

*First National Bank v. Bellotti*, 435 U.S. 765 (1978)

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## FIRST NATIONAL BANK V. BELLOTTI, 435 U.S. 765 (1978)

Free speech is often thought to protect two related interests: freedom of politics, by protecting debate essential to free elections, and freedom from politics, by creating a space in which individuals may ignore majority sentiments. Neither obviously applies to business corporations. Instead, at least since the Jacksonian controversy over the Bank of the United States, many Americans have seen corporate-funded political action, like censorship itself, as raising the specter of the privileged using their privileges to protect and expand privilege.

Federal law has banned corporations from using corporate funds to influence federal elections since 1907. In 1976, Massachusetts sought to expand this ban, barring business corporations from using corporate funds to purchase advertising to influence the outcome of referendum elections, unless the corporation's business interests were directly involved.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court, by a five-to-four majority, held that the ban on corporate-funded advertising violates the First Amendment. The Supreme Court has long extended various constitutional rights to corporations by analogizing them to "citizens" or "persons" needing protection from an arbitrary state. *Bellotti*, however, took a different path.

The First Amendment, Justice Lewis F. Powell Jr. wrote, protects "speech," not speakers. Thus, the issue is not, as the lower court viewed it, whether corporations have a constitutional right to influence elections, but whether the advertisements they sought to buy added to

the "mix of information" available to voters. This disembodied approach allowed Justice Powell to characterize the corporate expenditures as the "essence of self-government" without addressing the contention that corporate money poses a special threat to democracy.

Having held that corporate funding of political advertising is First Amendment "speech," the opinion then rejected two proffered compelling state interests to justify regulation. First, it held that the statute does not protect the integrity of the political process. In a referendum, corruption and bribery—the compelling state interests that justify campaign contribution limits—are not concerns. Moreover, following *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), the state may not intervene purely to ameliorate the consequences of unequal background distributions of wealth or power.

Second, the opinion found the regulation poorly adapted to protecting minority shareholders from being forced to fund corporate political speech with which they may disagree. In the Court's view, the regulation was both over- and under-inclusive, and internal corporate processes will allow shareholders to control corporate speech "democratically" or to "withdraw" their investments from the firm. These latter contentions appear to be based on misunderstandings of corporate law. Corporations are not "democracies." While shareholders vote for directors, votes usually are allocated proportionally to investment, not democratically. Moreover, after the election, the law normally requires that directors, and the managers they hire, manage in the corporation's best interests regardless of their, or the shareholders', political views of the national good. Nor are corporations voluntary associations of shareholders. Shareholder investments are permanent capital. Although individual shareholders may sell their shares to others, shareholders never have the unilateral right to withdraw funds from the corporation. In any event, the funds in question were corporate funds, which are more likely to have come from employees, customers, suppliers, or lenders than from shareholders—and none of those roles include corporate voting rights of any variety.

The two dissents took a radically different view of the case. Justice Byron White, joined by Justice William Brennan and Justice Thurgood Marshall, framed the issue as one of corporate governance. The statute at issue regulated only expenditures "not materially affecting the property, business or assets of the corporation." Accordingly, managers using corporate assets for noncorporate projects must be "representing their own personal or collective views," in violation of their fiduciary duty. Where the majority sees "speech" with no speaker, the dissent sees managers misappropriating "shareholder" (actually, corporate) money.

Even if the First Amendment protects “speakers” who are just spending other people’s money, the dissent saw three distinct state interests that can justify regulation. First, the state had a legitimate interest in separating investment decisions from ideological disagreements: if shareholders invest based on managerial politics instead of business acumen, economic growth will suffer. Second, when corporations used their amassed wealth to influence the very legislation that creates and directs them, the state’s “own creation [threatens to] consume it.” Third, shareholders of business corporations were unlikely to share views on non-business-related issues, and democratic values require protecting minority shareholder views (the dissent ignores other corporate claimants). In short, constitutionalizing corporate governance “is to elevate corporations to a level of deference . . . not seen . . . since [*Lochner*’s] substantive due process.”

Justice William Rehnquist challenged the basic conception of business corporations as Fourteenth Amendment “persons.” The relationship between a state and its corporate creatures is for political, not constitutional, determination, particularly because states might “fear that the corporation would use its economic power to obtain further benefits.”

Moreover, the statute did not restrict speech at all. Corporations remain entirely free to pass corporate funds on to their human participants—shareholders, managers, employees, or customers. “All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.”

Some later corporate speech cases have paid more attention to the actual workings of corporations. However, *Bellotti* remains a central part of two broad constitutional movements. First, it reinforces the classification of business corporations as private, citizen-like, “persons” in need of constitutional protection, as opposed to semisovereign, government-like, collective organizations from which citizens may need protection. Second, as Justice White points out, *Lochner*’s constitutionalization of laissez-faire economics today appears under the rhetoric of the First Amendment’s free market of ideas.

SEE ALSO *Corporation as a Person; First Amendment*

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## FLAG BURNING

The act of flag burning elicits strong and conflicting reactions. Some see expressive conduct that the First Amendment protects, whereas others see in the flag a national symbol that federal or state laws may protect from desecration. Both views informed the Supreme Court’s approach to flag burning cases decided in 1989 and 1990. Decisions in both cases prompted a response from Congress. Majorities in the two houses, along with the president, joined in a dialogue on the question of whether the government may prohibit flag burning.

### TEXAS V. JOHNSON, 491 U.S. 397 (1989) AND THE FLAG PROTECTION ACT OF 1989

In 1984 in Dallas, Texas, while taking part in a demonstration protesting Reagan administration policies, Gregory Lee Johnson set fire to an American flag. Johnson was convicted for violating a Texas law that criminalized desecration of a venerated object. Taking the case on