American Journalism, 28:1, 34–74

Transforming Corporate Political Media Spending into Freedom of Speech: A Story of Alchemy and Finesse, 1977–78

By Robert L. Kerr

This article documents the late seventies behind-the-scenes battle led by Justice Lewis F. Powell, Jr., that forged a five-justice majority for a narrow Supreme Court holding in First National Bank of Boston v. Bellotti *to bring corporate political media spending within the protections of the First Amendment. It shows that justices on the Court then recognized the holding as a considerably greater alteration of established law than another five-justice majority would maintain in 2010—when it expanded the influence of corporate money on democratic processes and the marketplace of ideas far beyond that seventies precedent. Justices William H. Rehnquist and Byron R. White remained so dissatisfied with the result in* Bellotti *that each authored harsh dissents declaring the majority holding to be completely at odds with settled law, and both remained on the Court long enough to have the opportunity to help form majorities in a series of subsequent cases that served to substantially narrow its holding. Nevertheless,* Bellotti *established a firm enough footing in the case law to allow the majority at the Court in 2010 to extend its reach far beyond what was established in 1978.*

Robert L. Kerr is an associate professor at the University of Oklahoma, College of Journalism and Mass Communication, 395 West Lindsey, Norman, OK 73019-4201. (405) 325-2125 rkerr@ou.edu

The second decade of the twenty-first century had just begun when the Supreme Court opened the door, via the First Amendment, to permit greater influence of corporate money on democratic processes than ever before. In the wake of that decision, it is instructive to look back at the original developments that made such an immensely consequential change possible a little more than a quarter-century later. It was in *First National Bank of Boston v. Bellotti* in the spring of 1978 that the Court first

brought corporate political media spending within the constitutional protections previously extended only to the freedom of speech of human beings.[1] Without the holding that it institutionalized in First Amendment case law, corporate managers would only be able to spend their own money for political purposes, rather than that of their shareholders. Thus, it is to *Bellotti* that one can trace the roots of the Supreme Court's January 2010 ruling that more sweepingly than ever protected the latter type of spending from regulation aimed at preventing corruption of political campaigns, or the appearance of such corruption.[2] And as this research documents, that seminal ruling was so contentious among the justices who decided it that it almost never happened.

It arguably would not have without the determined efforts in late 1977 and early 1978 of Justice Lewis F. Powell, Jr., a successful and influential corporate attorney before joining the Court, to put together a five-to-four majority for it. The intensity of the opposition to those efforts among other justices provides an indication of just what a radical alteration of the Court's jurisprudence on the subject *Bellotti* represented for them. Although current justices such as Anthony M. Kennedy have suggested that recent efforts to protect political campaigns from the corrupting influence of corporate money had no precedent,[3] this study's analysis shows it was *Bellotti* that more plausibly can be said to have come out of nowhere. This analysis of the justices' battle behind the scenes in *Bellotti* provides further indications of just how debatable a foundation supports the efforts at the court to remake corporate political media spending as corporate "speech."

"What is perhaps most remarkable about the Court's opinion in *Bellotti* is the virtual absence of the corporation from it," one scholar wrote a few years after the ruling.[4] "The opinion has a quality of abstraction, of disembodiment, of remoteness from social reality, that makes it formalistic. It reasons from highly abstract First Amendment principles. It supports its reasoning with arguments provable only through empirical investigation, but substitutes logic for evidence."[5] This study focusing on Justice Powell's papers relating to the development of *Bellotti* helps explain how that quality of artificiality arguably derives from a labored effort to avoid talking about what was actually at stake in the case: corporate political media spending. That was blurred from the beginning of Justice Powell's discussions with the clerk who assisted him extensively on *Bellotti*, reframing the matter at the heart of the case instead in terms of a corporation's "expression of views." In a literal sense, of

course, the artificial being that is a corporation cannot "express" views, or anything else. Its managers, employees, stockholders, and other parties interested in a corporation's operations can express *their* views—and of course their right to do so was constitutionally protected long before *Bellotti* reached the Court. So what was at issue in that case (and essentially at the heart of all the related cases since then) was whether the First Amendment could be used to block regulation of corporate managers' spending directly from the profits in corporate treasuries—which in principle belong to the stockholders—on media communications aimed at influencing political outcomes.

It was a deeply dividing proposition among the justices on the Court in 1978, and it has remained so to this day. In his *Bellotti* dissent, Justice Byron R. White spelled out what Justice Powell's majority opinion strove to shrug aside: "In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group."[6] Justice Powell's papers show that the *Bellotti* Court originally came close to an almost unanimous decision to dispose of the case on much narrower grounds that would not have established the landmark First Amendment protection for corporate political media spending. Whether and how that would have been addressed by the Court in some later case can only be speculated upon, but it is clear that developments behind the scenes dramatically evolved the nature of the *Bellotti* ruling by the time it was handed down in April 1978. Among those developments was the first clear articulation of the strategy on disregarding the source of the speech in question and focusing only on speech in the abstract, which appeared in a bench memorandum prepared for Justice Powell two months in advance of oral arguments in the case. In that memorandum, his clerk wrote that the corporate appellants would likely lose if the Supreme Court began from the premise—as the Massachusetts Supreme Court had—"that corporations are unique because of their artificial existence" as a creation of state law.[7] The memorandum's rhetorical emphasis on what corporations "think" and the "silencing" of corporations' "views" signaled the beginnings of what would become an enduring reframing effort.

This article was developed through historical analysis of the relevant memoranda, correspondence, and other documents in the private Court papers of Justice Powell, who died in 1998. Methodologically, it offers insights beyond what is available in published

rulings of the Court in that it permits exploration of the manner in which a watershed opinion reached its final, published form. Justice Powell kept extensive notes that provide researchers a detailed paper trail back into the *Bellotti* era of some three decades ago, revealing how the interactions among justices and between justices and clerks critically shape the nature of Court rulings. They provide a window into the priorities Justice Powell maintained in his efforts to fashion the resolution of *Bellotti* at the Court, as well as those of Justices White and William H. Rehnquist and Chief Justice Warren E. Burger in particular—whose communications with Justice Powell and separate opinions document the significant roles they played in the case. Justice Powell's archives are particularly valuable for this study in that the private papers of those justices are not yet available to researchers.

This introduction is followed by discussions of Justice Powell's background, relevant literature on scholarly assessments of his jurisprudence, and the manner in which corporate political media spending became the subject of a series of major First Amendment cases in the late seventies and early eighties. The remainder of the article is devoted to historical analysis of Justice Powell's papers related to the development of his opinion in *Bellotti*, a discussion of the landmark ruling's legacy, and conclusions.

The Jurisprudence of Justice Powell

Lewis Franklin Powell, Jr.'s fifteen years on the Supreme Court began in 1972 as part of a wave of new faces and ideologies. Between mid-1969 and the beginning of 1972, four new justices were appointed to the Court by President Richard M. Nixon, including Burger as chief justice following the retirement of Earl Warren.[8] "When Powell took his seat at the Conference table, . . . on the crucial issues, the Nixon Justices could be expected, more often than not, to end up on the same side," Justice Powell's biographer wrote. "Each of them was more conservative than any of the holdovers from the Warren Court. Together they formed a block of four, loosely united by outlook and sympathy, and—apparently—poised under the leadership of Chief Justice Burger to remake American constitutional law."[9] Justice Powell would prove by some measures to be the Court's most centrist justice, siding with the majority in ninety percent of the cases—more than any other justice—during his time on the bench and casting fewer dissenting votes.[10] "As a pragmatist, Powell had a distinct advantage. . . . There was nothing

but his own sense of justice to keep him from building a majority with justices on either side of the ideological spectrum," in Craig Evan Klafter's assessment.[11] Other analysis has contended that Justice Powell's particular pragmatism was characterized by a "representative balancing" methodology through which he aimed to give voice to a wide range of interests by arriving at a rule that could accommodate all of them, "consistent with recognition of and respect for other competing interests." Paul W. Kahn concluded that such an approach was an unacceptable foundation for judicial review, however, because rather than "calling on legal argument and the unique virtues of the Justice, it calls upon the virtues of statesmanship, and offers no principled explanations, thus offering "nothing new to the political debate."[12] Others have found Justice Powell's propensity for such balancing in contentious cases like *Regents of the University of California v. Bakke*—with a principal opinion that both struck down the school's minority-admissions system and established an enduring rationale for race-conscious admissions[13]—skillfully finessed complex questions and a deeply divided Court in a manner that "solidified his reputation as a pragmatic moderate and propelled him to national prominence."[14]

Powell's remarkable concurring opinion in *Branzburg v. Hayes*[15] also figures prominently in his legacy. Maintaining as it does a reporter's privilege to protect sources, a principle rejected by the majority, Powell's opinion has been described as "the concurrence that spoke louder than the majority."[16] Other scholarship has demonstrated the way Justice Powell's concurring opinions—which he wrote more of than any other justice during his time on the Court—frequently had the effect of similarly trumping majority opinions.[17] Indeed, so successful was his practice of providing a case's swing vote while authoring a highly influential concurring opinion that it has since been dubbed "Powelling."[18] Although Justice Powell did not employ that specific technique in *Bellotti*, the case did require him to call upon considerable skills at finessing an intensely divided court. Also evident in the development of that case is the way that the dominant experiences from his professional life shaped the particular understanding of the corporate being that he would strive—and to a great extent succeed—to institutionalize in First Amendment law.

It has been argued that Justice Powell's judicial centrism was actually more a reflection of "the social vision of the class he represented" than of a consistently principled approach.[19] Noting his upbringing in "a relatively well-to-do background in the solid white

Virginia middle class" and his relatively rapid climb "to the upper echelon of corporate America" in his law practice, Mark Tushnet asserted that Justice Powell's background "did not expose him to the wide range of human experiences that might have expanded his social vision. . . . [T]he people he worked with were drawn from a relatively narrow range."[20] During the deliberations on *Bowers v. Hardwick*, for example, in which Justice Powell ultimately provided the fifth vote for a majority holding that criminal prosecutions of consensual homosexual sodomy were constitutional, he countered assertions on the prevalence of homosexuality in society by insisting that he had never known a homosexual. It was common knowledge at the Court that he had worked with and even employed homosexuals, and in fact had discussions with a gay clerk working for him during *Bowers*—without either of them acknowledging the clerk's sexual orientation—as Justice Powell wrestled with his decision.[21] Justice Powell later said he regretted that vote, and his biographer concluded that he maintained "he had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it."[22]

Justice Powell's vision regarding the corporate being also had been developed by a career focus that tended to exclude more diverse understandings of corporate influence. "Powell's nearly forty years of experience in corporate boardrooms led him to trust the character of the average American businessman," wrote A. C. Pritchard in an article linking the justice's professional background with his jurisprudence on securities laws. "In Powell's world, free enterprise and the businessmen who made it work were the foundation of strong communities."[23] That research concluded that "it would be difficult to identify anyone who did more to limit the reach of the federal securities law than Powell," finding that acting "in all good faith," his reading of requirements on businesses regarding information provided to investors "was colored by his experience in corporate boardrooms, consistently leading him to favor narrower readings."[24] Indeed, before his confirmation to the Court, Justice Powell worried that his experience as a corporate lawyer would generate the sort of controversy that contributed to the rejection of Nixon nominee Clement Haynsworth, Jr. two years earlier. He confided to Attorney General John Mitchell his fear that "the nomination of another southern lawyer with a business-oriented background would invite—if not assure—organized and perhaps prolonged opposition."[25]

Ultimately, little attention during the confirmation hearings was paid to Justice Powell's connections to big business, although that almost certainly would have been different if information revealed a few months later had been public at the time. As the *New York Times* reported it in September of 1972, "Lewis F. Powell, Jr., in a confidential memorandum written two months before his nomination to the Supreme Court, urged the United States Chamber of Commerce to mount a campaign to counter criticism of the free enterprise system in the schools and the news media."[26] In the memorandum, which the Chamber has since made public, then-corporate attorney Powell also recommended aggressive efforts in the courts—particularly the Supreme Court—to advance business interests through the initiation of litigation and the filing of *amicus* (friend-of-the-court) briefs in other cases.[27] Since that time, the thirty-four-page document has proven to be "the very blueprint for Supreme Court litigation that the Chamber has since followed," research such as Richard J. Lazarus's has documented.[28] The Chamber (through its National Chamber Litigation Center) began filing *amicus* briefs in 1977, including one in *Bellotti* that declared the messages disseminated by "incorporated enterprise" were as equally vital to "the free, frank, and robust expression of public opinion" fostered by the First Amendment as any other source of such speech.[29] The Chamber's efforts escalated quickly from there, with the number of such briefs filed reaching a dozen per Supreme Court term by the mid-1980s.[30]

In recent analysis of the first term of the Roberts Court, the *Times* found that in the fifteen cases in which the Chamber filed briefs, its side won in thirteen—the highest percentage of victories in the thirty-year history of its litigation center.[31] Such dominance at the Court has been characteristic of an age in which, since the early 1970s, corporate interests have won ever greater Bill of Rights guarantees.[32] In considering the evolution in First Amendment law in that era, it is particularly relevant to document the formative legal and intellectual elements that shaped its beginnings in 1977 and 1978 within the chambers of the Supreme Court in *First National Bank of Boston v. Bellotti*, characterized as the "Magna Carta" of corporate First Amendment jurisprudence.[33] The manner in which corporate political media spending was brought within the shelter of constitutional protection is reviewed in the next section.

Corporate Political Media Spending and the First Amendment

The story of how regulation of corporate political media spending became the subject of a series of major First Amendment cases traces back to reform efforts late in the nineteenth century.[34] Particularly since the Civil War, Americans had seen a dramatically expanded use of the corporate form of organizing business, driven by abandonment of the inherited European tradition requiring an act of governmental charter in order to acquire corporate status. Within a relatively short period of time, such changes made incorporation routinely available to the largest business enterprises the world had ever seen.[35] A nation accustomed to small operations rarely valued at more than $1 million now looked upon corporations such as Standard Oil, American Tobacco, and US Steel, for example, all capitalized by the early twentieth century at hundreds of millions of dollars each.[36] For many Americans, the staggering influence of the massive new business corporations represented a threat to societal balance, dwarfing traditional institutions of family, church, and local community and looming as the very sort of excessive centralized power that American founders had sought to prevent.[37] Efforts to rein in the excesses of the giant corporations and trusts began in the late nineteenth century, launching what would become the country's first major period of regulatory activity.

Turn-of-the-century mass media were characterized by a "remarkable literature of indignation."[38] Ida M.Tarbell's *The History of the Standard Oil Company* and Henry Demarest Lloyd's *Wealth Against Commonwealth*, both targeting John D. Rockefeller and his Standard Oil Company, the largest corporation in the world, were among the most prominent.[39] Over the first decade and a half of the new century, a period of reform now called the Progressive Era saw the landmark 1911 breakup of Standard Oil and the American Tobacco Company by the Supreme Court for engaging in restraint of trade and monopoly.[40] More broadly, the period was highlighted by a flourishing of popular democracy, including the secret ballot, popular initiative and referendum, presidential primary elections, and women's right to vote. The creation of the Food and Drug Administration in 1906 represented the first consumer-protection legislation in American history.[41]

Massive contributions from corporations to political candidates[42] spawned the 1907 enactment of the Tillman Act,[43] followed by the stronger Federal Corrupt Practices Act of 1925,[44] through which corporations were prohibited from direct financial involve-

ment in federal elections. That process continued with The Federal Campaign Act (FECA) of 1971[45] and further regulations in response to numerous illegal contributions to Nixon's 1972 presidential campaign.[46] A series of amendments to FECA enacted in 1974[47] were challenged in 1976 in *Buckley v. Valeo* on the question of whether the First Amendment allowed government to regulate campaign spending so extensively. Concluding that the rise of expensive mass media made money the equivalent of speech, the Supreme Court's complex ruling basically found that contributions made directly to candidates represented a potential form of *quid pro quo* corruption but that expenditures made in the advocacy of issues did not. Thus it held that limits on such spending were unconstitutional.[48] *Buckley* established that "political spending and political speech are inextricably interrelated and that the former cannot be restricted without adversely affecting the latter," but it did not address regulation of *corporate* campaign spending.[49]

Two years later, the Court took up that matter in *Bellotti*. For some sixteen years before then, the legislature and corporate interests in Massachusetts had battled over whether the state could ban corporate spending on referendum questions that did not materially affect corporate interests. At the time of the *Bellotti* decision, thirty-one states had similar regulations, with many having been on the books for decades. The Massachusetts regulation went through much revision and litigation over the years, reaching the state's Supreme Court three times before going on to the US Supreme Court in 1978. In addition to First National Bank of Boston, the corporate plaintiffs were New England Merchants National Bank, Gillette, Digital Equipment, and Wyman-Gordon.[50] They argued that corporate expenditures to influence political decisions were simply another form of free speech.[51] The State of Massachusetts argued that the regulation was crucial in maintaining public confidence in the integrity of government and elections by preventing the potential corruption of corporate wealth drowning out the voices of individual citizens and undermining democratic processes.[52] An *amicus* brief filed by Northeastern Legal Foundation and Mid-America Legal Foundation (organizations focused on corporate legal issues), maintained that "the lessons of history tell us that when a fundamental right is taken from one group in society, that right will not be long enjoyed by others."[53]

The Supreme Court's ruling in *Bellotti* established a degree of First Amendment protection specifically for political media spending by corporations, ruling that corporate spending on communi-

cations that seek to influence the outcome of referenda does not lose its First Amendment protection "simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property."[54] Justice Powell's majority opinion declared that "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' "[55] Indeed, as will be discussed at more length in the next section, it was critical to Powell's assertions to focus them on "views" rather than spending. For example, he contended that the Massachusetts regulation would have meant that "much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties" that could be imposed upon them.[56] Corporate management actually would have risked criminal penalties under such regulation only if it spent corporate revenues to influence referenda. The managers would have faced no risk of that sort if they simply participated in referenda campaigns as individuals, with none of the special, wealth-generating advantages (perpetual life, limited liability, and tax treatment) that are granted by government to the corporate form—but not to individuals.[57]

In 1980, the Court reinforced its *Bellotti* holding in *Consolidated Edison v. Public Service Commission*[58] when it struck down another state regulation on a different form of corporate political media spending, a New York ban on enclosing corporate political messages with electric-bill inserts.[59] The Consolidated Edison Company had argued that it was essential to democratic processes that corporate speech "remain unfettered if the public is to be fully informed." In one of a number of *amicus* briefs filed by other corporate parties, Mobil Oil depicted such regulation as "a frontal assault on the core of the First Amendment."[60] Also in 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[61] Justice Powell authored the majority opinion in which the Court struck down a state energy-conservation regulation that had banned advertising that promoted greater consumption of electricity.[62] The State of New York contended that the power company's efforts to use the First Amendment to advance its pursuit of profits reflected disregard for society's pressing need to conserve energy,[63] but Central Hudson successfully argued that the state had banned "speech which conveys information of great importance to the consumer of energy and touches closely on vital societal interests."[64]

Additional cases will be discussed further below in the con-

text of how the opposition that Justice Rehnquist articulated during the debate among Supreme Court justices during the *Bellotti* ruling continued long afterward and ultimately shifted the Court's jurisprudence on corporate political media spending. Just as that debate among the justices remains contentious more than three decades after *Bellotti*, so too does the body of scholarship on this area of law. Multiple scholarly efforts have documented evidence of the corrupting influence of corporate spending in relation to democratic processes.[65] The literature addressing the Court's jurisprudence on corporate political media spending includes a substantial body asserting support for its soundness in terms of law, philosophical grounding, political and social benefit, and consistency with fundamental principles of American freedom of expression.[66] It includes another that argues against all that.[67] In the next section, this article contributes new analysis to that robust discussion. The memoranda, correspondence, and other documents examined here reveal the way the landmark precedent that *Bellotti* put in place was almost resolved far short of that, and then the difficult struggle that a determined Justice Powell faced in fashioning his opinion so as to win the barest of majorities for what the ruling ultimately did establish.

The *Bellotti* Papers: 1977

Justice Powell's papers suggest that he was disposed in favor of the corporate appellants very early in the Court's considerations of the case. In a memorandum he dictated as an "aid to memory" after reviewing the briefs filed in *Bellotti* more than eight months before the April 1978 decision was handed down, Justice Powell characterized his comments then as "quite tentative."[68] Yet his tone and points of emphasis offer little basis for conjecture that he would have ruled on that day much differently than he did after considering oral arguments and the other justices' views. He declared that in his "initial impression," the statute in question was "invalid for one or more of the reasons asserted by appellants." Justice Powell wrote that it seemed to him "appellants' equal protection argument has substantial merit" and that the Court's recent rulings in *Virginia Pharmacy* and *Linmark Associates* (neither of which were a corporate political media spending case, but which asserted a societal interest in the "free flow of commercial information" as protected by the First Amendment) "go a long way toward recognizing First Amendment rights of corporate entities."[69] Ultimately, in his *Belotti* opinion, Justice Powell would write of how those cases "illus-

trate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[70]

In that initial memorandum, however, Justice Powell made no mention of the transformational theory that would form the foundation of his *Bellotti* opinion. That premise would be that the bottom line in the case was not whether corporations should have the same First Amendment rights as human beings, but that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[71] It was through such alchemy that Justice Powell was able to transform corporate political media spending into "the type of speech indispensable to decision making in a democracy."[72] In Powell's *Bellotti* files, the first clear articulation of that approach—to disregard the source and nature of the actual object of the regulation in question and focus only on speech in the abstract—appears in a bench memorandum prepared for Powell a month later by his clerk, Nancy Bregstein, summarizing facts, issues, and arguments in the case in advance of oral arguments.[73]

In the thirty-three-page memorandum, Bregstein devoted several pages to the question of whether corporations have First Amend -ment rights, which as she acknowledged was "the way both sides have phrased the central question of the case."[74] But she warned that the corporate appellants would likely lose if the Supreme Court began from the premise—as the Massachusetts Supreme Court had—"that corporations are unique because of their artificial existence" as a creation of state law.[75] "If, on the other hand, one conceives of the problem in terms of *what* is prohibited rather than *who* is guaranteed a certain right . . . then the fact that appellants are corporations takes on a different significance [emphasis included]," she wrote. Taking the latter approach could be an uphill battle at the Court, she noted: "From the unanimity of the court below and the fact that there were four votes here to DFWSFQ [dismiss for want of a substantial federal question], I gather that others have adopted the former major premise."[76] Bregstein conceded that "the Court never has held explicitly that the First Amendment protects corporate speech to the extent that it protects the speech of natural persons," but argued "that is because until now government has not attempted to restrict corporate speech."[77]

As in any such bench memorandum, Bregstein's asserted argu-

ments draw from potentially relevant case law, including the recent commercial-speech cases and other cases that could be read to suggest (though not directly establish) First Amendment protection for corporations. Beyond the legal analysis in that memorandum, its choice of language reflects how early in the process that a rhetorical emphasis began to develop that stressed framing the subject in terms of what corporations "think" and corporations' "views."[78] For example: "In making up their minds, voters might (and should) be interested in . . . knowing how corporations *think*. . . . Although corporations are neither individuals nor sovereign, their *expression of views* on a political matter like the one involved here serves the goals sought to be furthered by the Amendment [emphasis added.]"[79] Framing the matter in terms of silencing corporations' "views" would be central to advancing Powell's arguments in *Bellotti*. As an "artificial being, invisible, intangible, and existing only in contemplation of law," as Chief Justice John Marshall put it in the seminal 1819 corporate-law case, *Dartmouth College v. Woodward*[80]—a corporation cannot truly "think" or have "views." It is the corporation's managers, employees, and stockholders who think and have views to express, and thus as Bregstein's memorandum noted, the regulation in question in *Bellotti* was argued to impose no more than "incidental" restrictions on those individuals' freedom of speech on corporate matters (or any other matters).[81] What the challenged Massachusetts regulation literally targeted was corporate managers' taking of funds from company treasuries (rather than their own money) for expenditures aimed at influencing the outcome of referenda. Thus, Bregstein wrote: "Rejection of the view that corporate speech is unprotected by the First Amendment requires rejection of the contention that any effect on speech here is incidental. The latter contention makes sense only if it is accepted that only speech by individuals is protected."[82]

Although Bregstein's memorandum declared that the "state's interests here, if expressed candidly, is in removing from the voters' consideration of the views of corporations,"[83] it noted that Massachusetts actually had argued its interests were in "(1) preventing corporations from interfering with the individual citizen's role in the electoral process; (2) sustaining the individual citizen's confidence in government; and (3) protecting stockholders who may not hold political views contrary to those held by management."[84] The memorandum dismissed the first two essentially on the argument that "[e]xpenditures to publicize a corporation's views on a ballot

question cannot buy influence, except in unusual circumstances not present here."[85] While accepting that the "[t]he state's interest in protecting corporate stockholders is legitimate, and perhaps even substantial," Bregstein argued that the Massachusetts regulation was "unnecessary because the state already has laws prohibiting *ultra vires* acts by corporate managers. If management used corporate funds to promote their own personal views, they could be held accountable in a derivative suit."[86] Powell endorsed that sweeping assertion through early drafts of his *Bellotti* opinion, but later would have to acknowledge the protection available to stockholders through the courts was rather more limited and nuanced.[87]

The Landmark Ruling That Almost Never Was

Early on in the Court's discussions on the case, it appeared the resolution of *Bellotti* was going to be a relatively simple matter, never producing the landmark ruling that ultimately resulted. When the justices met in conference two days after oral arguments were heard in November 1977, eight of the justices indicated that rather than address the question of corporate First Amendment rights, they would reverse the ruling on the narrow grounds that the regulation's "materially affecting" provision was unconstitutional.[88] The Massachusetts Supreme Court had declared constitutional the state regulation stipulating 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."[89] In the *Bellotti* conference, only Justice White agreed that the Constitution permitted government to define the material interests of a corporation. According to Justice Powell's notes, two justices (Justices Brennan and John Paul Stevens) mentioned concerns that a broader ruling could undermine the federal Corrupt Practices Act. Two justices (Justices Potter Stewart and Harry Blackmun) argued that corporations did have some degree of First Amendment rights, while two others (Justices White and William J. Brennan, Jr.) noted that government could be able to limit such rights as a corporation might possess. But ultimately the discussion on that day resulted in an eight-to-one vote to dispose of the case by ruling only on the "materially affecting" provision. Justice Powell indicated in his notes that he personally would prefer to go beyond that and also declare the entire Massachusetts statute unconstitutional, but wrote, "If we

can decide [the] case solely on the conclusive presumption [of the 'materially affecting' provision], I probably could join" the majority in such a ruling.[90]

In the days following that conference, however, other justices began to rethink their positions on *Bellotti*. Justice Brennan had been assigned to author the majority opinion, but three weeks after the conference he wrote the other justices to explain that his evolving position on the case had made him "doubt I can write an opinion that will command majority support."[91] Justice Brennan explained that because ruling only on the "materially affecting" provision would leave the ban on corporate spending in referenda in place, the Court would be failing to decide a substantial question that the appellants had raised. Further, he wrote, if he were to author an opinion addressing that question, "I presently feel that I would write to sustain its constitutionality." Justice Brennan went on to explain why he would do so in language and reasoning that indicated how deeply rooted the Court's jurisprudence and the weight of legislative action were in the judgment that corporate political media spending represented a threat to democratic processes. He said his inclination to uphold the Massachusetts regulation was based on his conclusion that the Court's holding the year before in *Buckley v. Valeo* (which Justice Brennan had joined) striking down federal campaign expenditure limits on human individuals would not similarly invalidate the Massachusetts ban on *corporate* expenditures in referenda.[92] Brennan said he would be "loathe to undertake to write an opinion for the Court if . . . this view could not attract a majority," but reminded the other justices that "[c]orporate spending as a corrupting influence in the political process . . . has produced numerous corrupt practice acts" over the course of the twentieth century "to enhance representative democratic government." To invalidate the Massachusetts referenda regulation, he contended, "must inevitably call into question the constitutionality of all corrupt practices acts."[93]

The same week, in a letter copied to the other justices, Chief Justice Warren E. Burger wrote to Justice Brennan that "[e]ven before I received your memo of December 1 . . . I had begun to have misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act's limitations." Not only did the Chief Justice find "differences between the First Amendment rights of an individual as compared with a corporate-collective body," but "[c]orporations rarely, if ever consult stock-

holders 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." He recalled that "[m]any of us at the Conference" in November had "expressed concern about taking any step which would undermine state and federal Corrupt Practices Acts."[94]

Bregstein wrote a memorandum to Justice Powell briefly summarizing why she believed Justice Brennan's views were "shocking" and arguing that he was wrong about both his interpretation of *Buckley* and the potential for the Court to undermine the constitutionality of corrupt practices acts. As in her earlier memoranda on *Bellotti*, she focused the question on corporate "expression of views" rather than corporate political media spending. "It is a sorry state for democracy when the expression of views—even by powerful, wealthy, and self-interested corporations (let alone corporations without those attributes)—is considered corruption," she declared.[95] Bregstein concluded by requesting that Justice Powell "[p]lease excuse the heightened emotional tone of this memo, but I am particularly surprised to hear these views coming from Justice Brennan. I am worried that other Justices may adopt them. I hope they will not."[96] Those concerns about other justices were not misplaced, as the months ahead and the justices' intense and near-even split in the development of the ruling would demonstrate.

A few days later Justice Powell wrote to the other justices, expressing more tactfully arguments similar to Bregstein's. He briefly made the case for a broader ruling on the question of corporate First Amendment rights. "I think it is too late to hold that persons who elect to do business in the corporate form . . . may not express opinions through the corporation on issues of general public interest," he wrote, in language that maintained the focus on corporate expression rather than corporate political media spending. "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."[97] Justice Stewart wrote the next day to tell Justice Powell that his "tentative views in this case closely parallel those expressed in your memorandum of December 6."[98] But further support toward reaching a majority in *Bellotti* would come very slowly and extend well into the spring of 1978.

Overcoming "Apparent Incongruities"

Justice Powell and Bregstein began to engage in the drafting of his opinion in earnest by the end of December 1977. In a memorandum late that month Bregstein described as "a very sketchy rendition of my thoughts about how to approach this opinion," she emphasized that the theme should be that "the speech at issue here is at the 'core' of the First Amendment and therefore presumptively is protected. . . . The opinion need not address whether corporations' First Amendment rights are 'coextensive' with those of individuals." Indeed, she recommended that "[t]he opinion should state that it is not necessary to explore the outer limits of corporate First Amendment rights in a case where the proposed speech is at the core of First Amendment protection."[99] Ultimately, Powell's majority opinion would declare: "[W]e need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."[100] Bregstein wrote that her conception of "core" First Amendment speech "resembles" the work of philosopher Alexander Meiklejohn, which "considers that speech which helps the citizenry govern itself is the most worthy of First Amendment protection."[101] The memorandum asserts "the heart of the opinion" should be that "[i]t is antithetical to the First Amendment to judge whether speech is protected by looking to its source."[102] Justice Powell's majority opinion four months later would state: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source."[103]

In that fashion, the *Bellotti* author would choose to embrace the interpretation that the reason "there is little discussion in the cases of whether corporations 'have' First Amendment rights" must be because "[s]peech presumptively is protected; only look to the source if relevant to the state's asserted interest"[104]—rather than the alternative interpretation that the question simply had not been addressed by the courts before then. Justice Powell's handwritten notations on that memorandum indicate much agreement with it and often enthusiasm. Next to a passage on Bregstein's reasoning that it followed from her interpretation of Meiklejohn that "the focus should not be primarily on the question 'Do corporations have First Amendment rights?' but on the question whether this speech is the type eligible for First Amendment protections,"[105] for example, he wrote, "Yes!"[106]

The choices made at that seminal stage of the development of *Bellotti* are crucial in understanding the leap of reasoning it would introduce into First Amendment jurisprudence on corporate political media spending. Ultimately, Justice Powell's majority opinion advanced its rationale in significant part by invoking what can at the least be considered debatable interpretations of Meiklejohn's First Amendment theories and the way the Supreme Court institutionalized them in *New York Times v. Sullivan*.[107] In *Bellotti*, for example, Powell cited Meiklejohn in support of one of the opinion's fundamental assertions, that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy."[108] Certainly Meiklejohn's considerable influence on the decision in *Sullivan*[109] is widely agreed upon by scholars.[110] Yet there is also considerable contention that Justice Powell's use of Meiklejohn represents a *deus ex machina* employed to overcome the "apparent incongruities" of extending First Amendment protection to nonhuman entities such as business corporations.[111] Central to Meiklejohn's influential First Amendment reasoning (including the conceptual elements Justice Powell cited so prominently in *Bellotti*) is his "town-meeting" articulation of freedom of speech, which he employs as a metaphor for illustrating government's role in protecting that freedom. When "the people of a community assemble to discuss and to act upon matters of public interest . . . [e]very man is free to come" and has "a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged."[112] So it is indisputable that Meiklejohnian thought mandates a barring of government from any viewpoint discrimination: "[N]o idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from [citizens]."[113] Yet it is also indisputable that Meiklejohn's town meeting additionally mandates equality in the marketplace of ideas—all there "meet as political equals"[114]—and a "moderator" role for government in maintaining that equality. "The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules," because as Meiklejohn makes clear the town meeting "is not a dialectical free-for-all." It is an assembly where the purpose is "not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require."[115]

Thus that town meeting represents something very different from the laissez-faire marketplace of ideas that Justice Powell's *Bellotti* opinion attempts to justify with Meiklejohnian thought. The latter would deny government any role in protecting the *freedom* of the marketplace of ideas, even to prevent domination by corporate political media spending. Although Meiklejohn's moderator is not allowed to decide which ideas are acceptable or unacceptable, he makes it clear how vital it is that the moderator take care to prevent any participants from dominating the deliberations. As an example of the moderator's role in guarding against such domination, Meiklejohn noted the case in which "twenty like-minded citizens have become a 'party,' and if one of them has read to the meeting an argument which they all have approved, it would be ludicrously out of order for each of the others to insist on reading it again."[116] Neither does *New York Times v. Sullivan* support a laissez-faire interpretation that would bar the moderator from protecting the town meeting against unfair dominance by more powerful participants. The *Sullivan* Court grounded its ruling in the most fundamental principles that drove the founders' efforts to ensure that the "structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels."[117] Nothing is more consistent in the language of *Sullivan* than its priority on how the decision is intended, above all, to help maintain the sovereignty of the people—a process that requires protecting citizens from concentrations of power that threaten fundamental rights. It consistently articulated its rationale throughout the opinion in terms of maintaining the peoples' speech rights against encroachment by more powerful influences. Although there are other elements of the opinion that are crucial to its outcome, none are as closely linked to its holding in factual context, language or reasoning.

The *Sullivan* Court invoked the ideal of an "unfettered exchange of ideas" not in a manner so as to imply establishing that condition as an absolute or laissez-faire standard but as part of its broader discussion of protecting speech rights of the people in order to further self- governance. It did declare that "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions . . . 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[118] But it did so specifically as part of its discussion on the question of whether "an expression of grievance and protest on one of the major public

issues of our time" loses it First Amendment protection "by the falsity of some of its factual statements and by its alleged defamation of respondent."[119] To reach its answer on that question, the Court weighed the interest in unfettered discussion of public issues against the interest in protecting reputation. That balancing led it to conclude that the Alabama liability standard was unconstitutional as applied to libel suits brought in response to criticism of government officials—because such a standard leads to self-censorship and "thus dampens the vigor and limits the variety of public debate."[120] What the *Sullivan* Court clearly did not choose to do as an answer to that question, however, was to conclude that protecting unfettered discussion required going so far as a laissez-faire standard *eliminating* libel as a cause of action whenever matters of public discussion are involved. Rather than embracing a laissez-faire approach of no standard at all, the Court set the standard higher, requiring actual malice as the level of fault required of public officials in libel actions.[121]

The *Bellotti* Papers: 1978

Thus, the choices that Justice Powell made early on in formulating his use of a laissez-faire understanding of the marketplace of ideas would result in an opinion that arguably stands considerably at odds with the sources it puts forth as its fundamental philosophical and legal justification. That intrinsic dissonance in conceptualization likely at some level contributed to the difficult battle that lay ahead for him in winning even the minimum support he needed to form a majority for his position in *Bellotti*. By January 19, Bregstein had developed a rough draft of the opinion for Justice Powell,[122] and he expressed enthusiasm for it, declaring it was true to the outline they had agreed upon and would "thoroughly demolish" the Massachusetts Supreme Court's line of reasoning on whether and to what extent corporations have First Amendment rights.[123] He acknowledged that it "may not be easy to handle" the argument he anticipated from "dissenting brothers" that "corporations, being creatures of the state, may be subjected to virtually any regulation."[124] But he recommended that "we must find some appropriate way to emphasize that our opinion does not undercut the Federal Corrupt Practices Act."[125]

In his comments written on that draft while visiting his home in Richmond, Virginia, Powell expressed additional approval but line-edited it carefully, making notations in the margins and be-

tween the lines on every page of the fifty-one-page draft and adding fifty pages of his own handwritten insertions and revisions.[126] The changes he made were as meticulous as replacing "parameters" with "limitations"—declaring the former "too fashionable"[127]—and as sweeping as a six-page, handwritten insertion elaborating on the argument that the Court's institutional-press cases had focused upon "the speech itself" rather than "the speaker's identity or its relationship to the subject matter." In that passage, he acknowledged that in such cases the Court "took into account" the speaker's identity insofar as it "entitled the party to assert abridgement of freedom of the press. . . . The press serves a special and constitutionally recognized role in informing and educating the public, offering criticism, and providing a forum for discussion and debate."[128] But then he argued that "while the press has been singled out as specially competent to perform this function, it is the function itself that entitles the press to its freedom, not simply the label 'press.' Freedom of speech and of the press are servants of the same master, and are so inextricably linked as not to admit of a clear distinction."[129] Thus, Powell suggested a conflation of all corporate political media spending with the practice of journalism, a blurring that would be resisted by others on the Court, particularly Justices White and Rehnquist.[130] In the same insertion, Powell similarly sought to blur the distinction between individuals expressing "themselves" and corporate managers spending stockholder profits for political purposes in arguing that the Court's prior cases had "recognized that individuals do not abandon this interest in expressing themselves when they participate in a corporate enterprise."[131] In the final version of his *Bellotti* opinion, those assertions on the institutional press would be more nuanced and narrow in scope, but their original form offers insight into his inclination to sweepingly broaden constitutional protection for institutional press rights.[132]

By the time a second draft was completed in early February, Justice Powell declared it "materially improved" and his principal concern at that point to be trimming the length.[133] A February 9 memorandum again highlighted Justice Powell's determination to brush aside the argument that the regulation in question regulated only corporate political media spending and thus did not restrict the freedom of speech of any individuals associated with the corporation. In response to Bregstein's note on the third draft that she had "ignored" Massachusetts' contention that its regulation represented no more than incidental infringement on expression in that "corporate management and employees still are free to speak on these

issues as individuals," Justice Powell wrote simply, "Forget this."[134] By the last week of the month, Justice Powell's draft opinion was circulating to other justices, and by early March, he was responding to the draft of Justice White's dissent that was also circulating. The dissent asserted that it was "long recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power but also the very heart of our democracy, the electoral process."[135] Justice Powell's March drafts include various changes made in response to that dissent, including one in which he declared: "Justice White's views would allow curtailment or elimination of corporate activities that now are widely viewed as socially constructive. Corporations no longer would be able safely to support—by contributions or public service advertising—educational, charitable, cultural, or even human rights causes."[136] He did not explain why a government would conceivably choose to ban such "socially constructive" spending, nor address the fact that long settled corporate law already provided majority stockholders the ability to do just that.[137]

The first to formally join Justice Powell's opinion was Justice Stewart, also a former corporate attorney, on March 7.[138] The remaining votes needed to form a majority would prove more challenging. Already, it was growing clear how deeply divided the Court would be in *Bellotti* as Justice Brennan joined Justice White's dissent the same day[139] and two days later, Justice Thurgood Marshall did the same.[140] The same week, Justice Stevens wrote Justice Powell twice, first to explain why he would not be able to join at least part of his opinion[141] and then to suggest a revision that might win him over.[142] The final opinion did not fully incorporate every change Justice Stevens requested but apparently went far enough to assuage him, as he joined Justice Powell's opinion in mid March.[143]

A few days earlier, Justice Powell had sent a letter to justices whom he was still hoping would support his opinion—Justices Blackmun, Rehnquist, Stevens, and Chief Justice Burger—to emphasize the changes he was making in response to Justice White's dissent. His salutation of "Dear Uncommitted Brothers" reflected the still tenuous status of *Bellotti* at the Court at that point, in that he would need to win over three of those four in order to form a majority.[144] Ultimately, he would get just that and no more, despite extended efforts to persuade Justice Rehnquist. Chief Justice Burger was the first to formally provide his support, though he noted he was considering a concurrence to emphasize his concern over its potential to undermine corrupt practices laws. He said he felt he

should "underscore the narrowness of the holding" because "I do not want corrupt practices statutes to be placed under a shadow. You have covered this, but it needs to stand out."[145] Ultimately, however, the Chief Justice issued a concurrence that did not mention corrupt-practices statutes but instead offered an ominous discussion of his assertion that it had grown difficult to distinguish between media and nonmedia corporations, even in areas of corporate regulations such as that *Bellotti* involved.[146] As for Justice Powell, he seemed to find the action by a justice whose support was crucial for the *Bellotti* opinion rather confounding. He wrote in the margin of a circulating draft of the concurrence: "I really don't understand why the C. J. thinks this is desirable—but it does not affect my opinion."[147]

Justice Powell almost formed his majority on March 13, but Justice Blackmun indicated he was still not decided. He wrote that he was "always bothered and hesitant" concerning the use of phrases such as "least restrictive alternative" in relation to declarations by the Court that a state had failed to utilize such an alternative in an effort to advance interests that implicate the First Amendment—as Justice Powell's draft did in two instances at that point. "It is so easy, after legislation has been enacted, and a challenge has come all the way here, to think of something less restrictive," Justice Blackmun wrote, explaining that he "would feel much better" if that language would be removed from Justice Powell's opinion.[148] Justice Powell agreed to the changes, and Justice Blackmun provided the fifth vote needed to form a majority.[149] But the elimination from the opinion of all assertions that any such regulation of corporate political media spending could go no further than the elusive "least restrictive alternative" represented a significant narrowing of *Bellotti*'s holding for future courts.

Failed Quest for Broader Majority

Even though Justice Powell had a majority for his opinion by March 14, he continued to lobby for a broader one well into April—as well as to ruminate privately upon the opinion. A striking example of the latter is reflected in a memorandum that Powell dictated on April 5, in which he seems to acknowledge (to himself, at least) that his earlier sweeping statements regarding the protection that *ultra vires* suits offered directors and stockholders against unjustified political spending by corporate managers went too far. He had been dismissive of concerns that if the Massachusetts regulation were struck down, minority shareholders' interests could not

be sufficiently safeguarded through such lawsuits—which seek to establish that a corporation has acted beyond the scope of its lawful authority. In December, for example, with regard to Massachusetts' assertion that one of its interests in the regulation in question in *Bellotti* was protecting minority shareholders from such spending, he had written simply: "Stockholders elect Board; they may sue."[150] In a memorandum on an early 1978 draft of his *Bellotti* opinion, he wrote that it would "demolish the state's argument that its interest is in protecting shareholders," and declared, "In short, this purported state interest is frivolous."[151] In the April 5 memorandum, however, he stated that he had grown "inclined to eliminate from my opinion the reference to *ultra vires*." He did not go so far as to concede Justice White's contention that the majority opinion will undermine protection of shareholders, but he recognized that "the use of *ultra vires* . . . has become a seldom used antique of corporation law," and that a "suit would rarely be brought under that rationale." He maintained that "a complaining stockholder" could still "sue management, in a derivative action, for an alleged breach of duty" in which the test would be "whether management had breached its duty to conduct affairs of the corporation with reasonable care in the best interests of the stockholders." Ultimately, Justice Powell concluded, "We need not get into all of this,"[152] and indeed, a reference to *ultra vires* action as a judicial remedy available to minority shareholders was dropped from Justice Powell's final opinion.[153] Justice White's dissent remained unwavering that by prohibiting Massachusetts from defining the powers of a corporation so as to bar the spending in question, the Court was rendering untenable shareholder lawsuits that might allege a corporation had exceeded its powers if it chose "to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support."[154]

Although at that point Justice Powell had the five votes he needed for a majority, he continued his efforts to persuade Justice Rehnquist to join the majority opinion, characterizing *Bellotti* as "one of the most important cases to come before the Court since you and I took our seats" six years before.[155] Justice Powell wrote to Justice Rehnquist on April 6, "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."[156] Despite that, Justice Rehnquist would issue a withering dissent that proclaimed the majority decision as completely at odds with settled law. "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," he acknowledged, then declared: "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."[157]

Justice Rehnquist, despite having joined the Court on the same day in 1972 as part of Richard Nixon's nominations aimed at shifting its jurisprudence back to the right after the Warren era,[158] made clear that he had brought a very different understanding of the corporate being's standing in law. "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," he wrote. "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."[159]

Even after seeing a draft of the dissent in mid-April that showed his "shot" had made little headway with Justice Rehnquist, Justice Powell continued to press the matter. A three-page April 17 letter maintained the unfailing cordiality that characterizes Justice Powell's correspondence, but reflected an unmistakable level of alarm. "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 their First Amendment rights except" to protect their property interests "or to perform the specific function for which they were chartered."[160] The letter went on to challenge Justice Rehnquist's conceptualization of corporate personhood: "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."[161] Justice Powell represented the corporation as deeply imperiled without First Amendment protection for its political media spending. "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,'" he wrote. "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."[162]

In an effort to respectfully acknowledge Justice Powell's urgent plea, while maintaining his own evident concern over burgeoning corporate power, Justice Rehnquist wrote back the same day: "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.'"[163] In that lengthy footnote to his dissent, Justice Rehnquist elaborated upon his view that assessment of the legislative motive in the Massachusetts regulation should play in the Court's consideration of the case. He indicated that he was more open to a skeptical assessment of that motive than was Justice White, but that ultimately that factor was not central to deciding the case—in Justice Rehnquist's view—and that he remained convinced the Massachusetts regulation should not have been declared unconstitutional by the majority.[164]

The *Bellotti* Legacy

Justice Rehnquist's arguments remained in the minority in the Court's early cases on corporate political media spending following *Bellotti*, but he continued to press them doggedly. He joined Justice Blackmun's dissent in *Consolidated Edison*[165] and authored a lengthy dissent of his own in *Central Hudson*,[166] extending his argument against granting the same First Amendment rights to non-human entities as it does to human citizens. "In a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence," Justice Rehnquist wrote portentously.[167] A few months before he was appointed chief justice in 1986, he wrote in dissent in *Pacific Gas & Electric Co. v. Public*

Utilities Commission of California that extending First Amendment protection to corporations based on "individual freedom of conscience . . . strains the rationale . . . beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' . . . is to confuse metaphor with reality."[168]

In other cases earlier in the 1980s, the Court had begun to reshape its doctrine on corporate political media spending in a manner more consistent with Justice Rehnquist's arguments, a process that produced its most forceful counterbalance to *Bellotti* in *Austin v. Michigan State Chamber of Commerce*.[169] In that 1990 ruling a six-to-three majority declared it constitutional to bar corporations from making expenditures from treasury funds for independent expenditures in connection with state candidate elections.[170] Justice Thurgood Marshall wrote for the majority that because such funds accumulated through the "state-created advantages" bestowed upon the corporate form—particularly "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments," they undemocratically advantage corporate beings over human citizens.[171] Thus, the *Austin* Court did not accept Michigan's regulation on the speech in question "simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property"—the basis that *Bellotti* had rejected.[172] Rather, *Austin* did so because the state sought to prevent potential corruption through the direct transfer of those advantages to the political marketplace by corporate managers.[173] The holding was grounded in interests established as compelling—meaning they justified the regulation in question in *Austin*—by majorities in other cases earlier in the decade.[174]

Additional legislative efforts (the Bipartisan Campaign Reform Act) aimed at soft-money contributions and sham issue advertising, particularly corporate involvement in such practices, were upheld in 2002's *McConnell v. Federal Election Commission*, the Court's most substantial case on corporate political media spending since *Austin*. The majority opinion, by Justices Stevens and Sandra Day O'Connor, emphasized Congress's century-long efforts to restrain corporate political activity in campaign finance legislation "in order to prevent 'the great aggregations of wealth, from using their corporate funds, directly or indirectly,' to elect legislators who would 'vote for their protection and the advancement of their interests as against those of the public.'"[175]

Then the Supreme Court was reconfigured with the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. Very shortly after that, it ruled in favor of a challenge to the application of a provision of the BCRA that targeted electioneering—political messages that evade restrictions on campaign spending by purporting to address issues while attacking a candidate. In 2007's *Federal Election Commission v. Wisconsin Right to Life,* then-new Chief Justice John G. Roberts, Jr. declared in his majority opinion that it was a narrow ruling that did not affect the *McConnell* holding on the BCRA's broader constitutionality.[176] In a concurring opinion joined by Justices Kennedy and Clarence Thomas, however, Justice Scalia argued the Court should have gone much further.[177] In 2010's *Citizens United v. Federal Election Commission*,[178] the same group of five justices[179] did just that, overruling central holdings of both *Austin* and *McConnell*. The Court's latest pronouncement on corporate political media spending does not affect federal and state bans on direct corporate contributions to candidates, but it declares virtually all limits on expenditures by corporations to otherwise influence political campaigns unconstitutional.

In his majority opinion, Justice Kennedy references *First National Bank of Boston v. Bellotti* twenty-four times and characterizes it as a holding much more sweeping and deeply grounded in well-established precedent than the development of *Bellotti*—as detailed in this article—and the later cases narrowing it would indicate. Indeed, he all but ignores those key cases that narrowed *Bellotti*, declaring after his assertion of it as controlling precedent: "Thus the law stood until *Austin*."[180] Yet Justice Kennedy maintained hereditary consonance with Justice Powell's choice of framing the matter in question by declaring that the 1978 case "rested on the principle that the Government lacks the power to ban corporations from *speaking* [emphasis added]."[181]

Conclusion

For better or worse, *Bellotti* must stand as one of Justice Powell's most far-reaching legacies. While it was before the Court, it required him to draw upon all his considerable skills of judicial finesse and personal diplomacy to push through the holding that he sought. His shrewd rhetorical reframing of what was at stake, so as to structure his opinion throughout on abstract freedom of speech rather than the more problematic palpability of corporate political media spending, also proved crucial to his cause. In the end, resis-

tance from other justices forced him to temper his original vision for *Bellotti* to some extent. Without such changes, Justice Powell might not have been able to form a majority for his opinion, and in the end his efforts to extend his majority beyond the minimum five votes needed were unsuccessful.

Justices Rehnquist and White remained so dissatisfied with the result in *Bellotti* that each authored harsh dissents that declared the majority holding to be completely at odds with settled law, and both remained on the Court long enough to have the opportunity to help form majorities in a series of cases that substantially narrowed that holding. The battle over First Amendment protection for corporate political media spending continued at the Court, with major rulings in the early years of the twenty-first century that would come down in diametrically opposing directions on the matter—in *McConnell* and *Citizens United*—and in five-to-four splits among the justices identical to that of the *Bellotti* Court that first squared off over the subject. This study's analysis of Justice Powell's papers documents how deeply among the justices who debated *Bellotti* the conviction ran that it represented a profoundly sharp turn in the Supreme Court's First Amendment jurisprudence. Nevertheless, it established a firm-enough footing in the case law to allow another bare majority to eventually extend its reach far beyond what was established in 1978.

Endnotes

[1] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Corporate political media spending (often referred to as "corporate speech") is the more precise term for the First Amendment category of corporate expression that seeks to influence political outcomes or social climate. It is distinguished from "commercial speech," media efforts that promote products or services. Each has generated a distinct body of First Amendment law, and in that context, all corporate speech is not *commercial*, and neither is all commercial speech *corporate*.

[2] In Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), a five-to-four majority ruled for the first time that corporations may make unlimited political expenditures directly from their treasuries.

[3] For discussion of such assertions, see Notes 179–181 and accompanying text.

[4] Carl E. Schneider, "Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti," *Southern California Law Review* 59, no. 6 (1986): 1287.

[5] Ibid., 1232.

[6] Bellotti, 435 U.S. at 813 (1978) (White, J., dissenting).
[7] Memorandum from Nancy J. Bregstein to Lewis F. Powell, Jr., 13 September 1977, p. 1, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law (hereafter cited as LFP Papers).
[8] Harry A. Blackmun and William H. Rehnquist were the other justices who joined the Court during that period.
[9] John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* (New York: Fordham University Press, 2001), 252–3.
[10] Jacob W. Landynski, "Justice Lewis F. Powell, Jr.: Balance Wheel of the Court," in *The Burger Court: Political and Judicial Profiles*, ed. Charles M. Lamb and Stephen C. Halpern (Champaign: University of Illinois Press, 1991), 310.
[11] Craig Evan Klafter, "Justice Lewis F. Powell, Jr.: A Pragmatic Realist," *The Boston University Public Interest Law Journal* 8, no. 1 (1998): 8.
[12] Paul W. Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell," *Yale Law Review* 97 (1987): 5, 58.
[13] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[14] K. G. Jan Pillai, "The Defacing Reconstruction of Powellian Diversity," *Thurgood Marshall Law Review* 31, no. 1 (2005): 2. It should be noted that this view of *Bakke* is far from universal. See for example, Dennis J. Hutchinson, "Remembering Lewis F. Powell," *The Green Bag* 2 (1999): 164, calling Justice Powell's *Bakke* opinion "a doctrinal failure" as support for the argument that Powell's "doctrinal brainchildren suffered at an unusual rate."
[15] Branzburg v. Hayes, 408 U.S. 665 (1972) (Powell, J., concurring).
[16] Michelle Bush Kimball, "The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege," *Communication Law and Policy* 13, no. 3 (2008): 379–81, which shows that Powell's papers indicate he "fully intended to leave room for" a qualified reporter's privilege with his *Branzburg* concurrence.
[17] Samuel Estreicher and Tristan Pelham-Webb, "The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring," *Constitutional Commentary* 25, no. 2 (2008): 229–240, which documents six of his concurring opinions that lower courts have treated as stating the majority holding of the Court.
[18] Tristan Pelham-Webb, "Powelling for Precedent: 'Binding' Concurrences," *New York University Annual Survey of American Law* 64, no. 4 (2009): 693–750. . Pelham-Webb credits the term "Powelling" to David O. Stewart, "A Chorus of Voices," *American Bar Association Journal*, April 1991, 50, 52.
[19] Mark Tushnet, "Lives in the Law: Justice Lewis F. Powell and the Jurisprudence of Centrism," *Michigan Law Review* 93, no. 6 (1995): 1854.
[20] Ibid., 1854, 1883.
[21] See Jeffries, *Justice Lewis F. Powell, Jr.*, 511–30, for a fuller discussion of Justice Powell's "tortured and unsure" deliberations on the *Bowers* decision.

[22] Ibid., 529.
[23] A. C. Pritchard, "Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws," *Duke Law Journal* 52, no. 5 (2003): 947.
[24] Ibid., 844, 946–47. In other research, Pritchard has found that Justice Powell's influence at the Supreme Court worked to restrain prosecutions for insider trading until justices rebuffed his efforts a decade after he left the Court. A. C. Pritchard, "United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading," *Boston University Law Review* 78, no. 1 (1998): 13–58.
[25] Letter from Lewis F. Powell, Jr., to John N. Mitchell, Attorney General, U.S. Department of Justice 1, 12 December 1969, cited in Jeffries, *Justice Lewis F. Powell, Jr.*, 2.
[26] Fred P. Graham, "Powell Proposed Business Defense," *New York Times*, September 29, 1972, 31.
[27] Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., "Attack on American Free Enterprise System," *Washington Report*, U.S. Chamber of Commerce, 23 August 1971, LFP Papers.
[28] Richard J. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," *Georgetown Law Journal* 96, no. 5 (2008): 1505.
[29] Brief for Chamber of Commerce of the United States of America, 3–5, *Bellotti*, 435 U.S. 765 (1978) No. 76–1172.
[30] Lazarus, "Advocacy Matters Before and Within the Supreme Court," 1506.
[31] Jeffrey Rosen, "Supreme Court Inc.: How the Nation's Highest Court Has Come to Side with Big Business," *New York Times Magazine*, March 16, 2008, 39–40.
[32] Carl J. Mayer, "Personalizing the Impersonal: Corporations and the Bill of Rights," *Hastings Law Journal* 41, no. 3 (1990): 577–667.
[33] Norman Dorson and Joel Gora, "Free Speech, Property, and the Burger Court: Old Values, New Balances," *Supreme Court Review* 1982 (1982): 212.
[34] For a fuller discussion of the historical process over the course of the twentieth century that produced efforts to use the First Amendment to block government regulation of corporate political media spending, see Robert L. Kerr, *The Corporate Free-Speech Movement: Cognitive Feudalism and the Endangered Marketplace of Ideas* (New York: LFB Scholarly, 2008).
[35] James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (Charlottesville: University of Virginia Press, 1970), 8. From the 1780s into the mid-nineteenth century, business corporations in the United States were most often public utilities created to provide inland navigation, turnpikes, toll bridges, banks, insurance companies, and municipal water services.
[36] Thomas K. McCraw, "Business & Government: The Origins of the Adversary Relationship," *California Management Review* 26, no. 2 (1984): 41–42.

[37] Roland Marchand, *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery* (Berkeley: University of California Press, 1998), 2–4.
[38] Albro Martin, "Uneasy Partners: Government-Business Relations in Twentieth-Century American History," in *Business and Government in America Since 1870*, ed. Robert F. Himmelberg (New York: Garland, 1994), 9:233–37.
[39] Ibid.
[40] See Standard Oil v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco, 221 U.S. 106 (1911).
[41] For a fuller discussion of the remarkable reforms of the Progressive Era, see, for example, Kenneth Fox, *Better City Government: Innovation in American Urban Politics, 1850–1937* (Philadelphia: Temple University Press, 1977); Morton Keller, *Affairs of State: Public Life in Late Nineteenth-Century America* (Cambridge, MA: Harvard University Press, 1977); Martin J. Schiesl, *The Politics of Efficiency: Municipal Administration and Reform in America, 1880–1920* (Berkeley: University of California Press, 1977); Nell Irvin Painter, *Standing at Armageddon: The United States, 1877–1917* (New York: Norton, 1987); Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (Cambridge, MA: Harvard University Press, 1990); John Whiteclay Chambers II, *The Tyranny of Change: America in the Progressive Era, 1890–1920* (New York: St. Martin's Press, 1992); Morton Keller, *Regulating a New Society: Public Policy and Social Change in America, 1900–1933* (Cambridge, MA: Harvard University Press, 1994); Charles W. Calhoun, ed., *The Gilded Age: Essays on the Origins of Modern America* (Wilmington, DE: Scholarly Resources, 1996); Sidney M. Milkis and Jerome M. Mileur, eds., *Progressivism and the New Democracy* (Amherst, MA: University of Massachusetts Press, 1999).
[42] Nancy Lammers, ed., *Dollar Politics*, 3rd ed. (Washington, DC: Congressional Quarterly, 1982), 3.
[43] 34 Stat. 864 (1907).
[44] 43 Stat. 1074 (1925).
[45] 86 Stat. 3 (1971).
[46] Jeffery H. Birnbaum, *The Money Men: The Real Story of Fund-Raising's Influence on Power in America* (New York: Crown, 2000), 32–33.
[47] 88 Stat. 1263 (1974).
[48] 424 U.S. 1, 19, 21, 47 (1976).
[49] Ann B. Matasar, *Corporate PACs and Federal Campaign Financing Laws: Use or Abuse of Power* (New York: Quorum, 1986), 14–15.
[50] *Bellotti*, 435 U.S. at 767–69. Francis X. Bellotti was Massachusetts Attorney General 1975–87 and in that capacity became the named party in the law suit challenging the state's regulation of corporate political media spending.
[51] Brief for Appellant at 35–36, *Bellotti*, 435 U.S.
[52] Brief for Appellee at 4–14, *Bellotti*, 435 U.S.
[53] Brief for Northeastern Legal Foundation et al. at 3, *Bellotti*.

[54] *Bellotti*, 435 U.S. at 784.
[55] Ibid., 784, 777.
[56] Ibid., 785.
[57] Daniel J. H. Greenwood, "Essential Speech: Why Corporate Speech Is Not Free," *Iowa Law Review* 83, no. 5 (1998): 1062–63. As Greenwood characterized it, a business "corporation is not a banding together of citizens but rather best understood as a pot of money . . . an institution we have created to serve us in a particular area and for a particular purpose."
[58] 447 U.S. 530 (1980).
[59] Ibid., 532–33.
[60] Brief for Mobil Corporation at 29–30, *Consolidated Edison,* 447 U.S. (No. 79–134).
[61] 447 U.S. 557 (1980).
[62] Ibid., 572. *Central Hudson* is generally considered to be more a part of the commercial-speech case law than the case law on corporate political media spending. But it straddled the line to some extent, as Justice John Paul Stevens argued in a concurring opinion. He characterized the regulated expression as corporate *political* speech because the banned promotional advertising very well could address crucial questions being considered by political leaders during the energy crises of that time. *Id.* at 580–81 (Stevens, J., concurring).
[63] Brief for Appellee, 6, 10–12, *Central Hudson*, 447 U.S. (No. 79–565).
[64] Brief for Appellant, 9, *Central Hudson*, 447 U.S. (No. 79–565).
[65] See for example, Randy M. Mastro et al., "Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It," *Federal Communications Law Journal* 32, no. 3 (1980): 315–369; Allen K. Easley, "Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns," *Georgia Law Review* 17, no. 3 (1983): 675–758; John S. Shockley, "Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?" *University of Miami Law Review* 39, no. 3 (1985): 377–428; David R. Lagasee, "Undue Influence: Corporate Political Speech, Power and the Initiative Process," *Brooklyn Law Review* 61, no. 4 (1995): 1347–1397; Robert Weissman, "First Amendment Follies: Expanding Corporate Speech Rights," *Multinational Monitor* May 1998, 15–19.
[66] See for example, Michael J. Merrick, "The Saga Continues—Corporate Political Free Speech and the Constitutionality of Campaign Finance Reform: Austin v. Michigan Chamber of Commerce," *Creighton Law Review* 24, no. 1 (1990): 195–237; Prescott M. Lassman, "Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce," *Virginia Law Review* 78, no. 3 (1992): 759–792; John S. Shockley and David A. Schultz, "The Political Philosophy of Campaign Finance Reform as Articulated in the Dissents in Austin v. Michigan Chamber of Commerce," *St. Mary's Law Journal* 24, no. 1 (1992): 165–196; Morris Lipson, "Autonomy and Democracy," *Yale Law Journal* 104,

no. 8 (1995): 2249–2275; Thomas W. Joo, "The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence," *Washington University Law Quarterly* 79, no. 1 (2001): 1–87; Robert H. Sitkoff, "Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters," *University of Chicago Law Review* 69, no. 3 (2002): 1103–1166; Michael R. Siebecker, "Building a 'New Institutional' Approach to Corporate Speech," *Alabama Law Review* 59, no. 2 (2008): 247–304; Daniel R. Ortiz, "The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation," *Albany Government Law Review* 1, no. 1 (2008): 141–168.

[67] See for example, Douglas M. Ramler, "Austin v. Michigan Chamber of Commerce: The Supreme Court Takes a 'Less Speech, Sounds Great' Approach to Corporate Political Expression," *Federal Communications Law Journal* 43, no. 3 (1991): 419–449; Michael Schofield, "Muzzling Corporations: The Court Giveth and the Court Taketh Away a Corporation's 'Fundamental Right' to Free Political Speech in Austin v. Michigan Chamber of Commerce," *Louisiana Law Review* 52, no. 1 (1991): 253–271; Sean T. Geary, "Austin v. Michigan Chamber of Commerce: Freedom of Expression Issues Implicated by the Government Regulation of Corporate Political Expenditures in Candidate Elections," *Boston University Law Review* 72, no. 4 (1992): 825–840; Robert Post, "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse," *University of Colorado Law Review* 64, no. 4 (1993): 1109–1138; Martin H. Redish and Howard M. Wasserman, "What's Good for General Motors: Corporate Speech and the Theory of Free Expression," *George Washington Law Review* 66, no. 2 (1998): 235–297; Susan W. Dana, "Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce," *Hastings Constitutional Law Quarterly* 27, no 1 (2000): 309–368.

[68] Memorandum by Justice Powell, 9 August 1977, p. 1, *Bellotti*, 435 U.S., LFP Papers.

[69] Ibid., 8.

[70] *Bellotti*, 435 U.S. at 783.

[71] *Bellotti*, 435 U.S. at 777.

[72] Ibid.

[73] Regarding her work on the *Bellotti* case, Justice Powell's former clerk (now an attorney residing in Pennsylvania) said: "Unfortunately, my memory is very hazy about most things that long ago, including my work on this case. The materials you are already reviewing are a much better record of what happened than anything I could tell you." Nancy J. Bregstein Gordon, e-mail message to author, 16 December 2009.

[74] Memorandum from Bregstein to Justice Powell, 13 September 1977, p. 11, *Bellotti*, 435 U.S., LFP Papers.

[75] Ibid., 1.

[76] Ibid., 2.

[77] Ibid., 3.
[78] Legal scholar Linda Berger has focused much work on the way that the metaphors society and the legal system choose to focus upon in regard to corporate spending demonstrate contrasts in understanding of the corporate role in a democratic society and can even influence judicial outcomes. Linda L. Berger, "Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation," *Mercer Law Review* 58, no. 3 (2007): 949–990; Linda L. Berger, "What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law," *Journal of the Association of Legal Writing Directors* 2 (2004)169–208.
[79] Memorandum by Justice Powell, 9 August 1977, p. 18–19, Bellotti, 435 U.S., LFP Papers.
[80] 17 U.S. 518, 636 (1819). In his majority opinion, Chief Justice Marshall declared of the corporation: "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."
[81] Massachusetts maintained that in restricting only spending done directly from corporate treasuries, the regulation's "effect on speech is 'only . . . incidental,' because corporate managers, employees, and stockholders remain free to speak," Bregstein wrote. Memorandum from Bregstein to Justice Powell, 13 September 1977, p. 20, *Bellotti*, 435 U.S., LFP Papers.
[82] Ibid., 21.
[83] Ibid., 18–19.
[84] Ibid., 22.
[85] Ibid., 22.
[86] Ibid., 26–27. The term *ultra vires* refers to acts by corporate managers that are beyond the authority granted them by law or the corporate charter under which they operate.
[87] For discussion of that acknowledgment, see Notes 150–154 and accompanying text.
[88] Conference Notes of Justice Powell, 11 November 1977, p. 1–3, *Bellotti*, 435 U.S., LFP Papers. After oral arguments are heard in a case, the justices meet together privately in conference to discuss the points of law at issue and for each justice to state the basis on which he or she would decide the case. Powell made notes for his own reference at such conferences during his tenure on the Court, which are preserved in his private papers.
[89] First National Bank of Boston v. Attorney General, 359 N.E.2d 1262, 1270 (Mass. 1977).
[90] Conference Notes of Justice Powell, 11 November 1977, p. 3, *Bellotti*, 435 U.S., LFP Papers.
[91] Memorandum from William J. Brennan, Jr., 1 December 1977, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[92] Ibid., 2–3.
[93] Ibid., 4.
[94] Letter from Warren E. Burger to Justice Brennan, 6 December 1977, p. 1, *Bellotti*, 435 U.S., LFP Papers.

[95] Memorandum from Bregstein to Justice Powell, 2 December 1977, p. 1–2, *Bellotti*, 435 U.S., LFP Papers.
[96] Ibid., 3.
[97] Memorandum from Justice Powell, 1 December 1977, p. 2, *Bellotti*, 435 U.S., LFP Papers.
[98] Letter from Potter Stewart to Justice Powell, 7 December 1977, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[99] Memorandum from Bregstein to Justice Powell, 29 December 1977, p. 1–2, *Bellotti*, 435 U.S., LFP Papers.
[100] *Bellotti*, 435 U.S. at 777.
[101] Memorandum from Bregstein to Justice Powell, 29 December 1977, p. 2, *Bellotti*, 435 U.S., LFP Papers.
[102] Ibid., 9, *Bellotti*, 435 U.S., LFP Papers.
[103] *Bellotti*, 435 U.S. at 777.
[104] Memorandum from Bregstein to Justice Powell, 29 December 1977, p. 9, *Bellotti*, 435 U.S., LFP Papers.
[105] Memorandum from Bregstein to Justice Powell, 29 December 1977, p. 2, *Bellotti*, 435 U.S., LFP Papers.
[106] Justice Powell, notes in margin of memorandum from Bregstein to Justice Powell, 29 December 1977, p. 2, *Bellotti*, 435 U.S., LFP Papers.
[107] The Court's landmark *Sullivan* ruling constitutionalized libel law in overturning an Alabama libel judgment that was grounded in the common-law doctrine of strict liability. 376 U.S. 254, 264–65 (1964). The lower court had held that because some of the statements in an advertisement calling for support for civil rights activists were false, it was libelous *per se* and did not require proof of fault or damage to reputation. That doctrine presumed legal injury to a public official from the fact of publication of critical statements alone. New York Times v. Sullivan, 273 Ala. 656, 673, 676 (1962).
[108] *Bellotti*, 435 U.S. at 777, citing Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948), 24–26.
[109] Although Justice Brennan did not cite Meiklejohn in his *Sullivan* majority opinion, he later published an article elaborating on the subject in William J. Brennan, Jr., "The Supreme Court and the Meiklejohnian Interpretation of the First Amendment," *Harvard Law Review* 79, no. 1 (1965): 1–20. Additionally, in a concurring opinion in *Sullivan*, Justice Hugo Black cited Meiklejohn in support of the assertion that "freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. . . . An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *Sullivan*, 376 U.S. at 296–97 (Black, J., concurring), citing generally Meiklejohn, *Free Speech and Its Relation to Self-Government*.
[110] See Cass R. Sunstein, "Hard Defamation Cases," *William & Mary Law Review* 25, no. 5 (1984): 898, in which the author declares that over that time it has been established as a "relatively uncontroversial working hy-

pothesis that the [*Sullivan*] decision rested on Professor Meiklejohn's conception of the First Amendment."

[111] Schneider, "Free Speech and Corporate Freedom," 1234–36. The term *deus ex machina* refers to an "unconvincing character or event brought artificially into the plot of a story, play, etc., to settle an involved situation." David B. Guralnik, ed., *Webster's New World Dictionary* (New York: Prentice Hall Press, 1986), 385.

[112] Meiklejohn, *Free Speech and Its Relation to Self-Government*, 22.

[113] Ibid., 89.

[114] Ibid., 22.

[115] Ibid., 23.

[116] Ibid., 25.

[117] *Sullivan*, 376 U.S. at 274.

[118] Ibid., 269, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

[119] Ibid., 271.

[120] Ibid., 279.

[121] Ibid., 280–81.

[122] Memorandum from Bregstein to Justice Powell, 25 January 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.

[123] Ibid., 1, 3.

[124] Ibid., 6.

[125] Ibid., 7.

[126] That level of involvement is consistent with a study that employed a number of empirical measures in finding evidence that Justice Powell maintained a significant degree of engagement in the writing of his opinions (as opposed to a greater degree of delegating to clerks). Paul J. Wahlbeck, James Spriggs, and Lee Sigelman, "Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts," *American Politics Research* 30, no. 2 (2002): 182–183. One clerk of Justice Powell's wrote that he "cared deeply about the quality of the writing, for he was acutely aware of the work, for good and for ill, that words perform in our lives." Anne M. Coughlin, "Writing for Justice Powell," *Columbia Law Review* 99, no. 3 (1999): 541.

[127] Justice Powell, Draft Opinion, 19 January 1978, p. 14, *Bellotti*, 435 U.S., LFP Papers.

[128] Ibid., 25a.

[129] Ibid., 25b-25c.

[130] *Bellotti*, 435 U.S. at 805 (White, J., dissenting), and at 824–26 (Rehnquist, J., dissenting). Chief Justice Burger, on the other hand, issued a concurring opinion in which he argued "the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the [nonmedia] appellants in this case." *Bellotti*, 435 U.S. at 796 (Burger, C.J., concurring). His concurrence so alarmed the nation's newspaper of record that its editorial page declared the Chief Justice had "served notice that the First Amendment rights of, say, the *New York Times* may one day be judged legally

no greater than those of General Motors." Editorial, "Corporate Speech and Media Inc.," *New York Times*, May 7, 1978, 22. To this day, however, state and federal regulations on the political media spending of business corporations includes exemptions for news media corporations' spending on such activities as political endorsements, editorials and comment on political developments, reporting on political activities, etc. Such exemptions repeatedly have been upheld by the Supreme Court, most recently in *McConnell v. Federal Election Commission*, 540 U.S. 93, 208 (2003). Even Justice Powell in his *Bellotti* opinion conceded that media "corporations need not make separately identifiable expenditures to communicate their views. They accomplish the same objective each day within the framework of their usual protected communications." *Bellotti*, 435 U.S. at 783.

[131] Justice Powell, Draft Opinion, 19 January 1978, p. 25e.

[132] The relevant passage in Justice Powell's published opinion reads: "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. But the press does not have a monopoly on either the First Amendment or the ability to enlighten. Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification." *Bellotti*, 435 U.S. at 782–83.

[133] Memorandum from Justice Powell to Bregstein, 6 February 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.

[134] Justice Powell, notes in margin of Memorandum from Bregstein to Justice Powell, 9 February 1978, p. 6, *Bellotti*, 435 U.S., LFP Papers.

[135] Justice Byron R. White, Draft of Dissent, 7 March 1978, p. 7, *Bellotti*, 435 U.S., LFP Papers.

[136] Justice Powell, Draft Opinion, 6 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers. Justice Powell expanded upon that assertion in his final opinion, contending that Justice White's reasoning "would allow a State to proscribe the expenditure of corporate funds at any time for the purpose of expressing views" on political or social questions not integrally related to corporate business operations. "Thus corporate activities that are widely viewed as educational and socially constructive could be prohibited. Corporations no longer would be able safely to support—by contributions or public service advertising—educational, charitable, cultural, or even human rights causes. Similarly, informational advertising on such subjects of national interest as inflation and the worldwide energy problem could be prohibited. Many of these 'causes' and subjects could be viewed as 'social,' 'political,' or 'ideological.' No prudent corporate management would incur the risk of criminal penalties, such as those in the Massachusetts Act, that would follow from a failure to prove the materiality to the corpo-

ration's 'business, property or assets' of such contributions or advertisements." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).
[137] Basically, under US law, fiduciary responsibility requires management to maximize shareholder profits at all times. American industrialists as mighty as Henry Ford have been forced to yield to that unwavering dictate when they sought to deviate from it—the iconic automaker finding himself barred by the courts from implementing a (quite arguably "socially constructive") plan to cut stockholders' dividends so that he could sell his Model Ts for a lower price. See Dodge v. Ford Motor Co., 204 Mich. 459 (1919).
[138] Letter from Justice Stewart to Justice Powell, 7 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[139] Letter from Justice Brennan to Justice White, 7 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[140] Letter from Thurgood Marshall to Justice White, 10 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[141] Letter from Justice Stevens to Justice Powell, 8 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[142] Letter from Justice Stevens to Justice Powell, 10 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[143] Letter from Justice Stevens to Justice Powell, 13 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers. Justice Stevens' request that a passage stating the "materially affecting" requirement of the Massachusetts statute "amounts to an impermissible legislative prohibition of speech based on its content" be revised instead to "based on the identity of the interests that spokesmen may represent in public debate over controversial issues" is included in the final opinion. In response to Justice Stevens' request that a passage from *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) articulating the nature of the ban on government engaging in content regulation be replaced with another from that ruling, a citation to the other (but not the passage itself) was included in the final opinion. Finally, Justice Stevens' request that a sentence reading, "Especially where, as here, the legislature suppressed speech in an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is offended unless the suppression is necessitated by governmental interests of the highest order," be replaced with "Especially where, as here, the legislature's suppression of speech gives one side of a debatable public question and advantage in expressing its views to the people, the First Amendment is offended unless the suppression plainly offended unless the state demonstrates that is action is necessitated by governmental interests of the highest order," was addressed in this manner: "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order." *Bellotti*, 435 U.S. at 784, 785, 785–86.

[144] Letter from Justice Powell to Chief Justice Burger, and Justices Blackmun, Rehnquist, and Stevens, 10 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[145] Letter from Chief Justice Burger to Justice Powell, 11 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[146] *Bellotti*, 435 U.S. at 795–802 (Burger, C.J., concurring). See Note 119 for additional discussion of the subject matter of Chief Justice Burger's *Bellotti* concurrence.
[147] Personal notes by Justice Powell, 13 April 1978 p. 1, *Bellotti*, 435 U.S., LFP Papers.
[148] Letter from Justice Blackmun to Justice Powell, 13 March 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[149] Ibid.
[150] Justice Powell, notes in margin of Memorandum from Bregstein to Justice Powell, 29 December 1977, p. 11, *Bellotti*, 435 U.S., LFP Papers.
[151] Memorandum from Justice Powell to Bregstein, 25 January 1978, p. 6, *Bellotti*, 435 U.S., LFP Papers.
[152] Memorandum by Justice Powell, 5 April 1978, p. 1–3, *Bellotti*, 435 U.S., LFP Papers. The document is notated at the top in the manner of other notes he wanted filed only for his own reference—in this case, "lfp/ss 4/5/78," indicating that it was dictated for typing by his longtime personal secretary Sally Smith.
[153] It was replaced with a statement that "minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." *Bellotti*, 435 U.S. at 795.
[154] *Bellotti*, 435 U.S. at 805 (White, J., dissenting).
[155] Letter from Justice Powell to Justice Rehnquist, 17 April 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[156] Ibid.
[157] *Bellotti*, 435 U.S. at 824–26 (Rehnquist, J., dissenting).
[158] Jeffries, *Justice Lewis F. Powell, Jr.*, 9–10.
[159] *Bellotti*, 435 U.S. at 826–27 (Rehnquist, J., dissenting).
[160] Letter from Justice Powell to Justice Rehnquist, 17 April 1978, p. 1, *Bellotti*, 435 U.S., LFP Papers.
[161] Ibid., 2.
[162] Ibid.
[163] Ibid.
[164] *Bellotti*, 435 U.S. at 827, n. 6 (1978) (Rehnquist, J., dissenting).
[165] 447 U.S. 530, 548–56 (1980) (Blackmun, J., dissenting).
[166] 447 U.S. 557, 583–606 (1980) (Rehnquist, J., dissenting).
[167] Ibid., 599.
[168] 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting). In that case—the last corporate First Amendment ruling with Justice Powell on the Court—the majority found unconstitutional a state order requiring a utility corporation to include messages from parties with different views in its billing

envelopes (where Pacific Gas regularly disseminated political messages of its own), declaring that such regulation unconstitutionally compelled the corporation to associate with the viewpoints of other speakers. Ibid., 20–21.

[169] 494 U.S. 652 (1990).

[170] Michigan Campaign Finance Act, Mich. Comp. Laws Ann. § 169.254 (West 1989).

[171] *Austin*, 494 U.S. at 658–59.

[172] *Bellotti*, 435 U.S. at 784.

[173] *Austin*, 494 U.S. at 659, quoting Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 257 (1986).

[174] Those interests—ensuring that aggregations of money amassed by the special advantages of the corporate form not be converted to potentially corrupting political war chests, protecting individuals who pay money into a corporation for purposes other than political activity from having their money used in support of candidates whom they may not support, and preventing organizations that accept contributions from business corporations from serving as conduits for corporate spending that threatens the political marketplace—were established as compelling in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208–09 (1982), and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986).

[175] 540 U.S. 93, 115–16 (2003), quoting United States v. United Automobile Workers, 352 U.S. 567, 571 (1957).

[176] 551 U.S. 449, 476 (2007).

[177] *Wisconsin Right to Life*, 551 U.S. at 483–505 (Scalia, J., concurring).

[178] 130 S.Ct. 876 (2010).

[179] Justice Samuel A. Alito, Jr., who replaced Justice O'Connor in 2006, provided the fifth vote in both those rulings of the Roberts Court.

[180] Citizens United*, 130 S.Ct. at 903.*

[181] Ibid.