") that channel business, trade association or union funds to the same end, fooling no one and adding hypocrisy to technical lawfulness.

It is by no means clear how far the implications of this ruling will carry. Justice Powell was at pains to lay out limits to the emancipation the Court accords corporations. The decision, he said, does not imply an end to bans on corporate giving to political candidates and campaigns, where the threat of corrupt relationships lurks.

Some of the dissenters think otherwise, however. They fret about an extensive contamination of the democratic dialogue by shadowy corporate and union financial power. And while the Court must be taken at its word, it will require ingenuity to confine the decision's effect.

Certainly the decision ramifies in all sorts of directions. It implies that First Amendment rights, at least in the eyes of five justices, pertain to the message, not the medium. The underlying vision of the "marketplace of Ideas" is broad. It presumes that it is ultimately the quality — the persuasiveness — of an argument that counts — not its source, amplitude or funding.

There may be pitfalls in this vision, as the dissenters insist. Justice White, in a lengthy dissent, invokes the specter of "a corporation (using) its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support." Assuredly, there's an element of risk; but who ever argued that the Bill of Rights isn't inherently risky?

Despite the obvious pitfalls — and we agree with Justice Powell that the framers of the First Amendment must have foreseen them — the decision, in our view, takes the right view of free expression. As Oscar Wilde once put it, "the fact a man's point is nothing against his pen." Similarly, that a certain point of view is urged by a business and propagated with its financial resources does not assure it of either assent or rejection — and certainly should not deprive it of the right to be heard and considered.
Bellotti and Beyond

Chief Justice Burger laid a small trap for anyone who might choose to disagree with the Supreme Court's decision last week giving business corporations more freedom to speak out on public issues.

"The court, in First National Bank of Boston v. Bellotti, struck down a Massachusetts criminal statute restricting businesses and banks from propagating their views, holding this restriction unconstitutional under the First Amendment. The Massachusetts law proscribed specified corporations from contributing or spending money to influence state referenda that have no material effect on the "property, business or assets of the corporation."

In concurring in the 5-to-4 majority opinion, the Chief Justice asked a far-reaching question: how could the court have upheld the Massachusetts law without at the same time "opening the door to similar restraints on media conglomerates with their vastly greater influence?" In other words, how do you draw a line between the free press rights of a corporation that happens to publish a newspaper or magazine and one that merely manufactures paper? Indeed, the same "media conglomerate," as the Chief Justice puts it, may do both.

The court has attempted to deal with this knotty question in the past in several different ways. It has, for example, tried to set apart the "press," operated under whatever organizational form, as a definable institution that the framers of the Constitution clearly intended to protect. And it has drawn distinctions between "commercial speech," i.e., corporate advertising, and "protected speech," a newspaper story.

But the present court obviously finds the logic of these limited definitions of the constitutional free press "right troublesome. In decisions in 1975 and 1976 involving restrictions on advertising in Virginia the court held that the public has a clear interest in obtaining commercial information; it thus greatly broadened First Amendment protections for commercial speech. Now the Bellotti decision moves further towards the position that the doctrine of Freedom of the Press was meant to assure the public of the broadest possible flow of information, not merely to set up a legally defined, protected institution.

This broad definition of the free press right removes many troubling contradictions, particularly the one raised by the Chief Justice. By reaffirming the principle that the free press is a constitutional right of all the people, not just a few with pen and pencil in hand, the court has bolstered it against attack by those who see it as institutional press as over-privileged,

Despite this, the majority ruling has come under attack, as the Chief Justice no doubt foresaw. The critics see the decision as opening up the public policy arena to money-laden oil companies and the like, and regard this as a bad thing. Mostly the critics are the likes of Common Cause and the AFL-CIO, whose own political clout is likely to be reduced by more intense competition in the marketplace of ideas.

We see, though, that the critics have been joined by at least one major newspaper, The Washington Post. This falls deftly into Mr. Burger's trap. Why is it a bad thing for Mobil Oil Corp. to make its public policy views known, but a good thing for The Washington Post Co. to do so? Is it a big difference that Mobil buys ads while the Post owns big printing presses? Would the Post be happier if Mobil, implementing an idea it has sometimes toyed with, goes beyond buying ads to buying whole newspapers?

We would be the first to recognize that the best newspapers, like the Post, develop traditions in which their views represent much more than grass commercial interests, and that where these traditions exist they earn those views a special hearing from the public. But it is the tradition, not the printing press, that does the trick. To the extent they want to be truly effective, politically active corporations will have to develop their own standing. This cannot be a bad thing.

The notion that mere money to buy ads somehow tilts "power" implies that after 200 years of democracy, the American electorate still is not fit to weigh all the various arguments and decide who comes up wanting. Justice Burger's trap was well laid. If everyone— even those artificial beings called corporations—has a say in public debate, public information and democracy can only benefit.
Money Talks?

The Supreme Court's ruling the other day that corporations have a constitutional right to express their views on political issues directly erodes in law and politics. It breaks open questions long thought to have been closed, it raises the possibility that not only corporations but also comparable entities—labor unions, associations, partnerships—will become even more deeply involved than they are now in political politics. And it helps to diminish the Corporation's peculiar status as "an artificial being, invisible, intangible," to use the memorable phrase of Chief Justice John Marshall. Legally a corporation is now a "person" with at least some fundamental rights and a voice the government cannot still.

Among the central questions the decision raises are these: Since government cannot limit the amount of money as individual spends directly on a political campaign (although it can limit contributions to candidates), can it limit the amount a corporation spends? Is there any difference between corporations and labor unions in terms of expressing political views and spending on campaigns? Can lobbying activities of corporations be regulated differently from the activities of individuals? Which of the other rights and protections given to individuals by the Bill of Rights now apply to corporations with equal force? How many other attributes of real persons will the law or the courts eventually brand over to these artificial "persons?"

We don't know anybody who claims to know the answers to those questions with any certainty—which is precisely why we are troubled by the direction in which the Court seems to be heading. A corporation, after all, is quite different from a human being. Most are created for only one purpose—making money—and are endowed with at least one quality human beings lack: potential immortality. Their stake in the politics of a nation is considerable. But they lack the mechanism for self-expression that has usually been thought of as the core of the First Amendment. Corporations are not minds that formulate ideas or even voices that freely express them. Rather, in a political debate corporations are megaphones for the views of those who own or control them. Yet corporations do not represent the majority view of all those who are shareholders in them. Corporations, in short, are money talking.

How, then, did the court come to this view that a corporation has a First Amendment right to participate in political discussion? It did so by looking at freedom of speech from the listener's, not the speaker's, point of view. Justice Lewis F. Powell, who wrote the majority opinion, believes the real meaning of free speech lies at least as much in "affording the public access to discussion, debate and the dissemination of information and ideas" as in fostering individual self-expression. What counts is the content of speech, not its source.

That view, a fairly new one in the court, grows out of decisions that extended First Amendment protections to publishing and broadcasting corporations. If a corporation such as that which publishes this newspaper enjoys the right to freedom of the press, the argument goes, other corporations must enjoy the same right. In the last two years, that analysis has been used to establish at least some First Amendment protection for advertising (commercial speech).

That rationale for what the court has done is not lacking in logic and appeal. But we find more persuasive the dissenting, traditional views of Justices Byron R. White and William H. Rehnquist. Justice White pointed out that the public would be unlikely to lose either ideas or information if corporations could not participate in political debate; the individuals who thought up the ideas or gathered the information would be perfectly free to communicate them as individuals. Justice Rehnquist noted that the court has previously extended the protections of liberty contained in the Bill of Rights only to publishing corporations and to associations created for political purposes. A basis can also be found in prior cases for a quite different decision, one that would have permitted government to restrict the speaking right of corporations and other such entities to those matters that directly affect the business in which they are engaged.

It will take years to comprehend the full dimensions of the change the court is making in the First Amendment. Presumably, one immediate result is that the views of IBM or AT&T or the AFL-CIO concerning, say, the Panama Canal treaties or who should be president can now be spread as widely as the views of a newspaper or individual. If those who control the former organizations want to make the effort, if that will mean more robust and comprehensive political debate, that seems fair enough to us. But if it will mean that the voices of those with the most money will have an unfair advantage over other voices in political debate, we do not see how that would usefully serve the purposes of free speech.
Free Speech for Corporations, Too

by JAMES J. KILPATRICK

Under the Supreme Court's recent decision in a Massachusetts case, corporations may now exercise a right of free speech they never knew they had. The idea takes a little getting used to, but on balance the public interest will be well served.

The case arose in the summer of 1976. Massachusetts had scheduled a referendum for November of that year on a state constitutional amendment. The object of the amendment was to let the state legislature impose an individual income tax. The First National Bank of Boston, in common with other banks and corporations, strongly opposed the proposition and wanted to mount a campaign of paid advertising against it.

Such a campaign would have violated a Massachusetts law making it a crime for any corporation to make expenditures "for the purpose of influencing the vote on referendum proposals." The statute specifically prohibited expenditures on the issue of an income tax, and generally limited corporations to paid advertising on referenda involving issues.

A FEW days ago, the U.S. Supreme Court, by a 5-4 vote, reversed. The effect is to nullify the Massachusetts law, and by extension to nullify similar restrictive statutes in 30 other states.

Speaking for the Court, Justice Powell drew a clear distinction between elections and referenda. Elections involve candidates, referenda involve issues. The question, said Powell, is not whether the corporations have First Amendment rights that are coextensive with individual rights of free speech. The question is, rather, whether the Massachusetts law abridges the liberty of expression the First Amendment intended to protect. "We hold that it does." The speech proposed by the plaintiff corporations, in opposition to a proposed tax, "is at the heart of the First Amendment's protection."

If individual persons wanted to buy advertising space to take sides on a referendum, "no one would suggest that the state could silence their proposed speech." Corporations may be artificial persons, but even so, they have "at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." Such speech "is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."

The majority's opinion drew a strong dissent from Mr. Justice White, who objected to the whole idea of corporations using their wealth "to acquire an unfair advantage in the political process." He saw no reason under the Constitution why a state could not prohibit corporate expenditures for ideological purposes.

The decision will serve one useful purpose in correcting the imbalance that now exists in many states. Labor unions have been free, of course, to use their funds in supporting or opposing referendum questions. Corporations will now have the same opportunity to shape public opinion for or against.

Justice White, in an extravagant phrase, feared that corporations might use their freedom "to consume" the states. So large an apprehension has small support. Corporations have no particular monolithic view, even on issues affecting their own business. Insurance companies are divided on no-fault insurance; auto companies have different views on the air bag; United Airlines supports deregulation while other airlines oppose it; supermarket corporations split on the Agent-2-Consumer Advocacy. And so on.

Banks and other corporations depend for their survival on a healthy social-economic climate. Even when public issues do not directly affect their profits, these issues may indirectly affect them in all kinds of ways. In the absence of any good reason to gag them, they ought to have a right to speak out. 

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Fortunately, the Chief Justice of the United States, Warren Burger, is not always judicious. He let fly a vigorous essay in the guise of a concurring opinion last week which reminded us of important quarrels on the high bench concerning freedom of the press and served notice that the First Amendment rights of speech and press. The New York Times may one day be judged legally no greater than those of General Motors. That raises some fascinating and troubling free-speech questions and we are grateful to the Chief Justice for bringing them to the surface. Unlike him, we think they are still safely academic and we hope he will not press them toward resolution too quickly.

The problems before the Court appeared relatively modest. Did Massachusetts have the right to forbid corporations to lobby voters during a referendum about an income tax? Like many states with similar laws, Massachusetts had been careful to leave corporations free to speak about everything in non-election sessions. It left them free also to participate in any referendum that materially affected their business. But it specified—imprudently, we think—that an income tax did not materially affect that business. So when the tax vote came, a bank and some corporations sued to speak. And now the Court, 5 to 4, has struck down the law.

We do not particularly object to this outcome. An income tax is arguably the business of a business ("We must move our company to Connecticut because young executives refuse to live in high-tax New York," our corporation friends keep telling us). And a referendum is arguably different from an election of officeholders in that it is a one-time poll involving no long-term delegation of power to anyone. So a state's understandable fear that corporations might use their legally nurtured economic power to overwhelm voter opinion need not justify the same prohibitions in every season or in every type of election. But we regret to see the Court's majority ventured down a tricky theoretical path, with the Chief Justice enthusiastically taking it.

To spare itself the burden of having to decide too early on whether any change in a corporation is a change in a corporation, the Court tried to the theory that corporations already share rights—though not yet all—of the ordinary citizen's First Amendment rights of free speech and press. The amendment, it held, protects not only a person's right to speak but also a community's right to hear speech on no matter what the source. Therefore, a state that would curb corporate speech bears a heavy burden of proving it necessary.

That, on the face of it, is an appealing theory; the more debatable is its curious case. It is one thing, however, to enhance corporate speech as a matter of policy, as conditions warrant. It is quite another to endow corporations—which are artificial "persons" created by the state—with more and more of the civil rights that the Constitution reserved for individuals. The speech of every person within a corporation, after all, is already fully protected. To urge augmenting the immutable rights of a legally immortal corporate body is to ignore the wise warning of the minority in the case that "the state need not permit its own creation to consume it."

As if these matters were not difficult enough, the Chief Justice then added his personal warning that the freedom of the press is not only similar to any other corporation's but may in fact come to depend on it. Two lines of his thought converge in this startling prognosis. One is that the free-press clause of the First Amendment really grants no special standing to the institutions of the press—only to the law of free speech and publication. If that is so, the Chief Justice contends, then limits on any corporation risk limiting the "media corporations" that he finds increasingly hard to distinguish from any other. But even if the Constitution were read to confer a special status on the media, he adds, then the state would have to decide who is press and who is not—a modern version of the dreaded licensing practice that gave rise to the free-press idea in the first place.

For the Chief Justice, therefore, everything rides on distinctions that he has trouble making between a "media corporation"—which may own paper mills (like The Times) or distribution agencies or even oil wells—and "any other business."

Is it really so difficult to pick out the press in a gallery of corporations? Did the Founders who provided for freedom of the press not recognize that the owners of some presses would also own lands or slaves? Of course they did; yet a press was still a press and they declared it practice for the protecting of other liberties. The Chief Justice may be right to foresee a potential connection between the rights of Exxon and the rights of The Times in the public mind if not in the Constitution. That might be particularly so if The Times should one day acquire oil tanks while Exxon acquires a newspaper or decides to publish handbills at election time. There is a problem here worth thinking about. But for the time, at least, he was not right to drive the issue. It remains possible to distinguish a company that owns newspapers from a company that sells oil and even from its own parent companies or subsidiaries that mash pulp or bind encyclopedias.

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At the moment, and the press clearly aside, the state has an obvious interest in determining how far it wants to let corporate money intrude into the political process. Corporate opinion is important—and it is hardly shy or hidden now. But the weight of money in our politics is also important. Let us distinguish the problems without rushing to embrace indiscriminate solutions.
Bellofetti file

Nancy — Clipthis in our file after you have read it.
Memorandum

I am interested in reviewing the
memorandum if you have
not already seen it.

P.S.
Corporate Free-Speech Ruling Widens Political Exposure
by Louis M. Kohlmeier

The Supreme Court's recent decision in *First National Bank of Boston v. Bellotti*, holding that corporations have a constitutional right of free speech to propagate their political and social views, has been hailed in the business community as a corporate Magna Carta. As such, inevitably, it raises many more questions of substance than it answers.

Does the First Amendment right of corporations to speak out on social and political issues imply that they bear constitutional responsibilities in those areas? By entering into the social and political lists, will corporations and corporate governance become still more controversial and vulnerable? And ultimately in the wake of the ruling, will the corporation remain essentially a capitalist instrument of private profit or become more a tool for social purpose?

"It has long been recognized," Justice Byron R. White asserted in his dissenting opinion in *First National Bank of Boston v. Bellotti*, "that ideological or political... pursuits are not the proper business of corporations. The common law was generally interpreted as prohibiting corporate political participation."

Congress supplemented the common law as long ago as 1907 with the Corrupt Practices Act barring corporate contributions in connection with Federal elections; some 30 states have similar laws prohibiting or limiting the financing of state election campaigns from corporate treasuries. About half of those states also prohibit or limit corporate contributions in support of or opposition to issues that are placed on the ballot in referendum elections.

The tradition that corporations have no business in political or ideological affairs finds expression also in SEC proxy rules under which corporations may refuse to submit to stockholder votes proposals concerning any political, social, racial, religious or other cause that is not significantly related to the business of the corporation or is not within its control.

And the Internal Revenue Code attempts to discourage corporate political activity by barring the deduction from corporate income taxes of expenditures made to influence legislation not directly related to its business, or for grassroots lobbying of the general public on legislative issues.

Reflection of Populist Fears

In law the corporation is a "person," created by the state for economic pursuits defined in its charter and endowed with limited liability and certain other privileges to further those pursuits, the laws and rules that prohibit, limit or discourage corporate political participation reflect fears that ideological or political pursuits may be inimical to economic pursuits. The
laws and rules undoubtedly also reflect old Populist fears that unleashed corporate wealth would overwhelm and corrupt the political process. Still older and deeper fears created a constitutional tradition that attempts to separate public from private wealth and power and to distinguish between Government and business. The Supreme Court in another landmark decision some years ago observed that the corporation "is an economic institution of such magnitude and importance that there is no present substitute for it except the State itself."

Separation Never Total

Of course the separation between American Government and American Business never has been total. Government for many years has imposed on private business certain responsibilities more social than economic in nature, such as child labor laws and the Social Security payroll taxes. Business for at least as long has sought from Government economic privileges, such as steel tariffs and airline subsidies.

Moreover, the laws and rules circumscribing corporate political participation never stopped any executive from pushing his political or social views as an individual, nor the corporation from lobbying on economic issues affecting its business. Traditionally, Government has imposed only limited responsibilities on business and business has sought only limited privileges from Government.

Lately, though, the passive roles of both sides have been changing. Government in recent years has imposed on corporations newer and larger responsibilities more social than economic in nature, including responsibilities for a cleaner environment, for racial and sexual equality in employment, and for worker safety and health — even as Social Security taxes and minimum wages continued to rise. Corporations have successfully sought more tariffs, subsidies and other privileges from Government.

The distinction has been blurred between economic issues that materially affect the corporation and social issues that traditionally were none of its business. Corporations have become more and more involved in the legislative and political processes.

Furthermore, organized labor always has felt free to participate in politics and to embrace social causes; it supported many of the social responsibilities that have been imposed on business. The Corrupt Practices Act today bars union as well as corporate treasuries from financing political election campaigns, but unions for years have been free to sponsor political action committees that collect contributions from union members to distribute to political candidates.

Scales Evened

Congress in 1971 evened the scales of justice. The 1971 Federal Election Campaign Act allowed corporations also to finance the establishment of political action committees. Now there are some 600 of them, compared with fewer than 100 in 1974.

Given the acceleration in the blurring of the traditional separation of Government and business, therefore it is timely for the Supreme Court to address the question of whether the corporation has a constitutionally protected right to speak out through its treasury on social and other causes previously held to be beyond its scope. The question could have arisen out of any number of contemporary situations, but it happened to reach the
Court has come full circle in the past quarter-century. Its soundly liberal majority then has been replaced with a soundly conservative majority now.

**Precedent for Invalidation**

At a minimum, the Powell opinion seems certain to become precedent for invalidation of the laws of all of the 15 states that, like Massachusetts, limit or prohibit corporate treasury spending to influence referendum elections. Inasmuch as growing numbers of social issues are being put to referendum votes, corporations' new freedom to speak out is significant enough.

Beyond that, however, lawsuits already are being prepared within the business community to overturn on constitutional grounds Federal and state laws and rules that prohibit tax deduction of corporate lobbying expenditures. Justice White's dissent went so far as to assert: "All the court has done is to reserve the formal intervention of the Corrupt Practices Act and similar state statutes for another day."

If business' initial enthusiasm thus is not misplaced, considerable caution also is indicated concerning the longer term meanings of _FN Boston_. After all, _Brown v. Board of Education_ marked the beginning, not an end, of civil rights turmoil. Its promise to blacks has not been realized fully a quarter-century later; it has contributed to profound urban problems that were not anticipated in 1954.

The ultimate social and economic consequences on business, labor and the nation, of the corporation's freedom to exercise First Amendment rights, similarly cannot be anticipated fully. For starters, however, it is quite unlikely that that right will be exercised without the imposition of new responsibilities on corporations.

An obvious issue arises from the nature of the corporation. For, inasmuch as the corporation is an unnatural "person," the ideas and ideology it propagates necessarily will be those of its management. But the stockholders of today's publicly-held corporations may have different ideas and ideologies. Justice Powell himself suggested that they might file derivative lawsuits challenging corporate spending "made for improper corporate purposes or merely to further the personal interests of management." The Powell opinion suggests even that stockholders resort to "corporate democracy" and throw out a management that propagates a disagreeable ideology.

**Change SEC Proxy Rules**

Nor is the issue of the rights of management versus the rights of stockholders to be considered in the abstract. The corporation's new freedom to speak out on non-economic issues would seem to require amendment of present SEC proxy rules that let management refuse to submit to stockholders proposals concerning political, social, racial, religious and other such causes. Commissioner Philip A. Loomis said in an interview that "We might feel we have to change our rules to get minority stockholders in on the act."

And all of that may be but the edge of the thicket. Unions for many years have espoused political and social as well as economic causes, and the Supreme Court has ruled that dissenting union members have certain constitutional rights. The Powell and White opinions both suggest that corporations and unions now are to be treated equally in the political and social spheres. So it seems not unlikely that the Supreme Court on some future day might decide that stockholders also
“Some 20 million Americans suffer from ‘The Silent Killer’ [high blood pressure] and are essentially unaware of it.... In a like manner, almost 220 million Americans suffer from a lack of awareness of the capital and job formation ‘disease.’”

This grim analogy is drawn by Charles D. Kuehner, editor of a new book of essays entitled Capital and Job Formation: our nation’s 3rd-century challenge (Dow Jones-Irwin, 1978, $15). The essays are by people who deal with the problem every day—Treasury Secretary W. Michael Blumenthal, for example, and such chief executives as John D. deButts of American Telephone and Telegraph Company, Reginald H. Jones of General Electric Company, Irving S. Shapiro of E. I. du Pont de Ne-mours & Co., Inc., and Rawleigh Warner, Jr., of Mobil.

But the tone is set by Dr. Kuehner, an executive with AT&T and an economist. Dr. Kuehner is a worried man. His concern is that capital formation—the process of channeling investment into new plant and equipment—is well down on the list of national priorities, and is hindered by government policies. The process, he points out, “is crucial in creating new and better jobs, goods, and services. Capital formation is also essential in combating inflation, cleaning up the environment, increasing productivity, and raising our citizens’ standard of living.”

Carrying his medical example to its logical conclusion, Dr. Kuehner notes that just as high blood pressure weakens the heart and other organs, the “capital and job formation disease” spreads throughout the economy:

- It widens unemployment, or underemployment, relative to the skills or training of each individual.
- It leads to demands for greater government intervention.
- If government spends more, and there is no corresponding expansion in private industry, inflation further weakens the economy.
- American industry loses ground to foreign competitors in domestic and world markets.
- As industry weakens, it spends less for research and development, and additional capital formation problems appear.
- Industry is less able to cope with problems of pollution and energy.
- Consumers, subjected to more inflation, demand still more government intervention, controls and spending.

Few people are even aware of the problem, let alone its magnitude, Dr. Kuehner says. He does point out that where governments give the issue top priority—in Japan and West Germany, for example—the result has been hailed as an economic miracle. In the U.S., on the other hand, “when an investor accumulates the $30,000 needed to finance a job in private industry, government policy then says ‘We will penalize you by, (1) taxing your dividends twice and, (2) if you make any capital gains we’ll tax that also—even though much of the gain merely reflects the impact of inflation and is not a true capital gain at all.’”

The book cites the specifics of many industries. But just as important as the insights it offers is the fact that the book was written at all. When people talk about a silent killer, economic or physical, then the silence is penetrated, the mystery falls away, and remedies become possible.

Remedies to the capital formation dilemma are long overdue.