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First Bank of Boston v. Bellottii, Corporations Right to Political Speech

Ever since the early 1900's and the "trust busting" days of Theodore Roosevelt, American government has seen the need and possessed the power to limit corporate spending on political issues and candidates.¹ While the government's need to limit corporate spending on such issues may still be present,² the recent case of *First Bank of Boston v. Bellottii*³ has seriously threatened the government's power to limit corporate political spending. The Court, in *Bellottii*, identified the possible state violation of free speech rights by statutory limitations on corporate political spending.⁴ The Court's holding granted the corporation the same

1. Theodore Roosevelt was challenged after the election of 1904, by his defeated opponent, Allen B. Parker, to clean up the national electoral process. Parker reported at the hearing before the House Committee on Elections that, "the greatest moral question that now confronts us is, shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections." Hearings before the Committee on Elections, 59th Cong., 1st Sess. 56, 572 (1904). Roosevelt responded by urging Congress to pass the Tillman Act, Act of January 26, 1907 ch. 420, 34 Stat. 864, which later led to the passage of the Corrupt Practices Act, Act of February 28, 1925 ch. 368, tit. III, 43 Stat. 1070, which authorized the federal government to regulate corporate political spending, and thereby corporate political speech.

2. Harris, *The Politics of Corporate Power*, Corporate Power in America 25-41 (R. Nader and M. Green eds. 1973).

3. 98 S. Ct. 1407 (1978) (A plurality (5-4) decision, Justices White, Brennan, Marshall and Rehnquist dissenting).

4. Id. at 1413; see generally, Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001, 1005-1010 (1976) [hereinafter cited as, *Is Money Speech?*] for a discussion of the free speech nature of corporate spending.

fundamental free speech right as that given to natural persons under the fourteenth amendment.⁵ In so doing, the Court demonstrated that it will subject government limitations on corporate speech to the *strictest scrutiny*, and will require that the government show a *compelling state interest* before it will allow the limitation.⁶

At stake are thirty-one state statutes limiting corporate political spending⁷ and portions of the newly amended Federal Corrupt Practices Act,⁸ which limits corporate spending in an attempt to cleanse the nation's electoral process of the evils exposed by Watergate.⁹

Corporate political free speech has been the subject of many legal commentaries in the last two decades. The government's power to restrict corporate speech has been linked, in these writings, to the artificial nature of the corporate "personhood."¹⁰ One of the surprises of the *Bellottii* case is the majority's failure to discuss the nature of corporate "personhood" and those cases which based approval of government limitations on the corporate entities' artificial nature. The Court in this instance looked to the inherent value of the speech that was prohibited.

This note will attempt to explain the reasoning of the Court in directing its attention to the speech prohibited rather than to the person speaking, and will assert that the holding in *Bellottii*

5. 98 S. Ct. at 1417, 1418.

6. *Id.* at 1421.

7. *Id.* at 1430 (White dissenting). See, Library of Congress, Analysis of Federal and State Campaign Finance Laws—Summaries (1977). 18 of these states prohibit or limit corporate contributions in respect to ballot questions like that in *Bellottii*. For a chart of states limiting corporate contributions, see, National Assoc. of Atty. General Legislation Concerning the Corruption of Public Officials, 17 (LEAA 1974).

8. Federal Corrupt Practices Act, 2 U.S.C. § 4416. See *Buckley v. Valeo*, 429 U.S. 1 (1976) where the Court struck down the limitations upon individual expenditures as being impermissibly restrictive of the right of individuals to speak their mind. If, therefore, through *Bellottii* the corporation possesses free speech rights identical to the individual, then limitations within the Corrupt Practices Act, on corporate expenditures may also be unconstitutional.

9. See, Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 545-546 (1975). See also, *Is Money Speech?*, *supra* note 4; Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148 (1974).

10. See *e.g. Id.*; Fletcher, *Corporate Political Contributions*, 29 BUS. LAW 1071, 1088-89 (1974); Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. REV. 1033, 1060 (1965); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR, 3 (1975) hereinafter cited as STONE; Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, 27 FORDHAM L. REV. 599 (1959); Comment, *Corporate Political Affairs Program*, 70 YALE L.J. 821, 833 (1961); *Cf.*, King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847 (1962). *Cf. also Corporate Contributions to Ballot-Measure Campaigns*, 6 U.M.J. REF. 781 (1973).

should be limited to the particular facts of that case.¹¹

I. BELLOTTI'S FACTUAL SETTING

Bellottii was a case involving the alleged unconstitutionality of a Massachusetts' statute¹² that forbade certain expenditures by banks and business corporations for the purpose of influencing votes on certain state referendum proposals.¹³ Corporate expenditures were prohibited if the referendum issue was one that did not "materially affect any of the property, assets, or business of the corporation."¹⁴ One referendum issue, in particular, was singled out by the statute as being outside the business purposes of the corporation and any vote influencing expenditures were, therefore, illegal. The specific issue in question concerned the amendment of the Massachusetts Constitution to allow for a personal graduated income tax.¹⁵ The Massachusetts statute declared:

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. No person . . . shall solicit or receive from such corporation . . . any gift, payment, expenditure, contribution . . . for any such purpose.¹⁶

The statute imposed a fine of not more than 50,000 dollars on the violating corporation and a fine of not more than 10,000 dollars and/or imprisonment of not more than a year for any director or agent of the corporation violating the statute.¹⁷

Perhaps the essential reason of the Court in *Bellottii*, that Massachusetts could not limit corporate speech on this or any other referendum issue, is found in the history and circumstances surrounding the Massachusetts statute (hereinafter referred to as section eight). Section eight was the result of the Massachusetts

11. In an attempt to sufficiently limit the analysis of *Bellottii* to provide some concrete value in exchange for the reader's efforts, this note will focus primarily on the weaknesses of the Court's opinion, especially with respect to its concept of corporate personhood. It will not, however, extensively cover other less essential issues also found in *Bellottii* concerning: distinctions between corporate contributions and expenditures (*see generally*, Buckley v. Valeo, 429 U.S. 1 (1976)), issues raising the commercial speech problems and cases (98 Sup. Ct. 1419), or issues concerning the free speech rights of the corporate press (98 Sup. Ct. 1418).

12. Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1978-79).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. 98 S. Ct. at 1411.

legislature's repeated attempts to amend the state constitution to provide for a personal graduated income tax. The predecessor of section eight,¹⁸ was first challenged in the case of *Lustwerk v. Lytron, Inc.*¹⁹ The former statute did not dictate that questions concerning the taxation of individuals could not satisfy the "materially affecting business" requirement of the statute.²⁰ In *Lustwerk*, the court construed the prior statute to allow expenditures by corporations urging voters to reject the proposed constitutional amendment concerning the graduated income tax.²¹

Subsequently, the statute was twice amended to specifically prohibit corporate spending on the graduated income tax referendum issue.²² It was the second amendment which led to the *Bellottii* case.

As a result of this factual background, the majority could hardly overlook the exertion of governmental influence against an idea or viewpoint that opposed that of the state legislature. The state's action was viewed as an effective imposition of a "prior restraint" on speech that opposed the graduated income tax. Limitations by the state in the nature of a "prior restraint" have been traditionally viewed with greater disfavor than any other limitation on speech. The Court was, thus, compelled to find that the state's action violated the first amendment rights of the corporation, as incorporated through the due process clause of the fourteenth amendment.²³

UTMOST PROTECTION GIVEN TO CORPORATE POLITICAL SPEECH

The factual setting of *Bellottii* caused the Court to frame the main issue in the case differently than did the Massachusetts court.²⁴ The Court stated:

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect.²⁵

This statement of the issue disregarded the lower court's discussion of the corporate "personhood" which had centered on whether the corporation has first amendment rights, and if so, the

18. Mass. Gen. L. ch. 55, § 77 (as amended by 1946 Mass. Acts, ch. 537, § 10).

19. 344 Mass. 647, 183 N.E. 2d 871 (1962).

20. 98 S. Ct. at 1412 n.3.

21. *Id.*

22. 1972 Mass. Acts ch. 958; 1975 Mass. Acts ch. 151, § 1.

23. 98 S. Ct. at 1415, 1416; *See*, Emerson, *The Doctrine of Prior Restraint*, 20 LAW AND CONTEMP. PROB., 648 (1955).

24. *First Bank of Boston v. Attorney General*, 359 N.E.2d at 1262, 1270 (1976).

25. 98 S. Ct. at 1415.

extent of such rights. The Supreme Court instead focused on the question of whether the speech involved was the type of speech "indispensable to decisionmaking in a democracy," in holding that the "inherent worth" of certain speech does not depend upon the identity of its source, whether corporation, association, union or individual.²⁶

It is essential to note that at this point that the Court's emphasis on the "informational" nature of the speech involved seems to be based in part upon the first amendment philosophy of the renowned constitutional scholar, Dr. Meiklejohn.²⁷ Dr. Meiklejohn's views on the first amendment will be reviewed here inasmuch as they are instructive in understanding the Court's position and the philosophy underlying first amendment rights.

Though he does not view the first amendment as an absolute prohibition on all governmental limitations on speech,²⁸ Dr. Meiklejohn does emphasize that the place and manner of speech are the primary areas of governing power allowed to government regulators.²⁹ The emphasis is, therefore, on the type of speech and when and where it is appropriate rather than on the source of the speech. When, as in *Bellottii*, the place and manner of speaking is of "governing importance" then the speech is accorded the utmost protection.³⁰

Speech of "governing importance" is by definition that speech which is essential to a democratic form of government: the discussion of political issues and candidates. It is this type of speech, Meiklejohn argues, with which the framers were concerned in drafting the first amendment. *The people* granted certain powers to government and reserved others to themselves.³¹ Speech in the political forum is of such primary and "governing importance" that it could not be entrusted to government and was, hence, reserved to *the people* in the Bill of Rights.

26. *Id.* at 1416.

27. See, Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1st Ed. 1948) See, Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13-14 (1965) hereinafter cited as Brennan; See, Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245 hereinafter cited as, *An Absolute*.

28. Brennan *supra* note 26, at 11.

29. *Id.* at 11-13.

30. The Court does not agree with Meiklejohn that speech of "governing importance" should be absolutely protected but it did find that the speech needed maximum protection.

31. *An Absolute*, *supra* note 26, at 254.

The majority, in *Bellottii*, emphasized the decision-making value inherent in political speech, and denied government the power to regulate this type of speech. The Court reasoned that *the people* had never given government the power to regulate such speech and without such a grant government, thus, lacks the ability to regulate it.³²

This writer has placed special emphasis on the phrase *the people* in order to point out what may be a flaw in the Court's reasoning, particularly concerning its stress on the inherent value of the specific type of speech involved without consideration of its source. It is not clear from Meiklejohn's discussion of the power reserved to *the people*, whether the corporation is one of *the people*. Meiklejohn, apparently, does not address the issue whether the government's incapacity to regulate political speech extends only as far as to *natural* persons and not to *corporate* persons.

This distinction reveals the difficulty in viewing political free speech rights as being a power denied to the government without examining whether the people also reserved the power and right of political speech to and for the corporation. Meiklejohn's discussion of the freedom of political thought and communication suggests that a corporation may not have the same rights as those reserved to individuals. He states:

The preceding section discussing the rights and powers reserved to the people may be summed up thus: The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thoughts and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, or governmental responsibility.

In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. That freedom implies *and requires* what we call '*dignity of the individual*.' Self-government can exist only insofar as the voters acquire the *intelligence, integrity, sensitivity, and generous devotion to the general welfare* that, in theory, casting a ballot is assumed to express. The citizens understanding, evaluating, and deciding of political issues are the activities to whose freedom the first amendment gives unqualified protection.³³ (Emphasis added.)

The justification for an absolute right to speak on issues of "governing importance" lies in the governing responsibilities reserved to the *individual*. The make up of the individual citizen-voter, his "intelligence, integrity, sensitivity, and generous devotion to general welfare," mandates that he be at least the primary user of the reserved power and right to speak politically. Whether or not

32. *Id.*

33. *Id.* at 255.

the corporation, as an entity, possesses the same attributes that justify the power to speak politically will be discussed later in this paper.

LIBERTY VS. PROPERTY RIGHT

The Massachusetts Attorney General had argued before the state court that the corporation could not claim first amendment free speech rights from among the *liberties* protected in the fourteenth amendment. Rather, he asserted that the nature of a corporation is such that it must derive its speech rights from the *property* language in the fourteenth amendment. This distinction in the source of the corporate speech rights between the *liberty* and *property* language in the fourteenth amendment, though not crucial to the Massachusetts court's finding, does present a unique and compelling argument. The Attorney General reasoned that a corporation's right to speak is protected only when its *property* or business rights are affected. This emphasis on right of speech as a means of preserving and protecting the *property* rights of the corporation is derived from an understanding that the "personhood" of a corporation came into existence only because of its business purposes and only to enhance the property and business needs of the shareholders. If a corporation speaks on matters other than its *property* rights, its speech could be protected only by fourteenth amendment *liberty* rights which the Massachusetts Attorney General argued the corporation does not possess.³⁴

The Supreme Court, in focusing on the "speech protected" instead of on the "person protected," summarily dispensed with the argument of the state. The Court saw no value in distinguishing the source of speech rights (in *property* or *liberty*) based on the corporate or individual nature of the holder. Free speech had traditionally been regarded as a fundamental liberty, safeguarded by the due process clause,³⁵ and the Court declined to identify corporate speech rights in accordance with their property-protecting function.³⁶

It must be noted that the majority's failure to find a different source of corporate free speech rights was most likely influenced

34. 98 S. Ct. at 1417.

35. *Id.* at 1417.

36. *Id.* at 1416-1417.

by the factual setting peculiar to *Bellottii*. The Court, apparently recalling the repeated attempts of the state legislature to change the state constitution, again emphasized:

The "materially affecting" requirement of § 8 is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues.³⁷

The Supreme Court's finding of a corporate free speech right protected by the "liberty" clause of the fourteenth amendment, led it to use a different test to judge the validity of section eight than was used by the state court. The Supreme Court used the "exacting scrutiny" test instead of the balancing test employed by the state court and found it necessary for the state to show a compelling interest in the limitation of corporate political speech before it could prohibit such speech.³⁸ The Court held, "Especially, where, as here a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling."³⁹ After a finding that the "strict scrutiny" test was the standard to be applied, the state's interest was likely to lack a sufficiently compelling nature to justify the limitations.⁴⁰

The state of Massachusetts had postulated two interests in referendums aimed at preventing corporate speech. The first was the interest of the state in "preserving the integrity of the electoral process" and in "sustaining the active role of the individual citizen," thereby preventing the diminution of public confidence in government.⁴¹ Though the Court recognized that these interests were of the highest importance, it found that the state had not sustained the burden of showing that corporate advocacy imminently threatened the democratic process.⁴²

The state's second interest, that of protecting the corporate shareholders, was also found to be less than compelling in the light of the Court's exacting scrutiny.⁴³ The Court found section

37. *Id.* at 1420.

38. *Id.* at 1421.

39. *Id.*

40. *Id.* at 1426. Strict scrutiny requires that the state statute in question must not only be justified by a compelling state interest, but that the statute must be the least onerous means of achieving that interest. See, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1122 (1969).

41. 98 S. Ct. at 1422-23.

42. *Id.* at 1423. *But see*, Harris, *The Politics of Corporate Power*, CORPORATE POWER IN AMERICA 25-41 (R. Nader and M. Green eds. 1973). See also Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 S. CT. REV. 1, 1-14 which discusses the need for governmental limitations on speech, at the federal level.

43. 98 S. Ct. at 1424-1425.

eight to be too narrow and, at the same time, too broad to achieve its purported purpose of shareholder protection. The statute was found to be underinclusive (too narrow) inasmuch as other organizations, such as labor unions and other unincorporated associations, with unprotected dissenting interests were not similarly excluded from making referendum contributions.⁴⁴ The statute was found to be overinclusive (too broad) inasmuch as it outlawed all corporate expenditures, even where every shareholder supported the proposed corporate speech.⁴⁵ Since the Court eyed these faults with such "exacting scrutiny" and because of the nature and importance of the free speech rights protected, the state statute was held to be ill-designed in serving the state's interest in protecting the shareholders. The Court therefore found the statute in violation of the corporation's free speech rights.⁴⁶

It is important to note that the Court, in examining the over and underinclusiveness of the statute, was strongly influenced, once again, by the factual setting of section eight. The Court reemphasized, "The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject."⁴⁷

CORPORATE PERSONHOOD

The Court's concern with the Massachusetts' improper motives in enacting section eight led it to announce principles concerning corporate rights that are contrary to a general understanding of a corporation's personhood.⁴⁸ The Court's decision overestimates the significance of the corporate personhood and thereby underestimates the state's interest in protecting the free speech rights of the dissenting shareholders in the corporation.⁴⁹ Had the legislative history of section eight been different, the nature of corporate speech might have been examined more carefully. For example, had section eight come before the Supreme Court at an earlier point in time, when the statute consisted only of the "ma-

44. *Id.*

45. *Id.* at 1425.

46. *Id.* at 1426.

47. *Id.* at 1425.

48. See *supra* note 9.

49. 98 S. Ct. at 1430-31, 1434 (dissenting opinion).

terially affecting business" limitation on corporate speech, rather than when it was freighted with the provision against corporate expenditures on the particular referendum issue of personal graduated income tax, the Court could have focused on the speech of the corporation without being prejudiced by the fear of what it saw as government censorship of certain political ideas.

A close examination of corporate speech outside the factual setting of *Bellottii* should cause the ruling in *Bellottii* to be limited to its facts. This is so for two overlapping reasons. The first is that the nature of corporate personhood is such that it should not be given the same free speech liberties as those accorded individuals.⁵⁰ The corporation as a "person" lacks the essential qualities that give rise to free speech rights in areas that do not materially affect its business purposes.⁵¹ In an earlier case, Chief Justice Marshall noted that, "It is clear that the communications of profit making corporations are not an integral part of the development of ideas, of mental exploration and of the affirmation of self. They do not represent the manifestation of individual freedom of choice."⁵²

By reframing the question before the Court, the majority sidestepped this discussion of the underlying justification for the protection of free speech; that is, that the individual's emotional, political, social, philosophical makeup necessitates the freedom to

50. See, *Northwestern Nat'l Life Ins. Co. v. Riggs* 203 U.S. 243, 255 (1906). Initially, corporations were held out not to be entitled to exercise the liberties of speech and press accorded natural persons. See, *Hague v. Committee for Indus. Organizations*, 307 U.S. 496, 514, 527 (1939); Comment, 66 *YALE L.J.* 545, 547-50 (1957); accord, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The distinction, however, between natural and artificial persons was weakened by later decisions, none of which, like *Bellottii*, explicitly considered the corporate character of the claimant. See, *Superior Films, Inc. v. Dept. of Education*, 346 U.S. 587 (1954); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In only one case, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), was the applicability of the fourteenth amendment to a corporation challenged, and there the court summarily found for the corporation. But see, *NAACP v. Alabama* 357 U.S. 449 (1958), where the Court found it necessary to sustain a New York corporation's freedom of speech on the ground that the speech was identical with the speech of all of the corporation's members. *Alabama* implies that first amendment rights of corporations are derivative of the shareholder's rights and not available to the legal entity as such, an idea which *Northwestern Nat'l* had stood for, in principle, for years.

51. 98 S. Ct. at 1439-43 (Justice Rehnquist dissenting). *Id.* at 1431-32 (Justice White for Brennan and Marshall, dissenting). See, T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT*, 4-7 (1966); See *West Virginia Bd. of Ed. v. Barnett*, 319 U.S. 624 (1943). See also, *United States v. United States Brewers Assn.*, 239 F. 163 (W.D. Pa. 1916) where a lower court specifically considered the personhood of a corporation and upheld the state statute limiting its speech.

52. *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L. Ed. 629 (1819) quoted at 98 S. Ct. 1407, 1440.

speak as protected by the constitution.⁵³ A corporation lacks these attributes when it speaks, particularly when it speaks outside its business purpose.⁵⁴

A corporation is an entity whose very existence is permitted by the state to carry on the singular business purpose of its investors.⁵⁵ To hold that a corporation exists beyond these limits would be to protect a group of directors in its actions as a political body as if it represented the shareholders united emotional, political, social, philosophical, and religious views.

In describing the personhood of a corporation, some commentaries have found that the label "corporate black box" is helpful to describe the state's justification for taxing the corporation as a separate entity and to explain the nature of the corporation's limited liability.⁵⁶ However, this "black box" concept or "invisibility" must not be used to cloud the fact that the corporation exists as a "mere creature of the law" and that it possesses only those properties which the charter of creation confers upon it, either expressly or incidental to its very existence.⁵⁷

These realities of the corporate makeup led dissenting Justice Rehnquist to conclude:

Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, *United States v. White* 322 U.S. 694, 698-701 . . . (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence."⁵⁸

Rehnquist went on to assert that the corporation did not possess free speech rights identical to those of natural persons.⁵⁹

The majority's holding, although purporting to make no express statement as to the personhood of a corporation, in effect does so

53. See, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966).

54. STONE, *supra* note 10, at 3. See, Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 569-76 for a discussion of the *ultra vires* nature of corporate political speech. *But see, Cort v. Ash*, 422 U.S. 66 (1975), where a federal statute against corporate contributions was interpreted *not* to grant a private cause of action to the shareholder on the basis of the *ultra vires* nature corporate contribution.

55. STONE, *supra* note 10, at 3. Stone writes: "After all, the corporation itself . . . is a *persona ficta*, a 'legal fiction' with 'no pants to kick or soul to damn.'"

56. PRACTICING LAW INSTITUTE, THE CORPORATION IN POLITICS, (Schartz ed. 1976).

57. 98 S. Ct. at 1440 (Rehnquist's dissenting opinion).

58. *Id.* at 1440-41.

59. *Id.* at 1440-43.

by protecting a corporation's right to speak.⁶⁰ The Court denies the practical reality that a corporation, when it speaks, speaks the views of the director, or directors, or percentage of shareholders, using the aggregate power of the amassed corporate wealth.⁶¹

In granting to the corporation the ability to speak on a referendum issue, the Court has also given the corporation an unrepresentative advantage in the political arena.⁶² The corporation's limited liability, its infinite duration, and its national and international character (i.e., that its shareholders can be citizens throughout the nation and throughout the world), give to the corporation an advantage over the natural person in deciding political issues.⁶³

The risk of this unfair corporate political advantage was found, by the majority, to be a necessary risk in the light of the public's need to learn and converse in a free marketplace of ideas.⁶⁴ The Court, in effect, held that even though the corporate speech may not be representative of the true force behind the political statement, the idea should be protected and presented for public consideration.⁶⁵

The Court failed, however, to discuss the fact that to deny corporate speech on an issue in no way hindered the right of natural persons within the corporation holding such views to express these views independently of the corporation.⁶⁶ The limitation on corporate speech would simply provide that speech on the referendum issue would be motivated, on all sides, by the individual feelings and desires of natural persons. Justice Rehnquist noted: "All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity."⁶⁷

60. *Id.* at 1439.

61. *See*, STONE, *supra* note 10, at 3.

62. *See*, Comment, *Corporate Political Affairs Programs*, 70 *YALE L.J.* 821-22.

63. *Id.* *See also*, 98 S. Ct. at 1441-42. *But see*, Lambert, *Corporate Political Spending and Campaign Finance*, 40 *N.Y.U. L. REV.* 1033 (1965), where Lambert argues that corporate activity is necessary in a day when mass communication costs are so high.

64. 98 S. Ct. at 1422-1424.

65. *Id.* The Court also placed great faith in "the people in our democracy . . . for judging and evaluating the relative merits of conflicting arguments." *Id.* at 1424.

66. 98 S. Ct. at 1443, *See also*, *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972), where the Court held that voluntary contributions to a segregated fund under the control of a union would be permissible corporate speech only if (1) it was segregated from other union dues and assessments, and (2) it was funded by noncoercive solicitations. *Id.* at 414. It would seem reasonable that the Court would demand the same of the corporation's political contributions.

67. 98 S. Ct. at 1443.

SHAREHOLDERS ARE UNPROTECTED

Closely related to a better understanding of the corporate personhood is a second reason for limiting *Bellottii* to its facts. Not only did the majority fail to consider the realities of the corporate personhood, it also appeared to ignore the free speech rights of the shareholders within the corporation.⁶⁸

Dissenting Justices White, Brennan, and Marshall, pointed out that since corporate free speech rights are not identical to those of the individual⁶⁹ the Court should not confuse or override considerations for the shareholders in the corporation.⁷⁰ The dissenters felt that the state should possess the power to limit this lesser type of free speech, especially when protecting other fundamental rights.⁷¹ Thus, the dissenter's emphasis was not specifically on the personhood of the corporation, but was instead on the power of the state to balance the competing rights involved in the limitations on corporate speech.⁷² The dissenters felt that strict scrutiny was too strong a test to be applied to the state's actions inasmuch as those actions were motivated by a concern for the competing rights.

A key, however, to an understanding of the balancing done by the dissent, is their shift in focus from the speech prohibited, to the persons speaking.⁷³ Justice White, for the dissent, wrote:

Any communication of ideas, and consequently any expenditure of funds which makes the communication possible, it can be argued, furthers the purpose of the first amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression.⁷⁴

This shift in emphasis to the practical nature of the corporate per-

68. See, Note, *Corporate Democracy and the Political Contribution*, 61 IOWA L. REV. 545, for an extensive discussion of shareholder's rights against the corporation for the corporation's political speech.

69. 98 S. Ct. at 1430-31. White writes that corporate communication "is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not."

70. 98 S. Ct. at 1431.

71. *Id.* at 1434-35.

72. *Id.* at 1438.

73. *Id.* at 1431. Inherent in a realization of other competing shareholder rights within a corporation, is a realization that the nature of corporate personhood is different from that of an individual. "Indeed, what some have considered to be the principle function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment is not at all furthered by corporate speech." *Id.* (Justice White dissenting).

74. 98 S. Ct. at 1432.

sonhood points up the numerous competing free speech rights of the shareholders. The corporation's speech therefore amounts to the compulsion of a contribution from all these competing view points.⁷⁵ Such compelled contributions were found by the dissent to raise free speech questions of the utmost gravity.⁷⁶ White analogized to Supreme Court cases involving the compulsion of contributions in public unions where such compulsion was found to be unconstitutional.⁷⁷ White reasoned that, although, in *Bellottii*, the contribution was compelled by a private corporation and therefore did not constitute state action (an important element of those cases), the state had a sufficient interest in prohibiting interference with member/shareholder speech, whether contributions were compelled by a public union, school, or private corporation.⁷⁸

AN ALTERNATIVE

The Court had another alternative available by which to eliminate any prior restraint on speech and yet keep intact the state's power to limit corporate speech. The Court could have struck down, as unconstitutional, only a part of the Massachusetts statute without affecting the correct understanding of corporate speech rights. By excising that part of the statute which defined taxation of individuals as immaterial to the property, business or assets of a corporation,⁷⁹ the Court could have focused on the improper legislative intent to which it had so often alluded throughout the decision, without distorting the constitutional limits of corporate speech. Left intact would have been the state's power to regulate corporate speech which was unrepresentative, unfair, and irresponsible to the shareholder and the individual citizen.

CONCLUSION

The *Bellottii* Court may have overreacted to the factual background of the Massachusetts statute in the articulation of broad principles concerning corporate speech. The Court has thereby significantly impaired the power of the state and federal government to check the unwieldy power of the corporate machine. In granting to the corporation full free speech rights, the Court failed to recognize the limitations on the fictitious personhood of a corporation and also failed to protect the shareholders from depriva-

75. *Id.* at 1435.

76. *Id.*

77. *Id.* at 1435-57, see, *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977).

78. *Id.* at 1437.

79. See, note 16, *supra* and accompanying text.

tion of their free speech rights. In so doing, the Court has effectively granted to the corporation those first amendment free speech rights previously reserved solely for individuals.

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