The Burger Court Opinion Writing Database

First National Bank of Boston v. Bellotti

435 U.S. 765 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 6, 1977

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

Dear Bill:

Even before I received your memo of December 1 in the above case, I had begun to have misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act's limitations. It seems to me that there are differences between the First Amendment rights of an individual as compared with a corporate-collective body. Corporations rarely, if ever, consult stockholders on expenditures and indeed a great many expenditures are made without consulting with the directors, even though management is accountable to both the directors and stockholders.

An example of the troublesome questions that could arise is a situation where a state, for example, proposed to abolish the corporate form of doing business within its borders -- thus eliminating corporations from the scene. (That might create a burden on interstate commerce?) Should domestic corporations not be permitted to spend corporate funds to defend their very existence?

Many of us at the Conference expressed concern about taking any step which would undermine state and federal Corrupt Practices Acts. I had assigned the case to you on the old English Judges' rule-of-thumb that when a case is to be narrowly written, it should be written by the judge "least persuaded." Harry came close to being in this category of not fully persuaded.

Would you feel in a position to undertake a memorandum to the Conference enlarging on your view?

I realize we are getting into a lot of "memo assignments" but the uniqueness of some of the questions confronting us this Term justify this course, which has demonstrated its effectiveness in the past.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1978

Dear Lewis:

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

I will join you and am considering adding a word to underscore the narrowness of the holding. Like the old lady who said she couldn't tell what she thought about a subject until she'd heard what she had to say, I will re-evaluate the situation after this writing is in print. I do not want corrupt practices statutes to be placed under a shadow. You have covered this, but it needs to stand out. Knowing my aversion to needless concurring opinions, do not be surprised if I do not publish mine.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 10, 1978

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

MEMORANDUM TO THE CONFERENCE

The "Ides of April" being upon us, can June be far behind!

Therefore my concurring comments in the above are circulated in Wangdraft form.

Regards,

WED

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 10 1978

Recirculated: _____

DRAFT - 4/10/78

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

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, 248-54 (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

Wm Brennan 00177 ## C.J. 4/10/78

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[April —, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

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CHANGES AS MARKED:

pp 2-5, 7-8

NEW FOOTNOTES:

fns 2, 6

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

2nd DRAFT

Circulated: _____

Recirculated: APR 21 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[April —, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

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

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Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many 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 newsprint and to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1978

Dear Lewis:

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

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

"Yet Massachusetts' position poses serious questions. The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such. Thus, the tentative probings of this brief inquiry are wholly consistent . . . ."

Regards,

WEB

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 1, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 76-1172 First National Bank v. Bellotti

I was assigned the opinion for the Court in this case, and I very much regret that I doubt I can write an opinion that will command majority support.

The case, as you will remember, involves a constitutional challenge to Massachusetts General Laws c. 55, Sec. 8, that prohibits business corporations from contributing any money to advertise concerning a referendum question "other than one materially affecting any of the property, business or assets of the corporation", and that contains a proviso that "no question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The Massachusetts Supreme Judicial Court upheld the statute against facial and as applied attacks of several corporations that wished to spend money opposing a referendum to amend the Massachusetts constitution to permit graduated individual income taxation. The Supreme Court held first

that corporations only enjoy free speech rights to protect their interests and stated that the general standard of Sec. 8 and the constitutional test are identical. Appendix to Jurisdictional Statement at 12-13. As to the constitutionality of Sec. 8's proviso, the opinion is ambiguous, compare Appendix to Jurisdictional Statement at 14 with id., at 23-24, but can be read as expressing the view that the "conclusive presumption" of the proviso may not be unconstitutional.

My view at conference was that we should attempt to address only the statutory proviso and reverse on the ground of disagreement with the Supreme Judicial Court's view, implicit in its opinion, that the proviso may be constitutional. In such case, I would have reserved the question whether the First and Fourteenth Amendments invalidate the statute's provision that the only corporations that may advertise are those able to show that the referendum question is one "materially affecting any of the property, business or assets of the corporation." My conference notes indicate that Byron alone thought this limitation clearly constitutional, that I was inclined to agree with him but preferred to avoid deciding the question, and that on one ground or another our seven other colleagues were inclined to think that the general ban was unconstitutional. If that is an accurate summary of views, I am not the one who should write the Court opinion. For I am satisfied that the opinion cannot be

limited to the constitutionality of the "conclusive presumption" and that the constitutionality of the general ban must also be decided. This is because appellants' submission, both here and below, is that they have on this record demonstrated that they have a constitutional right to spend money to oppose referenda questions concerning the adoption of graduated income taxation solely for individuals. See Appellants' Brief at 56-60. They have attacked both Sec. 8's proviso and its general ban. See Appendix at 7-9. Since it's clear that the general prohibition would remain in effect if we struck down only the proviso, a failure to decide the constitutionality of the general prohibition would be to deny appellants relief on a constitutional claim - which is ripe for review and not moot - without deciding any issue against them.

If I were to write an opinion that addresses the validity of the general prohibition of Sec. 8, I presently feel that I would write to sustain its constitutionality. I do not think that a holding invalidating the ban is compelled by Buckley v. Valeo's invalidation (which I joined) of the provisions of the 1974 Federal Election Campaign Act imposing ceilings (1) on overall campaign expenditures in a campaign for federal office, (2) on a candidate's expenditures from his own funds, and (3) on amounts that can be expended by a supporter directly on behalf of a candidate rather than

by contributions. Corporate spending as a corrupting influence in the political process has long been a national concern and has produced numerous corrupt practices acts, federal and state, ever since Theodore Roosevelt some 75 years ago urged their passage as necessary to curb the abuse to enhance representative democratic government. It seems to me that a decision invalidating the rather narrow Massachusetts general limitation must inevitably call into question the constitutionality of all corrupt practices acts. Nor do I presently believe that our many First Amendment cases involving corporate members of the press compel a contrary conclusion. The general prohibition of Sec. 8, in my view, if otherwise valid, would also be valid as applied to advertising expenditures of the Boston Globe, Inc. which were not shown by it to promote its self-interest. Its role in that capacity is quite different from its role as a member of the press serving the public interest.

Naturally, I am loathe to undertake to write an opinion for the Court if, as seems to be the case, this view could not attract a majority. I would appreciate knowing whether your conference notes also reflect disagreement by a majority with my views, for, if they do, the opinion doubtless should be reassigned.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 8, 1978

Re: No. 76-1172 - First Nat'l Bank v. Bellotti

Dear Byron:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

WJB, Jr.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 7, 1977

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

Dear Lewis,

My tentative views in this case closely parallel those expressed in your memorandum of December 6.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 7, 1978

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

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

Bellotti
Lee
76-1172

May 5, 1978

Memorandum to: The Chief Justice
Mr. Justice Powell

You will be interested in the enclosed copy of the lead editorial in this morning's Wall Street Journal, if you have not already seen it.

P.S.
P. S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 17, 1978

Re: 76-1172, First Nat'l Bank v. Bellotti

Dear Lewis,

I would be inclined to delete the Martin Linen citation, for the reasons expressed by the Solicitor General. I thought I had remembered a footnote in Martin Linen explicitly leaving open the applicability of the Double Jeopardy Clause to corporations, but my recollection was apparently faulty. In any event, I do remember that the Government in Martin Linen made only an arguendo concession, as detailed in the Solicitor General's letter.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1978

No. 76-1172, First Nat'l Bank v. Bellotti

Dear Lewis,

I am still inclined to the view that it would be a good idea to delete the citation to Martin Linen from this opinion. My reasons, in brief, are as follows:

(1) I do not think that it has ever been explicitly decided here that a corporation is protected by the constitutional guarantee against double jeopardy. Although certiorari was denied in the Security National case from the Second Circuit, three members of the Court did vote to grant the petition, indicating that at least that many thought that, despite Fong Foo, the issue remained sufficiently open to warrant decision by this Court. Moreover, I am convinced that the Martin Linen decision did not decide the matter, having in mind the arguendo reservations referred to in the memorandum you sent us.

(2) If the basic question has not been explicitly decided here, then surely there is nothing malevolent in the effort of the Solicitor General (even if it is Mr. Easterbrook who is doing it) to preserve the issue for litigation in the First Circuit and to try to create an inter-circuit conflict.

(3) I think the Bellotti opinion, which is all that we are concerned with now, would not in any way be weakened by the deletion of the citation.

Having said all this, I am quite content to leave the ultimate decision to the considered judgment of the author of the Bellotti opinion.

Sincerely yours,

L.F.P.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1978

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

Dear Lewis,

The letter drafted for Mr. Putzel to send seems fine to me.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

No. 76-1172 — First National Bank of Boston, et al. v. Francis X. Bellotti, Etc., et al.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: _____

MR. JUSTICE WHITE, dissenting.

Today, by holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 states restricting corporate political activity, [1/] as well as upon the Federal Corrupt Practices Act, 2 U.S.C. § 441(b). If the Court was able to reach its conclusion by deciding that the interests furthered by the Massachusetts statute were not sufficiently important to justify the burden it places upon First Amendment rights, such a decision would have been understandable in light of the Court's prior decisions according First Amendment freedoms a preferred status. This is not, however, a case which can be decided by such a mode of analysis; for the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 3/10

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today, by holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity,[1] as well as upon the Federal Corrupt Practices Act, 2 U. S. C. § 441 (b). If the Court was able to reach its conclusion by deciding that the interests furthered by the Massachusetts statute were not sufficiently important to justify the burden it places upon First Amendment rights, such a decision would have been understandable in light of the Court's prior decisions according First Amendment freedoms a preferred status. This is not, however, a case which can be decided by such a mode of analysis; for the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The question posed by this case, as approached by the Court,

[1] Library of Congress, Analysis of Federal and State Campaign Finance Laws (1977). Some 18 of these States prohibit or limit corporate contributions in respect to ballot questions. Appellants' Reply Brief 9–11, n. 6.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 3/13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

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

Today, by holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity,[1] as well as upon the Federal Corrupt Practices Act, 2 U. S. C. § 441 (b). If the Court was able to reach its conclusion by deciding that the interests furthered by the Massachusetts statute were not sufficiently important to justify the burden it places upon First Amendment rights, such a decision would have been understandable in light of the Court's prior decisions according First Amendment freedoms a preferred status. This is not, however, a case which can be decided by such a mode of analysis; for the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The question posed by this case, as approached by the Court,

[1] Library of Congress, Analysis of Federal and State Campaign Finance Laws (1977). Some 18 of these States prohibit or limit corporate contributions in respect to ballot questions. Appellants' Reply Brief 9–11, n. 6.

Changes throughout

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 3/24

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

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

The Massachusetts statute challenged here forbids the use of corporate funds to publish views about referenda issues having no material effect on the business, property or assets of the corporation. The legislative judgment that the personal income tax issue, which is the subject of the referendum out of which this case arose, has no such effect was sustained by the Supreme Judicial Court of Massachusetts and is not overturned by this Court today. Hence, the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business. The Court commendably enough squarely faces the issue but unfortunately errs in deciding it. The Court invalidates the Massachusetts statute and holds that the First Amendment guarantees corporate management the right to use not only their personal funds, but those of the corporation, to circulate fact and opinion irrelevant to the business placed in their charge and necessarily representing their own personal or collective views about political and social questions. I do not suggest for a moment that the First Amendment requires a State to forbid such use of corporate funds, but I do strongly disagree that the First Amendment forbids state interference with managerial decisions of this kind.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

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,

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 4/3

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 20

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

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

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 4/10

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 15

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

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

The Massachusetts statute challenged here forbids the use of corporate funds to publish views about referenda issues having no material effect on the business, property or assets of the corporation. The legislative judgment that the personal income tax issue, which is the subject of the referendum out of which this case arose, has no such effect was sustained by the Supreme Judicial Court of Massachusetts and is not disapproved by this Court today. Hence, as this case comes to us, the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business. The Court commendably enough squarely faces the issue but unfortunately errs in deciding it. The Court invalidates the Massachusetts statute and holds that the First Amendment guarantees corporate managers the right to use not only their personal funds, but also those of the corporation, to circulate fact and opinion irrelevant to the business placed in their charge and necessarily representing their own personal or collective views about political and social questions. I do not suggest for a moment that the First Amendment requires a State to forbid such use of corporate funds, but I do strongly disagree that the First Amendment forbids state interference with managerial decisions of this kind.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 10, 1978

Re: No. 76-1172, First National Bank of Boston, et al v. Francis X. Bellotti, Etc., et al.

Dear Byron:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 24, 1978

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

Dear Lewis:

We are, of course, dealing with an opinion already released. I think we should be extremely careful in what we do.

It is one thing to correct a clear cut error or to refuse to change the opinion. It is another step to add additional citations.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1978

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

Dear Lewis:

I am 90% certain that I shall be with you in this very difficult case, but I shall withhold my vote until the new draft promised by your note of March 10 comes around.

As is the situation with any reference to "compelling state interest," I am always bothered and hesitant about our use of the phrase "least restrictive alternative" or something similar thereto. It is so easy, after legi ation has been enacted, and a challenge has come all the way here, to think of something less restrictive. A reference of this kind appears twice in your draft of March 6, namely, in the first line on page 21 and at the end of the first paragraph on page 24. I would feel much better if on page 21 the phrase "or in the least restrictive manner" could be omitted, and if the last sentence of the first paragraph on page 24 could also go out. I doubt if either adds anything to the opinion. I must concede, however, that Byron works on this a bit.

Sincerely,

Harry

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1978

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

Dear Lewis:

Please join me in your recirculation of March 13. The two minor changes we discussed by telephone to be made on pages 21 and 25 satisfy my concerns.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 1978

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

Dear Lewis:

My recollection is the same as Potter's. Therefore, I, too, would be inclined to delete the citation to Martin Linen.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 6, 1977

76-1172, First National Bank v. Bellotti

MEMORANDUM TO THE CONFERENCE:

This is a response to Bill Brennan's memorandum to the Conference of December 1. Bill now thinks that his views are not in accord with the Conference vote. On the basis of my notes, I agree.

The opinion of the Massachusetts SJC addressed ambiguously the two questions identified in Bill's memorandum: (i) The validity of the conclusive presumption contained in the proviso; and (ii) the broader question of the validity of the §8 prohibition against corporate expenditures to influence or affect the vote on any referendum question "other than one materially affecting" the corporation's business. I believe a majority of the Conference thought the case could be disposed of by considering, and holding invalid, only the conclusive presumption.

My vote at Conference was that both provisions of the Massachusetts statute infringe protected First Amendment rights. I stated further that if the case could be disposed of on the conclusive presumption issue, I probably would join the opinion. I was not certain that this resolution was feasible. I am now inclined to agree with Bill that it will be difficult, if not impossible, to avoid reaching both questions. If the proviso were invalidated, §8 would continue to proscribe the exercise of First Amendment rights by corporations with respect to referenda issues not "materially affecting" their business. Appellants challenge the validity of this proscription on two grounds: first, that the State cannot restrict corporate speech in this manner; second, that even if the State could limit the speech of a corporation to issues "materially affecting" its property, business, or

assets, the good faith belief of the corporate officers as to materiality would have to be sufficient, lest the statute exert an undue chilling effect on protected speech. The Massachusetts SJC has rejected both points; and it has held that appellants failed to meet the "materially affecting" test. As Bill notes, unless we address the validity of the "materially affecting" limitation, appellants will remain subject to the criminal penalties of §8 even though their constitutional challenge has not been resolved against them.

I think it is too late to hold that persons who elect to do business in the corporate form [as distinguished, e.g., from a non-profit corporation such as Common Cause, a partnership, an association, or a non-corporate business trust in Massachusetts] may not express opinions through the corporation on issues of general public interest. It seems to me that circumscribing speech on the basis of its source, in the absence of a compelling interest that could not be attained otherwise, would be a most serious infringement of First Amendment rights.

I share Bill Brennan's concern that we not undercut the Corrupt Practices Acts. But I do not think a holding in appellant's favor on this issue would "call into question" the constitutionality of those acts. In Buckley v. Valeo, we drew a distinction between contributions and expenditures. This case is a major step further removed even from expenditures. It involves only the expression of views on public issues; not views in support of or in opposition to a political candidate. (Even if the corporation made "contributions" in order to pool its resources with others of like mind, the dangers inherent in political contributions would be absent.) No problem of "corruption" is involved at all, using that term in the context of the Corrupt Practices Acts.

There must be several hundred thousand corporations in the United States, most of which are small family or closely-held entities. To be sure, those that are most likely to take public positions on a referendum issue will be the larger corporations. But I doubt that we could distinguish, on a principled basis, between the small family corporation (that may wish, for example, to express a view by joining in some form of advertising, with respect to a local issue) and a large corporation that may wish to promote through advertising a state constitutional amendment with respect - say - to public education or environmental legislation.

As I mentioned at Conference, I am confident that corporations contributed heavily to the Governor's Committee that supported the recent Virginia referendum on a hundred million dollar bond issue designed to provide capital funds for state educational and mental institutions.

In sum, I would invalidate the broad §8 prohibition as well as the proviso.

L.F.P.

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 6 MAR 1978

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court therefore rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed jurisdiction to consideration of the merits. 430 U. S. 964 (1977). We now reverse.

I

The statute at issue, Massachusetts General Laws ch. 55, § 8, prohibits appellants, two national banking associations and three business corporations,[1] from making contributions or expenditures "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

[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

March 10, 1978

76-1172 First National v. Bellotti

Dear Uncommitted Brothers,

I have made some changes and added two or three footnotes in response to Byron's dissent.

But I will not have these for circulation until Monday.

Sincerely,

The Chief Justice
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

lfp/ss

76-1172

Bellotti

Supreme Court of the ~~United States~~

Memorandum 3-13-78

....., 19.....

Harry - Many thanks for your note. This draft was at the press before I received it.

If the changes I suggest on pp 21 and 25 meet your concern, I'll make them in the next draft.

L.F.P.

11, 15-19, 21-23, 26-27
Footnotes renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 13 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court therefore rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed jurisdiction to consideration of the merits. 430 U. S. 964 (1977). We now reverse.

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[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

✓

Stylistic Changes Throughout.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

See 1, 12, 15, 18-19, 21-25

From: Mr. Justice Powell

Circulated: _____

4th DRAFT

Recirculated: 15 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court therefore rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits. 430 U. S. 964 (1977). We now reverse.

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[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

pp. 6, 7, 15-18, 22, 24, 27
Footnotes renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

5th DRAFT

Recirculated: 30 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits. 430 U. S. 964 (1977). We now reverse.

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The statute at issue, Massachusetts General Laws ch. 55, § 8, prohibits appellants, two national banking associations and three business corporations,[1] from making contributions or expenditures "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

[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

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

lfp/ss

6, 11, 78
Footnotes renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 7 APR 1978

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[March —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits. 430 U. S. 964 (1977). We now reverse.

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The statute at issue, Massachusetts General Laws ch. 55, § 8, prohibits appellants, two national banking associations and three business corporations,[1] from making contributions or expenditures "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

[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

April 17, 1978

76-1172 Bellotti

Dear Bill:

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

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

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 20, 1978

No. 76-1172 First National Bank v. Bellotti

MEMORANDUM TO THE CONFERENCE:

In light of Bill Reqhnquist'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.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1978

No. 76-1172 First National Bank v. Bellotti

MEMORANDUM TO THE CONFERENCE:

The enclosed letter from the Solicitor General suggests that we consider deleting the citation of Martin Linen, n. 14, p. 12, because the question whether corporations are entitled to double jeopardy protection was not argued in that case.

My own inclination is to leave the citation, as it is completely accurate. There was no individual defendant in the case. Thus, the Court's decision afforded double jeopardy protection to a corporation.

To be sure, the precedential force of Martin Linen on this point may be weakened by the fact that the question was not put in issue. See Webster v. Fall, 266 U.S. 507, 511; also circulations in Monell. This can be argued in an appropriate case if a party so desires.

Unless there are different views, I will advise Mr. Putzel to retain the citation and to inform the Solicitor General.

L.F.P.

L.F.P., Jr.

SS

Office of the Solicitor General
Washington, D.C. 20530

May 2, 1978

Henry Putzel, jr.
Reporter of Decisions
Supreme Court of the United States
Washington, D.C. 20543

Re: First National Bank of Boston v. Bellotti,
No. 76-1172, decided April 26, 1978

Dear Mr. Putzel:

The United States was not a party in this case, and it did not appear as amicus curiae. One statement made in the opinion of the Court may affect the interests of the United States in pending litigation, however.*/ Because I believe that the statement in question may be based on a mistake of fact, I request that you bring the statement and this letter to the attention of the Court.

Note 14 at page 12 of the opinion of the Court states that decisions have afforded corporations the protection of constitutional guarantees other than the First Amendment. The footnote cites: "E.g., United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)(Fifth Amendment double jeopardy)". Although the decision in Martin Linen sustained a double jeopardy contention advanced by two corporations, the Court's opinion did not discuss the corporate status of the defendants or address the extent to which the Double Jeopardy Clause applies to corporations. Indeed, the United States and the corporations both had stated to the Court that such an issue was not presented.

Both the petition for a writ of certiorari (Pet. 9 n. 8) and the brief for the United States (Br. 13 n. 6) pointed out that although the defendants were corporations, the United States was not presenting any question concerning the application of the Double Jeopardy Clause to corporations because the issue had not been raised in the court of appeals. This amounted to an arguendo concession that the corporations were entitled to the same protection that the Double Jeopardy Clause gives to natural persons. At oral argument the attorney for the United States

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*/ Questions concerning the application of the Double Jeopardy Clause to corporations are pending in United States v. Hospital Monteflores, Inc., C.A. 1, No. 77-1377, argued February 13, 1978. We have apprised the First Circuit of both this Court's decision and this request.

again stated that the case did not require consideration of the extent to which the Double Jeopardy Clause applies to corporations (Tr. of oral argument 7). The attorney for the corporations stated (id. at 38-39):

> Now, the Government counsel has said frankly that the question of whether or not corporations, and the only parties before this Court are corporations, are entitled to the protection of the Double Jeopardy Clause is a question yet to be determined by this Court * * *. He frankly said that this is a determination that need not be made by this Court in this case, but that is a position, in all candor, that the Government takes both in its brief for petition of cert and also in its main brief in this Court.

In light of the representations that were made to the Court about the questions presented for decision in Martin Linen, and in light of the fact that the Court's opinion did not discuss in any way the application of the Double Jeopardy Clause to corporations I do not believe that the case should be cited for the proposition that the Double Jeopardy Clause applies to corporations. Cf. Webster v. Fall, 266 U.S. 507, 511.

Because it is possible that the lower federal courts may feel bound by the Supreme Court's description (albeit in dictum) of Martin Linen, the Court may conclude that is is appropriate simply to delete the citation. The deletion would not affect the sense of the footnote in any way, and it would not affect any of the arguments made there.

Thank you for your consideration in this matter. I would appreciate it if you could inform me of the Court's response to this letter.

Sincerely,

Wade H. McCree, Jr.
Solicitor General

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 22, 1978

76-1172 First National Bank v.Bellotti

MEMORANDUM TO THE CONFERENCE:

Following our brief discussion at the last Conference of the SG's request that we omit the citation to Martin Linen, I requested Nancy Bregstein to look into the question more thoroughly.

I now enclose her memorandum of May 22, together with the two attachments thereto. One is a copy of the opinion of CA2 in United States v. Security National Bank, No. 76-1077, in which we denied cert on March 25, 1977. The second attachment is a copy of the cert pool memo in Security National Bank, written by David Martin who clerked for me last Term.

I find Nancy's memorandum convincing, putting the SG's request in a light which in my view justifies its rejection out of hand. I think it fair to say that until recently the government, in effect, has conceded that Fong Foo v. United States, 369 U.S. 141, established that corporations are entitled to double jeopardy protection.

My present disposition is to retain the Martin Linen citation and add Fong Foo v. United States.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1978

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

MEMORANDUM TO THE CONFERENCE:

1. Appellee's petition for rehearing is on the Conference list for June 8.

It makes one point with respect to the opinion that I would like to correct. Appellee points out that Part V (p. 29) can be read as invalidating § 8 in its entirety, even though appellants challenged only that portion dealing with referendum questions and not those pertaining to candidate elections. See Slip Op., p. 29. Although appellee is correct as to the concluding statement, the opinion explicitly distinguishes referenda from candidate elections. Note 26 points out that appellants "do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections." Moreover, Massachusetts law would allow severence of the invalid from the valid portions of the statute.

Nevertheless, the next to the last sentence in the opinion in Part V (p. 29) should be amended to read as follows:

> "Because that portion of § 8 challenged by appellants prohibits protected speech in a manner unjustifed by a compelling state interest, it must be invalidated." (The underscored words are those to be added.)

I suppose we could simply have the Reporter advise appellee that this sentence will be amended to conform to the substance of the opinion.

2. While on the subject of Bellotti, I return to the SG's request that the reference to Martin Linen be

deleted from n. 14. For the reasons set forth in my memorandum of 5/22/78, I plan to leave this reference in the note. I will not, however, add a reference to Fong Foo v. United States, 369 U.S. 141, which supports - as the lower courts have held - the statement in n. 14. In short, absent a different view by the Conference, I will stand by the opinion as written - neither omitting Martin Linen nor adding Fong Foo.

I would suggest to Mr. Putzel that he so inform the Solicitor General.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1978

No. 76-1172 First National Bank v. Bellotti

MEMORANDUM TO THE CONFERENCE:

In accordance with discussion at our Conference on June 8, I have drafted a letter to be sent to the Attorney General of Massachusetts by Mr. Putzel. This should clarify the confusion occasioned by the penultimate sentence of the opinion.

I enclose a copy of the proposed letter (which I have shown to Mr. Putzel), and he will send it out when the Order List reflects our denial of the Petition for Rehearing, unless there is objection..

L.F.P.

L.F.P., Jr.

SS

6/19/78

Francis X. Bellotti
Attorney General, Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Bellotti:

Your petition for rehearing raised a question as to the scope of the Court's judgment in this case. Although the Court's opinion makes clear that appellants' challenge and the Court's holding were limited to the context of referenda or ballot questions, and not candidate elections, the Court agrees that the penultimate sentence of the opinion is confusing in that its language embraces § 8 in its entirety.

The Court therefore has authorized a change in that sentence so that it will read as follows:

> "Because that portion of § 8 challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated."

The opinion in the official reports will reflect this change.

We appreciate your calling this inadvertence to the Court's attention.

Sincerely,

cc: Francis H. Fox, Esquire
Bingham, Dana & Gould
100 Federal Street
Boston, Massachusetts 02110

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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,

WEB

Mr. Justice Powell

reDRAFT:WHR:4/19/78

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

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.,

@ WJB 4/77

J

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 19 1978

Recirculated: APR 21 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[April —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 396 (1886). Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same amendment. See, *e. g.*, *Smyth* v. *Ames*, 169 U. S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that amendment "is the liberty of natural, not artificial persons." *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255 (1906). Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936), and that a non-profit membership corporation organized for the purpose of "achieving . . . equality of treatment by all government, federal, state and local, for the members of the Negro community" enjoys certain liberties of political expression. *NAACP* v. *Button*, 371 U. S. 415, 429 (1963).

The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 8, 1978

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

Dear Lewis:

There are two reasons why I will not be able to join Part IIIC of your opinion. First, you rely on the statement in Mosley that government has no power to impose any regulation on expression because of its subject matter or content without addressing the cases discussed in my opinion in Young v. American Mini Theatres, 427 U.S. 50, at 65-70. Second, you imply that a state may suppress speech "in an attempt to give one side of a debatable . . . question an advantage in expressing its views to the people [if] the suppression is necessitated by governmental interests of the highest order." (Page 18.)

I will write briefly concurring in the judgment.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1978

Re: 76-1172 - First National v. Bellotti

Dear Lewis:

Would you consider a revision along these lines?

Respectfully,

JPS

Yes, with some changes.

Mr. Justice Powell

Attachment

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 13, 1978

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

Dear Lewis:

Please join me.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1978

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

Dear Lewis:

My recollection is the same as Potter's and Harry's, but I am nevertheless in favor of retaining the citation to Martin Linen because I think it does add something to your opinion.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 23, 1978

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

Dear Lewis:

As I indicated at the Conference, I quite strongly agree with your view that you should retain the Martin Linen citation. If you decide to add additional citations, I would propose American Tobacco v. United States, 328 U.S. 781, 787-788.

Respectfully,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 21, 1978

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

Dear Lewis:

Your draft of a letter for Mr. Putzel also seems fine to me.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference