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Defining The Specter of Corruption: *Austin v. Michigan State Chamber of Commerce*

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COMMENTS

DEFINING THE SPECTER OF CORRUPTION: *AUSTIN v. MICHIGAN STATE CHAMBER OF COMMERCE**

> The conscription of truth should never be undertaken lightly. The men who propose suppressions, in Congress and elsewhere, speak much of the dangers against which they are guarding, but they rarely consider the new dangers which they are creating or the great value of what they are taking away. **

INTRODUCTION

The role of corporations in American politics has been a source of legislative concern[1] since the beginning of the century and a source of litigation for almost as long.[2] Recently, in *Austin v. Michigan State Chamber of Commerce*, the United States Supreme Court upheld provisions of Michigan's Campaign Act that prohibit corporations from expending general treasury funds to

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* 110 S. Ct. 1391 (1990).

** Zechariah Chafee, Jr., *Does Freedom of Speech Really Tend to Produce Truth?*, *in* THE PRINCIPLES AND PRACTICE OF FREEDOM OF SPEECH 334 (Haig Bosmajian ed., 1971).

[1] Early attempts at regulating corporate participation in politics include the Tillman Act of 1907, the Federal Corrupt Practices Act of 1925 and the Taft-Hartley Act of 1947. The Tillman Act made it unlawful "for any national bank or corporation . . . to make a money contribution in connection with any election to any political office." Ch. 420, 34 Stat. 864 (1907) (codified at 18 U.S.C. § 610 (1948) (repealed 1976)). The Federal Corrupt Practices Act broadened the definition of "money" to include "in kind" contributions. Ch. 368, §302, 43 Stat. 1070 (1925). The Taft-Hartley Act extended prohibitions to expenditures in addition to contributions. Ch. 120, §304, 61 Stat. 136, 159-60 (1947). For a history of legislative regulation of corporate financial activity in political campaigns, see United States v. International Union United Auto. Workers, 352 U.S. 567, 570-84 (1957); John R. Bolton, *Constitutional Limitations on Regulating Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 374-402 (1980).

[2] *See* United States v. United States Brewers Ass'n, 239 F. 163, 169 (W.D. Pa. 1916) (holding that Congress had the authority to enact the Tillman Act and that the Act did not abridge defendant's right to free speech).

support or oppose a candidate in a state election. Although the Michigan State Chamber's proposed expenditure was "independent," i.e., made without coordination with a candidate or his election committee, the Court found that the requirement that such expenditures be made from segregated funds was justified by the compelling state interest in preventing corruption. Notably, this was the first time that the Supreme Court had found an expenditure restriction constitutional as applied.[3]

This Comment will review the Court's decision in *Austin*. It will discuss the governmental interest in preventing corruption as defined by the Court and conclude that *Austin*'s definition of corruption was a marked departure from the traditional construction. Previous Courts have considered corruption as the trading of money by a constituent for political favors from a candidate. The *Austin* Court, on the other hand, defined corruption to include what it found was the unfair influence of corporate money on the outcome of an election. Specifically, the *Austin* Court objected to the use of corporate general treasury funds for political purposes because those monies reflected economic success and not political support. This Comment will suggest that the Court offered only a perfunctory explanation for adopting its position, one which warranted a more authoritative and persuasive discussion. Further, this Comment will argue that in abandoning the traditional definition, the Court also abandoned the underlying justification for restricting speech to prevent corruption. Finally, this Comment will conclude that this broad definition of corruption renders the electoral process unreasonably susceptible to legislative intervention and may ultimately chill certain forms of corporate political speech.

I. BACKGROUND

The Supreme Court has interpreted the First Amendment[4]

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[3] The Supreme Court had previously considered a similar provision in a federal law but ruled that the expenditure restrictions could not be applied constitutionally to a small, nontraditional corporation. *See* Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). For a discussion of *Massachusetts Citizens*, see notes 86-103 & 114-29 and accompanying text *infra*.

[4] U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free practice thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

of the United States Constitution to limit government's "power to restrict expression because of its message, its ideas, its subject matter, or its content."[5] Because "[i]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,"[6] election finance law has been subjected to "exacting scrutiny."[7] Accordingly, the Court's analysis in campaign finance cases has turned on whether the specific regulation implicated constitutionally protected freedoms, whether such burden was outweighed by a compelling government interest, and whether the regulation had been narrowly tailored to that interest.[8]

In 1976 the Supreme Court decided *Buckley v. Valeo*,[9] which has since become the landmark case in election finance law. In *Buckley* the Supreme Court considered various challenges to the Federal Election Campaign Act [FECA] Amendments of 1974.[10] For purposes of analyzing *Austin*, however, the

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Government for a redress of grievances.

[5] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). In *Mosley* the Court invalidated an ordinance limiting picketing near school buildings to those schools involved in labor disputes. The Court found that the ordinance defined permissible picketing on the basis of its subject matter. The Court ruled that this was not a content-neutral regulation, and that it could not be justified as the city's attempt to regulate merely on the "time, place or manner" of expression. *Mosley*, 408 U.S. at 99. *See also* Cohen v. California, 403 U.S. 15 (1971) (upholding individual's right to protest the draft by displaying profane message on clothing); Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (striking ordinance prohibiting films with nudity from being shown at drive-in movie theatre).

[6] Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), *quoted in* Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[7] *Buckley*, 424 U.S. at 44-45. The Court set this standard for judicial scrutiny after reaching the threshold determination that regulations aimed at the giving and spending of money in connection with candidate elections operated in the sphere of core political expression. The Court rejected the government's contention that election finance legislation regulated conduct, and "its effect on speech and association were incidental at most." *Id.* at 15.

[8] *Id.* at 16.

[9] 424 U.S. 1 (1976) (per curiam).

[10] In order to curtail political corruption, Congress, in the Federal Election Campaign Act of 1971, as amended in 1974 [hereinafter FECA], developed an intricate scheme for regulating federal political campaigns. Federal Election Campaign Act, as amended 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (18 U.S.C. § 608 (1974) (repealed 1976)). Among its restrictions, the Act imposed ceilings on the amount of money that could be contributed to candidates as well as on expenditures made independent of campaigns, but for the purpose of advocating the election or defeat of candidates. 18 U.S.C. § 608 (repealed 1976). The Act also included reporting and disclosure requirements. In

most significant aspect of the *Buckley* decision was the distinction the Court found between regulating contributions—the giving of money directly to a candidate—and regulating expenditures—the spending of money in connection with a candidate without coordination with the candidate or campaign committee. The Court held that the regulation of contributions did not impose the same interference with protected expression as did the regulation of expenditures.[11] Furthermore, unregulated contributions posed a substantially greater threat to the electoral process than did unrestricted expenditures.[12]

The appellants in *Buckley* opposed both FECA's contribution and expenditure provisions. As enacted, FECA limited individuals and groups to a $1,000 contribution per candidate, with an annual ceiling of $25,000 in contributions.[13] The Act capped expenditures by an individual or group at $1,000 per candidate, per election.[14] Appellants argued that any limit on a dollar amount that individuals and associations could use toward political purposes impinged on First Amendment guarantees.[15] The Court conceded that in today's society virtually all political speech involves the spending of money; producing even the most

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addition, amendments to the Internal Revenue Code provided for a system of public financing of presidential elections and established the Federal Election Commission to administer and enforce the legislation.

Senator Buckley, joined by a candidate for the presidency, a potential contributor, a Political Action Committee, The Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. challenged these provisions as unconstitutional violations of their First Amendment rights of freedom of expression and association. *Buckley*, 424 U.S. at 7-8.

[11] *Buckley*, 424 U.S. at 39.

[12] *Id.* at 47. The Court determined that contributions were more likely to incur political debts than would expenditures which were made without consultation with a candidate or candidate committee. *Id.* at 26-27. *See* notes 38-41 and accompanying text *infra*.

[13] 88 Stat. 1263, 18 U.S.C. § 608 (1974) (repealed 1976). The statute uses the term "person" which it defines broadly to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons." *Id.* § 591(g). In addition, the statute authorized a higher limitation on contributions by a "political committee," provided it had been registered with the Federal Election Commission for no less than six months, had received donations from more than fifty persons, and, except for state political parties, had contributed to the campaigns of more than five candidates for federal office. *Id.* § 608(b)(2).

[14] 88 Stat. 1263, 18 U.S.C. § 608 (1974) (repealed 1976).

[15] *Buckley*, 424 U.S. at 15.

modest handbill assumes some cost.[16] To that extent the Court recognized that both contribution and expenditure provisions implicated the First Amendment,[17] yet it nonetheless upheld the Act's contribution provisions[18] and invalidated only the Act's expenditure provisions.[19] The Court permitted the limitations on contributions, finding that they posed only a "marginal restriction upon the contributor's ability to engage in free communication."[20] In the first place, the dollar limitation affected only donations made to candidates and their election committees. It did not affect the contributor's ability to discuss public issues or donate money to other political organizations. Second, the Court posited that allowing a contributor to make larger contributions did not allow him more expression.[21] According to the Court, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution since the expression rests solely on the undifferentiated, symbolic act of contributing."[22] The Court found that limiting contributions to a particular dollar amount still allowed the contributor to enjoy

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[16] *Id.* at 11.

[17] *Id.* at 23.

[18] *Id.* at 29.

[19] *Id.* at 51, 55-57.

[20] *Id.* at 20-21. The Court stated that the effect on the giver was the "primary" First Amendment problem with § 608(b). *Id.* at 24-25. Nonetheless the Court also examined the contribution provisions from the perspective of the donee, albeit in the context of an equal protection challenge. *Id.* at 30-35. The Court noted that the restrictions were facially neutral, applying equally to incumbents and challengers, major party candidates as well as minor party candidates. *Id.* at 31 n.33. Overall, based on the evidence before it, the Court concluded that there had been no showing that contribution limitations were discriminatory in effect. *Id.* at 32, 33-34.

[21] *Id.* at 21. The Court admitted that the size of a contribution might be an indication of the intensity of the contributor's support for a candidate. *Id.* However, the Court noted that the size of a contribution may also be affected by factors which have little bearing on the intensity of political support, for instance, the contributor's financial ability and past contribution history. *Id.* at 21 n.22.

[22] *Id.* at 21. The Court was careful to explain that contributions result in political expression "if spent by a candidate or an association to present views to the voters," but "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* This observation was critical to the Court's finding that a contributor was not unduly burdened by contribution ceilings. Similarly, the Court used this rationale in California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1978), wherein the Court sustained limitations of the amount of money an unincorporated organization could contribute to a multicandidate campaign committee. In *California Medical* the Court referred to contributions as "speech by proxy," the regulation of which entailed non-fatal intrusions into protected expression. *Id.* at 196.

the symbolic expression of giving.[23] More importantly, contribution ceilings did not foreclose the contributor from pursuing other, more direct avenues of political expression, such as joining political associations, and working on behalf of candidates.[24]

The net effect of limiting contributions, according to the Court, was that candidates must raise funds from a greater number of sources, and the giver must explore more direct means of political expression.[25] The Court balanced this burden on the contributor's First Amendment freedoms with the governmental interests behind regulating contributions.[26] Applying a "rigorous standard of review,"[27] the Court noted that even significant intrusions into protected rights may be sustained where the State demonstrated "a sufficiently important interest and employs means closely drawn."[28] The Court then examined Congress's interest in preventing corruption "spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[29] Finding this interest was sufficiently compelling to subordinate a contributor's protected expression, the Court then questioned whether contribution restrictions were narrowly tailored to this purpose.[30]

In this regard, the Court determined that contribution restrictions focused on the narrow problem of the effect of large campaign contributions on the actuality or perception of politi-

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[23] *Buckley*, 424 U.S. at 21.

[24] *Id.* at 22.

[25] *Id.*

[26] In addition to the "primary" interest in corruption prevention, the Court cited two "ancillary" interests advanced by the government. *Id.* at 25-26. First, the contribution and expenditure limits combined would have the effect of equalizing the relative ability of citizens to affect elections. *Id.* Second, the limits would put a brake on the skyrocketing costs of election campaigns. *Id.* at 26. The Court noted that for this latter purpose expenditure limits would be more effective than contribution limits, as expenditure ceilings would cap the aggregate cost of campaigns and not merely force the candidate to pursue a greater number of sources of funding. *Id.* at 26 n.27. The Court, however, rejected both of these "ancillary" rationales. *Id.* at 48-49, 57.

[27] *Id.* at 29. The Court also referred to its standard of review as "exacting." *Id.* at 44-45. The Court explained its application of rigorous scrutiny as applicable to limitations on "core First Amendment rights." *Id.* at 45.

[28] *Id.* at 25 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975)). *See also* NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[29] *Buckley*, 424 U.S. at 26.

[30] *Id.* at 28-29.

cal corruption.[31] The Court explored less intrusive alternatives to the FECA provision, such as laws against bribery and laws requiring financial disclosure from candidates. However, it concluded that neither measure was well suited to Congress's purpose in enacting FECA.[32] Moreover, neither of these alternatives stemmed the perception that improper influence of government has been achieved through massive contributions. Given the weight of the government's interest, and the relatively slight intrusion into protected rights, the Court upheld the contribution ceilings.[33]

The Court found that expenditure ceilings, unlike contribution ceilings, "impose[d] direct and substantial restraints on the quantity of political speech."[34] Whereas contribution limits served only to redirect, at a certain dollar amount, a contributor's participation in politics, the plain effect of expenditure limitations was to restrict speech to a dollar amount. After reaching the applicable dollar amount, a contributor could decide, for example, to purchase radio time to express political views. With expenditure limits, however, one's speech ended at the applicable dollar amount, however it was expended. Accordingly, expenditure restrictions limited the quantity of expression, in terms of the audience reached or the number of issues discussed.[35] In this way expenditure limits foreclosed "any significant use of the most effective modes of communication," simply because the costs of these alternate modes of political expression might be prohibitively large relative to the expenditure ceiling.[36] The Court deemed this result a markedly greater burden on political speech than that imposed by contribution ceilings, which only

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[31] *Id.* at 28. The Court found that the avoidance of the appearance of corruption was almost as compelling an interest as avoiding actual corruption: "the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* at 27 (quoting United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)).

[32] *Buckley*, 424 U.S. at 27-28 (bribery laws would be effective against only the most blatant conduct); *id.* at 28 (disclosure provisions would be of limited effect in this context, a partial measure that would not stem political deal making). See the Court's discussion of disclosure as serving other crucial functions, such as communication with the public. *Id.* at 60-84.

[33] *Id.* at 29.

[34] *Id.* at 39.

[35] *Id.* at 19.

[36] *Id.* at 19-20.

affected a single means of expression, the giving of money to a candidate.[37]

The Court refused to hold that expenditure ceilings were an appropriate means of safeguarding the electoral process, insisting that unregulated independent expenditures did not pose the same threats of real or apparent corruption as did unregulated contributions.[38] Not only did expenditures not suggest improper influence on a candidate, the Court found that expenditures might actually prove to be a thorn to candidates.[39] The Court found that: "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermine[d] the value of the expenditure to a candidate, but also alleviate[d] the danger that expenditures [would] be given as quid pro quo for improper commitments from the candidate."[40] Accordingly the Court found that the same interest in safeguarding the electoral process which was sufficient to justify limitations on contributions, was insufficient with respect to limitations on expenditures. Finding no potential for actual or perceived political quid pro quo arrangements, the Court struck the expenditure provisions.[41]

Two years after *Buckley* considered the effect of election law on candidate elections, the Supreme Court examined election law in the context of referenda and ballot issues. In *First National Bank of Boston v. Bellotti*[42] the Court struck down a Massachusetts statute that prohibited banks and corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[43] In considering

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[37] *Id.* at 44.

[38] *Id.* at 47-48.

[39] *Id.* at 47. Indeed the Court determined that, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.*

[40] *Id.*

[41] *Id.* at 51.

[42] 435 U.S. 765 (1978). This case is widely referred to as the "corporate speech" case, although the Court expressly deferred deciding whether restrictions on corporate speech might be justified where restrictions on an individual's speech would not. *Id.* at 777 n.13.

[43] *Id.* at 768 (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)). The Court's holding in *Bellotti* extended equally to corporate contributions and corporate

the case, the Court focused on the nature of the speech prohibited by the statute, rather than on the identity of the speaker.[44] The Court found that speech surrounding referendum issues was "indispensable to decisionmaking in a democracy"[45] and that the requirement that a corporation had to be "materially affect[ed]" was an impermissible restriction on speech.[46] Moreover, the Court concluded that such speech did not lose its First Amendment protection because the speaker was a corporation.[47]

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expenditures, and both means of expression remain available to corporations in connection with referenda.

[44] *Bellotti*, 435 U.S. at 776. In so doing, the Court shifted its emphasis from what had been the lower court's focus, stating, "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Act] abridges expression that the First Amendment was meant to protect." *Id.*

[45] *Id.* at 777.

[46] *Id.* at 784.

[47] *Id.* at 777 ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.").

Corporations have been considered "persons" for certain constitutional purposes, however the extent of First Amendment protection afforded corporations has been unclear, due in part to the different theories underlying the rights connected with freedom of expression. The extent to which corporations have enjoyed freedom of speech has depended upon whether the Court conceptualized the source of such a right to be the right of self-realization, association, or the listener's right to hear. First, the constitution protects the use of communication as "a means of self-expression, self-realization and self-fulfillment." *Bellotti*, 435 U.S. at 804. *See also* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966). This self-realization theory explains the protection afforded an individual's speech. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking compulsory flag salute regulation as it "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect). Simultaneously, an individual's self expression includes the right not to speak. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 715 (1977) (state may not force motorist to carry state motto on license plate). This interest in self-realization has been extended to protect expression by ideological organizations. The rights of the organization derive from the individual's rights, but may be asserted by the organization on behalf of its members. *See* NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 459-60 (1958) (denying standing to the organization and requiring members to assert the right themselves would force members to reveal information they sought to protect).

Subsequently, organizations were deemed protected by a First Amendment right in association itself. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428-29 (1963); Buckley v. Valeo, 424 U.S. 1 (1976) (the right of association protects " 'the common advancement of political beliefs and ideas' ") (quoting Kusper v. Pontikes, 414 U.S. 51, 56 (1973)); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) (right of association protects "the practice of persons sharing common views banding together"); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 494 (1985) (freedom of association protects "mechanisms by which large numbers of individ-

The Court held that while preserving the integrity of the electoral process was an "interest of the highest importance,"[48] the risk of corruption "simply is not present in a popular vote on a public issue."[49] *Bellotti* emphasized that because referenda are

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uals of modest means can join together in organizations which serve to 'amplify the voice of their adherents.' ") (quoting *Buckley*, 424 U.S. at 22). The right of association, however, protects only that expression which is related to the ideological basis of the organization. *Conservative Political Action Comm.*, 470 U.S. at 495 (contributions to PAC reflect agreement with its message); Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 259 (1986) ("The resources [MCFL] has available are . . . a function of its . . . popularity in the political marketplace."). Where the right of association operates, it is as protective as the individual's right. *Buckley*, 424 U.S. at 25 ("[T]he right of association . . . 'like free speech, lies at the foundation of a free society.' ") (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)). "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' " *Buckley*, 424 U.S. at 25 (quoting NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 460-61 (1958)). Accordingly, the right of association also protects organizations from being compelled to speak. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking state "right of reply" statute that required newspapers to furnish equal space for candidate to rebut criticisms).

The right of association vindicates the right of an individual or group to speak. But freedom of expression serves the interests of society as a whole in making information available. Another source of First Amendment protection focuses on the rights of the listener, rather than those of the speaker. This "right to hear," "right to know," or "right to information" rationale was the original basis of protection for commercial speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (presupposing a willing speaker, consumers of prescription drugs can assert right to receive advertising); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

This so called "right to hear" has a functional political basis as well. The First Amendment protects expression as a means of protecting our system of self-government:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971). *See also* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). This author believes the political basis of the "right to hear" doctrine should be controlling in corporate political speech cases.

[48] *Bellotti*, 435 U.S. 765, 789 (1978). Note, however, that the Court rejected Massachusetts's contention that the statute should be upheld based on the state's interest in protecting the minority shareholder who objects to corporate expenditures for political purposes with which he disagrees. *Id.* at 792-95.

[49] *Id.* at 790.

held on issues, not candidates, there is no opportunity to exact a political debt. Consistent with *Buckley*, *Bellotti* held that there had to be a threat of quid pro quo corruption to justify a restriction on speech.

In *Bellotti* the Court employed "exacting scrutiny" in its review of the Massachusetts statute. In *Federal Election Commission v. National Right to Work Committee*,[50] however, the Court appeared more deferential to legislative concerns, when it refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption [was] the evil feared."[51] Specifically the Court in *Right to Work* upheld the application to a nonprofit corporation of a restriction on the sources from which its Political Action Committee, or segregated fund, could solicit money.[52] Arguably, the Court's lenient review in *Right to Work* was not improper, as the Court considered only a "contributions" issue, the constitutional status of which *Buckley* had already explored.[53]

In *Right to Work* the Court's emphasis was on the purpose of FECA, which was designed "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization [would] not be converted into political 'war chests' which could be used to incur

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[50] 459 U.S. 197 (1982).

[51] *Id.* at 210.

[52] *Id.* at 207 (referring to The Federal Campaign Act of 1971, 90 Stat. 490, 2 U.S.C. § 441b(b)(4)(A) which requires that contributions to such a segregated fund be solicited only from members of the corporation). The Court construed the definition of "members" for a nonstock, nonmember corporation like NRWC not to include the 267,000 people solicited by mail for contributions. Instead, the Court suggested that members play some part in the administration or operation of the corporation. *Id.* at 205-06.

The rationale behind the solicitation provision is that political fundraising by a union or corporation should be limited to people intimately involved with the sponsoring entity. A segregated fund may be totally controlled by the parent corporation or union, in terms of the candidates it supports and by what means. It must be separate only insofar as the money is not to be commingled with the other assets of the sponsoring organization. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-17 (1972).

[53] *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 495 (1985) (*Right to Work* was decided "in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office."); Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 259 (1986) ("[T]he political activity at issue in *Right to Work* was contributions, the committee had been established for the purpose of making direct contributions to political candidates.").

political debts . . . ."[54] In *Federal Election Commission v. National Conservative Political Action Committee*,[55] however, the Court returned its focus to the distinction between regulating contributions and regulating expenditures as a means of preventing corruption. Examining the Presidential Election Campaign Fund Act,[56] the Court again invalidated a restriction on expenditures,[57] here ruling that expenditures by political committees could not be curbed without a showing that expenditures tended "to corrupt or give the appearance of corruption."[58] Consistent with *Buckley*, the Court in *Conservative Political Action Committee* refused to sustain the restriction as a purely prophylactic measure without evidence that expenditures, and not just contributions, posed a problem of corruption.[59]

In sum, by 1986 the Court had determined that election finance law operated in a sphere of protected freedoms. Limitations on both contributions and expenditures had received strict scrutiny, whereby governmental constraints had to be justified by compelling interests. The Court had recognized as compelling the state's interest in preventing corruption, so long as the restriction was narrowly tailored to achieve those purposes. This held true whether the speaker was an individual, a committee or a corporation. Although the corporate form itself had been offered as the basis of a potential threat to the electoral process, some measure of protection had attached to corporate political speech. In 1986, while *Austin* was in the courts, the Supreme

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[54] *Right to Work*, 459 U.S. at 207. The Court distinguished the "careful legislative adjustment of federal election laws" from Congress's first attempt to regulate corporate and union political contributions and expenditures in 1907 through the various amendments to FECA. *Id.* at 209. See note 1 *supra* for this history. In *Right to Work* the Court ignored the constitutionality of the umbrella provision in FECA that prohibited unions and corporations from making contributions and expenditures, except from segregated funds of PACs specifically established for political purposes. This provision was explored more fully in Federal Election Comm'n v. Massachusetts Citizens for Life, wherein the Court actually did balance the purpose of the regulation with the associational rights of a nonstock, nonmember corporation. 479 U.S. 238 (1986). *See* notes 87-99 and accompanying text *infra*.

[55] 470 U.S. 480 (1985).

[56] 26 U.S.C. § 9001 (1988).

[57] *See* Presidential Campaign Fund Act, 26 U.S.C. § 9012(f)(1) (1988) (making it a criminal offense for independent "political committees" to expend more than $1,000 to further the election of a major party presidential candidate who receives public financing).

[58] *Conservative Political Action Comm.*, 470 U.S. at 497.

[59] *Id.* at 500.

Court indicated that under some circumstances corporations could freely engage in partisan speech.[60] In general, the Court had permitted limitations on contributions in the context of candidate elections, disallowed expenditure limitations in the same context, and permitted neither contribution nor expenditure restrictions in the context of referenda.

II. *AUSTIN V. MICHIGAN STATE CHAMBER OF COMMERCE*

A. *Facts*

The Michigan State Chamber of Commerce is a nonprofit organization comprised of approximately 8000 members, seventy-five percent of whom are for-profit corporations.[61] The Chamber describes itself as "an ideological corporation formed to promote the common good and interests of the Michigan business community."[62] Among its purposes, its bylaws direct the Chamber to promote conditions supportive of the economic community, to collect and disseminate information regarding laws of interest to the business community, to publicize the views of the business community on such matters, to train and educate its members, and to foster ethical business practices.[63] The bylaws also authorize the Chamber to receive contributions and to make expenditures for political purposes, coordinate activities with similar organizations and perform any other lawful political activity.[64]

The Chamber pursued its active role in the political process in various ways. It lobbied the Michigan legislature with respect to assorted laws and regulations, advocated the passage or defeat of ballot questions, and communicated with its membership concerning partisan political issues.[65] In 1977 the Chamber estab-

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[60] *See* Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). *See* notes 87-99 and accompanying text *infra*.

[61] Brief for Appellant at 12, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569).

[62] Brief for Appellee at 4, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569).

[63] Michigan Chamber of Commerce v. Austin, 643 F. Supp. 397, 398 (W.D. Mich. 1986).

[64] Michigan Chamber of Commerce v. Austin, 856 F.2d 783, 784-85 (6th Cir. 1988).

[65] Brief for Appellee at 4, *Austin* (No. 88-1569) ("It is important for the State Chamber to be involved in electoral politics because elected officials make decisions in the legislative and regulatory arenas directly affecting the business community.").

lished the Michigan State Chamber of Commerce Political Action Committee ("PAC").[66] In 1985, however, when the Chamber wanted to place an advertisement in the Grand Rapids Press endorsing a candidate in a state election, it sought to do so from its general treasury funds.[67] Since section 54 of the Michigan Campaign Act, which required corporations to use segregated funds for political purposes, prohibited the Chamber from making this expenditure from its general treasury, the Chamber filed an action for declaratory and permanent injunctive relief, challenging this prohibition as an infringement to free expression under the First and Fourteenth Amendments of the Constitution.[68]

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[66] *Austin*, 643 F. Supp. 397, 398 (W.D. Mich. 1986). Michigan Compiled Laws § 169.255(1) authorizes the Chamber to establish a segregated fund to be used for political purposes, and provides:

> A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of candidate committees, ballot question committees, political party committees, and independent committees.

MICH. COMP. LAWS § 169.255(1) (Supp. 1989). These segregated funds are the only exception to the statute's general prohibition against corporate political expenditures. *See* note 68 and accompanying text *infra*. See also note 70 *infra* for text of MICH. COMP. LAWS § 169.255(3) (limiting sources from whom money may be solicited for contributions to segregated fund).

[67] *Austin*, 643 F. Supp. 397 at 398 n.1. The newspaper has a circulation of 140,000 copies and is the only major daily newspaper in the Grand Rapids metropolitan area. *Id.*

[68] The Act prohibits corporations from making political expenditures, except from segregated funds. MICH. COMP. LAWS § 169.254(1) provides:

> Except with respect to the exceptions and conditions in subsections (2) and (3) and [§ 169. 255], and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to [§ 169.204(3)(a)].

Id. For text of § 169.255, see note 66 *supra*. Section 169.204(3)(a) provides that contributions do not refer to any of the following:

> (a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.

Section 169.254(5) outlines the penalties for violation of these provisions:

> A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than three years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.

B. *The Lower Court Decisions*

The District Court of Western Michigan began its consideration of the case by reviewing the legislative history of the Michigan Campaign Finance Act, finding that the 1976 Act had actually expanded the role of corporations in Michigan political elections.[69] The 1976 Act added to the existing law the right of a corporation to establish and fund the administration of separate segregated funds from which to make expenditures in support of political candidates.[70] Nonetheless, the 1976 Act retained the prohibition of general treasury expenditures in connection with candidate elections, the prohibition at issue here.[71] Consequently the Chamber's position that the regulation resulted in a burden on free expression forced a constitutional challenge.[72]

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[69] *Austin*, 643 F. Supp. at 399-400. *But see* Amicus Curiae Brief of the Washington Legal Foundation at 11-12, Austin v. Michigan State Chamber of Commerce, 110 S. Ct. 1397 (1990) (No. 88-1569) (arguing that previous laws regulated *contributions*, and the 1976 law regulated *expenditures*, as well).

[70] *Austin*, 643 F. Supp. at 399-400, referring to MICH. COMP. LAWS § 169.255(1). *See* note 66 *supra* for text of § 169.255(1). Note, however, that the sources from which contributions may be solicited and accepted are severely limited by § 169.255(3), which states:

> Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:
>
> (a) Members of the corporation who are individuals.
>
> (b) Stockholders of members of the corporation.
>
> (c) Officers or directors of members of the corporation.
>
> (d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

MICH. COMP. LAWS § 169.255. It is likely that this provision would be construed as narrowly as was its equivalent in federal law. *See* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 204-07 (1985).

[71] MICH. COMP. LAWS § 169.254(1) (Supp. 1989). See note 68 *supra* for statutory text.

[72] The Michigan Supreme Court interpreted art. I, §§ 2, 3 & 5 of the Michigan Constitution as coextensive with the protections in the First and Fourteenth Amendments to the U.S. Constitution. The court cited for authority Advisory Opinion on Constitutionality of 1975 P.A. 227, 242 N.W.2d 3, 9-10, 14 (Mich. 1976).

As the Chamber's proposed advertisement was in support of a candidate and would constitute an *independent* expenditure under the Act, made without coordination with the candidate or his campaign, the court debated whether it was yet within the general prohibition of "expenditures" in section 54(1). *Austin*, 643 F. Supp. at 400. The court first considered the definition of expenditure under MICH. COMP. LAWS § 169.206(1), which states:

> "Expenditure" means a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate or the qualification, passage, or defeat of a ballot ques-

1. First Amendment Challenge

The court preliminarily addressed the Chamber's First Amendment challenge by reviewing the First Amendment protections.[73] It noted that while not every limitation on protected speech was unconstitutional, any such restraint must be justified by a compelling state interest.[74] Furthermore, to be a valid regulation, it must be narrowly tailored to that interest.[75] Accordingly, the court directed its attention to these standards, ultimately concluding that the restraints of section 54 were not contrary to the First Amendment.

Of the various interests advanced by Michigan,[76] the state's interest in protecting the integrity of the electoral process was deemed to constitute a compelling interest.[77] The court noted

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tion. An offer or tender of an expenditure is not an expenditure if expressly and unconditionally rejected or returned.

The court then considered the definition of an independent expenditure, outlined in MICH. COMP. LAWS § 169.209(1), as follows:

"Independent expenditure" means an expenditure as defined in [§ 169.206] by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.

Reasoning that independent expenditures were a category of expenditures in general, the court concluded that the Chamber's intended expenditure fell within the ambit of MICH. COMP. LAWS § 169.254. *Austin*, 643 F. Supp. at 400. With that determination, the court reached the Chamber's constitutional challenges.

[73] *Austin*, 643 F. Supp at 401 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-01 (1952)) (the First Amendment forbids states from enacting any law abridging the freedom of speech); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) ("The first amendment affords the broadest protection to such political expression in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (Political speech "does not lose its first amendment protection because money is spent to project it.").

[74] *Austin*, 643 F. Supp at 401 (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980)).

[75] *Id.* at 402.

[76] The three justifications advanced by the state were (1) to safeguard the electoral process from corruption or the appearance of corruption resulting from large independent expenditures made in support of political candidates, (2) to protect minority shareholders who object to the use of corporate funds in support of a political candidate they oppose, and (3) to make available to the public the sources of campaign finances since expenditures would be funneled through Political Action Committees (PACs) which must disclose such information. *Austin*, 643 F. Supp. at 402.

[77] *Austin*, 643 F. Supp. at 402 n.7. Although the court found that it did not need to consider the remaining two justifications, having accepted the rationale of safeguarding the electoral process, it did quote the Supreme Court as holding that "preventing corruption or the appearance of corruption are the only legitimate and compelling interest thus

that preventing corruption and the appearance of corruption had long been established as "interests of the highest importance."[78] The court then examined section 54 to see whether it was precisely tailored to these objectives.

In its discussion of the proscriptions of section 54, the court emphasized that the prohibitions were placed on corporations and did not reach expenditures made by individuals.[79] Indeed the court relied on this distinction between corporations and individuals: "The differing restrictions . . . reflect a judgment by [the legislature] that these entities have differing structures and purposes, and that therefore may require different forms of regulation in order to protect the integrity of the electoral process."[80] Moreover, the court reasoned that the limitation of section 54(1) did not amount to banning speech, particularly when viewed in conjunction with section 55(1) and its authorization of a segregated fund from which a corporation could make such expenditures.[81] The court concluded that section 54 was a valid regulation under the First Amendment, as it was precisely tailored to a compelling state interest.[82]

2. Fourteenth Amendment Challenge

Turning to the plaintiff's claims under the Equal Protection Clause of the Fourteenth Amendment, the district court rejected the Chamber's claim that the regulation was invalid because it

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far identified for restricting campaign finances." *Id.* at 402 n.7 (quoting Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985)).

[78] *Austin*, 643 F. Supp. at 402 (quoting the discussion in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978), which quoted United States v. International Union United Auto., Aircraft and Agric. Implement Workers of Am., 352 U.S. 567, 575 (1957)).

[79] *Austin*, 643 F. Supp. at 402-03. Apparently the court interpreted *Buckley* as striking down expenditure limitations placed on individuals. The *Buckley* Court, however, invalidated expenditure ceilings because they interfered with protected expression, and could not be justified by the government's interest in protecting the integrity of the electoral process. The Court in *Buckley* did not strike down the expenditure provision on overbreadth grounds, i.e., that the provision was unconstitutionally broad in reaching expenditures made by *individuals*, as well as expenditures made by groups, associations, etc. *Buckley*, 424 U.S. at 39-51.

[80] *Austin*, 643 F. Supp. at 403-04 (quoting California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 201 (1981)).

[81] *Austin*, 643 F. Supp. at 404. For text of MICH. COMP. LAWS § 169.255(1), see note 66 *supra*.

[82] *Id.*

failed to regulate the political spending of unions along with its regulation of corporations.[83] The court maintained that the "unique threat of corporate power to the electoral process," was sufficient justification for the statute to distinguish between corporate and noncorporate entities.[84] Likewise, the court dispensed with the Chamber's other equal protection challenge—the prohibition impermissibly distinguished between corporations involved in media and corporations that were not.[85] Thus the district court upheld section 54 of the Michigan Campaign Finance Act, deciding that while it burdened plaintiff's freedom of speech, it was narrowly drawn to achieve a compelling state interest, and made no impermissible distinctions between the Chamber and other persons.

3. The Significance of *Federal Election Commission v. Massachusetts Citizens for Life*

The Sixth Circuit Court of Appeals[86] reversed the district court's decision in *Austin*, attributing its holding to the intervening Supreme Court decision in *Federal Election Commission v. Massachusetts Citizens for Life*.[87] In *Massachusetts Citizens* the Supreme Court examined a federal provision of the Federal

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[83] U.S. CONST. amend. XIV, § 1 provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[84] *Austin*, 643 F. Supp. at 405. The Chamber's choice of unions as an example of the underinclusiveness of the statute may reflect the fact that unions in Michigan, America's car manufacturing capital, represent a significant interest.

[85] *Id.* The court argued that any corporation could avail itself of the media exemption to section 54(1) as the statute did not refer to one's status as a media corporation, per se. Presumably the activity was granted the exemption from the statute, not the organization itself. The court stated that the language of the statute did not refer to either media corporations or corporations, alluding to MICH. COMP. LAWS § 169.206(3)(d), which excludes from the definition of expenditure:

> An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting.

[86] Michigan State Chamber of Commerce v. Austin, 856 F.2d 783 (6th Cir. 1988).

[87] 479 U.S. 238 (1986).

Election Campaign Act (FECA),[88] similar to section 54 of Michigan's Act, and its effect on an ideological corporation.[89] The Court concluded that under the First Amendment, Massachusetts Citizens for Life (MCFL) could not be required to establish and administer a segregated fund from which to make its political expenditures. The Court balanced the burden placed on MCFL by such a requirement with the proferred government interest of preventing corruption, and concluded that the state's interest was not sufficiently compelling with respect to MCFL to permit any infringement on First Amendment freedom.[90]

The Court characterized MCFL as a corporation formed for ideological purposes, "a voluntary political association," which did not "suddenly present the specter of corruption merely by assuming the corporate form."[91] The Court identified the three features of MCFL upon which it based its holding.[92] The Sixth

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[88] The Federal Election Campaign Act (FECA) provides, in pertinent part:

> (a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political office, or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .

2 U.S.C. § 441b (1985).

[89] *Massachusetts Citizens*, 479 U.S. at 262-63. MCFL was incorporated as a nonprofit, nonstock corporation. The purpose of MCFL, as stated in its articles of incorporation was: "To foster respect for human life and to defend the right [of the] unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized . . . ." *Id.* at 241-42.

[90] *Id.* at 263.

[91] *Id.* at 262-63.

[92] *Id.* at 264. The three features by which the Court determined that MCFL could not constitutionally be restricted in its spending have become the standard by which other corporations seek similar exemptions:

> *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in 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 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

Circuit in *Austin* compared the Chamber to MCFL to determine whether the Chamber was enough like MCFL to warrant an exception to the Michigan statute.[93]

The first feature of an ideological corporation identified by the Court in *Massachusetts Citizens* as distinguishing it from ordinary business corporations was that MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities."[94] The *Austin* court of appeals recognized that this was not precisely true of the Chamber, but emphasized that the Chamber, like MCFL, was organized to disseminate ideas, and not to amass wealth.[95] It pointed out that the Chamber, like MCFL, had a membership based on "popularity in the political marketplace."[96] The court of appeals surmised that with regard to the first feature, the Chamber resembled MCFL.[97]

The second essential feature of MCFL, noted by the Court, was that the organization "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings."[98] The Court found it important that no one had an economic stake in MCFL because this assured that continued association with MCFL was based on support for the organization's political agenda.[99] The *Austin* court of appeals found this was true of the Chamber as well. The court presumed that there was a correlation between the candidates advocated by the Chamber and those supported by its members. In this respect the court found the Chamber was more similar to MCFL than a traditional corporation, where identity of political positions was less likely.[100]

Regarding the third feature of MCFL, the Supreme Court emphasized that MCFL was not established by a business corporation or a labor union.[101] Indeed MCFL did not accept contributions from either. The Court found that this policy prevented

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the political marketplace.

Id.

[93] *Austin*, 856 F.2d at 789-90.

[94] *Massachusetts Citizens*, 479 U.S. at 264.

[95] *Austin*, 856 F.2d at 789.

[96] *Massachusetts Citizens*, 479 U.S. at 259.

[97] *Austin*, 856 F.2d at 789.

[98] *Massachusetts Citizens*, 479 U.S. at 264.

[99] *Id.*

[100] *Austin*, 856 F.2d at 789.

[101] *Massachusetts Citizens*, 479 U.S. at 259.

MCFL and nonprofit corporations with similar policies "from serving as conduits for the type of direct spending that creates a threat to the marketplace."[102] The *Austin* court of appeals noted that this statement could not strictly be said of the Chamber, yet it nonetheless determined that "the reporting obligations of [Michigan's Act] preclude, as a practical matter, the prospect of 'faceless' Chamber corporate members using the Chamber as a conduit through which massive undisclosed contributions are funneled for political purposes."[103] Accordingly, the court of appeals found that the Chamber would not be used by business corporations as a way to circumvent their limitations on corporate political advocacy.

Concluding that the Chamber was sufficiently like MCFL, the Sixth Circuit held that Michigan's expenditure restriction could not be applied to the Chamber. Consequently, the court did not consider the Chamber's arguments that section 54(1) was imprecisely drawn, or that it violated the Equal Protection Clause of the Fourteenth Amendment.[104]

C. *The Supreme Court Decision*

The Supreme Court, reversing the Sixth Circuit, upheld the constitutionality of the Michigan Campaign Act, even as applied to the nonprofit Michigan State Chamber of Commerce.[105] The

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[102] *Id.* at 264.

[103] *Austin*, 856 F.2d at 789-90 (referring to MICH. COMP. LAWS § 169.251).

> A person, other than a committee, who makes an independent expenditure, advocating the election of a candidate or the defeat of a candidate's opponents or the qualification, passage, or defeat of a ballot question, in an amount of $100.01 or more in a calendar year shall file a report of the independent expenditure, within 10 days, with the clerk of the county of residence of that person. The report shall be made on an independent expenditure report form provided by the secretary of state and shall include the date of the expenditure, a brief description of the nature of the expenditure, the amount, the name and address of the person to whom it was paid, the name and address of the person filing the report, together with the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure. The filing official receiving the report shall forward copies, as required, to the appropriate filing officers as described in [§ 169.236].

MICH. COMP. LAWS § 169.251.

[104] *Austin*, 856 F.2d at 790.

[105] Austin v. Michigan State Chamber of Commerce, 110 S. Ct. 1391 (1990). Justice Marshall delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Brennan, White, Blackmun and Stevens joined. Justices Brennan and Stevens filed concurring opinions. Justice Scalia filed a dissenting opinion, as did Justice Kennedy,

Court found that while the Act burdened the Chamber's "expressive activity," its requirements did not stifle corporate speech.[106] Moreover, section 54 was supported by a compelling state interest in preventing corruption in the electoral process.

1. The Majority Decision

The Court focused on Michigan's interest in specifically regulating corporate political expenditures. Michigan argued that the state granted special advantages to corporations—perpetual life, limited liability and special tax treatment—for strictly economic purposes.[107] Without regulation, Michigan feared, corporations would use "resources amassed in the economic marketplace [to obtain] an unfair advantage in the political marketplace."[108] The Court determined that Michigan had a compelling interest in avoiding this sort of corruption or the appearance of such corruption of the electoral process.[109]

The Court cited *Buckley* for its holding that avoiding corruption or the appearance of corruption was a compelling state interest.[110] In the context of unregulated campaign *contributions*, the *Buckley* Court had acknowledged that large corporate donations might be offered in exchange for a prospective office holder's political debt.[111] Michigan's *expenditure* regulation, however, was not aimed at curbing the dangers of what it called "political quid pro quo."[112] Rather, the Court found Michigan's

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with which Justices Scalia and O'Connor joined.

[106] *Id.* at 1397. The Court discussed the requirements of a segregated fund in this context, referring to MICH. COMP. LAWS § 169.221 calling for a treasurer; MICH. COMP. LAWS § 169.224 requiring that the fund's administrators keep detailed accounts of contributions, and file a statement of organization with state officials; MICH. COMP. LAWS § 169.255 limiting the sources from whom a fund may solicit contributions. For text of § 169.255, see notes 66 & 70 *supra*.

[107] Appellant's Brief at 32, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569).

[108] *Austin*, 110 S. Ct. at 1397 (quoting *Massachusetts Citizens*, 479 U.S. at 257).

[109] *Austin*, 110 S. Ct. at 1398.

[110] *Id.* at 1397.

[111] Buckley v. Valeo, 424 U.S. 1, 27-28 (1976). Note that in the same decision, the Court refused to find that preventing such corruption in the context of expenditures constituted a compelling state interest. *Id.* at 47.

[112] *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (using the term "financial quid pro quo"). *See also* Buckley v. Valeo, 424 U.S. 1, 47 (1976) (use of "quid pro quo"); *Buckley*, 424 U.S. at 26 (use of "political quid pro quo").

regulation was directed toward, "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public's support for the corporation's political ideas."[113]

Recognizing Michigan's interest as compelling, the Court next examined whether the Act was narrowly tailored to avoid corruption, ultimately concluding that it was precisely targeted to Michigan's goal. The Court found that the potential for corruption which Michigan sought to eliminate was related to the corporate form itself: the economic advantages of incorporation—limited liability, perpetual life, etc.—themselves provided the potential for abuse of the electoral process.[114] The Court felt that the state granted corporations these advantages to facilitate economic success. However, when corporate resources, which were facilitated by state conferred advantages, were put to political use, it amounted to a distortion of the electoral process. Because all corporations enjoyed these advantages, the Court dismissed the Chamber's argument that section 54(1) was overinclusive because it extended to all corporations, regardless of size or accumulated wealth.[115] Similarly, the Court denied the Chamber's contention that the statute was not narrowly tailored because it applied to nonprofit as well as to for-profit corporations.[116] Rather than comparing for-profit and nonprofit corporations, the Court used the three features identified in *Massachusetts Citizens* to test whether a corporation posed the threat that Michigan's Act sought to eliminate.[117]

The Court then examined the Chamber for the three features by which an organization more closely resembles a voluntary political association than a business corporation. It is here that the Supreme Court reversed the Sixth Circuit. Where the court of appeals found similarities between the Chamber and

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[113] *Austin*, 110 S. Ct. at 1397.

[114] *Id.* at 1397-98.

[115] *Id.* at 1398. Note that the Court made this argument in its discussions of the narrow tailoring requirement and the Fourteenth Amendment claim. *Id.* at 1401.

[116] *Id.* at 1398-1400.

[117] *Id.* at 1398-99. Without stating as much, the Court presumed that not all nonprofit corporations shared MCFL's features which were "more akin to voluntary associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Massachusetts Citizens*, 479 U.S. at 263. See note 92 *supra* for the three distinguishing features of MCFL.

MCFL, the Supreme Court found critical differences between them.[118] On each of the three critical features of MCFL, the Court found enough difference to remove the Chamber from the *Massachusetts Citizens* exception.[119]

With regard to the first distinguishing feature of MCFL, the Court contrasted its single political purpose to the varied purposes of the Chamber, many of which were "politically neutral."[120] While the Chamber focused on providing services to its members, MCFL activities were all "designed to further its [political] agenda."[121] The second feature of MCFL noted by the Court was the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings."[122] The importance of this feature is that it ensures that no one suffers an "economic disincentive for disassociating with it if they disagree with its political activity."[123] The Court found that members of the Chamber, in contrast to MCFL members, might choose to remain members, notwithstanding political differences, merely to enjoy the nonpolitical benefits of membership.[124] For this reason, the Court determined that members of the Chamber had more in common with shareholders of a business corporation than members of MCFL.[125]

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[118] See notes 86-104 and accompanying text *supra* for Sixth Circuit analysis of Chamber's resemblance to MCFL.

[119] *See* notes 120-32 and accompanying text *infra*.

[120] *Austin*, 110 S. Ct. at 1399 (quoting testimony from the Chamber's President and Chief Executive Officer that one of the corporation's main purposes is to provide "service to [its] membership that includes everything from group insurance to educational seminars, and . . . litigation activities on behalf of the business community." Deposition of E. James Barrett, Nov. 12, 1985, at 11).

[121] *Austin*, 110 S. Ct. at 1399 (quoting *Massachusetts Citizens*, 479 U.S. at 242). The Court was not entirely clear whether the multi-purposed nature of the Chamber served to make the legislature's concern about corruption more viable than it had been with respect to *Massachusetts Citizens*, or whether the Chamber's varied purposes delimited the protection afforded by its associational rights. See note 47 *supra*, explaining the limited sphere in which the right of association operates.

[122] *Massachusetts Citizens*, 479 U.S. at 264.

[123] *Id.*

[124] *Austin*, 110 S. Ct. at 1399.

[125] *Id.* This observation talks to both the compelling nature of the state's interest and the limits of the Chamber's associational rights. The notion that the money available for political use should reflect only such money collected for political purposes is contravened when there is only one treasury for both political and nonpolitical uses. Alternatively, the fact that different people have different reasons for belonging to the Chamber diminishes the argument that the organization is merely "an amplification" of the individuals' political voices. Presumably, it is in this context that Justice Brennan urged the

Finally, the Court distinguished the Chamber for its dependence on business corporations for contributions. Whereas MCFL had a policy of refusing money from business corporations, more than three quarters of the Chamber's members were business corporations.[126] The Court warned that business corporations, their own contributions regulated by the state, might funnel money into the Chamber's general treasury as a way to circumvent the Act's effect on them.[127] The Court reasoned that payments to the Chamber would not be considered political expenditures or contributions, as they would not be given to influence an election. Business corporations could therefore give unregulated amounts of money to the Chamber, which, were the Chamber excepted from the Act's expenditure requirement, could use the money so collected for political purposes. The Court thus justified applying the regulation to the Chamber, lest it would be used as "a conduit for corporate political spending."[128] On this rationale, the Court determined that the expenditure restriction was not overinclusive for restricting nonprofit corporations as well as for-profit corporations.[129]

In addition, the Court found two reasons that section 54 was not underinclusive for not restricting unincorporated labor unions. First, the State's interest in regulating corporations was founded on the special advantages afforded the corporate form, not on the potential to accumulate wealth.[130] Second, the Court noted that a union member cannot be compelled to contribute to the union's political activities. Union member dues, where required, may only be used toward collective bargaining activities, and the like.[131] This policy ensures that the funds available for

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Court to consider the rights of the minority shareholder. *See* notes 136-41 and accompanying text *infra*.

[126] *Austin*, 110 S. Ct. at 1400.

[127] The Court noted that while a nonprofit corporation may receive contributions into its general treasury, under the Act, a nonprofit corporation could not receive contributions from corporations into its segregated fund. *Id.* at 1400 n.3 (referring to MICH. COMP. LAWS § 169.255(3). See note 70 *supra* for statutory text). The issue, therefore, became whether the "conduit theory" was sufficient justification to relegate nonprofit political advocacy to segregated funds, as well.

[128] *Austin*, 110 S. Ct. at 1400 (quoting *Massachusetts Citizens*, 479 U.S. at 264).

[129] *Id.*

[130] *Id.* at 1398.

[131] *Id.* at 1400-01 (citing Communications Workers of Am. v. Beck, 487 U.S. 735 (1988)) (Nonunion members of bargaining unit, while compelled to contribute to collective bargaining, may not be compelled to contribute to other union activities.); Abood v.

union political activities accurately reflect support for union positions. Accordingly, the compelling interest in regulating the "corrosive effect" of corporate wealth was already satisfied by dues-spending limitations where union wealth was concerned.[132]

Having found that section 54 did not infringe on the Chamber's First Amendment rights, the Court turned to the Chamber's claims under the Fourteenth Amendment and dismissed these as well. Even under strict scrutiny, the Court justified the State's decision to regulate on the basis of corporate form, as it recognized a compelling state interest in "eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations."[133]

Additionally the Court was satisfied that the Act's exemption for media corporations was constitutionally permissible.[134] Remarking on the unique societal role of the media, the Court justified removing media corporations from the Act in order to ensure that media corporations were free to report or comment on newsworthy events, including state elections.[135] The Court thus accepted Michigan's showing of a danger to the electoral process as well as its chosen means to curb the danger, and upheld section 54 and the requirement that corporate political expenditures be made only through segregated funds or PACs.

2. The Concurring Opinions

Justice Brennan, the author of the *Massachuetts Citizens* decision, wrote a separate opinion to clarify his views. He emphasized that the prohibitions of section 54 did not amount to a total foreclosure of corporate political speech, but merely required that candidate advocacy be funded from a Political Action Committee (PAC) or segregated fund.[136] Justice Brennan argued that there were two tiers of "minority shareholders" protected by applying the Act to the Chamber: small businesses

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Detroit Bd. of Educ., 431 U.S. 209 (1977) (Nonunion employees may not be compelled to contribute to union's political activities.).

[132] *Austin*, 110 S. Ct. at 1401.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1402.

[136] *Id.* (Brennan, J., concurring).

that joined the Chamber for nonpolitical advantages, and minority shareholders of member corporations who may have opposed political use of the corporation's money.[137] He believed that "the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message."[138] While Justice Brennan conceded that the law was underinclusive,[139] as it did not ban other types of political expression to which a member might object,[140] he justified this underinclusive approach as Michigan's attempt to address the particularly "sensitive" arena of elections.[141]

Justice Steven's concurring opinion argued that the distinction between contributions and expenditures should be abandoned in the analysis of corporate participation in candidate elections.[142] He found a sufficiently important state interest in avoiding either the fact or the appearance of corruption to justify regulating both contributions and expenditures.[143]

3. The Dissents

Justice Scalia wrote a scathing critique of the majority's and Justice Brennan's opinions. Attacking with both case law and public policy, he dubbed the holding an "Orwellian announcement."[144] Justice Scalia agreed neither that section 54 reflected a compelling state interest nor that it was narrowly drawn.[145]

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[137] *Id.* at 1404-05 (Brennan, J., concurring).

[138] *Id.* at 1406 (Brennan, J., concurring).

[139] Perhaps Justice Brennan did not see this as a fatal flaw because of the "one step at a time" rationale behind much regulatory legislation. Under this approach, a legislature may address that part of a problem that strikes it as most acute, later to return to other aspects of the problem. The justification for this latitude assumes that a legislature can not feasibly consider every aspect of a policy in a systematic and complete way, particularly as legislation often arises in response to a specific event. Even when a systematic approach is feasible, the legislature may choose to proceed experimentally and cautiously. See *Right to Work*, 459 U.S. at 209, which refers to the "cautious advance, step by step" approach recognized in National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937).

[140] *Austin*, 110 S. Ct. at 1406 (Brennan, J., concurring) (Chamber not restricted in expenditures relative to lobbying or issue advocacy, for example).

[141] *Id.* at 1407 (Brennan, J., concurring).

[142] *Id.* at 1407 (Stevens, J., concurring).

[143] *Id.*

[144] *Id.* at 1408 (Scalia, J., dissenting).

[145] *Id.* at 1414 (Scalia, J., dissenting).

Justice Scalia argued that in recognizing Michigan's interest as compelling, the Court abandoned the *Buckley* distinction between the threats posed by contributions and those by expenditures.[146] *Buckley* specifically found that independent expenditures, unlike contributions, did not raise a sufficient threat of quid pro quo corruption to justify restriction.[147] According to Justice Scalia, rather than defend its position, the *Austin* majority simply announced that *Buckley* and *Austin* were concerned with different evils which each Court referred to as corruption.[148] Justice Scalia referred to the corruption fashioned by the majority as the "New Corruption," cautioning that it too easily lends itself to abuse: "anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically 'corrosive.' "[149]

More troublesome for Justice Scalia than the Court's finding of a compelling state interest was the Court's application of the narrow tailoring requirement. He argued that if a restriction was designed to counter the effect of great corporate "war chests," then it should have been directed to corporations with great "war chests."[150] Justice Scalia concluded that section 54

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[146] *Id.* at 1410 (Scalia, J., dissenting) (referring to *Buckley*, 424 U.S. at 45).

[147] *Id.* (Scalia, J., dissenting) (citing *Buckley*, 424 U.S. at 45). More interesting in this regard is Justice Scalia's observation that the federal law struck in *Buckley* was a lesser restriction than Michigan's prohibition, which was upheld by the *Austin* majority. *Id.*

[148] *Id.* at 1410-11 (Scalia, J., dissenting) (referring to majority opinion, *id.* at 1397). Justice Scalia argued that:

> The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political 'corruption,' as English-speakers understand that term. Rather, it asserts that that concept (which the [majority] defines as "'financial quid pro quo" corruption,'. . .) is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. 'Michigan's regulation,' we are told, 'aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'

Id. at 1410-11.

[149] *Id.* at 1411 (Scalia, J., dissenting). One of Justice Scalia's criticisms of the New Corruption was that it rested upon the "shaky proposition" that government may ensure that expenditures " 'reflect actual public support for the political ideas espoused by *corporations.*' " *Id.* (quoting the majority opinion, *id.* at 1397) (emphasis added in dissent). Justice Scalia surmised that the majority's requirement of public support for corporate expenditures was based on an irrational distinction between "too much speech" by an individual billionaire and "too much speech" by a corporation. *Id.* at 1411.

[150] *Id.* at 1413. Justice Scalia cited *Buckley* as having considered and rejected "the

was not precisely drawn because it restricted speech on the basis of the "mere *potential* for producing social harm," the possibility that corporate expenditures "distort" the electoral process.[151] Justice Scalia contended that expenditures should not be restricted as a prophylactic measure, and condemned the majority's approach as incompatible with the First Amendment[152] and as a "departure from long accepted premises of our political system."[153]

Justice Kennedy's dissent accused the Court's holding of validating two schemes of censorship.[154] First, section 54 restricted speech based on content—the subject of candidate elections. Second, section 54 discriminated on the basis of the speaker's identity—some nonprofit corporations will fall into the MCFL exception, while other nonprofit corporations will not.[155] Justice Kennedy charged that it is improper for a legislature to determine either what subjects may be addressed or who may

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concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others . . . ." For Justice Scalia, this "one man, one minute" principle of free speech could not justify the Court's finding of a compelling interest. *Id.* at 1411. Nor was Justice Scalia persuaded by Justice Brennan that protecting the rights of minority shareholders within a corporation constituted a compelling state interest. *Id.* at 1411-12.

[151] *Id.* at 1413 (Scalia, J., dissenting) (citing Schenck v. United States, 249 U.S. 47, 49-51 (1919) for Justice Holmes's "clear and present danger" test).

[152] *Id.* at 1416 (Scalia, J., dissenting) ("The premise of our system is that there is no such thing as too much speech.").

> Despite all the talk about 'corruption and the appearance of corruption'—evils which are not significantly implicated and that can be avoided in many other ways—it is entirely obvious that the object of law [the Court has approved] is not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be 'unduly' extensive (because they are rich) or 'unduly' persuasive (because they are movie stars) or 'unduly' respected (because they are clergyman).

Id.

[153] *Id.* at 1415 (Scalia, J., dissenting) (The Court's decision departed from traditionally benevolent management of arena of public debate). See Justice Scalia's discussion of Madison, Jefferson, and Tocqueville. *Id.* at 1415-16.

[154] *Id.* at 1416 (Kennedy, J., dissenting).

[155] *Id.* at 1418-19 (Kennedy, J., dissenting) Only small, single issue nonprofit corporations pass the Court's test as "favored participants" in the electoral process. *Id.* at 1419.

address them.[156]

The flaw in the Court's analysis, according to Justice Kennedy, was that it adopted the reasoning behind restricting campaign contributions and imposed it on campaign expenditures.[157] To Justice Kennedy, this amounted to abandoning the distinction. He noted that while "the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form with regard to candidate campaign *contributions*, a similar finding could not be supported for independent *expenditures*."[158] Because he rejected the notion that what was a compelling rationale for regulating contributions was sufficiently compelling to justify regulating expenditures, he did not accept the majority view that "combatting the corrosive and distorting effects of immense aggregations of wealth," amounted to a compelling interest here.[159] Nor was Justice Kennedy persuaded that "equaliz[ing] the relative influence of speakers," by limiting corporate expression, constituted a proper and valid interest.[160]

Justice Kennedy would have stricken the Act because it was not narrowly tailored, and he pointed to *Massachusetts Citizens* as authority that mere incorporation does not "present the specter of corruption."[161] Alternatively, he would have invalidated the Act based on its blanket exemption for media corporations.[162]

III. ANALYSIS

Austin held that it is constitutionally permissible for a state to prohibit a corporation from using general treasury funds for expenditures made in connection with state elections. The Court ruled that a state has a compelling interest in avoiding the "cor-

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[156] *Id.* at 1418 (Kennedy, J., dissenting) (" '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.' ") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978)).

[157] *Id.* at 1420 (Kennedy, J., dissenting).

[158] *Id.* at 1421 (Kennedy, J., dissenting) (quoting *Conservative Political Action Comm.*, 470 U.S. at 500-01) (emphasis added).

[159] *Id.* at 1420 (Kennedy, J., dissenting) (quoting majority opinion, *id.* at 1397).

[160] *Id.* at 1421 (Kennedy, J., dissenting).

[161] *Id.* at 1425 (Kennedy, J., dissenting) (quoting *Massachusetts Citizens*, 479 U.S. at 263).

[162] *Id.* (Kennedy, J., dissenting).

rosive and distorting effects" of great corporate wealth that is accumulated with the help of the state-conferred corporate structure but has "little or no correlation to the public's support for the corporation's political ideas."[163] In accepting this as a compelling interest, *Austin* purported to reaffirm the proposition that preventing corruption and the appearance of corruption "are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[164] Yet, strictly speaking, *Austin* did not reaffirm that proposition. By broadening the definition of corruption, *Austin* deviated from *Buckley*; *Austin* simultaneously recognized a more generalized compelling interest and enlarged the confines of permissible legislative intervention in the electoral process.

A. *A Problem of Definition*

In *Austin* the Court conceded that the state of Michigan's understanding of corruption of the electoral process was somewhat different from that recognized in *Buckley*.[165] *Austin* justified Michigan's version by explaining that the *Buckley* definition was geared to only one particular evil, whereas Michigan sought to deter a greater corruption.[166] What the *Austin* Court failed to acknowledge, however, was how crucial *Buckley*'s narrow definition was in election finance case law.

1. The *Buckley* Definition of Corruption and Corruption-Prevention

Buckley's conception of corruption involved the threat that large financial contributions might have a coercive influence on a candidate's platform, and if elected, on the official's agenda: "To

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[163] *Id.* at 1397.

[164] *Id.* (quoting *Conservative Political Action Comm.*, 470 U.S. at 496-97, which in turn cited *Buckley* for the holding). *See* note 165 *infra*.

[165] *Id.* at 1397. The majority stated:

> Regardless of whether this danger of "financial *quid pro quo*" corruption . . . may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Id.

[166] *Id.*

the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[167] It was to defend against this form of abuse that the *Buckley* Court recognized as compelling the government's interest in corruption-prevention. This narrow construction of corruption was critical, not only to the holding in *Buckley*, but to subsequent election finance case law as well.

A narrow view of corruption, as the functional equivalent of bribery, was the basis on which the *Buckley* Court distinguished between the regulation of contributions and the regulation of expenditures. Because the Court determined that the threat of quid pro quo corruption was substantial with respect to unregulated contributions, but insignificant with respect to unregulated expenditures, the Court upheld only the restrictions on contributions.[168] Further, the *Buckley* Court did not even consider the regulation of expenditures as a means of preventing the *perception* of corruption.[169] Presumably the interest in regulating expenditures in order to prevent the appearance of corruption would not have been deemed compelling because the *Buckley* Court had already determined that expenditures provided no opportunity for actual corruption.[170]

Buckley's conception of corruption explains election finance case law up to *Massachusetts Citizens* in 1986. In general, the

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[167] *Buckley*, 424 U.S. at 26.

[168] *Id.* at 47-48.

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 47.

[169] The *Buckley* Court stated that the interest in avoiding the appearance of corruption was "of almost equal concern" with avoiding the actuality of corruption. *Id.* at 27. The Court continued, however, by tracing the appearance of corruption to "public awareness of the opportunities for abuse inherent in a regime of large individual financial *contributions*." *Id.* (emphasis added). Arguably, the Court felt that there must be the actual opportunity for corruption for there to be the appearance of corruption. Perhaps this explains why the Court discussed the avoidance of an appearance of corruption only in the context of contributions, where the Court had found the opportunity for corruption, and not in connection with expenditures, where the Court had concluded there was not the same opportunity.

[170] *See* notes 168-69 *supra*.

Court upheld restrictions on contributions[171] and struck restrictions on expenditures.[172] But the Court's inquiry in election finance cases had not been limited to the simple question of whether it was a contribution or expenditure at issue; rather the primary focus in each case was whether there had been the opportunity for political quid pro quo, the exchange of money for political debt. That emphasis explains why even contribution limits were struck in the context of referenda: there was simply no opportunity for this brand of impropriety.[173]

Buckley's use of a narrow definition of corruption was deliberate. It was the Court's attempt to balance legitimate regulation with legitimate participation in the electoral process. The definition had worked a bright line between permissible and impermissible legislative motives; in particular, *Buckley* sought to facilitate the elimination of political quid pro quo. On the other hand, the Court unequivocally refused to permit a legislative attempt to "equalize the relative ability of all citizens to affect the outcome of elections."[174] *Buckley*'s definition confined the legislature to regulating against an improper influence of money on a candidate or officeholder; it did not permit the legislature its concern about the influence of money on the outcome of elections. The Court rejected "as wholly foreign to the First Amendment" the notion that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others."[175] The Court reasoned that First Amendment

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[171] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, (1976); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982) (upholding restriction on solicitation of contributions). *See also* California Medical Ass'n. v. Federal Election Comm'n, 453 U.S. 182 (1981) (upholding limitation on contributions to "multi-candidate political committee").

[172] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (striking statute restricting PAC expenditures).

[173] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in popular vote on a public issue."). *See also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (striking an ordinance on contributions to committees formed to support or oppose ballot measures).

[174] *Buckley*, 424 U.S. at 48-49. The Court patently dismissed the government's proferred interest in restricting the access of wealthier speakers to enhance the relative voice of poorer ones. *Id.* Accordingly, the Court refused to uphold expenditure regulations on this basis.

[175] *Id.* at 49-50.

protection "against governmental abridgment of free expression can not properly be made to depend on a person's financial ability to engage in public discussion."[176]

Buckley's view of corruption underscores the different interests behind regulating against the exchange of money for political favors and regulating to equalize the relative voices of participants in the electoral process. The narrow view of corruption clarifies legislative intent insofar as it begs the question of whether a regulatory scheme is aimed at the relationship between a contributor and a candidate or the relationship between a financier and impact at the polls. By defining corruption to include only illicit political deal making, *Buckley* confined legislative intervention in the electoral process; it constrained the legislature from effecting its vision of a more egalitarian electoral process at the expense of constitutionally protected expression.

2. *Austin*'s "Corrosive and Distorting Effects" Model

Under *Austin*'s more expansive definition of corruption it is more difficult to distinguish a legislature's attempt to purge corruption from its attempt to equalize influence. Once the specter of corruption extends beyond the parameters of the relationship between the financier and the candidate, remedial regulation af-

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[176] *Id.* at 49. The *Buckley* Court found no support to regulate on financial ability from the equal access rationale that had supported the Federal Communications Commission's "fairness doctrine." *Id.* at 49 n.55. The FCC policy in question required broadcast licensees to devote some programming to public issues and to present both sides of any public issue. The Court noted that the limited number of broadcast frequencies imposed unique First Amendment problems. *Id. See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the political-editorial and personal-attack portions of the doctrine). The *Buckley* Court refused to extend the equal access rationale to the electoral process in general, contrasting the "undeniable effect of [FECA's expenditure restriction with] the presumed effect of the fairness doctrine [which was] one of 'enhancing the volume and coverage' of public issues." *Buckley*, 424 U.S. at 49 n.55 (quoting *Red Lion*, 395 U.S. at 388). Subsequently, the FCC abandoned this doctrine, having determined that the doctrine was not having its intended effect. *See* Robert D. Hershey, *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. Times, Aug. 5, 1987. at § A1.

Nor did the Court in *Buckley* find support in the voting rights cases. *Buckley*, 424 U.S. at 49 (citing Eastern RR Presidents Conference v. Noerr Motors, 365 U.S. 127, 139 (1961)) ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.").

fects the electoral process as a whole. Within this enlarged framework, legislative intent may more easily expand from the eradication of a particular evil, to the eradication of a larger class of evils, and even to the effectuation of some model of a greater good.

The *Austin* Court admitted that Michigan's interest had a broader focus than that which was upheld in *Buckley* and its progeny.[177] Nonetheless, the *Austin* Court insisted that restricting the source of corporate expenditures to segregated funds or PACs was not an attempt to "equalize the relative influence of speakers on elections."[178] Nothing in the opinion, however, clarified how Michigan's regulation, which was aimed at defeating corporate wealth's "corrosive" influence on elections, was any different from a general attempt to equalize speakers' influence on elections. Insofar as the evil recognized in *Austin* was the "unfair advantage" enjoyed by corporations in influencing election results, Michigan's remedy was to strip corporations of their unfair advantage, in effect, combatting corporate domination of elections by limiting corporate participation in the process. In this light, Michigan's regulation closely resembles an attempt to equalize the relative influence of speakers on elections.

While admittedly substituting broader concerns for those supporting *Buckley*, Justice Marshall offered thin explanation for *Austin*'s abandoning the traditional definition of corruption, nor much justification for adopting its own conception of corruption. In fact the whole of *Austin*'s own original discussion consisted of three remarks, all of which appear to be result-oriented.

In Justice Marshall's first attempt to defend Michigan's interest, he asserted that it was not the wealth of corporations but the "state-conferred corporate structure that facilitates the amassing of large treasuries [which] warrants the limit on independent expenditures."[179] Justice Marshall reasoned that the state afforded corporations various attributes which enhance their ability to attract capital and deploy resources, that these advantages were intended to facilitate success in an economic sphere, and that corporate resources amassed by virtue of these state conferred advantages constituted an "unfair advantage"

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[177] *Austin*, 110 S. Ct. at 1397. *See* note 165 *supra*.

[178] *Id.* 1397-98.

[179] *Id.* at 1398.

when used for political purposes. However, this contradicts constitutional tradition. As Justice Scalia asserted in his dissent, "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[180] That the state giveth and therefore may taketh away is a particularly troublesome argument in the realm of protected rights.[181] Nor can Michigan's statute be justified as a simple business regulation,[182] since even the majority in *Austin* acknowledged that the restriction constituted at least a burden on speech.[183]

Justice Marshall's second argument was that expenditures should be regulated, because even as expenditures, "[c]orporate wealth can unfairly influence elections."[184] Apparently Justice Marshall's fear was neither that corporate wealth would be used to influence candidates unfairly nor that corporations would benefit unfairly from such expenditures. It was not the prospect that "[e]lected officials . . . [would be] influenced to act contrary to their obligations of office" that worried Justice Marshall.[185] Rather the Court's concern was that, without regulation, corporate speech would have undue influence on the outcome of

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[180] *Id.* at 1408 (Scalia, J., dissenting).

[181] *See, e.g.*, Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984) (invalidating a ban on editorializing by noncommercial stations that receive federal funds because subsidy could not justify total ban); Perry v. Sinderman, 408 U.S. 593 (1972) (denial of employment to teacher on the basis of individual's speech is unconstitutional); Speiser v. Randall, 357 U.S. 513 (1958) (property tax exemption cannot be conditioned on an individual's views and expressions); Pickering v. Board of Education, 391 U.S. 563 (1968) (teacher may not be compelled to relinquish First Amendment right to comment on matters of public interest).

[182] *See* Amicus Curiae Brief of the American Civil Liberties Union in Support of Appellee at 19 n.13, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569) ("This is a free speech case, not an economic substantive due process case. Business interests are not seeking to avoid government regulation of their businesses; they are resisting government censorship of their speech.").

[183] *Austin*, 110 S. Ct. at 1396 ("requiring corporations to make independent political expenditures only through special segregated funds . . . burdens corporate freedom of expression") (citing *Massachusetts Citizens*, 479 U.S. at 252). Arguably, the statute totally bans corporate speech insofar as it prohibits a corporation from speaking as a corporation. *See* Brief of Amici Curiae, Washington Legal Foundation et al. at 15-16, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569) (arguing that political speech from a corporation's PAC is not the same as speech from the corporation itself, and that the Chamber's speech would be more credible than that from its associated PAC).

[184] *Austin*, 110 S. Ct. at 1398.

[185] This was the definition utilized by the Court in *Conservative Political Action Comm.*, 470 U.S. at 497.

an election.

Third, Justice Marshall argued that Michigan's regulation "ensures that expenditures reflect actual public support for the political ideas espoused by corporations."[186] Notably, the Court required *public* support, and not shareholder support, for the expression of corporate political ideas.[187] Presumably, even with 100 percent shareholder approval, corporate political speech, if made without public support, is itself a corruption of the election process.[188] Yet Michigan's regulatory scheme specifically prohibits a corporation from acquiring public support, particularly in financial terms.[189] The Act required a corporation to speak through its PAC or segregated fund, yet it severely limited the sources from which money could be solicited.[190] In this way the Michigan Act effectively denies a corporation the opportunity to achieve financial public support. Perhaps the majority

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[186] *Austin*, 110 S. Ct. at 1398. The distinction the Court found between the Chamber and MCFL was based in large part on the fact that MCFL's funds were a reflection of the popularity of its ideas in the political marketplace, that MCFL's political expenditures reflected public support. *Id.* at 1399-1400. *See* notes 118-29 and accompanying text *infra*. The Court found an important difference between the Chamber and MCFL in that the Chamber accepted corporate contributions into its treasury. *Id.* at 1400. Justice Kennedy's problem with this position was that "this distinction rests on the fallacy that the source of the speaker's funds is somehow relevant to the speaker's right of expression or society's interest in hearing what the speaker has to say." *Id.* at 1422 (Kennedy, J., dissenting).

[187] Perhaps the Court meant *shareholder* support when it referred to *public* support. This would be consistent with one of the features identified in *Massachusetts Citizens*, that a minority member should not face economic consequences by choosing to disassociate from the political activities of an organization. Certainly this was Justice Brennan's perspective. *See Austin*, 110 S. Ct. at 1404-05 (Brennan, J., concurring). But the vindication of shareholder rights is not sufficient to justify Michigan's regulation, for the same reasons it was not sufficient to justify the regulation in *Bellotti*. The purpose of protecting shareholders is "belied" by the terms of the statute itself. *See Bellotti*, 435 U.S. at 794-96. The fact that the statute is underinclusive, as it does not prohibit other forms of political activity, such as issue advocacy or lobbying state legislators, suggests that protecting shareholder rights is not the purpose of the regulation. Similarly, that the statute is overinclusive, as it does not authorize corporate candidate advocacy, even with absolute shareholder ratification, indicates that the regulation aims at something other than vindicating shareholder rights. *Id.*

[188] Justice Marshall's view assumes that the right of corporations to speak is based *solely* on the public's interest in corporate views. Yet the "right to hear" formulation of First Amendment protection is not based so much on already interested listeners as on the premise that self-governance requires exposure to antagonistic views. See discussion, note 47 *supra* and note 230 *infra* in this regard.

[189] MICH. COMP. LAWS § 169.255 (Supp. 1989). See notes 66 & 70 *infra* for statutory text.

[190] MICH. COMP. LAWS § 169.254 (Supp. 1989). See note 68 for statutory text *supra*.

intended to require public support in the form of political sentiment, rather than money. Yet such a proposition offends the often quoted purpose of the First Amendment, " 'to assure [the] unfettered interchange of ideas.' "[191] Rallying public support is often the objective of political speech; public support should not be its prerequisite.[192]

Taking *Austin*'s fear of corporate influence together with its requirement that corporate speech reflect public support, *Austin*'s conception of an attempt to purge corruption becomes indistinguishable from an interest in equalizing the relative effect of speakers on the outcome of election. Insofar as the Michigan Act attempts to redistribute speech according to its relative support, it regulates speakers into proportional voices. The difference between this attempt to purge corruption, and an attempt to "equalize the relative ability to affect the outcome of elections," is therefore only a difference in degree, not a difference in kind.

To supplement *Austin*'s three statements about the compelling nature of Michigan's interest, the majority cited only a few other cases.[193] Perhaps the Court's position was that since the issue of corporate domination was not de novo before the Court, it did not warrant much discussion. Yet even though *Austin* was the first time the Court held an expenditure regulation constitutional as applied, the Court announced its holding as if it were merely reciting established principles of jurisprudence. Unfortunately, the Court's use of precedent was too perfunctory to be effective.

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[191] *Buckley*, 424 U.S. at 13 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[192] *Buckley* expressly made this point in striking a limitation on a candidate's expenditures from personal funds. "The candidate, no less that any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley*, 424 U.S. at 52. *See also* Thomas v. Collins, 323 U.S. 516, 540 (1945) (the First Amendment protects "he who seeks to rally support for any social, business, religious or political cause.").

[193] *Austin*, 110 S. Ct. at 1397-98 (citing *Buckley*, 424 U.S. at 47; *Conservative Political Action Comm.*, 470 U.S. at 496-97, 500-01; *Massachusetts Citizens*, 479 U.S. at 258; and *Bellotti*, 435 U.S. at 788 n.26). These citations were not specific to Michigan's interest, but appeared as part of the majority's general discussion of the Court's recognition of corruption-prevention as a justification of election finance regulation, and precedential treatment of attendant constitutional issues. *See* notes 194-222 and accompanying text *infra*.

The *Austin* majority misplaced its reliance on some of the authority it cited. In the first instance, the Court read *Buckley* as distinguishing expenditures from contributions but only as concerned *individual*, rather than corporate, donors.[194] Yet "person" as defined in FECA for purposes of FECA's expenditure provisions included "an individual, partnership, committee, association, corporation, or any other organization or group of persons."[195] In fact the *Buckley* Court specifically noted the "broad definition of person" as it related to the expenditure provisions,[196] and the Court itself referred to "individuals and groups,"[197] "persons and groups,"[198] "persons and organizations,"[199] and "person[s] and association[s],"[200] throughout its discussion. It was somewhat surprising, then, for the *Austin* majority to proceed on the assumption that *Buckley* was not controlling with regard to regulating corporate expenditures.

A second problem with the *Austin* majority's use of authority was that the opinion attributed to *Conservative Political Action Comm.* an acknowledgement that the " 'compelling government interest in preventing corruption support[s] the restriction of political war chests funneled through the corporate form.' "[201] While the quoted passage does in fact appear in *Conservative Political Action Comm.*, it is actually a statement of the rationale used in *Right to Work*, and cited by Chief Justice Rehnquist in *Conservative Political Action Comm.* for the purpose of distinguishing the two cases.[202] Indeed the Chief Justice declared that while such a rationale supported the finding in the *contributions* context of *Right to Work*, it was insufficient in *Conservative Political Action Comm.* for restricting PAC *expenditures*.[203]

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[194] *Id.* at 1397.

[195] 18 U.S.C. § 591(g) (1976) (repealed 1980).

[196] *Buckley*, 424 U.S. at 39 n.45.

[197] *Id.* at 39.

[198] *Id.* at 45.

[199] *Id.*

[200] *Id.* at 50.

[201] *Austin*, 110 S. Ct. at 1397 (quoting *Conservative Political Action Comm.*, 470 U.S. at 500-01).

[202] *Conservative Political Action Comm.*, 470 U.S. at 500-01.

[203] *Id.* In *Conservative Political Action Comm.* Chief Justice Rehnquist stated that, "[w]hile in [*Right to Work* the Court] held that the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests

As progeny of *Buckley*, both *Right to Work* and *Conservative Political Action Comm.* employed the narrow view of corruption, and consistent with *Buckley*, determined that contributions gave rise to the opportunity for corruption whereas expenditures did not.[204] *Austin*'s reliance on the *Right to Work* rationale is diminished further in light of *Conservative Political Action Comm.*'s reading that even *Right to Work* "is consistent with this Court's holding [in *Bellotti*] that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates."[205] In this way *Conservative Political Action Comm.* stressed that *Right to Work* was decided as a contributions case, and reiterated the basis of *Buckley*'s con-

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funneled through the corporate form, in the present case [the Court does] not believe that a similar finding is supportable . . . ." *Id.*

At best *Austin* could use *Conservative Political Action Comm.* for the proposition that the Court would consider upholding regulations on expenditures after showing a link between expenditures and corruption or the appearance of corruption. *Conservative Political Action Comm.*, 470 U.S. at 501. But whether the Court in *Austin* chose to rely on *Conservative Political Action Comm.* or *Bellotti* for this proposition, that "a legislature *might* demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections," the Court in *Austin* did not acknowledge that when previous Courts referred to the opportunity for corruption, those Courts meant the opportunity for improper influence on candidates and officeholders. *Austin*, 110 S. Ct. at 1397 (quoting *Bellotti*, 435 U.S. at 788 n.26) (emphasis added). Both *Conservative Political Action Comm.* and *Bellotti* utilized *Buckley*'s narrow definition of corruption, *Conservative Political Action Comm.* stating itself, "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Conservative Political Action Comm.*, 470 U.S. at 497.

Interestingly, the majority in *Austin* did not dispute the fact that other Courts had found no showing of quid pro quo corruption with regard to expenditures. Instead, *Austin* argued that Michigan was concerned with a different type of corruption. *Austin*, 110 S. Ct. at 1397. Even having distinguished Michigan's view of corruption from that examined by previous Courts, however, *Austin* still did not address whether there had been a satisfactory showing of corporate dominance in elections. *Id.* This is the basis of Justice Scalia's concern that the majority upheld a speech restriction on the mere basis of "potential harm," as the Court upheld a regulation without a showing that expenditures gave rise to actual corruption, however defined. *Id.* at 1413 (Scalia, J., dissenting).

[204] *See Right to Work*, 459 U.S. at 208 (noting "the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption") (citing *Buckley*, 424 U.S. at 26-27); *Conservative Political Action Comm.*, 470 U.S. at 496-97 (finding that a limitation on independent expenditures by PACs was "constitutionally infirm," following the reasoning in *Buckley* that no tendency "to corrupt or to give the appearance of corruption" existed in connection with independent expenditures") (referring to *Buckley*, 424 U.S. 1).

[205] *Conservative Political Action Comm.*, 470 U.S. at 495-96.

struction of corruption as "a subversion of the political process . . . [t]he hallmark of [which] is the financial quid pro quo: dollars for political favors."[206] *Conservative Political Action Comm.* interpreted *Right to Work* as having upheld the "fundamental constitutional difference" between expenditures and contributions and as merely extending contribution regulations to nontraditional membership corporations.[207]

Austin also cited *Massachusetts Citizens* to support the legitimacy of Michigan's interest.[208] At the cited page, *Massachusetts Citizens* itself offered four authorities:[209] the same quotation from *Conservative Political Action Comm.* taken out of context, as discussed above, a passage properly attributed to *Right to Work*,[210] and statements from two pre-*Buckley* cases that involved union activities. Combined, these cases are insufficient to distinguish Michigan's purported interest from an attempt to equalize the influence of speakers on the outcome of an election. Nor do they require the finding that Michigan's view of corruption reflected a compelling interest.

Massachusetts Citizens' citation to, and *Austin*'s reliance on, *Right to Work* is inapposite because *Right to Work* was a *contributions* case, the restrictions on which have traditionally required "less compelling justification than restrictions on expenditures."[211] The fact that contributions have been regulated does not further the argument that expenditures should be. The Court may be properly criticized for obfuscation when it tries to substitute the "less compelling justification" (for regulating contributions) for the more compelling one required to justify regulating expenditures. Moreover, the compelling interest served in

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[206] *Id.* at 497.

[207] *Id.* at 497, 500.

[208] *Austin*, 110 S. Ct. at 1391 (citing *Massachusetts Citizens*, 479 U.S. at 257 (1986) wherein the Court reviewed federal equivalent of Michigan's expenditure provision).

[209] *Massachusetts Citizens*, 479 U.S. at 257 (citing *Conservative Political Action Comm.*, 470 U.S. at 501; *Right to Work*, 459 U.S. at 207; United States v. International Union United Auto., Aircraft and Agric. Implement Workers of Am., 352 U.S. 567, 585 (1957); Pipefitters Local Union v. United States, 407 U.S. 385, 416 (1972)).

[210] The Court in *Massachusetts Citizens* described the need to regulate "the substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization." *Massachusetts Citizens*, 479 U.S. at 257 (quoting *Right to Work*, 459 U.S. at 207).

[211] *Id.* at 259. *See Buckley*, 424 U.S. at 20-22; *Conservative Political Action Comm.*, 470 U.S. at 501; California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 194, 196-197 (1981).

Right to Work was the prevention of corruption as *Buckley* defined it; *Right to Work* is not precedent for judicial recognition of a state's interest in equalizing influence on elections.

The remaining two cases cited by *Massachusetts Citizens* involved union activities. Surely these cases were useful to the Court in *Massachusetts Citizens*, where it examined a federal regulation that extended to labor unions as well as corporations. Yet the usefulness of union cases in examining a regulation aimed only at corporations is questionable, particularly when the Court has opined about the different imperatives in regulating unions and corporations.[212] It is noteworthy that while an employee may be compelled to join a union, investors in a corporation are driven by economic choice and strategy. Without regulation, a union member faces the choice of subsidizing political speech with which he disagrees or giving up his livelihood.[213] Reinvesting one's holdings in a politically compatible corporation is a difficulty of narrower dimension. Similarly, the concern that money used for political purposes should not be "money diverted from another source," is more compelling in the context of union expenditures than corporate expenditures.[214] Union funds, collected from membership dues and agency shop fees, are used exclusively for collective bargaining, contract administration and grievance procedures.[215] Corporate treasuries, on the other hand, serve the more generalized purpose of maximizing profits, and it is well established that corporate managers enjoy considerable discretion in determining what furthers the eco-

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[212] *See Bellotti*, 435 U.S. at 794 n.34 (finding that reliance on "union" cases was inapposite because of the "critical distinction . . . that no shareholder has been compelled to contribute anything") *Id. See also Austin*, 110 S. Ct. at 1424 (Kennedy, J. dissenting) (finding the "disincentives to disassociate" were not "comparable"); *Austin*, 110 S. Ct. at 1411-12, (Scalia, J. dissenting) (arguing that the requirement that corporations speak through PACs is actually based on protecting the minority shareholder, which is not a compelling interest, even according to the majority).

[213] *See* Machinists v. Street, 367 U.S. 740 (1961) (Railway Labor Act does not permit union to expend even nonmember agency fees on political causes).

[214] *Massachusetts Citizens*, 479 U.S. at 258 (regarding the underlying theory of requiring that political expenditures come from segregated funds, established for political purposes) (quoting *Pipefitters*, 407 U.S. 385, 423-24, quoting 117 CONG. REC. 43,381 (1971)).

[215] *See* Communications Workers of Am. v. Beck, 487 U.S. 735 (1988) (union may not compel financial support from employees for activities beyond collective bargaining, contract administration or grievance adjustment).

nomic interest of the corporation.[216]

Thus, it is at least imprecise to impose the reasoning of these union cases on a discussion about a regulation that does not affect unions. Nevertheless it is interesting to explore those pre-*Buckley* cases for their perception of potential evils in the electoral process. In *United States v. Automobile Workers*, for example, the Court acknowledged the "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption."[217] The opinion also traced the history of election law as paralleling "a continuing congressional concern for elections 'free from the power of money.' "[218] Similarly, the *Pipefitters* opinion documented Congress's intention to "eliminate the effect of aggregated wealth on federal elections."[219]

Automobile Workers and *Pipefitters* demonstrate that a distrust of those in control of large amounts of money has a strong tradition. What those cases do not justify, and what tradition fails to prove, however, is the constitutionality of statutory enactments born out of that distrust alone.[220] To the contrary, the more recent *Conservative Political Action Comm.* Court discredited the argument that because PACs spend more money than individuals the potential for corruption was greater.[221] The Court in *Conservative Political Action Comm.* concluded that "such an exchange of political favors for uncoordinated expenditures remain[ed] a hypothetical possibility and

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[216] *See* Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974). To the extent that New York Telephone Company's $50,000 expenditure to publicize its views on a bond issue was prompted by civic concern, it was authorized by state corporation law, regardless of whether the corporation anticipated any benefit. *Id.* at 854. To the extent that the expenditure was motivated by anticipated benefit, the expenditure was authorized by traditional corporate benefit rule. *Id.*

[217] *Automobile Workers*, 352 U.S. 567, 570 (1957) (statute held to prohibit use of union dues to sponsor commercial television broadcast endorsing political candidate).

[218] *Id.* at 575 (*Hearings before House Committee on Elections*, 59th Cong., 1st Sess. 12, at 28-31 (Mar. 12, 1906) (quoting Samuel Gompers)).

[219] *Pipefitters*, 407 U.S. 385, 416 (1972) (statute prohibits union from making political expenditures unless monies have been volunteered by its members for this purpose).

[220] *See Conservative Political Action Comm.*, 470 U.S. at 499 (finding in the context of PACs that "A tendency to demonstrate distrust. . . . is not sufficient [to establish] the critical elements to be proved: corruption of candidates or public perception of corruption of candidates.") *Id.*

[221] *Conservative Political Action Comm.*, 470 U.S. at 497-98.

nothing more."[222]

It was not enough for the *Austin* majority to attempt to justify Michigan's regulatory scheme by pointing to a long-term concern with the problem at which the regulation was aimed. The Court's reasoning was marred by the superficial use of precedent: the Court misread *Buckley* as applying to only those expenditures made by individuals; it misapplied the *contributions* rationale of *Right to Work* to an *expenditures* case; and it misquoted *Conservative Political Action Comm.* as recognizing a compelling interest in regulating corporate political war chests. Furthermore, the Court in *Austin* should have questioned the soundness of the dicta in *Massachusetts Citizens*, instead of inappropriately citing it to justify Michigan's view. Unfortunately the Court blithely followed *Massachusetts Citizens*, complete with its underlying assumptions.

B. *Application of* Austin's *Model of Corruption*

When *Austin* predicated so much of its argument on *Massachusetts Citizens*, it consequently adopted *Massachusetts Citizens*'s underlying assumptions. What is most interesting in this respect is the reference in *Massachusetts Citizens* to the marketplace of political ideas, a metaphor coined by Justice Holmes in his famous *Abrams* dissent: "[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[223] The Court in *Massachusetts Citizens* argued that legislative concern over the "corrosive influence" of corporate war chests was an attempt to protect the integrity of political marketplace.[224] The *Massachusetts Citizens* Court reasoned that the integrity of the political marketplace was threatened when resources which reflect economic success are spent in the political marketplace. The Court thus justified intervening in the market to stem an "unfair deployment of wealth."[225]

This perspective of "correcting" the market is not without

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[222] *Id.* at 498.

[223] *Massachusetts Citizens*, 479 U.S at 257 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting)).

[224] *Id.*

[225] *Id.* at 259.

support.[226] Yet regulating against a "corrosive influence" runs uncomfortably close to unconstitutionally interfering in the electoral process.[227] By requiring that corporate expenditures reflect public support for their ideas, the Court in *Austin* strips from the corporation a legitimate use of political speech, which is to persuade people to agree with one's ideas. As *Bellotti* noted, "corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[228]

Constitutional tradition has assumed an alert public capable of making informed decisions at the poll.[229] Even if election law represents a balance of First Amendment interests,[230] the Court

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[226] *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, 676 (1978) (The right to know "carries the implication that government, while it may not close the market[place of ideas], may move to correct its defects and regulate its incidental consequences."); Judge Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 636 (1982) ("[T]he truth-producing capacity of the marketplace of ideas is not enhanced if some are allowed to monopolize the marketplace by wielding excessive financial resources.").

[227] *See Buckley*, 424 U.S. at 57.

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign.

Id.

[228] *Bellotti*, 435 U.S. at 790. *See* Kingsley Int'l Pictures Corp. v. Regents Univ. State of N.Y., 360 U.S. 684, 689 (1959) (The Constitution "protects expression which is eloquent no less than that which is unconvincing."). Nor is it relevant for constitutional analysis that money is spent to project speech. *Buckley*, 424 U.S. at 15-17 ("[The] Court has never suggested 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."). *See also* Meyer v. Grant, 486 U.S. 414, 426-27 n.7 ("The concern that persons who can pay petition circulators may succeed . . . when they might otherwise have failed cannot defeat First Amendment rights."); Eastern RR Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 137 (1961) ("[T]o a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known.").

[229] *See Bellotti*, 435 U.S. at 791-92 ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider in making their judgment, the source and credibility of the advocate.").

[230] *See Bellotti*, 435 U.S. at 807 (White, J., dissenting):

> One of the . . . [First Amendment's] functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the

has emphasized the limited nature of those restrictions it has upheld and the availability of alternate avenues of expression.[231] The Court's ultimate preference should be for allowing speech. As Justice Powell argued against government paternalism in *Bellotti*, "[I]f there be any danger that the people cannot evaluate the information and arguments advanced by [corporations], it is a danger contemplated by Framers of the First Amendment."[232] In any case, it is not for a legislature (or a court) to adjust political debate on the basis of what it fears will be too successful, and result in a corrosive or distorting effect.[233]

Even *Massachusetts Citizens*, upon which *Austin* relied so thoroughly, may be read as facilitating speech, rather than restricting speech. Although the Court in *Massachusetts Citizens* intimated a willingness to address a disparity of influence on elections by acknowledging the legitimacy of Congress's concern, nonetheless it did not apply the organizational restraints of the Act.[234] Intervention in the political marketplace to equalize

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> First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. In the first place . . . [i]deas which are not a product of individual choice are entitled to less First Amendment protection. Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition.

But cf. Austin, 110 S. Ct. at 1415 (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things — even some seemingly *desirable* things — that government cannot be trusted to do. The very first of these is establishing the restrictions on speech that will assure 'fair' political debate.").

[231] *See, e.g., Buckley*, 424 U.S. at 28 ("[T]he Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion . . . .").

[232] *Bellotti*, 435 U.S. at 792 (citing Wood v. Georgia, 370 U.S. 375, 388 (1962)).

[233] *See* Brown v. Hartlage, 456 U.S. 45, 60 (1982) ("[T]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.") (quoted in Meyer v. Grant, 486 U.S. 414, 426-27 n.7 (1988)). *See also* Bellotti, 435 U.S. at 791 n.31 ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.").

[234] Many commentators are persuaded that the Court in *Massachusetts Citizens* decided the case on the basis of the right of association protection of the First Amendment, rather than on corporate self-realization grounds, or the public's right to hear. See dis-

voices may be accomplished from either of two directions: by enabling a weaker voice, or by restraining a stronger one. Notably, however, the *Massachusetts Citizens* Court did not intervene on MCFL's behalf; the Court took a more laissez-faire approach—it refrained from imposing restrictions on MCFL. In this respect, *Massachusetts Citizens* did not even effect its own dicta, that it is proper for government to adjust the marketplace of ideas.

The inherent optimism of the marketplace of ideas is undermined when laissez-faire gives way to regulation. Worse still is the prospect that what legislators find distasteful today will be termed "corrosive and distorting" tomorrow. As previously noted by the Court, "we must be particularly wary in assessing [a regulation] to determine whether it reflects an impermissible attempt 'to allow a government to control . . . the search for political truth."[235] The problem with *Austin*'s expansive view of corruption, then, is that it permits a measure of such government control; it allows for a new kind of targeting—from the nature of the speech, to the nature of its effect, to the identity of the speaker. Under a quid pro quo analysis, *Bellotti* focused on the nature of the speech to determine its constitutional protection.[236] Under the *Austin* analysis, on the other hand, emphasis was placed on the source of the speech, the corporation as speaker, and on its effect. This shift in focus allows legislators a

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cussion of different theories underlying First Amendment protections at note 47 *supra*. *See* Charles N. Eberhardt, Note, *Integrating the Right of Association with the* Bellotti *Right to Hear*, 72 CORNELL LAW REVIEW 159 (1986). This argument may explain the seeming inconsistency between the outcomes in *Bellotti* and *Austin*, yet it ignores the inherent danger of choosing between two theories of First Amendment protection to determine the extent of such protection. Particularly because *Austin* did not clarify how much political activity would remove an "ideological" corporation from the exception the Court carved for small, single issue associations like MCFL, political incorporated associations may be unable to determine at what level of activity they will no longer be protected by the right of association and only by the lesser interest in the public's right to hear.

[235] Federal Communications Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 384 (1984) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 568 (1980)).

[236] *See Bellotti*, 435 U.S. at 777.

> It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id.

stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content based regulation.

The question after *Austin* is whether the Court's recognition of such a broad state interest will be the basis upon which legislators justify other regulations, and with which courts subordinate legitimate expression. Some assurance that the *Austin* rationale will be applicable only to "corporations cases" comes from the other "corporate speech case," *Bellotti*: "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech."[237] This may not be prophetic, however, as *Austin*'s expansive view of corruption has been used in another context already. In *Geary v. Renne* the "distorting and corrosive effects" model of corruption was proffered to justify an amendment of the California constitution banning political party endorsements of candidates for nonpartisan city, county, school and judicial offices.[238] While the Supreme Court ultimately held that the First Amendment question was not justiciable in that case,[239] it is noteworthy that both the original panel[240] and the Ninth Circuit Court of Appeals en banc[241] considered an application of *Austin*'s rationale. While acceptable to the original panel, on rehearing, the Ninth Circuit found the analogy between corporations and political parties flawed, due in part to the " 'long history of regulation of *corporate* political activity.' "[242] This suggests that other courts may use *Austin* to support the proposition that an historical fear is sufficient justification for diminished protection under the First Amendment. At best *Austin* stands for the alternative proposition that less is more, at least as concerns corporate political speech.

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[237] *Id.* The different results in *Austin* and *Bellotti* may be attributed to the different emphasis, both in what constituted corruption, and the nature of First Amendment protection.

[238] 911 F.2d 280, 284 (9th Cir. 1990) (en banc), *vacated and remanded*, 111 S. Ct. 2331 (1991).

[239] 111 S. Ct. 2331 (1991).

[240] 880 F.2d 1062 (9th Cir. 1989).

[241] 911 F.2d 280 (9th Cir. 1990) (en banc).

[242] *Id.* at 284 (citations omitted).

CONCLUSION

The importance of *Austin* is that it represents a significant departure from *Buckley* and its progeny. Where *Buckley* relied on a narrow definition of corruption to come to its holding, *Austin* considerably broadened the scope of corruption to justify upholding a restriction on political expenditures. Although dicta in *Massachusetts Citizens* indicated the susceptibility of corporations to expenditure regulations, *Austin* was the first to hold such expenditure regulations constitutional as applied. The flaw in *Austin* then, was not so much that its strayed from precedent as that the Court too easily accepted a value-laden rationale for doing so. Fortunately, the weaknesses in the Court's argumentation also suggest that the holding in *Austin* will be self-limiting: a paranoia about corporate war chests will not lend itself to justifying restrictions aimed at any individual or association besides corporations.

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