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WHAT JUSTICE POWELL AND ADAM SMITH COULD HAVE TOLD THE CITIZENS UNITED MAJORITY ABOUT OTHER PEOPLE’S MONEY

ROBERT L. KERR

This article is based on my much briefer comments as a panelist at the “Citizens United and the First Amendment” Symposium presented by the First Amendment Law Review at the University of North Carolina School of Law in October of 2010. In this fuller essay, I seek especially to address concerns expressed by symposium participants Floyd Abrams and James Bopp, respectively, on (1) how a political message like Hillary: The Movie could ever not be protected expression, and (2) why “liberals” are not more concerned about the argument that allowing restrictions on the Citizens United association would have meant similar restrictions on associations like the Sierra Club. I propose to address those questions by considering them in terms of the bigger one they avoid: Given that long before Citizens United all individuals had the right to make unlimited political expenditures, as well as the right to do the same as associations of individuals, if an organization like Citizens United could not find support for its message via all unlimited spending, what then justifies allowing corporate managers to provide their stockholders’ money for such funding?

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I have a difficult time seeing that as a "liberal" question. It strikes me quite simply as a stockholder or property-owner question, and it offers the ultimate answer to those relatively lesser and indeed misleading questions noted above. After all, if Citizens United had not utilized contributions by business corporations out of what is actually their stockholders’ property, then none of us would have been at the UNC symposium in the first place. The Federal Election Commission could have never lifted a finger regarding *Hillary: The Movie* and it could have aired immediately, as Citizens United ostensibly desired, when its subject was still in the running to be the presidential candidate of her party — instead of the entire matter being dragged out in the courts for years. There quite simply would have been no First Amendment case to be litigated.

Indeed, if we must consider this matter at all in terms of the "liberal-conservative" dichotomy that dominates and distorts far too much political discourse today, it seems that it would be the modern conservative movement that should be more concerned over *Citizens United*. If, as that movement has so often insisted in recent decades, it is wrong for government bureaucrats to decide how to spend other people’s money, how can it be acceptable for corporate bureaucrats to decide how to spend other people’s money for political purposes — without their permission and most likely without their knowledge? The latter do not obtain the money in question via taxation, to be sure, but they also do not obtain it for the purpose of political expenditures. Investors seek profits with their stock purchases and can choose their own political expenditures from those profits — expenditures which, again, could be

5. The fact that the non-profit corporation Citizens United accepted contributions from business corporations meant that it did not qualify for the right to make unlimited expenditures established in *Massachusetts Citizens for Life* for ideological corporations. *See Mass. Citizens for Life*, 479 U.S. at 263-64. The Court stipulated that an ideological corporation is “not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.” *Id.* at 264. The majority in *Citizens United* rejected the Citizens United organization’s request that the case be resolved by expanding the *Massachusetts Citizens for Life* exemption to include ideological corporations, such as itself, that accept only a *de minimis* amount of funding from business corporations. *See Citizens United*, 558 U.S. at __, 130 S. Ct. at 891-92 (2010); *id.* at __, 130 S. Ct. at 936-37 (Stevens, J., dissenting).
made without limits individually and in associations long before Citizens United.

This article will be devoted in large part to the group of 1980s Supreme Court cases that quite clearly sought to fully protect from restrictions unlimited political expenditures by individuals and by individuals joined together for the same purpose — while barring corporate managers from spending stockholders' money on political candidates. As will be detailed, they establish those elements so compellingly that they could well be called the "Other People's Money" cases. In asserting the untenability of Justice Anthony Kennedy's position in his Citizens United majority opinion, in which he all but pretends those cases do not exist, I will draw upon work by Justice Lewis F. Powell, Jr. in those and related cases, as well as the seminal marketplace economics of Adam Smith. I will also argue how any fair reading of those cases and the doctrine they advanced must reject Citizens United as incorrectly decided.

I come at this subject as a First Amendment historian and theorist rather than as a lawyer. I have focused the greatest part of my research over the past decade on what I considered — and still consider — to be perhaps the most important question that is shaping the nature of our democracy: What does it mean to decide that the First Amendment blocks regulation of corporate political media spending? I had written two books and half-a-dozen scholarly articles on that subject even before the Citizens United ruling. My many years of focusing on it led me to see the central question involved specifically in those terms — in terms of regulation of corporate political media spending, rather than in terms of the freedom of corporate "speech."

6. See infra notes 71-89 and accompanying text (discussing analysis of those cases using those terms).

7. The term "corporate political media spending" is utilized to reference the First Amendment category of corporate "expression" that seeks to influence political outcomes or social climate. Despite the multitudinous forms such efforts may take, the former term almost inarguably offers a more precise term than "corporate speech," as it is often referenced. First of all, "corporate political media spending" is more clearly distinguished from "commercial speech"— media efforts (corporate or not) that promote products or services. Each category has generated a distinct body of First Amendment law, and in that context, all corporate speech is not commercial. Neither is all commercial speech corporate. Additionally, in literal meaning, a corporation cannot of course actually "speak" in the way that human beings can,
It is certainly possible to quibble with my framing of the question. But if we look at the major cases on the matter at hand, we find that what they focus on more truly than anything else is the degree to which the First Amendment should or should not block regulation of corporate political media spending. In the basic facts of each we find (1) regulation targeting such spending and then (2) challenges to such regulation on First Amendment grounds. The regulation of such spending is something that our democracy began to consider justified — indeed necessary to preserving the democracy — well more than a century ago. The effort to employ the First Amendment to block such regulation began much more recently, in the mid to late 1970s. I have characterized that effort as “the corporate free-speech movement.”

Because my analysis led me to conclude and say in print for some two years before Citizens United that the corporate free-speech movement was nearer than ever to its biggest victories at the Supreme Court, I was not very surprised at the ruling earlier this year. I expected this Court to greatly expand First Amendment protection for corporate political media spending. Yet, I was surprised at how far and how fast it moved the Court’s jurisprudence on the subject toward absolute protection of such spending. That was because my work had led me to

given that it is an “artificial being . . . existing only in contemplation of law,” as Chief Justice John Marshall so succinctly put it in the majority opinion of the seminal corporation case of U.S. law, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). It can only spend — pay someone to express messages on its behalf (through the spending decisions of corporate management). Beyond that, the use of the term “corporate speech” also represents an arguably disingenuous act of rhetorical framing, creating the impression that something that does not in fact actually exist is an everyday reality. 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. See Linda L. Berger, Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation, 58 MERCER L. REV. 949 (2007); Linda L. Berger, What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004). Thus this article, for the most part, forgoes the expression “corporate speech” in favor of the more terminologically representative “corporate political media spending.”

conclude that the body of enduring wisdom developed over time against such absolute protection is simply too great—if we want to preserve a democracy of the people. I did not think this Court would so totally and casually shrug off all that—at least not all in one case, one that on the part of the petitioners did not even actually raise the question of whether it should.9

In the next section, I will focus on how theoretical work grounded in marketplace economics indicates very clearly that First Amendment protection for corporate political media spending diminishes democratic participation in political processes. After that, I will proceed with analysis grounded more squarely in case law and history. But I start with theoretical analysis because advancing theoretical reasoning is at the heart of Justice Kennedy’s majority opinion in Citizens United, just as it was at the heart of the opinion that Justice Kennedy relied upon so extensively—Justice Powell’s majority opinion in First National Bank of Boston v. Bellotti.10 Justice Kennedy cited that 1978 opinion twenty-four times in Citizens United, and without Bellotti, there could be no Citizens United. Nevertheless, I will offer evidence of how solid a case can be made that even Bellotti-author Justice Powell would not have gone as far as the Citizens United majority.

Professor Gene Nichol, in his role of moderator of our UNC panel, said at one point that it seemed to highlight a trend in which journalists respect precedent and lawyers don’t. For my part, I actually haven’t worked as a journalist in more than fifteen years, never took a single journalism course in five years of graduate school (where my research on this subject began), and I teach not journalism, but the law of mass communication. So, I suspect the question of whether precedent

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9. As Justice Stevens noted in his dissent, the question of whether “corporations’ electoral expenditures may not be regulated any more stringently than those of individuals” was “not included in the questions presented to us by the litigants . . . .” Citizens United, 558 U.S. at ___, 130 S. Ct. at 931 (Stevens, J., dissenting). In its appeal to the Supreme Court, Citizens United raised only an as-applied challenge to the regulation at issue (rather than the facial challenge the majority considered), and “never sought a declaration that [the regulation] was facially unconstitutional as to all corporations and unions; instead it argued only that the statute could not be applied to it because it was ‘funded overwhelmingly by individuals.’” Id. at ___, 130 S. Ct. at 932.

should be respected or not is less a matter of journalists versus lawyers than one of basic legal philosophy. Eric Jaffe, another symposium participant, said that he doesn't respect precedent as much as he does what is right. Although he and I disagree on the Citizens United decision, I agree with him on that particular point. But I would propose that to that end we must then ask whether we believe that precedent can represent a collective assessment over time of broader societal judgments on "what is right."

Certainly, history has shown us how such judgments can be wrong, indeed very wrong, as in such infamous cases as those that held African-Americans are not protected by the Constitution\(^{11}\) and established the separate-but-equal doctrine.\(^{12}\) In order to distinguish the precedents swept away by Citizens United and provide justification for asserting their rightness, I will begin the following discussion with what marketplace-of-ideas theory suggests about those precedents, which the Court has consistently grounded in such theory. I will seek to establish that both the relevant precedents — and the broader, enduring philosophic wisdom from which they are derived — demonstrate how very wrongly Citizens United was decided. In that process, I will press the case for seriously considering such accumulated wisdom from the past in our quest to determine "what is right," as opposed to reinventing that wheel anew each time out. Indeed, regard for the former would seem more consistent with core traditional conservative principles.\(^{13}\) As Justice William H. Rehnquist once wrote of the lessons of history in a First Amendment case on corporate expression: "[I]n 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."\(^{14}\)

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13. See, e.g., Patrick Allitt, The Conservatives: Ideas and Personalities Throughout History 2 (2009) (asserting that "conservatism is, first of all, an attitude to social and political change that looks for support to the ideas, beliefs, and habits of the past and puts more faith in the lessons of history than in the abstractions of political philosophy").
WHAT ADAM SMITH TELLS US ABOUT THE MARKETPLACE OF IDEAS

To elaborate upon that, let me begin with what Adam Smith tells us about the jurisprudence represented by the majority ruling in *Citizens United*. In my 2008 book I characterized him as its patron saint. There and elsewhere I have drawn extensively upon the work of the eighteenth-century thinker best known for writing *The Wealth of Nations*. That book’s enduring influence for more than two centuries makes him hands-down the consensus choice to be called the father of the economic system now known as capitalism. And his work on the best way to structure truly free economic markets, I have proposed, offers us guiding principles for similarly structuring the marketplace of ideas.

But Smith’s life stands in cautionary testament to the stunning way that time reduces even the greatest historical figures to convenient bits of shorthand. Today, what comes to mind most often when Smith is mentioned is the “invisible hand.” And that phrase has been endlessly parroted out of context and out of proportion to render Smith in popular imagery as something of a supernatural chamber-of-commerce publicist. In that role, Smith serves as the ultimate talisman, one that can slap down conservation regulation that banned advertising that promoted greater consumption of electricity. *Id.* at 572. This case is generally considered more directly to be part of the commercial-speech case law than the case law on corporate political media spending. Yet it had some relevance for the latter, as Justice Stevens argued in a concurring opinion. He characterized the regulated expression as corporate political speech — rather than commercial — because the banned promotional advertising very well could address crucial questions being considered by political leaders during the energy crises of the period. *Id.* at 580-81 (Stevens, J., concurring). Justice Rehnquist’s dissent more broadly asserted the theory that non-human entities such as state-created monopoly utilities and other corporations are subject to government regulations that human citizens are not — including regulations on otherwise protected expression. *See id.* at 586, 588-89 (Rehnquist, J., dissenting); *See also infra* notes 123-26, 156-59 and accompanying text (discussing Justice Rehnquist’s extensive jurisprudence advancing that theory).

15. *See Kerr, supra* note 8, at 115.


any restrictions on business interests as unjustifiable interference. Consider though that Smith mentioned his “invisible hand” concept only one time in all of The Wealth of Nations and in quite qualified and nuanced language in that instance. That’s because in his most famous book, as in his life, his concerns encompassed so much more than that widely misinterpreted and misused phrase on the way that pursuit of self-interest can contribute to the public good. Smith believed in free markets, without question. But the understanding of a free market that he articulated at great length was not at all one in which democratic government would be denied any role in preventing more powerful participants from unfairly dominating that market.

When Justice Powell authored the majority opinion in First National Bank of Boston v. Bellotti, ruling that the spending of company profits by corporate management on political media messages was a form of expression constitutionally protected from government regulation, he grounded his reasoning in “the role of the First Amendment in . . . affording the public access to discussion, debate, and the dissemination of information and ideas.” The Supreme Court has used such marketplace-of-ideas reasoning, more than any other theoretical basis for guiding First Amendment jurisprudence, to advance the concept “that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .” In articulating that, Justice Oliver Wendell Holmes also made clear how important it is to understand law in that sort of theoretical context. “That at any rate is the theory of our Constitution,” he said of his marketplace-of-ideas concept. “It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”

The linkage between application of theory and constitutional jurisprudence was clear. Ideas have consequences. And so, also, does the misunderstanding of ideas. My analysis leads me to conclude that Bellotti and Citizens United both represent cases of the latter. And as the

19. Id. at 783.
21. Id.
22. Id.
central basis for that conclusion, I recommend the seminal marketplace economics of Adam Smith. That is, Smith’s concept of *individuals* competing equally in a free market toward the greatest good for society can be applied to the concept of *ideas* competing in a free market. His fundamental principles enable us to consider the workings of the marketplace of ideas in more practical terms beyond Justice Holmes’ famous metaphor. Smith’s basic principles cannot only be successfully translated from the economic marketplace to the marketplace of ideas, they provide compelling language for communicating their relevance in terms of law and public policy. Time has shown that the basic concepts Smith laid out remain fundamentally sound more than two centuries later. Smith offers us the foundation upon which dominant economic thought on free markets continues to be analyzed and debated. As historian Jeffrey Collins wrote last year in reviewing a new biography of Smith, the teachings of *The Wealth of Nations* “are so fundamental to modern economics that familiarity often dulls our appreciation of its brilliance.”

As a professor of moral philosophy at Glasgow University in the second half of the eighteenth century, Adam Smith lectured in theology, ethics, and jurisprudence. He became famous with the 1759 publication of *The Theory of Moral Sentiments*, in which he focused on ethical theory. In *An Inquiry Into the Nature and Causes of the Wealth of Nations*, published in 1776, Smith advanced his economic theories. The whole of his analysis comprises inquiries not only into the economic wealth of the nation, but also into both “the well-being of society as a whole and for the freedom of the individual[s] within that society.” In most basic terms, Smith called for limiting government in order to allow


25. See Smith, supra note 16.

the motivation of self-interest to flourish and generate material benefits for society — because that advanced the utilitarian value of the common good, Smith’s ultimate concern. However, he also emphasized that a system of justice was essential to protect all members of society as well as possible — including protecting free markets from domination by the most powerful business interests.

Since his death, however, many economics texts have tended to “distort[] both Smith’s moral theory and his economics,” as Smith scholar John E. Hill has written.27 “These texts emphasized laissez-faire, a word Smith did not use — it never appears even once in Wealth of Nations — and competitive individualism, at the cost of the benevolence and justice which Smith emphasized.”28 His work reflected a much broader, more humane subject than economics as generally taught in universities today. “Smith’s modern followers tend to be economists without a strong sense of civic life, and so that is how his admirers and detractors see Smith himself,” in the assessment of economist Athol Fitzgibbons.29 Indeed, too many of both followers and admirers today tend to imagine Smith as some sort of philosophical forerunner of Gordon Gekko, the unapologetic inside trader from Oliver Stone’s 1987 film Wall Street30 and the 2010 sequel Wall Street: Money Never Sleeps.31 Yet, “[t]here is nothing in Smith’s work that would even for a

28. See Kerr, Impartial Spectator, supra note 17; see also Hill, supra note 27, at ix (expounding on Smith’s “concept of political balance among economic classes” and his “criticisms of excessive individualism” with the goal of dispelling commonly held misconceptions of Smith and his values); ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 109–10 (1997) (explaining the way in which Smith combined what other thinkers viewed as mankind’s drive to economic advantage and the “consideration on the part of others” by concluding that, for Smith, achieving the latter meant also achieving the former and so the two were really one concept for him).
30. WALL STREET (20th Century Fox 1987).
31. WALL STREET: MONEY NEVER SLEEPS (20th Century Fox 2010).
moment suggest that ‘greed is good,’” Solomon points out, referencing Gekko’s most famous line.32

Justice Powell’s majority opinion in Bellotti similarly contradicts Smith’s free-market principles. In essence, Justice Powell’s reasoning went, opening up the marketplace of ideas to more corporate political media spending would advance the First Amendment role of making that market freer and providing more ideas and information to political debate on public issues. However, Smith’s principles highlight how First Amendment protection for corporate media spending actually provides a conduit for the transfer of the corporation’s government-provided advantages from the economic market directly to the marketplace of ideas — a concept crucial to shaping the Supreme Court’s jurisprudence on corporate political media spending in most of the related cases between Bellotti and Citizens United. Smith’s concepts do emphasize openness and similar opportunities for all competitors in the economic marketplace. Yet rather than laissez-faire economics, he stressed that the efforts of the most powerful competitors can be expected to work against maintaining freedom of competition in the marketplace. “The interest of the dealers . . . . in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the publick,” he wrote.33 “To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the publick; but to narrow the competition must always be against it . . . .”34 Further, he declared, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices.”35

So just as strongly as Smith cautioned against dominance of the marketplace by government, he warned also about the same by powerful business interests, which he characterized as “an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who

32. Kerr, supra note 17 (quoting Robert C. Solomon, Ethics and Excellence: Cooperation and Integrity 85 (1992)).
34. See id.
35. See id. at 129.
accordingly have, upon many occasions, both deceived and oppressed it." Smith called not for rejecting all government regulation but more precisely for rejecting the sort that was dominant at the time he was writing *The Wealth of Nations* in mid eighteenth-century England. In particular, he argued against then common mercantilist policies of sanctioning monopolies, putting quotas on imports, heavily regulating activities of individual tradesmen, and restricting other such aspects of economic behavior. Smith called for abandoning all such policies that privileged the few at the expense of the many and prevented most from competing fairly in a free market. *The Wealth of Nations* was published the same year that American revolutionaries declared independence and was highly influential among the founders.

Smith supported regulation that served to resist the narrowing of the marketplace, particularly a system of justice that emphasized liberty, competition, and fair play. In *The Wealth of Nations*, he wrote that government is responsible for "protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it . . . ." Indeed, when considered in this broader context of Smith's work, his invisible-hand concept is more accurately understood not as an independent force but as a dependent variable — one that must be protected by government in order for it to function effectively.

36. See id. at 157; see also G.R. Bassiry & Marc Jones, *Adam Smith and the Ethics of Contemporary Capitalism*, 12 J. BUS. ETHICS 621, 621 (1993) (arguing that "[c]ontemporary capitalism, dominated as it is by large corporations, entrenched political interests and persistent social pathologies, bears little resemblance to the system which Smith envisioned would serve the common man").


38. See Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* 26 (1984) (discussing the impact Smith's *Wealth of Nations* had on Americans since it was published).


40. See, e.g., Jerry Z. Muller, *Adam Smith in His Time and Ours: Designing the Decent Society* 19 (1993) (discussing how the markets were set to promote the well-being of society and how government must interfere to protect the public). Patricia H. Werhane, *Adam Smith and His Legacy for Modern
Among the key areas in which Smith advocated strong roles for government were in maintaining national defense, law enforcement, and a judicial system; protecting copyrights and patents; enforcing contracts; regulating mortgages; controlling paper money and the banking system; administering taxation necessary to fund required services; enforcing limits on interest rates to protect consumers; overriding free trade when foreign-policy measures necessitated it; funding public-works projects such as roads, canals, bridges and harbors; and providing broad public education. Certainly such expansive involvement of government in so many areas of life is at odds with a laissez-faire approach to social organization, as well as so many popular representations of Smith’s ideas. But community-oriented concerns are prominent throughout Smith’s work. In *The Theory of Moral Sentiments*, he articulated at length his concept of the “impartial spectator.”

That was the name Smith gave to the instinct that “whenever we are about to act so as to affect the happiness of others, calls to us, with a voice capable of astonishing the most presumptuous of our passions, that we are but one of the multitude, in no respect better than any other in it . . . .” It is the “impartial spectator” who “shows us the propriety of generosity and the deformity of injustice; the propriety of resigning the greatest interests of our own, for the yet greater interests of others . . . .”

This concept is crucial to Smith’s concept of justice advancing the common good, which is equally central to both *The Theory of Moral Sentiments* and *The Wealth of Nations*. Indeed, the two works treat essentially the same topics in different realms — the former’s examination of the basis for morals and legislation is extended to form the ethical foundation for the latter’s focus on political and economic spheres. In *The Theory of Moral Sentiments*, for example, Smith called the pursuit of wealth illusory but useful. “If we consider the real satisfaction which all these things are capable of affording . . . . it will always appear in the highest degree contemptible and trifling,” he said.

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41. See Smith, supra note 24, at 137.
42. Id.
43. Id.
44. See id. at 181.
45. Id. at 183.
The pleasures of wealth and greatness . . . strike the imagination as something grand, and beautiful, and noble, of which the attainment is well worth all the toil and anxiety which we are so apt to bestow on it. And it is well that nature imposes upon us in this manner. It is this deception which rouses and keeps in continual motion the industry of mankind.  

Then in The Wealth of Nations, he similarly grounded his concept of limited government encouraging individual self-interest to flourish in the relentless passion of humans for bettering our condition, a desire which, though generally calm and dispassionate, comes with us from the womb, and never leaves us till we go in the grave. . . . In the whole interval which separates those two moments, there is scarce perhaps a single instant in which any man is so perfectly and completely satisfied with his situation, as to be without any wish of alteration or improvement, of any kind.

Bottom line, Smith called for channeling the relentless human impulse for personal gain so as to maximize the common good — not for letting that impulse run rampant, regardless of the societal cost.

In The Theory of Moral Sentiments, Smith wrote that a competitor

may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should jostle, or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair play, which they cannot admit of.

That assertion is consistent with his emphasis in The Wealth of Nations on government’s responsibility for “protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it.” When corporate managers are allowed to participate in candidate elections through deployment of their corporate

46. id.
47. See SMITH, supra note 16, at 203.
48. See SMITH, supra note 24, at 83.
49. See SMITH, supra note 16, at 392.
treausuries, it represents just such a “violation of fair play.” Providing First Amendment protection for such spending of stockholders’ money allows corporate managers to wield 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. In that manner, managers are permitted to transfer those advantages from the economic marketplace directly over to the political marketplace, diminishing true free trade in ideas because other participants are not provided with such significant advantages.

I wrote in 2007 that the future of First Amendment jurisprudence on corporate political media spending would be crucially shaped by the Court’s choice between the laissez-faire and the Adam Smith understandings of the marketplace of ideas. Over the course of the years following Bellotti, we saw significant holdings by majorities at the Court trending toward the latter understanding. But with the death of Chief Justice William Rehnquist in 2005 and the retirement of Justice Sandra Day O’Connor in 2006 (both of whom were part of the six-three Austin v. Michigan Chamber of Commerce majority), the trend reversed. For the majority in Citizens United, the holding in Austin in particular “interferes with the ‘open marketplace’ of ideas protected by

50. See Smith, supra note 24, at 83.
the First Amendment." In rejecting Austin's structural mechanism for preventing deployment of "resources amassed in the economic marketplace" through state-created benefits of the corporate form to obtain "an unfair advantage in the political marketplace," Citizens United advances an understanding of a laissez-faire marketplace of ideas. The Citizens United majority, however, not only diverged from an understanding of marketplace freedom that Adam Smith would endorse, it probably moved even beyond what Justice Powell could accept.

**HOW THE ACTUAL AUSTIN CONTRADICTS THE CITIZENS UNITED VERSION OF AUSTIN**

In the course of overruling Austin, Justice Kennedy's majority opinion insists that "before Austin, the Court had not allowed the exclusion of a class of speakers from the general public dialogue." It concedes that Bellotti "did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under Bellotti's central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." With that, Justice Kennedy begins a process more grounded in his hypothesizing about how earlier Courts would have ruled on that matter than in how they actually did. He proceeds as if there were no related cases between Bellotti and Austin, stating immediately after that discussion of Bellotti: "Thus the law stood until Austin." After briefly summarizing the facts involved in Austin, he declares that it "identified a new governmental interest" in "preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the

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54. Id. at __, 130 S. Ct. at 904 (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659 (1990)).


56. Id. at __, 130 S. Ct. at 899.

57. Id. at __, 130 S. Ct. at 903.

58. Id.
help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”  

From there, Justice Kennedy proceeds to deliver what can be read as evidence of imposing an artificial baseline similar to that which Cass Sunstein’s influential analysis asserts as the ultimate error of *Lochner v. New York.*  

“This Court is confronted with conflicting lines of precedent: a pre-*Austin* line forbidding speech restrictions based on the speaker’s corporate identity and a post-*Austin* line permitting them,” in Justice Kennedy’s version of the case law.  

There and elsewhere in his opinion, Justice Kennedy presents his analysis as grounded in a baseline that he maintains as natural and pre-political, resonating of the error that Sunstein characterized as *Lochner’s* ultimate illegitimacy.  

Rather than critiquing *Lochner* simply in terms of judicial activism, Sunstein’s oft-cited analysis articulates it in terms of the Court treating market ordering under the common law as part of nature rather than a legal construct, which led it to impose as pre-political an artificial baseline from which to measure the constitutionality of government

59. *Id.* Justice Kennedy describes that interest by employing a term that does not actually appear anywhere in the *Austin* opinion: “an antidistortion interest.” *Id.*  

60. *See Citizens United,* 558 U.S. at __, 130 S. Ct. at 883; *Lochner v. New York,* 198 U.S. 45, 56-57 (1905) (striking down a New York regulation limiting to sixty the number of hours that bakery employees could be required to work in a week). *Lochner* provided broad precedent for invalidating other regulation of business until it was rejected by the Court in 1937. *See West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 391-94 (1937); *see generally* Cass R. Sunstein, *Lochner’s Legacy,* 87 COLUM. L. REV. 873 (1987) (discussing the baseline analysis of *Lochner*). This article has been called “by far the most influential revisionist work on *Lochner*” and “one of the most influential constitutional law articles,” of recent decades, having been cited in law reviews hundreds of times, far more often than any other assessment of *Lochner.* *See generally* David E. Bernstein, *Lochner’s Legacy’s Legacy,* 82 TEX. L. REV. 1, 13-16 (2003) (discussing how the article’s impact extends to the way its themes have been developed in many of Sunstein’s other well-cited articles and books (particularly Cass R. Sunstein’s *The Partial Constitution*), which have also been widely cited and taught in law schools and have influenced the work of many scholars, as well as several Supreme Court justices).  


regulation. His analysis concluded that "[a]bove all, the [Lochner] Court's concern was that" the bakery regulations were "partisan rather than neutral," and "[i]t was neutrality that the due process clause commanded." Reasoning that "neutrality was served only by the general or 'public' purposes comprehended by the police power" and concluding that the regulation could not be "justified as a labor or health law . . . it was invalidated as impermissibly partisan." Thus, the Lochner majority's framework conceptualized common-law categories that "were taken as a natural rather than social construct. The status of the common law as a part of nature undergirded the view that the common law should form the baseline from which to measure deviations from neutrality . . . ."

Because the Court in that manner deemed the bakery regulations to represent impermissible interference with the existing distribution of wealth, Sunstein concluded: "Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship." When the Court three decades later signaled its abandonment of Lochner in West Coast Hotel Co. v. Parrish, it adopted an "understanding that in any case, government — through minimum wage laws or the common law system — is making a choice." In Sunstein's analysis, that Court acknowledged its chosen baseline was "a system in which all workers had a living wage" that rejected Lochner's dogma that it was "natural and inviolate" to adhere to "a system that was legally constructed and took the status quo as the foundation from which to measure neutrality."

My analysis finds considerable evidence that Justice Kennedy's Citizens United opinion similarly advances as natural and inviolate what

63. See Sunstein, supra note 60, at 874.
64. Id. at 878.
65. Id. at 878-79.
66. Id. at 879.
67. Id. at 874 (declaring that understanding to be "faithful to what the Court said when it both engaged in and abandoned Lochner-like reasoning").
68. 300 U.S. 379 (1937).
69. See Sunstein, supra note 60, at 881.
70. Id. at 881-82.
are actually no more than legal constructs of considerable artifice, particularly in the way it characterizes Austin as some sort of doctrinal island with no precursor in the case law. In order to maintain such a pretense, one must ignore the group of highly significant cases on corporate political media spending from the 1980s in which the Court built the foundation for Austin by walling off spending in candidate elections from corporate treasuries advantaged by the special, state-created protections of perpetual life, limited liability, and tax advantages. And that foundation was even more deeply grounded in the priorities of more than a century of legislative and judicial judgment. Through that process — with key support from justices in the Bellotti majority — the Court established a carefully balanced doctrine that fully protected political expression and unlimited political expenditures not only by individuals but also by associations of individuals who wished to engage in such expression through similarly unlimited media spending via political action committees or ideological corporations. Thus, the argument that without Citizens United, the First Amendment rights of associations of individuals would be limited pretends that those rights were not already fully protected by the 1980s rulings on the subject — the cases I suggest can be called the “Other People’s Money” cases. But as in Justice Kennedy’s Citizens United opinion, that pretense is necessary in order to avoid spotlighting what Citizens United actually protected — the right of corporate management to spend stockholder’s money on political candidates — rather than leaving the choice on such expenditures of their money to the stockholders. Protecting the right to thus spend other people’s money effectively dismantled a doctrine that maximized political expressive freedom by individuals and associations of individuals and minimized encroachment upon that freedom by structurally advantaged corporate spending of other people’s money.

In skipping directly from Bellotti to Austin in his central discussion of the relevant case law on corporate political media spending, Kennedy first omitted Federal Election Commission v. National Right to Work Committee.71 In that 1982 case, the Court had

unanimously upheld a section of the Federal Election Campaign Act that prohibited corporations or labor unions from soliciting contributions for separate segregated funds (political action committees) from sources outside a committee's legally allowable membership. The Court accepted the government's argument that Congress had acted to prevent corporations from using their general treasury funds to influence federal elections "only after it became aware of widespread abuses which were thought to present imminent danger of corruption of the federal election process, resulting in a decline of public confidence in the integrity of elected officials and the fair operation of government."

The government successfully argued that it had a compelling interest in ensuring that the "substantial aggregations of wealth" accumulated through the special legal advantages granted the corporate form would not be converted into political "war chests" — the deployment of which could incur political debts from candidates in elections, as the Court had established in 1957 in United States v. United Auto Workers. The government also emphasized that the holdings in Buckley v. Valeo and Bellotti as well had supported that interest as "of the highest order." Asserting the further interest of protecting individuals who invested in a corporation for economic purposes from

75. Nat'l Right to Work Comm., 459 U.S. at 208 ("We agree with petitioners that these purposes are sufficient to justify the regulation at issue.").
76. Id. at 207.
78. Nat'l Right to Work Comm., 459 U.S. at 207.
80. 424 U.S. 1, 47 (1976) (per curium).
81. 435 U.S. 765, 788-89 (1978). The Court noted that while "[t]he importance of the governmental interest in preventing [the creation of political debts] has never been doubted. The case before us presents no comparable problem." Id. at 788 n.26.
82. Brief for Petitioners, supra note 74, at 18.
having their money used for political purposes, the government cited *United States v. Congress of Industrial Organizations*, which was decided more than a quarter century before. In accepting that the asserted interests were compelling and thus outweighed the First Amendment rights asserted by the National Right to Work Committee, the unanimous Court declared: “The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals.” The emphasis on preventing both real and apparent corruption drew upon *Buckley’s* assertion that the latter was “[o]f almost equal concern as the danger of actual *quid pro quo* arrangements” because of its potential eroding impact on confidence and participation in political processes. It also should be noted that Justice Powell, the author of *Bellotti*, joined the opinion in full, and no justices wrote separately to qualify or challenge the majority opinion in any way. Indeed all four of the justices from the *Bellotti* majority still on the Court — Justices Burger, Blackmun, Stevens, and Powell (the fifth, Potter Stewart, having retired the year before) — joined the *National Right to Work Committee* holding.

Thus, *National Right to Work Committee* — and the body of case law it reaffirmed — glaringly contradicts Justice Kennedy’s *Citizens United* assertions that “*Bellotti*’s central principle” means “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity” and that *Austin* “identified a new governmental interest” in “preventing ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the

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84. Brief for Petitioners, *supra* note 74, at 18.
86. *Id*. at 210-11 (citation omitted).
help of the corporate form." 89 Most strikingly, eight years before Austin, the author of Bellotti and the remainder of his Bellotti majority accepted just such restrictions in National Right to Work Committee. In doing so, a unanimous Court in 1982 recognized as long established the interest that Justice Kennedy twenty-eight years later represented as having been “new” in 1990’s Austin.

Then 1985’s Federal Election Commission v. National Conservative Political Action Committee, 90 in striking down limits on campaign expenditures by political action committees, 91 declared that it did so because such expenditures did not represent the same threat of real

89. Id. (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)). Several pages later, in a separate subsection, Justice Kennedy does acknowledge that “NRWC did say there is a ‘sufficient’ governmental interest in ‘ensur[ing] that substantial aggregations of wealth amassed’ by corporations would not ‘be used to incur political debts from legislators who are aided by the contributions.’” Id. at ____, 130 S. Ct. at 909 (quoting Nat’l Right to Work Comm., 459 U.S. at 207-208 (1982)). He also concedes that “NRWC suggested a governmental interest in restricting ‘the influence of political war chests funneled through the corporate form,’” but then insists the case “has little relevance here” because it “decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment.” Id. (citing Nat’l Right to Work Comm., 459 U.S. at 206). Therefore, he concludes, National Right to Work Committee is not relevant to Citizens United because the latter involved corporate expenditures rather than contributions. Id. But he makes no attempt to reconcile National Right to Work Committee’s holdings with his sweeping statements — upon which his central analysis is based — that “before Austin, the Court had not allowed the exclusion of a class of speakers from the general public dialogue” and that Austin “identified a new governmental interest.” Id. at ____, ____, 130 S. Ct. at 899, 903. Thus Justice Kennedy seems to maintain that when a majority opinion — even a unanimous one — states that there are well established and legitimate interests in preventing the corrupting influence of advantaged corporate wealth being converted from the economic market to the marketplace of ideas, then it somehow means those interests only exist in relation to such transfers made via PAC funds and not directly from corporate treasuries.


91. Id. at 501. At issue was a section of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9012(f) (2006), that made it a criminal offense for an independent political committee to expend more than $1,000 to further the election of a presidential candidate who had elected to accept public financing. See 26 U.S.C. § 9012(f) (2006); Nat’l Conservative Political Action Comm., 470 U.S. at 491-92.
or apparent corruption as those of business corporations. It emphasized that the speech interests of individuals joined together for the purpose of expressing viewpoints were protected and distinguished from the economic interests represented by funds accumulated in corporate treasuries through the special advantages of the business corporate form. A year after that, in Federal Election Commission v. Massachusetts Citizens for Life, Inc., the Court still again distinguished spending made directly via such treasuries as fundamentally different from human First Amendment expression in holding that regulations of independent political expenditures applied to ideological corporations (rather than business corporations) were unconstitutional. The economic advantages provided to the business corporate form can create "an unfair advantage in the political marketplace," the Court declared, because the "resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers." Massachusetts Citizens for Life established a three-part test to distinguish between the two types of corporations, a test that critically emphasized why such ideological corporations could not accept contributions from business corporations — so as to prevent the former from serving as conduits into the political marketplace for spending from the latter.

93. Id. at 500.
95. Id. at 259-63.
96. Id. at 257-58.
97. Id. at 263-264. The ruling established a three-part test to distinguish between the two types of corporations:

In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that
Thus it could be argued as anticlimactic — rather than “new” — four years later, in Austin v. Michigan Chamber of Commerce, when the majority once again recognized interests already established as compelling in National Right to Work Committee and Massachusetts Citizens For Life. For its holdings reflected a doctrine clearly articulated by the Court over the previous decade in the “Other People’s Money” cases. By walling off spending from corporate treasuries advantaged by special, state-created protections (perpetual life, limited liability, and tax advantages), the Court had reached a carefully balanced doctrine that fully protected political expression and unlimited political expenditures by any human individual, as well as that of any association of such individuals who wished to engage in such expression collectively through the similarly unlimited media spending of political action committees or ideological corporations. That doctrine arguably represented as close to as nearly perfect a balance as possible between maximizing human political expressive freedom and minimizing encroachment upon that freedom by structurally advantaged corporate spending — a balance that preserved the priorities of more than a century of legislative and judicial judgment.

WOULD EVEN BELLOTTI AUTHOR POWELL HAVE JOINED CITIZENS UNITED?

The enduring wisdom in maintaining such a delicate but equitable balance in this infinitely complex area of law is most convincingly demonstrated by the fact that Justice Powell, the author of persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id.

the *Bellotti* opinion in which Justice Kennedy’s *Citizens United* ruling purports to be grounded so solidly, joined the majorities in all three of the cases that established the foundation for 1990’s *Austin* ruling. Justice Powell’s participation in *Massachusetts Citizens for Life* is particularly revealing in that it offers indications on just how likely it appears he would have disagreed with Justice Kennedy’s interpretation of the case law on corporate political media spending between *Bellotti* and *Austin*. Although Justice Powell believed corporate spending of the type at issue in *Bellotti* (on referenda) should be protected by the First Amendment, his private papers indicate he was comfortable with the pre-*Austin* line of cases restricting such spending that involved candidate elections to political action committees.

For Justice Kennedy, the regulations on corporate political media spending represent “a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak” because a political action committee “is a separate association from the corporation. So the PAC exemption . . . does not allow corporations to speak.” 99 Additionally, he writes in *Citizens United* that political action committees “are burdensome alternatives; they are expensive to administer and subject to extensive regulations.” 100 Yet former corporate attorney Justice Powell, who also had some experience in electoral politics in Virginia before joining the Court, 101 in the deliberations on *Massachusetts Citizens for Life*, expressed no disagreement with regulations limiting corporate spending in candidate campaigns to funds raised through political action committees — rather than directly from corporate treasuries. In a memorandum dictated for his files “to refresh my recollection as to the issues,” he wrote that if the corporation before the Court “had created a separate segregated fund, derived from contributions of subs[c]ribers or sympathizers, that fund could be used without limit to publish the corporation’s views in support of, or in

100. *Id.*
opposition to, any candidate. Thus, the burdening of First Amendment rights is — at most — quite limited . . . ,"102

Justice Powell also expressed acceptance for broader principles justifying regulation of at least some corporate political media spending, writing “Yes”103 in the margin of his clerk’s bench memorandum next to the statement: “There is a strong argument that unlimited expenditures by large corporations [in candidate elections] could indeed pose the danger of corruption.”104 In another memorandum two months later, his clerk detailed guidelines that the public-interest group Common Cause proposed in an amicus brief for distinguishing between business corporations and ideological corporations, guidelines that focused on walling off the latter from financial support or influence by the former.105 In the margin next to that passage, Justice Powell bracketed the guidelines and wrote, “Seems reasonable.”106 Indeed, the three-part test that the Court went on to establish for that purpose contained essentially the same elements as those proposed by Common Cause.107

Most significantly, after the first draft of the majority opinion by Justice William J. Brennan’s opinion was circulated, a memorandum on it by Justice Powell’s clerk emphasized for him that

[the major question for you is whether you agree with the principle set out... that organizations are properly subject to the requirement that they form a PAC when there is a danger that they will use funds gained from the economic arena to engage in speech in the political


104. Id.


106. Id. (referring to notes in margin of memorandum).

arena.... This would seem to be the principle from this opinion that will be applied to later opinions.\textsuperscript{108}

Justice Powell's papers offer one example after another of how actively he would lobby justices in the process of authoring majority opinions with which he had concerns and often seek changes accordingly. Yet even after reviewing his clerk's prescient and unequivocal memorandum on what Massachusetts Citizens for Life would mean for the direction of case law, Justice Powell made no requests for revisions in joining Justice Brennan's majority opinion.\textsuperscript{109} And that occurred the same year that Justice Powell aggressively worked to forge a narrow majority for protecting corporate expression from being compelled to associate with the viewpoints of other speakers in \textit{Pacific Gas \\& Electric Co. v. Public Utilities Commission of California}.\textsuperscript{110} Thus even though Justice Powell continued to assert a degree of First Amendment protection for corporate political media spending in 1986, he also accepted with no evident disagreement the proposition that corporations "are properly subject to the requirement that they form a PAC when there is a danger that they will use funds gained from the economic arena to engage in speech in the political arena."

We cannot, of course, know with certainty how Justice Powell would have voted if he had still been on the Court when it considered \textit{Austin} four years after \textit{Massachusetts Citizens for Life}.\textsuperscript{112} We can, however, know how the majorities of justices who were on the Court in 1990 did decide the questions concerning regulation of corporate expenditures in candidate elections in \textit{Austin} and in the preceding "Other

\textsuperscript{108} Memorandum to Justice Lewis F. Powell, Jr., Supreme Court Case File No. 85-701, at 2 (Nov. 6, 1986) (on file with \textit{First Amendment Law Review} and Washington \\& Lee University School of Law).


\textsuperscript{110} 475 U.S. 1, 20-21 (1986). The case posed the question of whether parties with different views should be allowed to include political inserts in billing envelopes containing such inserts from a utility corporation, as the state's Public Utility Commission had ruled and the California Supreme Court had allowed to stand. The United States Supreme Court reversed. \textit{Id.} at 4-7.

\textsuperscript{111} Memorandum to Justice Lewis F. Powell, Jr., \textit{supra} note 108.

\textsuperscript{112} Justice Powell retired from the Supreme Court in 1987 and died in 1998.
People's Money" cases that provided the solid set of holdings establishing its foundation (all holdings, to re-emphasize, that \textit{Bellotti} author Justice Powell joined). In contrast, Justice Kennedy's \textit{Citizens United} opinion relies less on what those majorities decided than on a hypothesis based on his reading of \textit{Buckley} and \textit{Bellotti}. Regarding the former, he declares that although it "did not consider a separate ban on corporate and union independent expenditures . . . " had such expenditures "been challenged in \textit{Buckley}'s wake . . . it could not have been squared with the precedent's reasoning and analysis."\textsuperscript{113}

Justice John Paul Stevens points to the incongruity of that analysis in his dissent:

In the \textit{[Citizens United]} Court's view, \textit{Buckley} and \textit{Bellotti} decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.\textsuperscript{114}

Nevertheless, Justice Kennedy's creative assessment of the case law leads him to insist there was one inevitable result in \textit{Citizens United}: "\textit{Austin} should be and now is overruled. We return to the principle established in \textit{Buckley} and \textit{Bellotti} that the Government may not suppress political speech on the basis of the speaker's corporate identity."\textsuperscript{115}

\textbf{HOW THE \textit{BELLOTTI} COURT UNDERSTOOD \textit{BELLOTTI}}

As with the cases between \textit{Bellotti} and \textit{Austin}, however, my analysis also suggests that Justice Kennedy greatly mischaracterizes \textit{Bellotti} in representing it as a sweeping holding so deeply grounded in well established precedent that the \textit{Citizens United} majority simply had

\textsuperscript{114} Id. at \textsuperscript{130} S. Ct. at 957 (Stevens, J., dissenting).
\textsuperscript{115} Id. at \textsuperscript{130} S. Ct. at 913.
to dismiss more recent holdings on corporate political media spending. That is contradicted by considerable evidence as to how *Bellotti* was understood by the justices who participated in it — including its author and driving force, Justice Powell.

For example, in *Citizens United*, Justice Kennedy cites *Bellotti* as authority for flatly declaring: "The Court has recognized that First Amendment protection extends to corporations."\(^{116}\) The *Bellotti* opinion, however, declared up front that it would not consider the question of "whether and to what extent corporations have First Amendment rights" because that was the "wrong question."\(^{117}\) Indeed, it emphasized that its ruling would not even consider anything so sweeping as "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."\(^{118}\) Justice Powell's opinion maintained that the "question must be whether" Massachusetts' ban on corporate spending to influence referendum questions that did not materially affect corporate interests "abridges expression that the First Amendment was meant to protect," and then proceeded to conclude: "We hold that it does."\(^{119}\)

And even that holding, such as it was, broke considerable precedential ground for many, if not virtually all, of the Justices who participated in the decision. That was particularly true with Justice Rehnquist who, like Justice Powell, had been nominated to the Court by President Richard Nixon to push the Court in a more conservative direction.\(^{120}\) Nine days before the *Bellotti* ruling was handed down,

\[\text{\ldots}\]

\(^{116}\) *Id.* at __, 130 S. Ct. at 899.


\(^{118}\) *Id.* at 777.

\(^{119}\) *Id.* at 776.


[O]n the crucial issues, the Nixon Justices could be expected, more often than not, to end up on the same side. Each of them was more conservative than any of the holdovers from the Warren Court. Together they formed a bloc of four, loosely united by outlook and sympathy, and — apparently — poised under the leadership of Chief Justice Burger to remake American constitutional law.

*Id.*
Justice Powell conceded to Justice Rehnquist that no previous case truly had gone as far as his opinion would: "[N]o prior decision has expressly recognized corporate speech generally as explicitly as my opinion does." Still lobbying Justice Rehnquist in hopes of expanding the majority for his opinion beyond the minimum five votes, Justice Powell argued that, nevertheless, "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." The effort did not persuade Justice Rehnquist, who proclaimed the majority decision as significantly at odds with settled law.

While a corporation's state charter "implicitly guarantees that the corporation will not be deprived of [its] property absent due process of law," Justice Rehnquist insisted that 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." For him, constitutionally protecting that right for corporations represented a potential threat to the democratic governance that had created the corporation: "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." Thus, more than a decade before *Austin*, the future Chief Justice, widely considered the most conservative in decades, articulated that case's essential rationale for preventing transfer of the corporation's government-provided advantages from the economic market directly to the marketplace of ideas. Dissenting in

122. Id.
124. Id. at 825-26.
125. For example, when Chief Justice Rehnquist died in 2005, the first sentence of his obituary noted that he "helped lead a conservative revolution on the Supreme Court during 19 years as chief justice of the United States." Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Is Dead at 80*, N.Y. TIMES, Sept. 4, 2005, at A38.
Bellotti, he held forth what he articulated as the more deeply established 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. 126

That and other indications of the sharp divide among the Justices who decided Bellotti provide further evidence undermining Justice Kennedy's Citizens United contention that settled law holds corporate political media spending as indistinguishable from human political expression. The Citizens United Court split five-to-four, just as the Bellotti Court did more than three decades before. Justice Byron R. White in his dissent rejected the majority opinion just as fully as did Justice Rehnquist's dissenting opinion: "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."

In fact, Justice Powell's papers show that the Bellotti Court originally came close to an almost unanimous decision to dispose of the case on drastically narrower grounds and never even consider it in the manner that ultimately established First Amendment protection for corporate political media spending. When the Justices met in conference two days after oral argument in late 1977, eight indicated they would dispose of the case by reversing the lower court ruling only on the

127. Id. at 813 (White, J., dissenting).
grounds that the regulation's "materially affecting" provision was unconstitutional, without reaching the First Amendment question.

Justice Brennan was assigned to write a majority opinion on those lines, but three weeks later informed the other justices that he had since grown inclined to uphold the Massachusetts regulation, based on 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. As a member of the majority the year before in Buckley, which had struck down federal campaign expenditure limits on individuals, he said he had concluded that Buckley would not similarly invalidate the Massachusetts ban on corporate expenditures in referenda. He said at that writing that he did not know if his view on Bellotti could attract a majority, but warned that declaring the regulation at issue unconstitutional "must inevitably call into question the constitutionality of all corrupt practices acts" that had been enacted over the course of the twentieth century to restrict "[c]orporate spending as a corrupting influence in the political process." Similarly, Chief Justice Warren E. Burger noted the same week he "had begun to have misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act's

128. The Massachusetts Supreme Court had declared constitutional the state regulation stipulating that "[n]o 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 or the corporation." First Nat'l Bank of Boston v. Att'y Gen., 359 N.E.2d 1262, 1267-68 (Mass. 1977) (footnote omitted).


131. Id. at 51.


133. Id. at 4.
Beyond the "differences between the First Amendment rights of an individual as compared with a corporate-collective body" that he saw, it further concerned the Chief Justice that "[c]orporations rarely, if ever, consult stockholders 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."

And he reminded his colleagues that "[m]any of us at the Conference" in November "expressed concern about taking any step which would undermine state and federal Corrupt Practices Acts."

Those developments led Justice Powell to express interest in developing an opinion advancing his view 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." As he and a clerk developed early drafts of his opinion, they agreed to focus on articulating it "in terms of what is prohibited rather than who is guaranteed a certain right," acknowledging 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..." Ultimately, that thematic strategy resulted in *Bellotti*’s carefully worded assertion that the bottom line in the case would not be 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


135. Id.

136. Id. Ultimately Chief Justice Burger joined the *Bellotti* majority but pressed Justice Powell to "underscore the narrowness of the holding" because "[he did] not want corrupt practices statutes to be placed under a shadow." Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell, Supreme Court Case File No. 76-1172, at 1 (Mar. 11, 1978) (on file with *First Amendment Law Review* and Washington & Lee University School of Law).


upon the identity of its source, whether corporation, association, union, or individual.”

In that manner, Justice Powell was able to reframe Bellotti’s emphasis from regulation of corporate political media spending to “the type of speech indispensable to decisionmaking in a democracy.” But it also meant that the holding clearly would stop short of stating “that First Amendment protection extends to corporations,” as Justice Kennedy contends in Citizens United.

Justice Kennedy also maintains that “Bellotti reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity,” because only a “single footnote in Bellotti purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption.” The footnote in question declared that the “importance of the governmental interest in preventing,” through corrupt practices legislation, the “corruption of elected representatives through the creation of political debts.” Since referenda do not involve candidates, Bellotti presented “no comparable problem,” the footnote continued, before conceding that

a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

For Justice Kennedy, that was all no more than irrelevant dicta, despite the fact that it accompanied text at the beginning of the crucial section of Justice Powell’s opinion in which the government’s interests behind the Massachusetts regulation were considered.

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140. Id.
142. Id. at __, 130 S. Ct. at 902 (citation omitted).
143. Id. at __, 130 S. Ct. at 909 (citing Bellotti, 435 U.S. at 788 n.26).
145. Id.
146. Id. at 786-95.
question of whether those interests — “sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen’s confidence in government” and “protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation” — were compelling enough to “survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech” was necessary to the case as decided.148

In the sentence to which the footnote in question is attached, Justice Powell’s opinion critically distinguishes corporate media spending in referenda from such spending in candidate elections: “However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition.”

While resolution of one of the requisite elements of the strict-scrutiny test in a First Amendment case may represent mere dicta for Justice Kennedy some three decades later, four years after Bellotti, Justice Rehnquist would ground National Right to Work solidly within that particular section’s affirmation of the enduring primacy of corruptpractices acts, including citing three times as authority the very footnote that Justice Kennedy dismisses in Citizens United.150 Indeed, on the closely divided Bellotti Court, the qualifying language Justice Kennedy brushes aside may well have been necessary to reach majority support for Justice Powell’s opinion. It is that language that grounds Bellotti’s holding strictly within the specific context of referenda because a “corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” Justice Harry A. Blackmun did not join the opinion until after key language was revised at his request in the specific passage that Justice Kennedy dismissed as insignificant. Informing Justice Powell that he was “always bothered and hesitant” concerning the use of phrases such as “least restrictive

147. Id. at 787.
148. Id. at 786.
149. Id. at 787-88.
alternative” in relation to declarations by the Court that a state had failed to utilize such an alternative in advancing interests that implicate the First Amendment, he expressed concern that Justice Powell’s draft, at that point, did just that.152 “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.153 Justice Powell agreed to the changes, and Justice Blackmun later provided the fifth vote needed to form a majority.154 Making the requested change eliminated from the opinion any assertion that regulation of corporate political media spending in the future could go no further than the elusive “least restrictive alternative.”

Finally, the strength of views contradicting the Bellotti majority on the Court that decided it are demonstrated by the fact that Justices Rehnquist and White not only each authored harsh dissents declaring the majority holding to be at odds with settled law, but both also proceeded in later years to help form majorities in the series of cases between 1982 and 1990 that emphasized Bellotti’s holding was limited to the specific type of restriction on corporate referenda spending involved in that case.155 Justice Rehnquist in particular articulated an extensive rejection


153. Id. While Justice Blackmun did not explicitly demand the change for his vote and arguably could have joined the majority even if the changes were not made, he did write: “I shall withhold my vote until the new draft promised by your note of March 10 comes around.” Id. Justice Blackmun’s position on the breadth of First Amendment protection for corporate political media spending was tenuous enough that two years later in Consolidated Edison v. Public Service Commission, he did not join Justice Powell’s majority opinion, authoring a dissent in which he defended the regulation in that case as constitutional. Consol. Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 548-56 (1980) (Blackmun, J., dissenting).

154. Bellotti, 435 U.S. at 788 n.26. Specifically, in the text accompanying the footnote that Justice Kennedy declined to consider significant, the change meant that rather than asserting that the government’s interests in the Massachusetts regulation “either are not implicated in this case or are not served at all, or in the least restrictive manner,” the final phrase became “or in other than a random manner.” Id. at 788 (emphasis added).

155. See supra notes 55-98 and accompanying text for fuller discussion of that body of cases.
of a laissez-faire approach recognizing no distinctions between corporations and citizens, maintaining that the First Amendment protects political discussion by and among human — not corporate — beings.\textsuperscript{156} Whatever regulations might be placed on corporate political spending, he asserted, "[a]ll natural persons, who owe their existence to a higher sovereign than the Commonwealth, [will] remain as free as before to engage in political activity."\textsuperscript{157} He continued to forcefully press the point through the next decade, writing in his \textit{Pacific Gas \\& Electric} dissent,\textsuperscript{158} shortly before being confirmed as Chief Justice, that regulation of corporate political media spending had nothing to do with the liberty of a natural person. 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," he wrote.\textsuperscript{159}

\textbf{CONCLUSION}

Thus, my years of work on this area of law leads me to conclude that — for the reasons detailed above and for those in additional scholarship by myself and others — there is overwhelming theoretical and historical evidence that \textit{Citizens United} was very wrongly decided. The body of enduring wisdom against such expansive First Amendment protection for corporate political media spending is simply too great — if we want to preserve a democracy of the people. That wisdom was articulated with particularly compelling force in the "Other People's Money" cases that the \textit{Citizens United} majority disregards. Thus, in short, the legitimate answers to the questions presented at the beginning of this article are, respectively: (1) \textit{Hillary: The Movie} always was protected expression and certainly was never banned — because it was only the corruptive spending of other people's money from advantaged corporate treasuries that was not protected; and (2) associations that

\begin{itemize}
\item \textsuperscript{156} Bellotti, 435 U.S. at 828 (Rehnquist, J., dissenting).
\item \textsuperscript{157} Id.
\item \textsuperscript{158} 475 U.S. 1, 26-35 (1986) (Rehnquist, J., dissenting).
\item \textsuperscript{159} Id. at 33 (Rehnquist, J., dissenting).
\end{itemize}
spend their members’ money rather than other people’s provided by corporate managers were already fully protected long before *Citizens United*.

To toss aside all that, as I contend the *Citizens United* majority has done, requires embracing its interpretation of marketplace-of-ideas doctrine as rendering historical corrupt-practices concerns irrelevant, its speaker-neutrality conceptualization equating corporate political media spending with human expression, and its creative characterization of significant precedents as trivial. Doing so quite arguably also means accepting an oligarchic understanding of democracy and freedom of expression in which huge, powerful corporate institutions dominate the political marketplace of ideas and the role of most citizens is greatly diminished. Such a sweeping institutionalization of the objectives of the corporate free-speech movement represents a transformation of the quality of democratic decisionmaking that trends away from a sovereignty of the many toward a sovereignty of the few.\(^{160}\)

For the future, we cannot know for sure whether the *Citizens United* precedent will be respected by future courts more than its majority respected the precedents of past courts. At this point, however, with this majority, by all evidence, firmly in place at the Court for some time to come, it appears that the most hopeful opportunities to avoid a sovereignty of the few lie in greatly expanded disclosure requirements. Too often, corporate political media spending is conducted “behind dubious and misleading names like: ‘The Coalition — Americans Working for Real Change’ (funded by business organizations opposed to organized labor), ‘Citizens for Better Medicare’ (funded by the pharmaceutical industry)...”\(^{161}\) In the only element of *Citizens United* that did not split the Court down the middle, eight justices firmly

\(^{160}\) See Kerr, supra note 8, at 1-18.

supported that sort of regulation.162 “Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election,” Justice Kennedy’s opinion declared.163

Ideally, that would include regulation that requires corporate managers to notify their stockholders in advance of such spending when they intend to use company profits on expenditures for political candidates — a form of disclosure quite specifically endorsed in Justice Kennedy’s *Citizens United* opinion:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests . . . . [D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.164

Even more ideally, given all that, it seems justified to also consider legislation that would provide stockholders with rights similar to corporate rights that the Court protected in *Pacific Gas & Electric.*165 If political media spending is protected First Amendment expression, then *surely* spending someone else’s money for such purposes must be considered an unconstitutional act of forcing the owners of the money to associate with viewpoints with which they may not agree. After all, protecting corporate speakers from such compelled association was precisely what the Court established in *Pacific Gas & Electric.* If the current majority truly holds that no distinction can be made in First

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163. *Id.* at __, 130 S. Ct. at 915.

164. *Id.* at __, 130 S. Ct. at 916 (citations omitted).

165. 475 U.S. 1, 20-21 (1986) (protecting corporate expression from compelled association with the viewpoints of other speakers).
Amendment law between political speakers, should it not also protect stockholders from such compelled association? For as long as that majority remains in place, such protection seems to offer the only remaining hope for reviving the enduring wisdom of the “Other People’s Money” holdings in the Court’s jurisprudence on corporate political media spending.