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Muzzling Corporations: The Court Giveth and the Court Taketh Away a Corporation's "Fundamental Right" to Free Political Speech in Austin v. Michigan Chamber of Commerce

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I. INTRODUCTION

In the spring of 1985, the Michigan State Chamber of Commerce placed an advertisement in a Michigan newspaper to persuade voters in the state's 93rd House district to support its favored candidate, Richard Bandstra, in a special election to fill a vacancy in the Michigan State House of Representatives.[1] Like the thousands of similar ads that are placed every year in support of candidates for political office throughout the nation, the Chamber's ad discussed the issues that the Chamber felt were important to the voters and explained why Bandstra was the Chamber's choice for the job.[2]

On March 27, 1990, the United States Supreme Court declared the mere placing of the advertisement to be a felony, upholding a Michigan statute banning political campaign ads paid for by corporations.[3]

The case arose when the Michigan State Chamber of Commerce decided to place the ad in direct violation of the Michigan Campaign Finance Act in order to challenge a provision of the act that outlawed contributions by corporations to political campaigns. The statute also forbade "independent expenditures"[4] by corporations on behalf of declared candidates for public office in Michigan,[5] making the expenditure

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1. For the full text of the advertisement, see Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1427 (1990).

2. Id.

3. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990).

4. An independent expenditure is one that is "not made at the direction of, or under the control of, another person," especially the campaign itself. Mich. Comp. Laws Ann. § 169.209 (West 1989). See infra discussion in text accompanying note 18.

5. Michigan Campaign Finance Act, Mich. Comp. Laws Ann. § 169.254 (West 1989). The act also outlawed direct contributions by corporations to political campaigns, but since the Chamber's advertisement was an independent expenditure, the contribution issue was not before the Court. For the difference between contributions and independent expenditures, see infra text accompanying note 18.

of such funds a felony.[6] The Chamber sued for injunctive relief to prevent the enforcement of the statute.[7]

The Chamber is a non-profit corporation, comprised of over 8,000 members, three-fourths of which are for-profit corporations. The general treasury of the Chamber was funded through annual dues required of all members.[8] Although the Chamber had established a "segregated fund" and could have complied with the statute by using this fund to pay for its political advertisement, the Chamber chose to use its general treasury to pay for the ad in order to challenge the statute.

The Chamber argued that the prohibition on expenditures from the corporation's general treasury violated the corporation's First Amendment right to free speech by effectively banning political speech by the corporation. Secondly, the Chamber argued that the ban on independent expenditures by corporations, but not by labor unions, violated the Chamber's Fourteenth Amendment Equal Protection right to be treated equally to similarly situated entities. The United States District Court for the Eastern District of Michigan upheld the statute,[9] but the Court of Appeals for the Sixth Circuit reversed, holding, in part, that the statute could not be applied to the Chamber without violating the corporation's First Amendment rights.[10] The United States Supreme Court, while acknowledging that the corporation has a fundamental First Amendment right to free speech,[11] reversed and upheld the statute. By a six to three vote,[12] the Court held that the statute violated neither

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6. The statutory penalty for violating the statute is a "fine of not more than $5,000.00 or imprisonment for not more than three years, or both, or if the person is not an individual, by a fine of not more than $10,000.00." Since the Chamber is a juridical "person," not an individual, the maximum fine upon conviction was $10,000.

7. *Austin*, 110 S. Ct. at 1396. The Chamber was a non-profit corporation, comprised of over 8,000 members, three-fourths of which were for-profit corporations. The general treasury of the Chamber was funded through annual dues required of all members. *Austin*, 110 S. Ct. at 1395. Although the Chamber had established a "segregated fund" and could have complied with the statute by using this fund to pay for its political advertisement, the Chamber chose to use its general treasury to pay for the ad, in order to challenge the statute.

8. *Austin*, 110 S. Ct. at 1395.

9. Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397 (W.D. Mich. 1986).

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

11. Austin v. Michigan State Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990). ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.") The Court derives this acknowledgment of the corporation's right to free speech from First National Bank of Boston v. Bellotti, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416 (1978).

12. Justice Marshall wrote the opinion for the majority, joined by Chief Justice Rehnquist, and Justices Brennan (who filed a concurring opinion), White, Blackmun, and Stevens. Justices Scalia, Kennedy and O'Connor dissented.

the corporation's First Amendment nor Fourteenth Amendment rights under the United States Constitution. It is the First Amendment claim that received the lion's share of the Court's attention in the majority opinion in *Austin*, and which will be the subject of this note.

II. Purpose of This Note

In *Austin*, the Court did not decide to overrule prior cases in which it held that a corporation has a fundamental right to free political speech. Instead, it stated that it was leaving that "fundamental right" intact; yet for all practical purposes, the court rendered the right devoid of any real meaning. Under prior jurisprudence, the designation of a right as "fundamental" has meant that any state action infringing upon the right must be justified by a compelling state interest in regulating the activity, and must be narrowly tailored to accomplish that interest. In *Austin*, the Court diminished the value of the fundamental right designation by stretching the definition of a "compelling state interest" so far that the right is very easy to circumvent for a state that wishes to regulate "free" political speech.

This note will examine the Court's troublesome insistence that it is following the precedent that acknowledged the fundamental right of corporations to engage in political speech. It will be shown that the Court did not give full deference to that right. Instead, the Court allowed the right to be overcome by a "compelling" interest so weak that the "fundamental right" is not really being honored at all. By accepting a less-than-compelling state interest as sufficient to allow a state to regulate a fundamental right in *Austin*, the Court may have weakened other fundamental rights that are currently protected by the "compelling state interest" requirement.

III. *Austin v. Michigan Chamber of Commerce*

A. The Facts

In order to challenge the statutory ban on independent expenditures made by corporations on behalf of political campaigns, the Michigan Chamber of Commerce placed a newspaper advertisement supporting Richard Bandstra in a special election to fill a seat in the state House of Representatives.[13] The Chamber then sued for injunctive relief to prevent the enforcement of the section of the Michigan Campaign Finance Act that made the placement of such an ad punishable as a felony.

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13. For the full text of the advertisement, see *Austin*, 110 S. Ct. at 1427.

B. *The Statute: The Michigan Campaign Finance Act*

The Michigan Campaign Finance Act of 1976 sets the rules for funding campaigns for public office in the state of Michigan.[14] Section 254 of the statute makes it a felony for a corporation to "make a contribution or [independent] expenditure or provide volunteer personal services" to campaigns of declared candidates for public office.[15] The proscription extends to all corporations, whether incorporated in Michigan or in any other state or foreign country, with an exception for corporations formed for political purposes.[16] The spending ban applies to campaigns of political candidates only; it does not apply to efforts to qualify, pass, or defeat a referendum.[17]

The *Austin* case involved independent expenditures to show support for a political candidate. Independent expenditures are made by an outside party not related to the campaign—in this case the Chamber of Commerce—in order to convince the public to support the election of a candidate. Unlike a campaign contribution, the independent expenditure is made directly by the outside party without consultation with the campaign, typically by the purchase of a newspaper ad or the printing of buttons or bumper stickers bearing the candidate's name. In this case, the Chamber placed the advertisement directly with newspapers, paying for the production and placement of the ad and controlling its content and design.[18]

The Michigan legislature included a provision allowing the corporation to set up a "segregated fund" which is separate and distinct from the corporation's general treasury that contains the funds the

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14. Michigan Campaign Finance Act, Mich. Comp. Laws Ann. §§ 169.201-169.282 (West 1989). The Michigan statute was based on Section 441b of the Federal Election Campaign Act, 2 U.S.C. § 441b (1990). The Michigan statute applies to elections for state and local offices in Michigan; elections for federal offices are covered by the federal statute.

15. Mich. Comp. Laws Ann. § 169.254(1) (West 1989). Section 169.204 (West 1989) describes which volunteer services constitute campaign contributions. It is illegal for corporations to provide these services.

16. Mich. Comp. Laws Ann. § 169.254(2) (West 1989).

17. Mich. Comp. Laws Ann. § 169.254(3) (West 1989). There are, however, some limits on the ban. The statute makes an exception for "loans made in the ordinary course of business" so that lending institutions and creditors extending credit to political campaigns would not be guilty of a felony. (Mich. Comp. Laws Ann. § 169.254(1) (West 1989)). Two types of corporations are excepted from the proscription entirely: corporations formed expressly for political purposes—commonly known as "political action committees" or PACs—and media corporations, such as television stations and newspapers.

18. The disclaimer at the bottom of the advertisement read: "Not authorized by the Candidate Committee of Richard Bandstra. Paid for by the Michigan State Chamber of Commerce, Suite 400, 300 Washington Square, Lansing, Michigan 40833." *Austin*, 110 S. Ct. at 1427.

corporation accrues from conducting its business. This was an attempt to insulate the statute from a finding that it violates a corporation's First Amendment rights by banning corporate political speech.[19] The segregated fund could make political expenditures from its own resources, but the corporation's general fund could not be spent on campaign contributions or independent expenditures,[20] and the corporation itself would not be allowed to contribute to the segregated fund.[21] Instead, the statute limits who can contribute to the segregated fund, with one set of eligible contributors for segregated funds of for-profit corporations and another set for non-profit corporations. The segregated fund of a for-profit corporation is limited to soliciting contributions from stockholders, officers and directors of the corporation, as well as "[e]mployees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."[22]

In the case of the Chamber, a non-profit corporation, the segregated fund can receive contributions from the same sources as for-profit corporations, and may also solicit contributions from members of the Chamber who are *individuals*, stockholders of the Chamber's members, officers or directors of the Chamber's members, and employees of the Chamber's members who have key policy making or supervisory positions in their respective organizations.[23] By limiting member contributions to members who are individuals, the statute eliminates from contributions virtually the entire Chamber membership, which is made up predominantly of corporations.

At the heart of the statute is the prohibition on spending from the general treasury. By not permitting the corporation to fund its speech through its general fund and by also barring the corporation from contributing to the segregated fund, the statute is not a "limitation" on the corporation's speech in state elections, but an outright *ban*.

C. *The Issue in* Austin

The first amendment issue in *Austin* was whether the Michigan statute was narrowly tailored to address a state interest that was sufficiently compelling to justify the restriction of the Chamber's funda-

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19. For the Supreme Court precedent recognizing a corporation's right of free political speech, see infra text accompanying notes 31-34.

20. Mich. Comp. Laws Ann. § 169.255 (West 1989).

21. The corporation itself, via a general treasury is *not* on the narrow list of individuals and entities which may contribute to the fund, as set out in Mich. Comp. Laws Ann. § 169.255(2) (West 1989) (for segregated funds of for-profit corporations) nor in Mich. Comp. Laws Ann. § 169.255(3) (West 1989) (for segregated funds of non-profit corporations).

22. Mich. Comp. Laws Ann. § 169.255(2) (West 1989).

23. Mich. Comp. Laws Ann. § 169.255(3) (West 1989).

mental right to free political speech. In other words, was the perceived evil engendered by the spending of money by corporations on political speech sufficiently dire that the state was justified in banning the speech?

Prior to *Austin*, the closest the Court had come to deciding the constitutionality of restricting corporate speech to segregated funds was the ruling in *Federal Election Commission v. Massachusetts Citizens for Life*,[24] in which the Court struck down the segregated fund restriction in the Federal Election Campaign Act (on which the Michigan statute in *Austin* was based) as it applied to a pro-life group in Massachusetts. However, the *Massachusetts Citizens for Life* ruling was not controlling in *Austin* because the Court noted that the corporation in *Massachusetts Citizens for Life* (unlike the Chamber of Commerce in *Austin*) was formed specifically for political purposes, making the group "more akin to voluntary political associations than business firms."[25] Contributors to the corporation knew that their money would be used for the political purpose of the corporation, unlike a business corporation in which the shareholder contributes for the purpose of making a profit, but may disagree with the corporation's political views.[26]

To understand the first amendment issue as it applies to *Austin*, two related questions must be answered: first, does a ban on political *spending* by a speaker necessarily infringe upon that speaker's right to political *speech*, and second, are corporations among these entities that are afforded a fundamental right of free political speech under the First Amendment? Prior United States Supreme Court cases answered both questions in the affirmative.

In *Buckley v. Valeo*,[27] the Court acknowledged that in the modern environment of political speech that is generated predominately through expensive mass mailing campaigns and saturation television advertising, the freedom to expend large quantities of money is an integral component of political speech. As the Court stated in *Buckley*:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[28]

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24. 479 U.S. 238, 107 S. Ct. 616 (1986).
25. Id. at 263, 107 S. Ct. at 631.
26. Id. at 260-61, 107 S. Ct. at 629.
27. 424 U.S. 1, 96 S. Ct. 612 (1976).
28. Id. at 19, 96 S. Ct. at 634-35.

The majority in *Austin* conceded that "[c]ertainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression' at the core of our electoral process and of the first amendment freedoms."[29]

The question of whether corporations are included in the First amendment's guarantee of free speech has also been previously decided by the Court. At the beginning of the *Austin* opinion, the Court acknowledged its precedent recognizing a fundamental right of corporations to engage in political speech, which can only be abridged upon the showing by the state that its regulation is narrowly tailored to serve a compelling state interest.[30]

It was in *First National Bank of Boston v. Bellotti*[31] that the Court ruled that first amendment rights apply not only to individuals, but to corporations as well. The *Bellotti* court rejected the "proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[32] The Court noted that the need to protect political speech "is no less true because the speech comes from a corporation rather than an individual."[33] The Court stressed that it is not only the speaker's right to engage in speech that is protected by the First Amendment, but society's need to hear all points of view. "[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[34]

The Court has stated, in *Federal Election Commission v. Massachusetts Citizens for Life*,[35] that requiring a corporation to make its speech through a segregated fund rather than through its general treasury burdens the corporation's right to free political speech. The fact that "the corporation is *not* free to use its general funds for campaign advocacy purposes" burdens the corporation's speech.[36] A finding that

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29. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990), quoting *Buckley*, 424 U.S. at 39, 96 S. Ct. at 644, which in turn quoted Williams v. Rhodes, 393 U.S. 23, 32, 89 S. Ct. 5, 11 (1968).

30. *Austin*, 110 S. Ct. at 1396. The "compelling state interest" requirement dates back to the 1963 case of NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 341 (1963), in which the Court declared that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." Since *Button*, the Court has come to accept that corporations as well as individuals have a fundamental right to free speech that can only be abridged upon the showing that the state action meets the *Button* compelling state interest test.

31. 435 U.S. 765, 98 S. Ct. 1407 (1978).

32. *Bellotti*, id. at 784, 98 S. Ct. at 1420.

33. Id. at 777, 98 S. Ct. at 1416.

34. Id. at 783, 98 S. Ct. at 1419.

35. 479 U.S. 238, 252, 107 S. Ct. 616, 624 (1986).

36. Id., 107 S. Ct. at 624.

an action "burdens" speech is independent of determining whether the burden is permissible or not; instead, finding that an action burdens speech is just another way for the Court to say that the action affects a fundamental right and must therefore meet the compelling state interest test. By finding such a burden in *Massachusetts Citizens for Life*, the Court was acknowledging that the state action affected the corporation's *fundamental right* to free political speech.

The ban on spending from the corporation's general treasury and the required use of a segregated fund also appears to conflict with the Court's pronouncement in *Meyer v. Grant* that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[37]

All of this must be understood in the light of the Court's general ban on restricting speech based on the identity of the speaker: in this case, restrictions based on the fact that the speaker is a corporation. In *Police Department of Chicago v. Mosely*,[38] the Court struck down a statute that prohibited non-union picketers near certain buildings, while allowing unions to picket the same areas, because the classification was based solely on who was doing the picketing. In the Michigan statute at issue in *Austin*, the same principle applies; corporations are banned from speaking solely because of their identity as corporations. Every other individual and entity in the state is allowed to spend money to publicly debate elections except for corporations. In *Bellotti*, the Court held that "[i]n 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."[39]

As a result of these precedents, the *Austin* Court was required to justify its upholding of the Michigan statute's ban on corporate political speech by showing that the state's action was narrowly tailored to a compelling state interest in regulating the speech.

IV. The Court's Decision in *Austin*

In *Austin*, the Supreme Court upheld the Michigan Campaign Finance Act, allowing the ban on corporate independent expenditures in political election campaigns to stand. The Court acknowledged that corporations like the Chamber have a fundamental right to engage in political speech, but found that the state had a compelling state interest that justified the infringement of that right. Rather than finding a single compelling interest, the Court asserted two interests that had, taken

37. 486 U.S. 414, 424, 108 S. Ct. 1886, 1893 (1988).

38. 408 U.S. 92, 92 S. Ct. 2286 (1972).

39. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85, 98 S. Ct. 1407, 1420 (1978).

individually, been rejected in previous cases as insufficiently compelling and offered them together as a compelling interest.[40] These interests are: first, the fact that corporations acquire their wealth with the help of the "special advantages"[41] state corporation law confers upon the corporation, and second, the possibility that political expenditures by corporations will cause "corruption" of the electoral process.[42] As Justice Scalia pointed out in his dissent, the majority "seeks to create one good argument by combining two bad ones."[43]

A. "Special Advantages"

By organizing under the state's corporation laws, the corporation receives certain "special advantages" that enable it to do business and facilitate the accumulation of wealth under the corporate form. Among these advantages are limited personal liability of the corporation's stockholders, perpetual existence of the corporation, and "favorable treatment of the accumulation and distribution of assets."[44] The Court reasoned that since these advantages allow the corporation to acquire assets—including the money it spends on political speech—the state has a compelling interest in counterbalancing any unfair advantage the corporation may gain over other speakers who do not have similar state-conferred assistance in raising money for political speech. Quoting *Federal Election Commission v. Massachusetts Citizens for Life*, the Court reasoned that by using the advantages of corporate status to advance its political ideas, the corporation is using "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[45]

B. "Corruption"

The Supreme Court had previously held in *Buckley v. Valeo*[46] and *Federal Election Commission v. National Conservative Political Action Committee (NCPAC)* that the state's interest in controlling corruption or the appearance of corruption was the only "legitimate and compelling government interest[s]" that would justify a state's regulation of political spending.[47] But in *Buckley*, the court also explicitly concluded that

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40. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1409 (Scalia, J., dissenting).

41. *Austin*, 110 S. Ct. at 1397.

42. Id.

43. *Austin*, 110 S. Ct. at 1408 (Scalia, J., dissenting).

44. *Austin*, 110 S. Ct. at 1397.

45. Id., quoting Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 257, 107 S. Ct. 616, 627 (1986).

46. 424 U.S. 1, 96 S. Ct. 612 (1976).

47. Federal Election Commission v. Nat. Conserv. Pol. Action, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 1468 (1985).

independent expenditures *do not* pose the threat of such corruption.[48] Realizing the difficulty it would have reconciling *Buckley* with a finding for the state in *Austin*, the Court decided to circumvent *Buckley* by drawing up a new definition of corruption. The traditional definition of corruption was reiterated in *NCPAC*:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.[49]

Rather than using this standard *quid pro quo* definition of corruption, and conceding that corporate independent expenditures do not corrupt the system according to the Court's own definition, the Court crafted a new, amorphous definition of corruption malleable enough to include independent expenditures: any speech that has "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."[50] This, the Court acknowledged, is a "different type of corruption" from the generally understood meaning of the word.[51]

The Court also went one step further. The Court ruled that the ban on political expenditures by corporations could be constitutionally applied to corporations that are not large or wealthy enough to cause the feared "distortion" of the political process. The Court ruled that the "potential" for corruption inherent in the corporate form would allow Michigan to ban contributions from even small or non-profit corporations that are not capable of actually causing the Court's version of "corruption."[52]

V. ANALYSIS

A. Analysis of "Special Advantages" Reasoning

The Court's "special advantages" reasoning is unsatisfying because it is circular. In short, the Court reasoned that a corporation's acknowledged fundamental right to free political speech may be infringed because a corporation receives certain advantages over the speakers because it amasses its wealth with the assistance of state corporation

48. *Buckley*, 424 U.S. at 45-46, 96 S. Ct. at 647-48.
49. *NCPAC*, 470 U.S. at 497, 105 S. Ct. at 1468.
50. *Austin*, 110 S. Ct. at 1397.
51. Id.
52. Id. at 1398. See infra discussion in text accompanying notes 73-79.

law. In the Court's previous decisions in which it accepted the fundamental right of corporations to engage in political speech, the Court clearly took into account the fact that the speaker is organized as a corporation under state law, with any "special advantages" that such incorporation might entail. Since the whole point of incorporating is to gain the benefit of these special advantages, the Court certainly knew when it accepted the fundamental right that every corporation seeking to assert the right had received the benefit of these advantages. Yet, the majority used these same special advantages as a justification for circumventing the very right it just acknowledged. In other words, the Court decided that a corporation has a fundamental right to free speech which can be abridged solely because the corporation is a corporation.

The insufficiency of this argument is demonstrated by the fact that the Court had already rejected the same reasoning in *Bellotti*, in which the Court stated that the mere fact that an entity is organized as a corporation does not remove its speech from the protection of the First Amendment.[53] The special advantages argument in *Austin* is an attempt to get around *Bellotti* by acknowledging the precedent of a fundamental right of a corporation to speak while at the same time claiming that the very nature of the corporation itself permits the state to abridge that right.

As Justice Scalia pointed out in his dissent, many individuals and entities receive "special advantages" from the state in the form of tax breaks, contract awards, public employment and outright cash subsidies,[54] yet the Court would not consider abridging their free speech rights on this basis. Is the tax exempt status of church-owned property a "special advantage" that contributes to the wealth of the Roman Catholic Church, thereby justifying a ban on political speech by the Church?

As far back as 1958, in the case of *Speiser v. Randall*, the Court held that the state cannot abridge a person's fundamental right merely because he receives special advantages from the state.[55] In *Speiser* the Court ruled that California could not burden a war veteran's right of free speech merely because the veteran received the "special advantage" of a special veterans' tax deduction. In so holding, the Court struck down a state law that would only allow the tax deduction to be claimed by veterans who did not advocate the illegal overthrow of the United States government. The Court determined that such a restriction, and the placing of the burden of proof of nonadvocacy upon the taxpayer rather than the state, unconstitutionally burdened the taxpayer's right of free speech.

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53. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416 (1978). Also, id. at 784, 98 S. Ct. at 1420.

54. *Austin*, 110 S. Ct. at 1408 (Scalia, J., dissenting).

55. 357 U.S. 513, 78 S. Ct. 1332 (1958).

In *Pickering v. Board of Education*,[56] the Court held that a school teacher may not constitutionally be compelled to relinquish First Amendment rights he would otherwise enjoy as a member of the community to make critical public comments regarding the actions of the local school board merely because he is employed by the board.[57] The Court ruled that the board wrongly denied the teacher his constitutional right of free speech when it dismissed him for writing a letter to a local newspaper stating that the school needed more money for educational programs and should spend less on athletics.[58]

The most disturbing aspect of the Court's "special advantages" logic is that the evil the Court seeks to eliminate is the prospect that the special advantage-supported speech of the corporation may have an influence on the public that is disproportionate to the popularity of the corporation's ideas. Quoting *Massachusetts Citizens for Life*, the Court stated that "'[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas'" and that "'[t]he availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.'"[59] The *Austin* Court decided to take it upon itself to right this "evil" by ruling that, at least in the case of corporations, the Court itself can decide if a speaker is having too much influence on the election process and can therefore be constitutionally silenced.

Calling the Court's reasoning "Orwellian,"[60] and characterizing the majority's approach as "one man, one minute,"[61] due to its potential to allow the Court to determine how much speech a speaker is entitled to, Justice Scalia noted that "the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe . . . [T]hat principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."[62] Scalia quoted *Buckley v. Valeo*, in which the Court specifically rejected the notion of weighing the relative influence of speakers:

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56. 391 U.S. 563, 88 S. Ct. 1731 (1968).

57. Id. at 568, 88 S. Ct. at 1734.

58. The text of the letter can be found in *Pickering*, id. at 575-78, 88 S. Ct. at 1738-40.

59. Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 258, 107 S. Ct. 616, 628 (1986).

60. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1408 (Scalia, J., dissenting).

61. Id. at 1411 (Scalia, J., dissenting).

62. Id. at 1408 (Scalia, J., dissenting).

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the Federal Election Campaign Act of 1971]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information [to the public]."[63]

The concept of justifying the censorship of political speech based on the amount of popular support the speech commands is an extremely dangerous notion for the Court to consider adopting. The First Amendment is not designed to protect only speech that has "popular support." In fact, such speech needs no protection, since it is highly unlikely that speech that meets with the approval of the majority of the citizenry will be censored. Rather, it is *unpopular* speech that is the primary focus of the protective nurturing of the First Amendment. Presumably, that includes speech by unpopular speakers. As Justice Scalia put it, the First Amendment is not designed merely to protect popular ideas, but to create a system "in which true ideas could become popular."[64] The recent sweeping changes in the former Communist Bloc in Eastern Europe have shown us the power of ideas that start in small groups with little popular support and grow with time until they have freed a nation. Would the U.S. Supreme Court have allowed the state to ban the speech of the Solidarity trade union (if the union made the fatal mistake of incorporating) because it began with only a few shipyard workers in Gdansk and little popular support? Would the Court allow the state to silence a minor third party candidate on the grounds that he lacks the requisite public support to justify the protection of the First Amendment?[65]

In upholding the Michigan statute in *Austin*, it is unlikely that the Court truly intended to claim the ability to choose which speakers will be permitted to engage in political speech. Nevertheless, *Austin* resulted in the denial of a previously recognized right to free speech based on

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63. Id. at 1411 (Scalia, J., dissenting, quoting Buckley v. Valeo, 424 U.S. 1, 48-49, 96 S. Ct. 612, 648-49 (1976) (citations omitted)).

64. *Austin*, 110 S. Ct. at 1415 (Scalia, J., dissenting).

65. The Court has already rejected this idea in Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5 (1968), in which the Court ruled that election officials cannot favor major political parties to the detriment of minor parties. The plaintiffs were the rather odd combination of George Wallace's American Independent Party and the Socialist Workers Party, both of which were attempting to get on the ballot in Ohio, thus proving the old adage that politics make strange bedfellows.

the Court's sole weighing of the amount of influence the speaker could have on its audience and introduced the prospect that the Court could decide who had engaged in "too much speech."[66] The Court should reconsider the idea that it is competent to weigh the popularity of speech and deny a speaker the right to speak on that basis.

B. Analysis of "Corruption" Argument

As explained above, corruption of the political system has been the only recognized compelling interest justifying a ban on corporate spending for political speech. The *Austin* Court cited no evidence whatsoever of a link between corporate spending on political campaigns and corruption. Since the Court could not demonstrate how corporate independent expenditures would lead to corruption as that term has been heretofore defined, it reinvented the concept so that corporate expenditures *equal* corruption, thereby preempting debate on the issue.

Stating that "In *Buckley* and *Bellotti* . . . we rejected the argument that the expenditure of money to increase the quantity of speech somehow fosters corruption,"[67] Justice Kennedy, in his dissent, argued that this new definition of corruption runs directly counter to the Court's precedents. In a system set up to maximize the amount of information available to the voters so that they may make the most informed choice possible, it seems absurd to label as "corrupt" an attempt by anyone to bring more information to the public. Kennedy goes on to explain that the use of money in an election "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."[68]

In reaching its new definition of corruption the Court again attempted to tie the right to engage in speech with the pre-demonstrated public support for that speech, referring to the lack of "correlation" between a corporation's capacity for speech and its public support. Justice Kennedy argued that the Court's approach involving calibrating a corporation's right to speech with the level of popular support for its stand amounts to an attempt to "restrict[ing] the quantity of speech to equalize the relative influence of speakers on elections," which he contends is "antithetical to the First Amendment."[69]

The majority's aim to prevent the corporation's speech from exerting influence disproportionate to the ideas currently entertaining popular support runs contrary to the Court's holding in *Bellotti*. The *Bellotti*

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66. *Austin*, 110 S. Ct. at 1416.

67. *Austin*, 110 S. Ct. at 1421 (Kennedy, J., dissenting).

68. Id. at 1422 (Kennedy, J., dissenting, quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 790, 98 S. Ct. 1407, 1423 (1978)).

69. *Austin*, 110 S. Ct. at 1421 (Kennedy, J., dissenting).

Court, in upholding a corporation's right to make an independent expenditure on behalf of a ballot issue, said:

> [I]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, 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.[70]

The majority's line of reasoning here leads right back to the same arguments the Court made in the "special advantages" section; the only thing the court could find wrong with the corporation's speech is that it is too influential. Justice Scalia sees the Court's real definition of the New Corruption[71] as "too much of one point of view."[72]

Not only does the Court allow the banning of speech that can cause the "New Corruption," the Court also takes pains to authorize the state to restrict corporate speech that does not even meet its own definition of corruption, because it is made by small corporations or non-profit corporations who do not have the "immense aggregations of wealth" that the Court finds likely to have "corrosive and distorting effects" on elections. Not to worry; the Court declares that it is not corruption that allows the state to restrict corporate speech, but the mere "*potential* for such corruption that demands regulation."[73] The danger of permitting the state to restrict any speech that it feels has the *potential* to be harmful cannot be understated. "The Court," Justice Scalia stated in his dissent, "thus holds, for the first time since Justice Holmes left the bench, that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere *potential* for producing social harm."[74] Noting that the principle that a state cannot ban speech that does not cause harm, but merely holds the potential to harm, dates back to Justice Holmes' "clear and present danger" test[75], Scalia pointed out that this ruling could alter previous first amendment rulings by allowing the Court to convict individuals for selling books that have a potentially harmful influence on minors,[76] ban indecent telephone com-

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70. *Bellotti*, 435 U.S. at 777, 98 S. Ct. at 1416.

71. *Austin*, 110 S. Ct. at 1414 (Scalia, J., dissenting).

72. Id. at 1414 (Scalia, J., dissenting).

73. *Austin*, 110 S. Ct. at 1398.

74. *Austin*, 110 S. Ct. at 1413 (Scalia, J., dissenting).

75. Schenck v. United States, 249 U.S. 47, 49-52, 39 S. Ct. 247, 249 (1919).

76. *Austin*, 110 S. Ct. at 1413 (Scalia, J., dissenting, citing Butler v. Michigan, 352 U.S. 380, 77 S. Ct. 524 (1957). Note: the cases in footnotes 76-79 were cited by Justice Scalia to show how their outcomes would change applying the Court's definition of the "New Corruption."

munications that have the potential of reaching minors,[77] compel publication of membership lists of organizations that have the potential for illegal activity,[78] or compel an applicant for membership in the bar to reveal his or her political beliefs and affiliations to eliminate the potential for subversive behavior.[79] The specter of the government as arbiter of what is "potentially harmful" speech is much more haunting than the "specter" of a corporation getting more than its "fair share" of political speech.

C. *The Segregated Fund: Allowing Some Speech*

As the law stands after *Austin*, the effects of the statute are astonishingly broad. Not only would the statute have the effect of banning "endorsement" advertisements like the one at issue in *Austin*, but, Michigan conceded, the statute makes it a felony for non-profit corporations like the Sierra Club, the ACLU, or the Chamber to print voting records of incumbents to advise the public how its representatives voted on issues of concern to its members and the general public.[80] If this activity is not protected by the First Amendment, what is?

The intended constitutional safeguard of the segregated fund system (ostensibly allowing the corporation an avenue for *some* speech, so as not to have the statute struck down as violative of the corporation's First Amendment rights) fails entirely to protect the corporation's right to free speech. The corporation has only the hollow privilege of lending its name to the project, but not the capacity to use its own corporate funds to get its message across to the public through the mass communications media, the very essence of free speech in today's political environment of expensive television and direct mail campaigns.[81] Clearly, the "corporation's" speech loses its effectiveness if the corporation cannot spend any of its funds to produce the speech, instead relying on the relatively meager assets of the individuals it employs. It is doubtful that these individuals can put up enough money for even a short television blitz in a medium-sized market. Thus, their combined speech is unlikely to be able to have any substantial impact on a state-wide election. There is no comparison between the relative assets—and ad-

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77. Sable Communications of California v. FCC, 492 U.S. 115, 109 S. Ct. 2829 (1989).

78. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464, 78 S. Ct. 1163, 1173 (1958).

79. *Austin*, 110 S. Ct. at 1414 (Scalia, J., dissenting, citing Baird v. State Bar of Arizona, 401 U.S. 1, 91 S. Ct. 702 (1971)).

80. *Austin*, 110 S. Ct. at 1418 (Kennedy, J. dissenting).

81. Buckley v. Valeo, 424 U.S. 1, 19, 96 S. Ct. 612, 634-35 (1976) acknowledged that mass communication requiring the expenditure of large amounts of money is "indispensable" in today's electoral process.

vertisement purchasing power—of a vice president of General Motors and the corporation itself. If GM's speech is limited to what the vice president can personally afford, the corporation will not be able to say very much. It therefore appears that despite the Supreme Court's claim that the *Austin* decision respects the corporation's fundamental right of free speech, the Court upheld a statute that effectively prohibits such speech from having any real effect.

D. Narrowly Tailored?

This brings us to the question of whether the Court's solution to the "corruption" problem was narrowly tailored to serve a compelling state interest, as required by *Buckley*.[82]

Assuming for the moment that some regulatory limitation on corporate expenditures was justified due to the specter of corruption, the Court's solution—allowing a ban on corporate expenditures and forcing corporations to rely on segregated funds to which they cannot themselves contribute—is not narrowly enough tailored to attack the problem.

In the first place, we have seen that the statute seeking to address the problem of corporations which possess "immense aggregations of wealth" acting to cause "corrosive and distorting effects" on elections applies equally to small corporations or non-profit corporations which have no capacity to cause such "corruption." The language of the Michigan statute is clearly overinclusive, since it would serve to ban expenditures by *all* corporations, not just those capable of creating the distorting effect the Court seeks to prevent. A small corporation set up to run a single sandwich shop, with virtually no capacity to distort the political debate in even a small local race, would be subject to the same spending ban as General Motors. Conversely, how is a $250 newspaper advertisement more evil if it is placed by the incorporated Chamber of Commerce than if it is placed by the candidate's next-door neighbor? The solution is not "narrowly tailored" if it bans a $250 newspaper ad that is incapable of causing the perceived "distortion" of the system. As Justice Scalia put it, "[i]f narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed 'war chests'[83] must be targeted, if possible, at amassed 'war chests'" and not at small corporations that do not have the offending accumulations of wealth, or small expenditures which do not, in fact, exhibit a distorting effect on the electoral system.[84]

Secondly, despite the Court's assertion that the statute involves merely a permissible limitation of the corporation's free speech rights

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82. Id. at 44-45, 96 S. Ct. at 646-47.

83. *Austin*, 110 S. Ct. at 1401 (Scalia, J., dissenting) (use of the word "warchest").

84. Id. at 1413 (Scalia, J., dissenting).

and not a ban,[85] we have seen that the "segregated fund" restriction *does* in fact operate as a ban on corporate speech, since the corporation is not permitted to contribute to the segregated fund nor to make its own expenditures for political speech.[86]

Even if the segregated fund system did not amount to a total ban on corporate political spending, it would still be impermissibly burdensome on corporate speech. Justice Kennedy pointed out that between twenty-five and fifty percent of the money raised by a political action committee like the segregated funds is required to "establish and administer the PAC," so the corporation would get less speech for its money than if it spent the funds directly.[87] Quoting *Massachusetts Citizens for Life*, Justice Kennedy stated that the fact that the "avenue left open is more burdensome than the one foreclosed is 'sufficient to characterize [a statute] as an infringement on First Amendment activities.'"[88] It is certainly more burdensome on a corporation's speech to receive only one-half to one-fourth of the speech for its dollar that it would have been able to make if it had engaged in the speech directly.

The ban on political speech is impermissible if a lesser restriction would suffice to solve the perceived problem. In the case of corporate political spending, lesser restrictions such as a requirement that corporate political spending be reported to the state election authorities, or a reasonable limit on the amount of money a corporation could spend in support of an individual candidate would be just as effective in preventing the corporation from spending enough money to "distort" the political debate without impinging on the corporation's free speech rights any more than necessary.

VII. CONCLUSION

In *Austin*, the Court claimed to continue to recognize the fundamental right of one type of speaker, a corporation, to engage in political speech, but then allowed the right to be abrogated because the speaker might get "too much speech."[89] The Court allowed the right to be denied for such faint state interests that the "fundamental right" is but an illusion that can disappear as soon as the corporation attempts to exercise it. If the state can abrogate a right by combining two arguments that had, taken individually, been rejected by the Court, what assurance do any of us have that our fundamental rights will be respected?

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85. *Austin*, 110 S. Ct. at 1398.

86. See supra text accompanying notes 19-23.

87. *Austin*, 110 S. Ct. at 1423 (Kennedy, J., dissenting).

88. Id. at 1423 (Kennedy, J., dissenting, quoting Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 255, 107 S. Ct. 616, 626 (1986)).

89. *Austin*, 110 S. Ct. at 1408 (Scalia, J., dissenting).

It is a very serious matter in a democracy to make publishing an endorsement of a political candidate in a newspaper a felony. The right to choose our leaders, and to have a voice in their election, is the fundamental right upon which our nation is founded, the central tenet of our democratic system. For the Supreme Court to abrogate that right merely because it does not like the identity of the speaker is a very grave signal that could conceivably lead to more "narrowly tailored" solutions which ban the speech of other groups or individuals who do not meet with the Court's approval. It should be the task of the people, not the Court, to decide what speech will sway them. "The premise of our system," Justice Scalia explained, "is that there is no such thing as too much speech—that the people are not foolish, but intelligent, and will separate the wheat from the chaff."[90]

In light of the tortured logic and great lengths to which the majority went in order to justify upholding Michigan's ban on corporate political speech, Justice Scalia observed that "[i]t is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech."[91] It is to be hoped that in the next political speech case the Court can fashion a new majority that will refrain from infringing on the fundamental right of free political speech absent a truly compelling state interest.

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90. Id. at 1416 (Scalia, J., dissenting).
91. Id.