Memorandum to Mr. Justice Powell

FROM: Nancy
RE: Bellotti draft Jan. 25, 1978

This is a very rough draft. It is a very basic and unrefined skeleton for the opinion. I don't mean that the ultimate opinion will be any longer than this; I intend to cut and streamline it, if anything. But I just had time to set out the main ideas, and even they need much more work.

Ordinarily I would be hesitant about giving you an opinion in this form, but I know you want to take it with you to Richmond. This isn't false modesty— I am aware of significant flaws in the opinion as it's presently drafted and I would rather have remedied them before you had to struggle with them. I'll just mention the main problems of which I'm presently aware.
1. Style. I intend to to substantial editing and polishing of the way things are said. Right now it reads roughly. I've not had time to take care of transitions and things like that. Also cites, quotations, and the like will be polished up.

2. Because I was trying to work in a lot of different ideas, the opinion lacks a coherent thesis. This is true even in the several sections of the draft. There's also some substantive tension between Part III, where I explain why this is classic First Amendment speech, regardless of the fact that it's spoken by a corporation, and Part IV, where I discuss the State's interests. You would think there would be little need for Part IV if the protected nature of this speech were so clear from Part III. I think this indicates some confusion in my thinking, which I'll have to work out. Parts III and IV also are somewhat redundant.

3. There are two ideas I have not included at all, and the more I think about it, the more I think they should be included. The first is that even if the "materially affecting" requirement in theory were a permissible limit on corporate speech, it still would be impermissible because of the chilling effect it would have. Corporations would not want to take the chance that certain speech might be held not to meet the "materially affecting" requirement, so they would forego it. At first I didn't include this section because it would seem to undercut the major premise of the opinion—that the
materially affecting requirement is not permissible in the first instance. But we might want to include this as an alternative point. (?) or note it as a further point.

The second point is that the materially affecting requirement really is a classic form of content regulation. It tells corporations what they can say and what they can't say.

I think I might include these points at the end of Part III.C., as I've indicated in the text.

3. The fact statement needs work. We could relegate the discussion of the past court challenges to the statute to a footnote, same with part of the discussion of the holding of the court below on other than First Amendment grounds.

4. The introduction to Part III may be too abstract, and I'm considering dropping it.

5. I intend to write a better discussion of Buckley in note 19.

6. I did not mention that this statute is neither a prior restraint (as appellants contend) nor a regulation of time, place, or manner (as appellee contends). The points seem obvious. But if you'd like me to include these, I can write a simple two-paragraph footnote.

7. It might be advisable to include a discussion of the availability of ultra vires actions in Part IV.B.

8. I will improve the discussion of the difference between contributions to candidates and
Or, we might include it as a footnote. It just seems unnecessary to discuss why we're not reaching the presumption issue when appellants challenge the very **fax** requirement of the fact presumed. And, in view of the SJC's holding that the statute does not create a presumption at all (but rather two separate crimes), I would rather not get into the presumption issue.
expenditures to express ideas, since this really is the core of the decision.

9. I've consciously avoided citing the cases on the Federal Corrupt Practices Act (except at one point), the language of the dissents or concurrences in those cases, and law review articles on those cases. There is a lot of useful language and ideas in those sources on freedom of speech and corporations, but I thought it better not to cite them, to avoid conveying the impression that we are endorsing the view that the Corrupt Practices Act is unconstitutional. (I just thought you might have wondered about the dearth of scholarly citations.)

* * * *

I hope you don't have too much trouble with this. I'll give you an improved draft early next week, unless you'd like to offer some suggestions or criticisms before then. (I also need to step back from it for a few days.)

Have a pleasant trip to Richmond,

Nancy

P.S. I forgot to mention: Originally, I wrote a section of the opinion (to go after the mootness section) explaining why we are not addressing the irrebuttable presumption issue. But when I wrote it, it sounded so obvious as not to require discussion. Instead, I've attached the discussion after the footnotes, in case you want to use it (or something like it) as a memo to the other Justices to accompany the opinion.
MEMORANDUM TO Mr. JUSTICE POWELL
FROM: Nancy DATE: Dec. 29, 1977
RE: No. 76-1172, First Nat'l Bank of Boston v. Bellotti

This is a very sketchy rendition of my thoughts about how to approach this opinion. I am not very good at working out ideas ahead of time; I usually work from a very broad outline and alter my thinking substantially as I write. I'll try to set out the basic topics I plan to cover; theme of the opinion; open questions that I believe need not be addressed; and some thoughts on the implications of this decision for the Federal Corrupt Practices Act (FCPA). This will be a combination memo/outline.

* * * *

Basically, the theme of the opinion should be that although corporations obviously differ from individuals in many ways, the speech at issue here is "core" of the First Amendment and therefore presumptively is protected; and the State has not advanced sufficiently weighty interests to deprive these corporations of their right to engage in the proposed speech through expenditures. The opinion need not
address whether corporations' First Amendment rights are "coextensive" with those of individuals. It may be that certain activities could be forbidden to corporations while they could not be forbidden to individuals. For example, a total ban on political contributions (as in the FCPA, if you ignore the loophole of segregated funds) might be permissible as to corporations but not as to individuals. I would not go into this, but the 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.

My conception of the "core" of the First Amendment, at least for purposes of this decision, resembles the Meiklejohn theory but certainly need not endorse that theory explicitly. The Meiklejohn theory, simplistically stated, considers that speech which helps the citizenry govern itself as most worthy of First Amendment protection. This need not necessarily be political speech (because other forms of speech also educate the people and teach them to deal with freedom), but here in fact we do have an instance of speech related to one of the most basic aspects of self-government: a referendum on an important social and economic question. Thus the focus should not be on the question "Do corporations have First Amendment rights?" but on the question whether this speech is the type eligible for First Amendment protections, in light of the ideals expressed in the Amendment.

An outline and discussion of the contents of the opinion follow:
I. MOOTNESS

This is easy and will be dealt with briefly. I will state the basic principles and then note some or all of the following factors in support of the proposition that this case meets the "capable of repetition, yet evading review" standard: (1) This is an election case, and here the parties moved to trial and through appeal as quickly as possible, because the facts were stipulated. They would never have more time to have the question litigated between the time an amendment was proposed and the referendum was held. [Do you want me to go into all the dates, etc., disputed by the parties? I thought I'd just satisfy myself that appellants' dates are accurate.] (2) The history of the proposed amendment indicates that there is a great likelihood that the legislature will propose the amendment again. (Indeed, this is supported by appellee's statement that a majority of states have graduated income taxes; it is not the kind of thing the legislature would drop after three attempts to have one passed.) (3) Appellants intend to spend money in the future and appellee intends to prosecute for violations of § 8. Indeed, one of appellants has been threatened with prosecution on an unrelated proposed expenditure.

II. THE STATUTE

A. Description

B. History of the Mass. prohibition of corporate expenditures on ballot questions, and particularly of the three amendments of present § 8 in order to keep corporate money out of the referendum process
Although the Court might not want to inquire into the legislative motive—which clearly was to keep corporate money out of the referenda on the graduated income tax because the corporations are opposed to the tax and the legislature is its main proponent—I think it's important to set out the genesis of §8. It is important in order to understand the discussion of the "materially affecting" requirement, see infra, and its inclusion in the opinion will be an implicit way of letting readers know what really was going on here. This will be helpful, too, if the Court later wants to limit the opinion.

C. The SJC’s construction of the statute

1. The court’s limiting construction in order to avoid vagueness and overbreadth problems

2. Two possible interpretations of what the court held is prohibited by §8

   (a) any corporate expenditure, regardless of whether it materially affects the corporation’s interests

   (b) if corporation could prove that the expenditure would materially affect its interests, it could make the expenditure legally, either because

   (i) this would make the statutory irrebuttable presumption irrational, and thereby would invalidate it, or because

   (ii) such a construction would violate the First Amendment. In order to construe the statute not to violate the First Amendment, the court construes the presumption to be rebuttable.

3. Which interpretation to choose?

   (a) Some First Amendment cases suggest that the state statute should be construed by this Court at its broadest (contrary to normal
statutory construction), so that the statute won't get this Court's approval and then later get applied more broadly by the state court

(b) **Adopt** Take the opinion below at face value and assume that the Mass. courts will **xenile xenax** construe the statute to avoid First Amendment problems and will allow corporations to spend money (even on a ballot question involving a personal GITY) if they can prove material effect.

[I would prefer to write the opinion adopting the latter approach. The Mass. SJC has recognized that corps have First Amendment rights when the proposed speech meets the materially affecting requirement. Although the construction of this statute in the opinion below is unclear, the Mass. SJC made clear in its earlier opinions construing the predecessors of § 8 that a statute prohibiting a corporations from spending money when the ballot question would materially affect their interests would violate the First Amendment. I therefore think it safe to assume, as have appellants, that the court below construed the presumption in the second sentence of § 8 as a "rebuttable" presumption.]

D. Appellants' challenge to the statute

1. To § 8 on its face (I think this is their challenge to the "materially affecting" limitation

2. As applied (I think this is appellants' contention that they did prove material effect or at least the reasonable, good faith belief of management that the referendum would materially affect the corp.'s business
Appellants address the invalidity of the "materially affecting" requirement in two separate ways. Their main attack on it is that it is an impermissible limitation of corporate freedom under the First Amendment. But they also attack it under the due process clause, either because it is an irrebuttable presumption (see Viandis v. Kline, 412 U.S. 441) or because it is an invalid rebuttable presumption. The latter attack is based on the strict standard for presumptions in criminal statutes, coupled with the fact that this is a criminal statute implicating First Amendment rights.

I think the opinion of the Mass. SJC, opaque though it is, states that the presumption is not irrebuttable. There are intimations in the opinion that the second sentence of § 8 states a separate crime, as to which materiality is not a relevant factor, but other parts of the opinion (especially when considered in light of the Mass. SJC's earlier opinions, mentioned above) indicate that a corporation solely that could prove that a ballot question/ on a personal GIT would materially affect its interests would be allowed. (On the other hand, the fact that the SJC did not find the presumption rebutted on the facts of this case indicates that the chilling effect of even a rebuttable presumption would be great.)

Thus the most the Court should address is the permissibility of the rebuttable presumption. But I think that would be an unnecessary exercise. Even if the Court should say that the
The presumption is invalid, so that corporations can spend money on a ballot question involving a personal GIT if it materially affects them, appellants still insist that they cannot be limited to speaking about things that materially affect them. Even if the prosecutor had to prove lack of material effect, corporations still would be chilled in their exercise of First Amendment rights because a jury might conclude that the issue did not materially affect the corporation. Thus if the Court is going to hold the materially affecting limitation invalid, I see no reason for addressing the question whether certain issues can be presumed not to materially affect the corporation. If material effect is irrelevant, then the presumption is irrelevant. I would ignore the due process challenges to the presumption.

IV. FIRST AMENDMENT

As a preliminary matter, it is arguable that § 8 implicates the right to freedom of association as well as the right to freedom of speech. I would prefer not to discuss this. Although it could be argued that § 8 abridges the rights of shareholders to express views they hold in common qua shareholders, the analogy to cases like NAACP v. Button and NAACP v. Alabama is quite attenuated. Shareholders in a corporation do not usually share political and social goals even as much as members of a union. Indeed, one of the state's asserted interests is in protecting shareholders who disagree with management's expression of views. Thus I think it would
be better not to discuss this at all.

In discussing the freedom of speech issue, I would cover the following:

A. Argument that corporations have no First Amendment rights (put forth by appellee but rejected by the court below)

1. Although corporations may not be "citizens" for purposes of the privileges and immunities clause, they have been held to be "persons" within the meaning of the due process and equal protection clauses.

2. Corporations have been afforded First Amendment rights in many cases, and the Court has said that a profit motive does not take away First Amendment protection (Grosjean, Joseph Burstyn, Binsley; cases affording employers First Amendment rights; commercial speech cases).

B. Are the First Amendment rights of corporations limited to issues "materially affecting" the corporations' interests (business, property, assets)

1. Sources of this theory, put forth by appellee

(a) Although the Court has afforded protection to corporations in the communications business, communication is their business and therefore materially affects them.

(b) In the commercial speech cases, the proposed advertising or other form of speech also had a material effect on the corporation's business (and the same probably can be said of the pornography cases).

(c) Theoretical basis for this proposition: since the First Amendment applies to the states through the due process clause of the Fourteenth Amendment, and since it has been held that corporations do not possess "liberty" as do natural persons, the First Amendment protection must come through the "property" clause of the 14th Amendment. Therefore First Amendment protection of a corporation is limited to issues that affect the corporation's business or property (Pierce v. Society of Sisters).
2. Rebuttal

(a) If appellee were right in its theoretical assumption, there would have to be a difference between the protection afforded corporate speech against infringement by the State and federal governments, because the First Amendment itself is not tied to "liberty" or "property". This cannot be. Besides, the cases holding that corporations do not have an interest in "liberty" were decided during the era of substantive due process, when the concept of liberty was not tied to specific constitutional guarantees. In any event, those cases are distinguishable. The Hague case, in particular (which held that the ACLU, as a corporation, had no rights to freedom of speech under the 14th Amendment), probably has been overruled by subsequent cases.

(b) In a more practical sense, the theory would allow a State to restrict religious corporations to speech about religion, charitable corporations to speech about charity, etc. Wholly untenable concept.

(c) It is antithetical to the First Amendment to judge whether speech is protected by looking to its source. This may be why there is little discussion in the cases of whether corporations "have" First Amendment rights, even when those rights have been afforded corporations. Speech presumptively is protected; only look to the source if relevant to the state's asserted interest (see infra, Part C).

(d) Central meaning of the First Amendment—protection of discussion of social issues, especially with respect to self-government. Meiklejohn, Kalven, New York Times v. Sullivan. Relate to commercial speech cases; but here, not just a question of the public's right to receive information, but importance of criticism of the government and the expression of views different from the governing authorities. Corporations can provide this kind of information and criticism as much as individuals. Since the relevant component of the First Amendment in this context is the need for open
discussion and debate, and not the value of self-expression (the individualist component), the identity of the speaker is not significant.

(e) the suggested compromise: good faith belief of management that the issue materially affects the corporation. I would prefer not to discuss this, since it was suggested by appellants, not appellee, and does not seem to be sufficient protection of the First Amendment interests at stake.

C. The state's interest

[This is the section where I'll set down principles by which the FCPA can be distinguished. The major difference between the two statutes is that the FCPA prohibits spending in order to get a candidate elected (which may or may not involve socially beneficial expression entitled to absolute protection) whereas § 8 prohibits spending to express ideas.]

1. Prevention of corruption. This interest is irrelevant here, because no candidate is getting money. It is also antithetical, in this context, to the self-government theory of the First Amendment. It's acknowledged (by the State and in this Court's decisions) that corporations have the right to petition the government for redress of grievances (including the legislature, the courts, and administrative agencies). Mass. allows lobbying. But § 8 prohibits corporations from taking their case to the people, who ultimately are sovereign.

2. Preventing the influence of money in elections. This usually means preventing wealthy candidates from having an edge over others. The state does not assert it as an interest here, so it need not be discussed. But it could be rebutted by noting that it's not clear that this is a sufficient interest for curtailing speech even when political candidates are involved; it certainly is not sufficient when just the expression of views is involved. The result would be that the public would have less information on which to base its decisions. [This point should not be discussed, because it isn't raised by the State and it's one
of the areas in which a corporation's First Amendment rights might be more limited than an individual's.

3. Protection of minority shareholders.

   (a) Poke holes in the statutory scheme to show that this really isn't the State's interest here.

   (b) There are less restrictive ways of doing this.

   (c) Leave open question whether state could require a majority vote for expenditures on ballot questions if it didn't require majority vote either for other expenditures in general or for other expenditures to express a point of view to the public.

*   *   *   *

Rather than detail right now some of the questions I think need to be left open, I'll mention them to you when we talk about this or after the draft is written. If any (or much) of this is unclear, I'd be happy to explain it better in person.

Nancy
MEMORANDUM

TO: Nancy
FROM: Lewis F. Powell, Jr.

76-1172 First National Bank v. Bellotti

In Richmond over the weekend I reviewed, with more than ordinary interest, your draft of 1/19/78 of the opinion in this case. It follows rather faithfully the outline we agreed upon. Although your transmittal memo of January 25 expressed concern as to the quality of the draft, I found your misgivings quite unjustified. To be sure, the draft requires additional work. But this is true of all first drafts, especially when the case is one of first impression requiring - as this one certainly does - meticulous analysis and writing.

I believe your analysis is sound, and am quite pleased with what you modestly call an "unrefined skeleton for the opinion". Your memo of January 25 identifies some of the areas requiring additional attention. Without attempting now to address all of these, I will - instead comment generally on the various sections (Parts) of the draft.

At the outset, I would like to frame the introductory paragraph in a way that minimizes the repetition that follows in Part I. I appreciate the difficulty, and have submitted a rider that is not particularly informative but it will alert the reader
to the subject matter. Feel free to change or revise it.

Part I
This is a rather full statement of the case, history of the effort to approve the constitutional amendment, and the decisions of the Massachusetts Court. It is longer (eight pages) than one would wish. Perhaps, as you suggest, the history portion could be summarized and relegated to a note. Perhaps also there could be tightening up throughout. Give this a try, but defer work on it until you have a second draft of Parts III and IV – the critical portions of the opinion. I could accept Part I virtually as written, especially if you are able to shorten by three to five pages the remainder of the opinion.

Part II
This deals adequately with the issue of mootness.

Part III
I see no reason to rewrite pages 13-16, down to subpart A. You have reformulated the question quite skillfully.

Subpart A
This is a critical section of the opinion. Your thinking is sound, but I think some revisions and rearrangement will strengthen subpart A (p. 16-20). The
opening paragraph seems a bit weak. I suggest, in a marginal comment at the top of page 17, that you might start this subpart with the quotation from Thornhill now located in the middle of page 17. I also would omit the second paragraph on page 18, although the good quote from Garrison deserves some place in the opinion. The last two paragraphs on page 19 are good strong ones.

Subpart B

Although I will give this subpart further thought, my initial reaction is that you are right on target. If you have accurately stated the position of the Massachusetts Court (and my recollection is that you have), I think you thoroughly demolish that Court’s line of reasoning.

Your paragraph on the libel cases (pp. 24, 25) could be made somewhat clearer, I think. The business of the media corporations was, in one sense, “materially affected”. Their “product” is news, and the common law of libel was held to affect that business, i.e., reporting of the news. Your answer to this is correct: the Court’s concern as to this “business” was not the corporate identity of the speaker but the effect on speech itself. The point is important enough to elaborate to the extent of amplifying the last three sentences.
I would limit this to the first sentence, which is excellent.

Part IV

This also is a critical section of the opinion. Despite the absence of any showing by appellee as to exactly what the state interests are, or how they would be affected, I anticipate that my dissenting Brothers will attack at this point. They also will argue that corporations, being the creatures of the state, may be subjected to virtually any regulation desired by the state. This latter point may not be easy to handle, but you are correct in not anticipating what the dissent may say. Let us see it before trying to rebut it.

I do agree that Part IV is necessary and, for the most part, your arguments are both resourceful and persuasive.

Subpart A

Some of the language and thoughts in this subpart require refinement. I had rather not say flatly that a state cannot limit expenditures by a nondiscriminatory statute that regulated rather than shut off all First
Amendment expression. Buckley - and its language - should be our guide here.

I am dictating off the cuff a suggested revision commencing on page 30. I wanted to make the point that where state interests are sufficiently important or compelling they may be weighed against First Amendment rights, as we did in Buckley. In this case - as you demonstrate - there has been little or no showing of any genuine state interests.

I am afraid I got a bit lost in my dictation. I wanted to incorporate most of your good points, and hope that you will use my draft merely as a source of a suggested approach, and then try your artful hand at rewriting this sensitive portion of subpart A.

One thought that I intended to include is the importance of "disclosure". As Buckley makes clear, the single most effective means of preventing corruption or undue influence through campaign expenditures is to assure "openness" or visibility of the conduct. Absent disclosure laws, and even with the loopholes that existed in prior federal laws, the principal evil of campaign contributions - and expenditures - was that the public rarely knew who was giving what to whom. This problem is de minimis - if not nonexistent - where advertising is concerned so long as the source of the ad is disclosed. This would be a far
less restrictive means of preventing the evils perceived in this case than foreclosing First Amendment rights entirely.

Subpart B

You demolish the state's argument that its interest is in protecting shareholders. Although I have not had time to review this subpart with any care, I think you have made the principal points. Perhaps they can be stated somewhat more briefly, and with better transition. In addition - as your memo suggests - we should mention ultra vires. Also, the stockholders derivative action always is available. Then, too, there is corporate democracy and federal and state laws designed to make it effective. As you mention, protective provisions could be added to a corporate charter by amendment; directors could be ousted at annual meetings of stockholders; protests could be made at such meetings. It is unlikely that corporate funds could be spent effectively in public opposition to a referendum issue without stockholders knowing about it. In short, this purported state interest is frivolous.

Miscellaneous Comments

You will, of course, add a concluding paragraph.
I agree with you that transitions - the relating of one paragraph to the preceding one or the parts and subparts to each other - require some polishing.

I also agree that we need not address the "irrebuttable presumption issue", as it simply washes out.

Although you have referred to the critical distinction between candidates and referenda issues, I think we must find some appropriate way to emphasize that our opinion does not undercut the Federal Corrupt Practices Act. John Stevens, among others, wondered whether we could write an opinion that did not do this. Take a look at the footnote in Buckley on this subject.

I make no further comments, as your memo of January 25 pretty well covers all possible means of improving the draft. Indeed, as indicated above, I am considerably more positive about the draft than you are.

My suggestion is that you take a couple of days to review and edit the draft with your usual care and deft pen. Then give me another shot at it. Meanwhile, I am happy to discuss any aspect of it.

I do appreciate your producing it under pressure so that I could have it with me in Richmond.

L.F.P., Jr.
76-1172 First National Bank of Boston v. Bellotti

I reviewed with some care the revised draft of our opinion delivered to me on February 4. I have marked it, for identification purposes, as the "second draft", including - however - only Parts I, II and III. (Nancy, please keep my working drafts in the file until we have completed the process to the point of a circulation printed draft).

You have materially improved a good first draft, and your further work reflects an enormous amount of research and a broad grasp of the authorities. I continue to be comfortable with the general line of analysis that both of us have endorsed.

You will not be surprised that my principal concern now is the length of our opinion, both text and notes. This concern is reflected in some of my editing. The problem is not merely the number of pages. As often happens with a long opinion at the draft stage, we still have a good deal of repetition.

Part I still seems long and a bit tedious. But I have identified no specific material to be omitted. We both might give some further thought to this.
Part II (Mootness) remains satisfactory. I suppose, however, that in the end — if eliminating a couple of pages prevents our opinion from seeming to be inordinately long, we could reduce the mootness question to a footnote. The principles are well settled, and this is clearly a classic example of "evading review".

Our problems begin with critical Part III. The introduction (page 13 to the middle of page 16) is exceptionally good, and - subject to my editing - I would leave it about "as is".

Subpart A does afford an opportunity for considerable condensing. The content of this subpart is the cornerstone of our analysis, but what we say also is quite elementary. As indicated, I think we can omit some of the more obvious statements and repetitious quotations. In short, I have tried to tighten this up. I leave it to you to "polish" and be sure it hangs together.

Subpart B presents an even more challenging problem of condensation. It now embraces about a dozen typewritten pages. To be sure, it addresses the ultimate question in the case (whether the corporate identity of a speaker deprives this speech of protection). I have had difficulty, therefore, in suggesting any single element of the discussion that can be eliminated. The best bet is to ask, with respect to each paragraph, whether it can be expressed in more conclusory terms or whether some of the
cases cited are marginal and cumulative, and therefore may be eliminated.

We must, I suppose, meet head on - as you have - the argument that a corporation's speech rights are derived from the Property Clause of the Fourteenth Amendment. I would have thought this argument so unsound as to require little refutation. But apparently this was the linchpin of the Massachusetts court's decision, and is now defended by appellee. Again, I am working at home without my books or briefs. I assume we have not exaggerated the extent to which appellee relies on this argument.

I believe the best opportunity for a more summary treatment commences with the discussion at the bottom of page 24. There, and for a number of succeeding pages, you meet appellee's effort to show that many, if not all, of the corporate First Amendment cases can be explained on the "materially affecting" theory. Your lead paragraph into the refutation of this argument (commencing at the bottom of page 24) is fine. Commencing with the last paragraph on page 25, I suggest that you try some reduction in length by being more conclusory, and feeling less of a necessity to document by elaboration. The discussion proceeding from that point would be excellent in a Law Review, but a Court opinion need not be so expansive.

I doubt that many of our readers (Brothers on the Court or others who will read this landmark case) will take seriously appellee's argument as to the Fourteenth Amendment property
right analysis, and the conclusion therefrom that states have
greater latitude to restrict speech than the federal government.
Nor will many be impressed by appellee's view that Sullivan and
similar cases turned on a "business" interest analysis. Linmark
and Virginia State Board of Pharmacy also the question whether
business interest, rather than societal concerns, entitle
commercial advertising to First Amendment protection.

The best opportunity for condensation extends from the
paragraph mentioned at the bottom of page 25 through 26 (with
your various 25a, 25b, etc., and riders). I think pages 27, 27a
and 27b are splendid.

I have not done any careful editing on footnotes
throughout the draft. We should eliminate marginal material in
these, although I do not view the notes generally as being
excessive.

One formalistic thought: we might subdivide Subpart B
(of Part III) into arabic 1, 2 and 3. One of the problems, in
terms of readability, is that Subpart B will appear as a rather
forbidding mass of unbroken text.

* * * * *

This week, and through the next weekend, will be my best
opportunity to work on this opinion. We have a Conference Feb.
17th, with 7 or 8 cert lists, that will require a good deal of
preparation. Then we move into two weeks of argument followed by
the assignment of further opinions to write.
I therefore suggest that you continue to give this priority over bench memos, long or short. I remain enthusiastic about the opinion.

L.F.P., Jr.
Feb. 16, 1978

Justice Powell,

Here is *Bellotti* again, this time edited by Bob. I've gone over the edited version with him, and I think he's been especially helpful in cutting out unnecessary material in Part III. Where I disagreed with his changes I either went back to my original (when only style was involved or he had misunderstood something), or pointed out why I'd do it differently. Certain portions of the text have been moved to footnotes and parts of the footnotes have been moved around. I hope you can follow it. (I didn't want to make the changes on the Wang, so that you could see what had been changed.) I'll also have to renumber footnotes after you've gone over it.

I feel pretty strongly that the footnote adverting to the Federal Corrupt Practices Act (and comparable state laws) should be cut down to the minimum, and that instead we should circulate a memo with the opinion explaining why this case is so different. Is it still too premature for me to draft something for you to look at?

Nancy
MEMORANDUM TO MR. JUSTICE POWELL

FROM: Nancy  DATE: Feb. 9, 1978
RE: Bellotti, third draft

I am still troubled by certain aspects of this opinion, and can't quite figure out why. I think maybe my co-clerks will be able to pin me down on fuzzy points when the opinion gets edited and put into a chambers draft. For now, I'll explain certain changes I made and point out certain ideas that you might still want to include. Basically, I think they are ones that can wait for rebuttal once we've seen the dissent.

I. Changes

1. Upon rereading appellee's brief a final time, I realized that I had improved upon his arguments, in stating them, and that what he argues really makes so little sense that it isn't worth rebutting in the opinion. For example, appellee still contends, as he did before the SJC, that corporations not in the business of communications have no First Amendment rights. Alternatively, he argues that those rights are limited to those materially affecting the corporation's
business. I've now acknowledged the fact that appellee still argues the more extreme position, in fn. 12a. (Footnotes will be renumbered, of course.) Because the SJC did not accept this view, I originally wrote the whole opinion addressing the SJC's contention, not appellee's more extreme contention. Is this all right? Appellee's arguments in support of his position are (1) that the press is special; (2) some non-press corporations have been accorded First Amendment rights because they facilitate the expression of their individual members; and (3) Linmark is explained as a "right to hear" case, and appellee says (without explanation) that this is not such a case. Because I address all these arguments as rebuttals to the "materially affecting" limitation, I've said in n. 12a that the points in the text apply a fortiori to appellee's more extreme position. I've also amended relevant portions of the text.

Similarly, appellee seizes on the "property" position of the SJC and turns it around completely. Appellee says that because a corporation holds property by virtue of the authority granted by the State, the State can do anything to the corporation. Again, this is such a silly argument that I did not address it in the first drafts. In case you think we should, I've added n. 14a to explain this. I think it's unnecessary, but thought you might want to look at a shot at it.

Finally, my final reading of the SJC's opinion convinced me that the court was even more ambiguous than I had thought. The court seems to say that whether a corporation's rights are denominated "liberty" or "property", they are tied to the
corporation's property rights. I do not understand that at all; but I've now quoted the court verbatim so we won't be accused of setting up a straw man.

2. Part III.C. I think this analysis is correct, but we may have some trouble with some of your Brethren. JPS, in particular, has pointed out (in Young v. American Mini Theatres) that content sometimes is the basis for differential First Amendment treatment. Obscenity, for example, is in a class by itself. But I think we are right that we've already identified the category of this speech--pure speech on an issue of public importance--and it's a category entitled to protection. Within that category, the State has imposed a content and speaker restriction.

Your Brethren also might point out, in anticipating a restriction on a challenge to the Federal Corrupt Practices Act, that/speech by corporations with respect to candidates also would be a restriction on content, under our theory. They might be right, and that's what makes that case a difficult one. Therefore I've concluded Part III.C. with a sort of equivocal comment, rather than the absolute statement I'd written before about content restrictions being absolutely impermissible. That also leads into Part IV. better; otherwise we'd stated our conclusion before assessing the State's interests.

3. Footnote 11: I'm afraid to specify exact numbers, because the charts I have are a little hard to follow. It looks like 38 states have graduated personal income taxes, but that includes states that take a fixed percentage of the federal tax, which, of course, is graduated. It looks like 10 or 12 states have graduated corporate taxes, but some of
them only have 2 gradations.

4. Footnote 18: I think this is an important addition. It keeps coming back to me that a good argument could be made that even in terms of our theory (provision of valuable information and discussion to the public), a legislature might reasonably conclude that even that interest is served only when the corporation speaks about something it's familiar with, i.e., matters directly pertaining to its business. What does a corporation know about other things? I thought it important, therefore, to acknowledge that this might be true in practice, but that as a matter of constitutional law, it's not up to the Legislature to make this determination. I didn't say it, but the same could be said about individuals. I've also added a rider stating that the same could be said about all sorts of specialized corporations (religious, charitable, etc.).

The second paragraph of this footnote says that even if the materially affecting limitation otherwise were unobjectionable, it would impermissibly chill protected speech. I've spoken explicitly of "chilling effect" because this is the context in which it properly is used.

5. Part IV. I think I've improved this section by making it reflect more accurately what appellee claims the State's interests to be. The paragraph on true corruption could be omitted; it's there simply to distinguish the Federal CPA. I've made clearer that the State's declared concern with corporate money "drowning out" other views is related, supposedly, to its concern with lack of confidence in
government. This is silly, of course, and I'm still a little wary of saying there may be situations where such a concern would be legitimate. I've cited Red Lion, however, to communicate something of the notion that the government has an interest in keeping channels of communication open, and if a situation arises where people truly can't here what other citizens think because the corporations have taken over so much, then regulation might be permissible. Is this consistent with what you were thinking?

If you like, I can add some figures on relative corporate expenditures in the last referendum (provided by appellants). I didn't include them before because they are inconclusive. Appellee had argued that the coordinating committee to which appellants contributed to oppose the referendum proposal raised over $100,000, while the committee in support of it raised only $7000. This does indicate that the corporate expenditures were much higher. But appellants point out that it's not clear that all the contributions to the opposition committee came from corporations; and there is no indication of how much money was spend by individuals and other proponents of the graduated tax apart from this one committee. I thought it better not to get into all this, and to state in the text that none of this come close to showing disillusionment of the voters, which is the conceded end concern.

II. Issues not addressed

1. Would you like note 4 expanded, to state in appellants' words all their concerns about how a grad. tax would affect them?
2. Should I mention that no one has threatened to apply § 8 to the institutional press, so the court below declined to consider that question?

3. As I've scribbled in the margin at n. 6, I think our discussion of why we're not distinguishing between the first and second sentences of § 8 might be included here. Perhaps in our transmittal memo to the Conference, we can include the explanation separately and ask if anyone would like it included in the opinion.

4. As of now, there's nothing in the opinion about the fact that the legislature has ignored the fact that some corporations may feel differently about the graduated tax than the monolithic view the legislature has imagined. I think that observation is correct, but I'm not sure how to say it without undercutting Part III.C., where we say the legislature was attempting to suppress a particular point of view. We might add a note explaining that the Legislature not only is not entitled to do this, but that it was misguided as well.

5. I've still omitted any discussion of the points that this is not a prior restraint or a time, place, or manner restriction. These points seem obvious. Would you like a footnote on either point?

6. I've ignored appellee's contention that § 8 is only an incidental restriction on speech. Appellee says it's only incidental because corporate management and employees still are free to speak on these issues as individuals. This seems silly to me once you've recognized that a corporation has an independent legal existence.
I don't think we need to address the point unless the dissent does.

7. If the dissent relies heavily on the right of a state to regulate its creatures, I'll expand the point about the national banks not being creatures of the state. That's a peripheral point, however.

* * * * * *

Good luck with this draft!

Nancy

P.S. Of course I'll make all the citations correct, etc. (Putzel does use "App. to Jurisdictional Statement"—but all those cites will be changed anyway to the Mass. Reports and N.E.2d.)
Justice Powell,

I'll be back in time to discuss the Bellotti changes, but I thought I'd mention two problems I have with your proposed riders.

I think the point in the rider for p. 28 contains a very good point about the media, and I've added a cite to Tornillo which I think is supportive. But I see problems in the rest of the rider. You are right, of course, that corporations, like individuals, range from the Mom-and-Pop operation to the corporate giant. But BRW's point is a double one: it's not only that corporations are wealthy, but that whatever wealth they have has been generated under the auspices of favorable treatment from the State--e.g., limited liability, continuous life, etc. Thus BRW would distinguish between all corporations and all individuals and associations. In addition, this rider might undercut what we have said in n. 24 about the possibility that Congress might be able to prove a greater danger of corruption and the appearance of corruption with respect to corporate expenditures in connection with a federal election that it did with respect to individuals and groups in Buckley. If we add your proposed rider, BRW will have better grounds for attack. If the Corrupt Practices Act is to be upheld, it will have to be on the basis that Congress is entitled to enact a prophylactic rule that bars political expenditures by all corporations, not just the wealthy and powerful
multinationals. (It is for this reason that I am not as certain as your Brethren that the Act should be upheld in its entirety, and why I think the resolution will depend on the particular facts of who is making an expenditure and for what purpose.) In order to leave the Corrupt Practices 
Act question as open as possible, and in order not to contradict our statement that it is an open question, I do not think we should add a statement that denies that there are distinctions between corporate wealth and individual wealth.

If it's agreeable to you, I will find an appropriate point for the point about the press.

Anyway, we do cite to the statement in Buckley that it is impermissible to silence a segment of society on the basis of its perceived wealth or power, and I could elevate this to text.

On the second paragraph of the rider, dealing with the shareholders, I think this point is made in the addition I've made to n. 33. Also, while there is no record of shareholders' objection to this expenditure or the expenditure in 1972, the 1962 suit (Lustwerk v. Lytron) was a shareholder derivative suit.

As for the rider dealing with BRW's distinction between profit and non-profit corporations, I think you and BRW are addressing yourselves to different points. Your point would make a good rebuttal to BRW's shareholder protection argument, because you are right that members of
certain of the NAACP or ACLU may object to the corporation's programs or views. I tried to suggest this point in n. 33, where I mention the members of any voluntary association.

BRW uses his point in a different context: he is saying that the organization itself has an interest in self-expression because it was formed partly for that purpose, whereas a business corporation is formed to do certain business, and its shareholders invest in it for that reason, not for the advancement of certain political or social views. Here I think he has a valid point, because cases like NAACP v. Alabama afford First Amendment rights to that kind of corporation (BRW calls it a "membership" corporation) because of the guarantee of freedom of association. I do not think we have to get into a discussion, which would be lengthy and also dictum, of the circumstances under which corporate investors also have such a right.

Your point about the Chamber of Commerce really is one step removed from the shareholder protection problem addressed by BRW. The Chamber of Commerce might express views that are not shared by its corporate or individual members; but the right of a member corporation to contribute to the Chamber of Commerce really is not different from the right at issue in this case (to purchase advertising space by contributing to a coordinating committee). I am not sure, therefore, why use of the Chamber of Commerce as an example gets us any farther.
I would suggest that we might add a sentence at the right point in n. 33 to make more clear the point about the NAACP's members possibly objecting to expenditures, and the point that the appropriate remedy for an objection is to withdraw membership, just as in the corporate context the remedy is to withdraw the investment.

Nancy
Justice Powell,

Here is a marked-up copy of the Third Draft. There are 2 problems. The first is HAB's request that we delete references to the concept of "least restrictive means". I do not really understand why he finds this objectionable; it is one of the basic, and usually unquestioned, tenets of First Amendment law. I understand the substance of the objection, as stated in HAB's letter, but it just seems a little late to be questioning this kind of reasoning. In any event, I don't think it would do harm to take out the sentence on p. 25 to which HAB refers (it used to be on p. 24). The phrase on p. 21 is a little more difficult to delete, since § 8 does serve to protect shareholders, but not in the least restrictive manner. But its protection of shareholders haphazard, and seems like an afterthought or post hoc justification by the State. Therefore I've substituted the words "in a haphazard manner" on p. 21. I know you wanted that phrase removed when we had it in a different place in the opinion, but it really does convey the problem with the State's justifications for § 8. Perhaps there's another word you'd prefer.

The second problem is the one I mentioned to you on your way to meet the Yalies. As printed, the sentence suggests that we agree with the Mass. legislature that all corporations will be lined up on one side of the referendum issue, while all individuals will
be lined up on the other side. We expressly disclaim this assumption in n. 20. The point we want to make is that it looks like this is what the legislature was trying to do. But JPS is concerned lest we suggest that even when a legislature is trying to suppress one side of a debate, the suppression might be permissible if the State has strong enough interests. This is contrary to basic First Amendment principles, and is contrary to JPS favorite formulation of the First Amendment's prohibition meaning: the State cannot depart from neutrality as to different points of view. Stewart Baker and I rewrote the paragraph in a way that is acceptable to both of us, and Stew told JPS about the change. According to Stew, JPS will find the new wording acceptable. I also took out the cite to Buckley that used to be in the first paragraph of Part IV (on p. 19). The phrase "exacting scrutiny" is still there, but the quote was taken out so as not to convey the impression that the holding on expenditures in Buckley necessarily would mean invalidation of the expenditure prohibition in the Corrupt Practices Act. The quoted phrase from Buckley appears in the section invalidating the expenditure limits, and I thought it would be more cautious to avoid that connection in readers' minds.

In the interests of avoiding undue delay, I took suggested the changes on pp. 18-19 down to the print shop. If they're all right with you, I'll be able to insert the
corrected pages into the rest of the printed Third Draft before circulating it.

Nancy
These are the 2 pages to be substituted. The pencilled-in changes are stylistic and can be made in our next circulation.

N.
In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Police Dept of Chicago v. Mosley, 408 U. S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. 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 what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right.

The dissent of Mr. Justice White would limit a profit corporation's First Amendment rights to speech "integrally related to corporate business operations." Post, at 16. Even more explicitly than the opinion of the Massachusetts court, the dissent would allow a State to prescribe corporate speech on all "political issues"; it would approve the forbidding of such speech on "ideological" issues, and—indeed—"on questions of general concern." Post, at ——, and ——. Mr. 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. Many such causes are viewed as "ideological." Similarly, informational advertising on such subjects of national interest as inflation and the worldwide energy problem could be proscribed. These present "questions of general concern." No prudent corporate management would incur the risk of criminal penalties such as those in the Massachusetts Act, that could follow from a failure to prove that such contributions or advertising were "integrally related to corporate business operations."

Our observation about the apparent purpose of the Massachusetts Legislature is not an endorsement of the legislature's factual assumptions about
plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these interests.

IV

The constitutionality of § 8's prohibition of the “exposition of ideas” by corporations turns on whether it can survive exacting scrutiny. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, “the State may prevail only upon showing a subordinating interest which is compelling.” Bates v. City of Little Rock, 361 U. S. 516, 524 (1960); see NAACP v. Button, 371 U. S. 415, 436-439 (1963); NAACP v. Alabama ex rel. Patterson, 357 U. S., at 469; Thomas v. Collins, 323 U. S. 516, 530 (1945), “and the burden is on the government the views of corporations. We know of no documentation of the monolithic view on an issue such as the adoption of a graduated personal income tax. Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family. It is arguable that small or medium-size corporations might welcome imposition of a graduated personal income tax that might shift a greater share of the tax burden on wealthy individuals. See Brief for New England Council as amicus curiae 23-24.

It is too late to suggest “that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.” Buckley v. Valeo, 424 U. S., at 11; see New York Times Co. v. Sullivan, 376 U. S., at 266. Furthermore, § 8 is an “attempt directly to control speech . . . rather than to protect, from an evil shown to be grave, some interest clearly within the sphere of legislative concern.” Speiser v. Randall, 357 U. S. 513, 527 (1958). Compare United States v. O'Brien, 391 U. S. 367 (1968).
Outline of Part III

Preamble (1-4 - 11)

Good
Reframe G
Restates G on 11
(Do not a comprehensive
restatement. The ultimate
G re stated on p. 14.)

OK

Sub-Part A (11 - 14)

Put speeche - heart of 15th

Sub-Part B (14 -

Due cause, identity defend
pure speech of its protection (14)
Cause are person.

There would does not deny
true, but argum that severe of
cause might in 2nd post clause
of 1445 (16, 17)
But cause refute this 14
assume argument (17)
Justice Powell,

Here's the corrected copy of Bellotti. I think the changes, prompted by PS and Bob, are improvements. I have added 2 riders (on p. 6) and 2 footnotes (on p. 14); they are typed and stapled into the opinion following the page where they are indicated.

The only change that I think may not be a good one appears on pp. 10 and 13. You will notice that those sections of text have been numbered (1) and (2). There used to be no subdivision. The ideas are distinct, and I am glad that Bob picked that up. He suggested making that even clearer by creating separate sections. The unifying theme of the whole section B is the "materially affecting" theory is not derived from the Constitution (either the First Amendment or the Fourteenth) or this Court's precedents. Then part C goes on to explain why it is an impermissible legislative creation. The division into sections (1) and (2) makes clearer the distinction between appellee's argument based on the language of the Constitution and his argument based on this Court's precedents. I think you suggested a division at one point. I really don't oppose the division, but it's sort of clumsy that there's no introduction to part B preceding the new subsections; and the text in each section is fairly short. I don't think I'd want to divide it into parts B & C, to be followed by D, because that departs from the thematic structure stated above. I'll leave this up to you!
Bob also suggested adding a footnote on p. 15, where we mention the realm of "protected" speech, explaining that of course this does not preclude the legislature from dictating things in the realm of obscenity, libel, fighting words, and shouting "fire" in a crowded theatre. But all of that would seem to be excluded by the word "protected". (Bob had made a valid objection to my original use of the word "pure" necessarily speech, which wouldn't exclude some obscenity, libel, etc.) I did not think we needed a footnote to explain use of the word "protected", but I'd be happy to add one if you think it necessary.

Otherwise, I think we're ready to take on the dissent!