

William Rehnquist's Dissent in *Bellotti*

(*First National Bank of Boston v. Bellotti*; decided April 26, 1978; footnotes omitted.)

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. 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 nonprofit 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 previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. I think it quite probable that their judgment may properly be reconciled with our controlling precedents, but I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

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

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

The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by

state law. Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, *United States v. White*, 322 U. S. 694, 698-701 (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence." *Dartmouth College, supra*, at 636.

There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business. *Grosjean* so held, and our subsequent cases have so assumed. E. g., *Time, Inc. v. Firestone*, 424 U. S. 448 (1976); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748, 761-770 (1976). Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed. I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.

One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of the Supreme Judicial Court [the highest court in the state of Massachusetts] in this case. That court reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expression by a corporation "when a general political issue materially affects a corporation's business, property or assets." 371 Mass. 773, 785, 359 N. E. 2d 1262, 1270 (1977).

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid.

It is true, as the Court points out, *ante*, at 781-783, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity. Cf. *Maier v. Roe*, 432 U. S. 464, 474 (1977).

I would affirm the judgment of the Supreme Judicial Court.