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THE POLITICAL PHILOSOPHY OF CAMPAIGN FINANCE REFORM AS ARTICULATED IN THE DISSENTS IN *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE*

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I. INTRODUCTION

The 1992 presidential candidacy of Jerry Brown, who called for campaign contribution limits of one hundred dollars, has reignited the issue of campaign finance reform. Indeed, the United States Supreme Court has recognized the importance of campaign finance reform as a judicial issue. The importance of this issue is marked by the Court's continued willingness to address the regulation of campaign financing

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since the 1976 landmark case of *Buckley v. Valeo*.[1] Since that time, an often-divided Court has issued decisions which many find controversial and perplexing.[2]

In the spring of 1990, the Court decided *Austin v. Michigan Chamber of Commerce*,[3] which is notable for its deference to legislative prohibitions of corporate campaign expenditures. Authored by Thurgood Marshall,[4] the six-to-three majority opinion upheld a Michigan law which prohibited corporations from expending corporate treasury funds to support or oppose any candidate for public office.[5] The Michigan law stated that corporations could make expenditures only from separate, segregated funds used solely for political purposes.[6]

The *Austin* case emphasized the somewhat confused nature of the Supreme Court's campaign finance reform decisions. The decision also surprised constitutional scholars because earlier cases could have been used to strike down the Michigan law.[7] The decision seemed to

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1. 424 U.S. 1 (1976). In *Buckley*, the Supreme Court considered whether the Federal Election Campaign Act interfered with First and Fifth Amendment Freedoms. *Id.* at 14. The Federal Election Campaign Act required corporations to use segregated funds to finance expenditures made in federal elections and limited individual campaign contributions to any single political candidate. *Id.* The petitioner argued that the statute violated First Amendment speech guarantees because it restricted political expression. *Id.* He argued that the statute also violated the Fifth Amendment because it hurt non-incumbent candidates and minor parties. *Buckley*, 424 U.S. at 14.

2. *See, e.g.*, Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 768 (1991) (noting that *Buckley* and its progeny have confused finance reform); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 599 (1991) (outlining arguments surrounding campaign finance decisions); Marlene Arnold Nicholson, *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 J. L. & POL. 509, 510 (1987) (describing the Supreme Court's historical analysis of campaign finance as "seesaw approach").

3. 494 U.S. 652 (1990).

4. *Austin*, 494 U.S. at 654. Chief Justice Rehnquist and Justices Brennan, White, Blackmun, and Stevens joined Justice Marshall's majority opinion. *Id.* Justice Brennan also wrote a separate concurring opinion. *Id.* at 669.

5. MICH. COMP. LAWS § 169.209(6)(d) (1979). The disputed portion of the Michigan law was modeled after the Federal Election Campaign Act which the Supreme Court addressed in *Buckley*. *See Austin*, 494 U.S. at 655 n.1 (noting that Michigan law stems from federal roots).

6. *Austin*, 494 U.S. at 655. However, media corporations were not subject to the same expenditure restrictions. *Id.* at 666-67.

7. *See The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 213 (1990) (noting that *Austin* represents dramatic shift from earlier Supreme Court position that "First Amendment protects speech regardless of the speaker").

signal a shift in the Court toward a more encompassing view of corruption and a greater concern for equality in the political process.[8] The potential significance of the case on campaign finance regulation was enough to produce bitter dissents by Justice Antonin Scalia[9] and Justice Anthony Kennedy.[10]

For several reasons, it is worthwhile to examine more carefully the dissenting opinions in *Austin*. First, the Supreme Court and state legislatures will likely continue to address the important relationship between campaign financing and political corruption. These bodies will also continue to wrestle with the issue of equality in the political process. Finally, the dissenting Justices in *Austin* are quickly becoming representative of the Supreme Court's majority. In particular, this paper will focus on two broad points: the fallacies in the argument that money is the equivalent of speech, and the dissenting Justices' mischaracterization of American intellectual history.

II. THE MAJORITY OPINION

In *Austin*, the Court considered the constitutionality of the Michigan Campaign Finance Act (the Michigan Act) under the First and Fourteenth Amendments.[11] The six-person majority held that corporations, even certain non-profit corporations like the Michigan Chamber of Commerce (the Chamber), could constitutionally be prohibited from expending direct corporate treasury funds to support or oppose political candidates.[12] Corporate *contributions* to candidates had already been prohibited because they may lead to the "actuality and appearance of corruption."[13] Yet, the Court has historically distin-

8. *See* Michael J. Merrick, Note, *The Saga Continues-Corporate Political Free Speech and the Constitutionality of Campaign Finance Reform: Austin v. Michigan Chamber of Commerce*," 24 CREIGHTON L. REV. 195, 196 (1990) (commenting upon Supreme Court's deference to legislative judgment and its attempt to curb dangers to democratic process inherent in unlimited corporate campaign spending).

9. *Austin*, 494 U.S. at 679 (Scalia, J., dissenting).

10. *Id.* at 695 (Kennedy, J., dissenting) (joining Justice Kennedy in this dissent were Justice O'Connor and Justice Scalia).

11. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 654 (1990).

12. *Id.* at 669.

13. Buckley v. Valeo, 424 U.S. 1, 26 (1976). Preventing corruption is considered the central justification for campaign finance reform. *Id.* In *Buckley*, the Supreme Court majority cited corruption as the basis which upheld the $1,000 contribution limit for federal candidates. *See id.* (stating that constitutionality of limitation apparent from law's primary purpose alone).

guished between contributions and independent expenditures.[14] The Court more easily regulated or prohibited contributions based on the belief that contributions could likely lead to corruption.[15] However, because independent expenditures are not coordinated with or approved by the candidate or the candidate's campaign committee, the Supreme Court viewed these funds as constituting "free speech" protected by the First Amendment.[16]

The *Austin* majority, however, retreated from this distinction between contributions and independent expenditures. The Court did not hold that all money used for political purposes furthers the free flow of ideas that citizens need in order to make informed choices. On the contrary, the Court ruled that campaign finance laws should more actively regulate the marketplace of ideas to ensure that the marketplace functions fairly and efficiently.[17]

To make this shift, the majority gave greater weight to an expanded definition of corruption. Instead of viewing corruption as merely a narrow, individual quid pro quo exchange between a candidate and a lobbyist or interest group, the majority expressed concern over "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."[18]

Therefore, the State of Michigan, and presumably all other government entities, may constitutionally regulate corporate political activity more strictly than many expected the Supreme Court to allow. Spending the corporate treasury to support or oppose candidates may be prohibited even for some non-profit corporations like the Chamber.

Austin thus differs in tone and emphasis from *Buckley v. Valeo*. It differs even more from a case decided two years after *Buckley*, *First National Bank of Boston v. Bellotti*.[19] In *Bellotti*, the five-to-four ma-

14. *See id.* at 46-47 n.53 (distinguishing "expenditures" from "contributions" and providing illustrative example).

15. *See id.* at 38 (noting that Supreme Court already found contribution limitations constitutionally valid).

16. *See id.* at 47-48 (stating that expenditure limitations fail to curb political corruption).

17. *See Austin*, 494 U.S. at 659 (stating that failure to regulate corporations' contributions and expenditures gave them political advantage).

18. *Id.* at 659-60.

19. 435 U.S. 765 (1978).

jority held that "[t]he 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."[20] Using this language from *Bellotti* as precedent, the Court could have incorporated similar reasoning and allowed direct corporate expenditures in partisan elections.

In 1986, the Court first intimated that it might broaden its definition of corruption. In *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*,[21] the Court held that corruption includes activities involving the electoral process itself, not merely conduct of individual candidates.[22] *MCFL* most nearly controlled *Austin* because *MCFL* carved out a constitutional exception to the prohibitions against direct corporate treasury expenditures for political contributions. *MCFL* allows non-profit corporations formed "to disseminate political ideas"[23] to contribute with funds from their corporate treasuries. The Chamber attempted to qualify for this exception because it was a non-profit corporation.[24] However, because the organization gained three-quarters of its funding from for-profit corporations,[25] the majority held that it fell outside the *MCFL* exception.[26] For the first time, the Court gave weight to the dicta in *MCFL* which stated that corporate power can threaten to dominate political discourse.[27] Thus, the *Austin* case seems to confirm a shift that originated in *MCFL*. The Court appears to be more concerned with the dangers of corporate spending and massive concentrations of wealth in the political process. Also, the Court is less hostile to the goal of equalizing spending in the political process.

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20. *Id.* at 777. However, *Bellotti* dealt with ballot propositions, not candidate elections. *Id.* at 767. The Court held that the danger of corruption was not present in non-candidate elections. *See id.* at 787-88 (stating that considerations in this case differed from those involving partisan candidate election).

21. 479 U.S. 238 (1986).

22. *See id.* at 259 (discussing concerns of political process as a whole).

23. *Id.*

24. *Austin*, 494 U.S. at 661.

25. *Id.* at 656.

26. *See id.* at 661-65(discussing differences between non-profit corporation in *MCFL* and Michigan Chamber of Commerce that led to Supreme Court's denial of Chamber's exemption).

27. *MCFL*, 479 U.S. at 257-258; *see* Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE W. RES. L. REV. 589, 599-600 (1988) (examining *MCFL* in detail and noting Supreme Court's strong concern for power of corporations in electoral process).

While the *Austin* decision did note that the Chamber would be disadvantaged by the requirement that political action committees (PACs) form from separate funds,[28] the Court held that the Michigan Act is justified by the compelling state interest in preventing corruption or the appearance of corruption in the political arena.[29] In essence, the law reduces the threat that huge corporate treasuries will be used to influence "unfairly the outcome of elections"[30] by ensuring, through PAC requirements, that expenditures "reflect actual public support for the political ideas expressed by corporations."[31]

Austin, then, continues the trend noted in *MCFL* of broadening the definition of corruption to include undue influence on both the candidate and the voter. As such, *Austin* may mean that the Supreme Court will view new campaign finance laws regulating corporations, independent expenditures, and wealth more favorably. Not surprisingly, this shift in goals and permissible regulation of campaign funding produced dissents from within the Court.

III. JUSTICE SCALIA'S DISSENT

Justice Scalia attacked the constitutionality of the majority's goal to regulate the use of wealth in the political process.[32] Justice Scalia's dissent indicates a belief that the dangers of corruption are not seriously implicated by independent expenditures.[33] However, the dissent concedes that dangers do arise from large contributions.[34]

Of the nine justices, Justice Scalia alone would broaden the holding in *MCFL* and expand the exception for a non-profit corporation's political spending to include all corporations, including those most

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28. *See Austin*, 494 U.S. at 658 (noting that segregated fund requirement limits Chamber's freedom to use its general funds as it chooses).

29. *Id.* at 660.

30. *Id.* at 660, 669.

31. *Id.* at 685. It is not entirely clear what the majority meant by this statement, but presumably corporate campaigns must have been contributed by real people for the express purpose of political action, unlike direct corporate spending. David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 564-65 (1991).

32. *See generally* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679-695 (1990) (Scalia, J., dissenting) (claiming that Michigan regulation is unconstitutional violation of free speech).

33. *Id.* at 683-84 (Scalia, J., dissenting) (stating that independent expenditures may prove ineffective or counterproductive, thereby negating possibility for corruption).

34. *Id.* at 682 (Scalia, J., dissenting) (acknowledging that wealth given directly to political candidate, subject to that candidate's direction and control, creates risk of political corruption).

powerful.[35] Justice Scalia reasoned that government regulation of corporate political expenditures creates far greater dangers because "[t]o eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate."[36] Justice Scalia's dissent characterized money as the equivalent of speech, attacking the majority by contending that "[t]he premise of our system is that there is no such thing as too much speech."[37]

Besides attacking the Michigan Legislature's goal as unconstitutional, Justice Scalia also argued that the law is both overinclusive and underinclusive. It is overinclusive because the state interest in preventing "corruption" should be directed only at those corporations with "amassed war chests," not at all corporations, and especially not at non-profit corporations like the Chamber.[38] It is underinclusive because an individual billionaire could breed corruption as easily as corporations, yet the Michigan Act allows such a person to engage in unlimited independent expenditures.[39] Justice Scalia further stated that, unlike corporations, other associations and private individuals receive all sorts of special advantages from the government without being singled out.[40]

Justice Scalia also charged that the Supreme Court's opinion is a departure from previous decisions addressing both the relationship between campaign financing and corruption and the fundamentals of American intellectual history as developed by the Framers and Alexis de Tocqueville.[41] Thus, Justice Scalia concluded that the majority's holding is inconsistent with both the original intent and interpretation of the First Amendment.

To support these claims, Justice Scalia argued against the majority's position that legislatures can regulate corporate speech because "[s]tate law grants [corporations] special advantages" that allow them

35. *Id.* at 694 (Scalia, J., dissenting).

36. *Austin*, 494 U.S. at 694 (Scalia, J., dissenting).

37. *Id.* at 695 (Scalia, J., dissenting).

38. *Id.*

39. *See id.* at 685 (Scalia, J., dissenting) (noting that individual billionaire may advocate political candidate, despite fact that ideas being supported are not those garnering "actual public support").

40. *Austin*, 494 U.S. at 685 (Scalia, J., dissenting).

41. *Id.* at 693-95 (Scalia, J., dissenting).

to amass wealth.[42] Justice Scalia reminded the majority that the "[s]tate cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[43] However, the Court may limit speech, even political speech, to serve a compelling state need.[44] While Justice Scalia agreed that a compelling state need warrants limitations on contributions, the Justice did not believe that the same compelling state need warrants the limitation of independent expenditures.[45]

Moreover, Justice Scalia argued that the majority's special corporate regulation of political speech is inconsistent with previous rulings like *Federal Communications Commission v. League of Women Voters of California*,[46] which struck down bans on political editorializing by noncommercial broadcasting systems.[47] Justice Scalia also contended that the majority misuses *Federal Election Commission v. National Right to Work Committee (NRWC)*.[48] Justice Scalia noted that the majority abandoned *NRWC's* assertion that "we accept Congress' judgment that the special characteristics of the corporate structure create a *potential* for . . . influence that demands regulation" and, instead, fashioned an overly broad limitation upon all corporate speech.[49]

Justice Scalia agreed with the majority that *Austin* is a departure from *Buckley*. *Buckley* disallowed direct contributions to candidates but permitted independent expenditures, akin to those the Michigan Act was designed to prohibit, as long as the individual expenditures were not coordinated with the candidate's campaign.[50] In effect, Justice Scalia contended that while *Buckley* sought to eliminate direct quid pro quo corruption, the aim of the Michigan Act is to address the "New Corruption" problem. "New Corruption" occurs when the

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42. *Id.* at 680 (Scalia, J., dissenting).

43. *Id.* (citing Pickering v. Board of Educ., 391 U.S. 563 (1968) and Speiser v. Randall, 357 U.S. 513 (1958)).

44. *Austin*, 494 U.S. at 657.

45. *See id.* at 683-84 (Scalia, J., dissenting) (quoting *Buckley* for proposition that independent expenditures are less threatening than contributions).

46. 468 U.S. 164 (1984).

47. *Austin*, 494 U.S. at 681 (Scalia, J., dissenting).

48. 459 U.S. 197 (1982).

49. *See Austin*, 494 U.S. at 688-89 (Scalia, J., dissenting) (quoting Federal Election Comm'n v. National Right to Work Comm'n, 459 U.S. 197, 209-10 (1982)).

50. *See id.* at 683-84 (Scalia, J., dissenting) (discussing Supreme Court's departure from *Buckley* decision).

speech of one unpopular participant is reduced in order to "enhance the relative voice of others."[51] Reducing one participant's speech will have the net effect of reducing the total amount of speech in society and will limit free expression, diversity of thought, and exchange of ideas in society.[52] Thus, Justice Scalia contended that the Michigan Act is a form of censorship and "government cannot be trusted to assure, through censorship, the 'fairness' of political debate."[53]

In addition to arguing that the majority misused past precedents on campaign finance, Justice Scalia speculated about the sinister motives behind regulating campaign finance and the damaging consequences of such laws. Justice Scalia also cited past instances of judicial censorship and quoted James Madison, Thomas Jefferson, and Alexis de Tocqueville to show how the Michigan Act and *Austin* holding are censorship contrary to the original intent of the First Amendment, and democratic theory and practice.

IV. ANALYSIS OF JUSTICE SCALIA'S DISSENT

Justice Scalia's opinion is the harsher dissent and is also the most sympathetic to corporate freedom of speech.[54] Justice Scalia questioned the majority's departure from a narrow, individual, quid pro quo view of corruption in electoral campaigns, to a broader, more systemic view of the power of money to corrupt the entire electoral process. Justice Scalia was correct to note this shift.

Arguing that the Supreme Court has always been concerned only with the former and never with the latter, the Justice labeled this shift as "Orwellian."[55] As early as the campaign finance case of *Burroughs v. United States*,[56] however, the Court reasoned, "To say that Congress is without power to pass appropriate legislation to safeguard such an election *from the improper use of money to influence the result* is to deny the nation . . . the power of self protection."[57] Even in

51. *Id.* at 685 (Scalia, J., dissenting) (citing Buckley v. Valeo, 424 U.S. at 48-49).

52. *Id.*

53. *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

54. While this analysis considers the majority of Justice Scalia's dissent, it is not comprehensive. It omits from discussion, *inter alia*, the Michigan law's exemption for media corporations.

55. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

56. 290 U.S. 535 (1934).

57. Burroughs v. United States, 290 U.S. 534, 545 (1934) (emphasis added). In *Bur-*

Bellotti the majority stated, "According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If [one's] arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."[58] Then, the *MCFL* majority, including Justice Scalia, clearly indicated concern over the possible corruptive power of massive wealth. The majority explained that state-created advantages for corporations permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."[59] This line of cases clearly indicates that the Supreme Court's fear of the corruptive influence of wealth is neither "a hitherto unrecognized genus of political corruption"[60] nor "novel."[61]

In a truly "Orwellian" manner of his own, Justice Scalia stated that under the Michigan Act "the corporation as a corporation is prohib-

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roughs, the Supreme Court considered whether Congress had the power to require certain political committees involved in presidential elections to issue financial reports. *Id.* at 541-42. The Supreme Court's opinion indicated support for campaign finance reform. *See generally id.* at 540-48 (noting need to protect against evils of corruption inherent in system which allows unregulated campaign contributions).

58. First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978). However, this same majority opinion later stated, "To be sure, 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." *Id.* at 790.

59. Federal Election Comm'n v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238, 257 (1986). Some justices have not been persuaded by the Supreme Court's distinction first enunciated in *Buckley* that independent expenditures in support of a candidate do not pose corruption dangers, whereas contributions to a candidate do. *See* Federal Election Comm'n v. National Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 509-10 (1985) (White, J., dissenting) (analyzing similarities between expenditures and contributions); *id.* at 519-20 (Marshall, J., dissenting) (announcing that he no longer believes distinction between contributions and independent expenditures has any "constitutional significance"). Of course reformers have attacked this distinction as well because some personnel in the "independent" campaigns for Presidents Reagan and Bush apparently have had close ties to the formal campaigns. *See, e.g.*, Martin Schram, *The Making of Willie Horton*, THE NEW REPUBLIC, May 28, 1990, at 17 (questioning relationship between PAC called Americans for Bush and Bush administration). As Justice White also remarked in *NCPAC*, "The candidate cannot help but know of the extensive efforts 'independently' undertaken on his behalf." *NCPAC*, 470 U.S. at 510 (White, J., dissenting). In *NCPAC*, the Supreme Court upheld an appellate court decision which struck down the federal limit on independent expenditures for presidential candidates accepting federal funds. *Id.*

60. *Austin*, 494 U.S. at 684 (Scalia, J., dissenting).

61. *Id.* at 703 (Kennedy, J., dissenting).

ited from speaking."[62] In fact, there is no such prohibition. Corporations can speak all they want. They can communicate at any time about any subject to all their shareholders and their families. They may even exercise their right of free speech to endorse a candidate for office. Corporations may communicate this endorsement not only to their shareholders but to the public at large through regular press contacts. The *Austin* case merely establishes that corporations cannot generally use their treasuries to finance a political campaign.[63]

Not only may corporations, as corporations, exercise their First Amendment rights, but corporate personnel, like any other citizen, may speak and write whatever they want about current issues or political candidates. They may do so as individuals, or even through corporate PAC's solely funded by voluntary political contributions.

Justice Scalia disagreed with the majority's holding that the corporate structure, licensed by the state and designed to accumulate wealth with limited liability, cannot be used to fund electoral campaigns. Frustrated by this limitation, Justice Scalia incorrectly asserted that a corporation is prohibited from speaking at all. Justice Scalia, himself, fell prey to a "poetic metaphor" of a sort worse than he accuses the court majority of doing: that money equals speech, therefore denial of money equals denial of speech.[64]

Perhaps the clearest way to untangle the distinct, but related, concepts of money and speech is through the work of one commentator who writes that the difference between candidates with abundance of money and those without

> lies not in the "quantity" of speech they produce, much less its quality, but in the size of the audiences they reach. [One] has access to that large indifferent public all politicians want to reach, and [one] does not. . . . Speech should not be confused with access to listeners. It was not speech that was being limited, but the purchase of mass audiences for it.[65]

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62. *Id.* at 681 (Scalia, J., dissenting) (noted by asterisk).

63. *Cf.* THE FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR ORGANIZATIONS 1 (Mar. 1992) (explaining that Federal Election Campaign Act only prohibits direct corporate contributions and that many other avenues exist for corporate participation in election activities).

64. *Austin*, 494 U.S. at 684 (Scalia, J., dissenting). The "poetic metaphor" that Justice Scalia attacks is the shift from narrow quid pro quo individual corruption to the idea of systemic corruption. *Id.* The Justice argues that the majority seems to think that the word "corrosive" is "close enough to 'corruptive' to qualify" as corruption. *Id.*

65. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FED-

If one argues as firmly as Justice Scalia that money really is speech, then one might just as easily argue that we cannot have free speech until we have free money. How can poor people, how can people without wealth, "speak?" Yet, Justice Scalia did not consider this point. Instead, Justice Scalia moved in the opposite direction. After deciding that money is "free speech" and that money is essential for "effective" communication, Justice Scalia concluded that this country's democratic traditions do not allow restrictions on individuals whose "speech may be 'unduly' extensive (because they are rich). . . ."[66] Justice Scalia almost seemed to indicate that speech in the form of money is more important than speech alone. Why else would the Justice assert that a corporation is "prohibited from speaking" when, in fact, it is not prohibited from speaking, but is prohibited from using direct corporate funds in political campaigns? Even after *Austin*, by forming a PAC a corporation may still engage in "speech" far more valuable than that of an ordinary person or typical interest group of moderate means.

Justice Scalia's defense of corporate wealth and his extreme hostility to monetary equality in political dialogue also led the Justice to an erroneous conclusion. Justice Scalia assumed that the majority's desire to have campaigns reflect individual, rather than corporate support meant that the United States is entering an "illiberal free speech" era of "one man, one minute."[67] Here, money spent must "reflect actual public support for the political ideas espoused."[68] Justice Scalia's assumption and assertion are false. The Court majority did not require that the amount spent on the political speech somehow

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ERAL CAMPAIGN FINANCE LAW 55-56 (1988). At least two others have analyzed and attacked the Supreme Court's equating money and speech. *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 304 (1981) (White, J., dissenting) (stating that limits on campaign contributions do not inhibit other means of contributing to campaign); Judge Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 631-32 (1982) (asserting that political spending and political speech are not subject to same constitutional protections and any analysis that equates them as such is "perverse").

66. *Austin*, 494 U.S. at 695 (Scalia, J., dissenting). The Supreme Court has already noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." Buckley v. Valeo, 424 U.S. 1, 19 (1976). However, Justice Kennedy, like Justice Scalia, later concluded that society does not need greater regulation of campaign financing. *See generally Austin*, 494 U.S. at 695-713 (Kennedy, J., dissenting) (arguing that wealthy individuals and corporations have same rights to political speech as others).

67. *Austin*, 494 U.S. at 684 (Scalia, J., dissenting).

68. *Id.*

correspond to the extent of public support for that speech. Before anyone else besides Justice Scalia chooses to believe that America has entered the "one man, one minute" philosophy of financing campaigns, it would be helpful to consider basic income and wealth data.

In 1988, the top 1% of American families earned 2.5 times as much income as the bottom 20% of all families.[69] The top 20% earned 44% of all income in 1988, up from 41.6% in 1980; the bottom 20% earned only 4.6% of all family income, down from 5.1% in 1980.[70] Family wealth, which is more relevant to the ability to "speak" in a campaign, is even more skewed. By 1983, the top .5% of American households held 26.9% of family net worth. This is more than fifty times the amount of wealth one would expect if family wealth were roughly equal and hundreds of times more than the family wealth held by the bottom half of American families.[71] The top 10% controlled approximately 68%, or more than 2/3 of all family wealth. The disparity in family wealth is also growing.[72] These data hardly indicate income equality, income leveling, or Justice Scalia's dreaded world of "one man, one minute."

Is this top .5%, or top 10%, representative of American public opinion and voting behavior? In important ways it is not. Data accumulated by the National Election Studies of the University of Michigan for the 1988 presidential campaign indicate that white voters with annual family incomes over $75,000, the top 8% of the electorate, gave Michael Dukakis only 23% of their votes, or less than half the percentage the rest of the population gave him.[73] Data for the 1980 and 1984 presidential elections indicate that President Reagan overwhelmingly made his best showing among the wealthiest voters. If political speech, or political money, were calibrated to the degree of public opinion that supports it, we would have a very different campaign system from the one currently allowed by the Supreme Court. In fact, as long as America has such a lop-sided balance of income

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69. *See* KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR 13 (1990) (charting data furnished by Federal Reserve Board and Census Bureau).

70. *Id.*

71. *Id.* at app. B.

72. *See* Robert Pear, *Rich Get Richer in 80's*, N.Y. TIMES, Jan. 11, 1991, at 1 (describing income and wealth trends in 1980's). The Census Bureau reported that wealth increased for the most affluent 20% of all households by 14% from 1984 to 1988, while households in the bottom 80% remained roughly the same. *Id.*

73. PAUL ABRAHAMSON ET AL., CHANGE AND CONTINUITY IN THE 1988 ELECTIONS 125 (1990).

and wealth, it is impossible to say that campaign financing, whether contributions or expenditures, reflects popular support.

Perhaps Justice Scalia is opposed to what the Justice sees as an "illiberal free speech" era of "one man, one minute" in part because the Justice believes that such an era would more greatly advantage incumbents.[74] In his dissent, Justice Scalia suspects that the Michigan Legislature's true motive in passing this law was to "assure 'balanced' presentation because it knows that with evenly balanced speech incumbent officeholders generally win."[75] However, this logic ignores the fact that wealthy individuals may still spend as they wish to support candidates. In addition, empirical evidence shows that Justice Scalia's statement is misleading.

Analysis of all United States congressional contests in 1986, 1988, and 1990 indicates that, in "balanced" spending contests, incumbent officeholders generally win, but are much more likely to be defeated than in the typical congressional race.[76] Assuming that by "balanced speech" Justice Scalia means roughly equal amounts of money spent by both challenger and incumbent, those contests in which the challenger spent between 90 and 110% of what the incumbent spent probably qualify as "balanced speech" contests.[77] In 1986, House incumbents on average raised $381,000 and spent an average of $310,000.[78] Challengers on average raised only $128,000 and spent $118,000.[79] Only 9 of the 391 races in which a House incumbent sought re-election qualified as balanced contests. Overall, 98% of the

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74. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 794-95 (2d ed. 1988) (introducing philosophies behind content based regulations of free speech); *id.* § 13-29, at 745-48 (critiquing corporate contribution limitations).

75. *Austin*, 494 U.S. at 692-93 (Scalia, J., dissenting).

76. *See* Common Cause, Press Release (Mar. 26, 1991) (on file with *St. Mary's Law Journal*) (analyzing House incumbent-challenger financial data for 1990 election); Common Cause, Press Release (Feb. 28, 1991) (on file with *St. Mary's Law Journal*) (analyzing Senate incumbent-challenger financial statistics from January 1, 1985 through December 31, 1990); Common Cause, Press Release (Mar. 28, 1989) (on file with *St. Mary's Law Journal*) (quoting House election finance statistics from January 1, 1987 through December 31, 1988); Common Cause, Press Release (Apr. 7, 1987) (on file with *St. Mary's Law Journal*) (comparing House financial data for 1986 election).

77. In truth, incumbents have perquisites of office like the franking privilege and a paid staff that still give them financial advantages in a contest where challenger and incumbent spent roughly equal amounts of money. *See* Erik H. Corwin, Recent Development, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 572-73 (1991) (stating that congressional perquisites worth $1 million for two year term).

78. Common Cause, Press Release (Apr. 7, 1987) (on file with *St. Mary's Law Journal*).

79. *Id.*

391 incumbents were re-elected.[80] But of those nine races in which the spending was roughly equal, three incumbents were defeated.[81] A 67% re-election rate is significantly lower than the nearly 99% re-election rate of those 382 contests in which the spending was not balanced.

However, had all races been roughly balanced monetarily, it is uncertain whether the re-election rate would drop as low as 67%. Money to challengers is both a cause and an effect of the perceived weakness of the incumbent. Also, the mandated ceiling level established to balance contests could determine the effectiveness of the ceiling. Most people believe that the higher the equal spending ceiling the greater the advantage to the challenger. This is because, other things being equal, a challenger begins a race with less name recognition than an incumbent. To be effective, however, the ceiling must represent an amount of money the challenger can either plausibly raise or the government can guarantee.[82]

For Senate contests in 1986, twenty-three of twenty-eight incumbents won re-election.[83] Incumbents on average raised $3,409,000 in comparison to an average of $1,799,000 raised by challengers.[84] Of the 3 races in which challengers raised at least 90% of the incumbent's funds, 2 of the 3 challengers were successful.[85] A re-election rate of 33% is significantly lower than the more than 90% rate for those 20 senatorial incumbents who raised more than 110% of their challengers' funds.

The same phenomenon occurred in 1988. Overall, 402 of 408 House incumbents won, for a 98.5% rate.[86] The financial disparity between incumbents and challengers widened, with incumbents on average raising $427,117 and challengers only $118,654.[87] Only eleven

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80. *Id.*

81. *Id.*

82. *See generally* Gary C. Jacobson, *Enough is Too Much: Money and Competition in House Elections, in* ELECTIONS IN AMERICA 173 *passim* (Kay Schlozman ed., 1987) (discussing tension between goals of limiting private campaign contributions and vigorous electoral competition). Jacobson believes that the amount a challenger spends is more important than the amount an incumbent spends because a challenger must fight for name recognition and credibility. *Id.*

83. Common Cause, Press Release (Feb. 13, 1987) (on file with *St. Mary's Law Journal*).

84. *Id.*

85. *Id.*

86. Common Cause, Press Release (Mar. 28, 1989) (on file with *St. Mary's Law Journal*).

87. *Id.*

contests had roughly equal expenditures.[88] Of these eleven races, incumbents were defeated in two, which again is a noticeably higher rate of defeat.[89]

In the 1988 Senate contests, twenty-three of twenty-seven incumbents were re-elected, with incumbents on average again raising double the amount of challengers.[90] In seven races, challengers were able to spend roughly the same amount as the incumbent.[91] In these 7 races, challengers were successful in 3 races, for a 43% success rate.[92] Incumbents not faced with roughly equal spending by opponents won re-election by a 95% rate.[93]

The results in 1990 were not as clear because 1990 was in some ways a more volatile election year, with the budget crisis of October and the escalation of the Gulf War catalyzing voter dissatisfaction. While the spending gap between incumbents and challengers in both the Senate and House continued to widen, some upsets occurred among challengers spending far less than the incumbents. In the Senate, only four challengers were able to match up to 90% of the funds spent by the 32 incumbents seeking re-election, and all lost.[94] Only one incumbent, Rudy Boschwitz, a Republican from Minnesota, was defeated.[95] He lost to a challenger who spent only 18.7% of the amount spent by Boschwitz.[96]

In the House, 391 of 406 incumbents were re-elected, indicating that the re-election rate "dropped" to 96%.[97] The gap between challenger and incumbent spending widened, however, to an average of six and one-half to one![98] Only 7 House races had challengers spending between 90 and 110% of the incumbents' funds.[99] Of these, one incumbent was defeated, a 14.3% success rate overall.[100] Eight chal-

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88. *Id.*
89. *Id.*
90. Common Cause, Press Release (Mar. 2, 1989) (on file with *St. Mary's Law Journal*).
91. *Id.*
92. *Id.*
93. *Id.*
94. Common Cause, Press Release (Feb. 28, 1991) (on file with *St. Mary's Law Journal*).
95. *Id.*
96. *Id.* Senator Bill Bradley, a Democrat from New Jersey, was nearly beaten by a virtual unknown who spent only 8.5% as much money, $1 million as compared to Bradley's $12.5 million. *Id.*
97. Common Cause, Press Release (Mar. 26, 1991) (on file with *St. Mary' Law Journal*).
98. *Id.*
99. *Id.*
100. *Id.* One challenger in Virginia's Eighth District spent 89% of the incumbent's

lengers spent more than 110% of the incumbents' amount, and one of these was successful.[101] Twelve other challengers, however, were successful even though they spent less than 89% of the incumbents' amounts.[102] In a half dozen more races, challengers nearly won even though they were outspent by at least two and one-half to one.[103] The 1990 results indicate the greater volatility of this election. Money seemed less closely correlated with success than in 1986 and 1988. Nonetheless, in 1990, as in the two previous congressional elections, being able to match incumbent spending increased one's likelihood of winning.

Although empirically correct, Justice Scalia's claim that in "evenly balanced speech, incumbent officeholders generally win" is misleading. Incumbents do generally win, but they stand a greater chance of being defeated in evenly balanced races.

The majority in *Austin* did respond to certain aspects of Justice Scalia's dissent. However, the majority did not focus on the misleading aspects of the Justice Scalia's argument or the use of "Orwellian" metaphors.

V. JUSTICE KENNEDY'S DISSENT

Justice Kennedy, joined by Justices O'Connor and Scalia, wrote a less critical dissent in *Austin*, but made many of the same points as Justice Scalia. Like Justice Scalia, Justice Kennedy maintained that the law "decrees it a crime for a non-profit corporate speaker to endorse or oppose candidates for Michigan public office."[104] Justice Brennan responded in a concurring opinion that non-profit corporations which meet the three criteria set out in *MCFL* may indeed spend direct corporate treasury funds on candidates. However, the non-profit corporation: (1) must be formed to promote political ideas, not business activities, (2) must have no shareholders with an economic disincentive to disassociate from the corporation should they disagree with the political activity, and (3) cannot have been established by a

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amount and won. *Id.* If this race is included in the "balanced" spending contests, 2 of the 8 challengers, 25%, succeeded. *Id.*

101. Common Cause, Press Release (Mar. 26, 1991) (on file with *St. Mary's Law Journal*).

102. *Id.*

103. *Id.*

104. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting).

business corporation or labor union or accept contributions from these entities.[105]

A more important point to make in response to Justice Kennedy's contention is that a non-profit, and a for-profit "corporate speaker," can endorse or oppose candidates for public office even in the wake of the *Austin* decision. They just cannot, as noted earlier, spend *direct* corporate treasury funds, other than a minimal amount, in political campaigns. Thus, Justice Kennedy is simply incorrect in stating that the Michigan Act "prohibits corporations from speaking on a particular subject, the subject of candidate elections."[106] Corporations *can* speak on this subject. Justices Kennedy and O'Connor, like Justice Scalia, can only disagree with this proposition by accepting the "poetic metaphor" that money is more speech than speech itself.[107] By accepting this contention, the Justices simultaneously denigrate the money and speech rights of individual citizens and PACs. The Justices are also devaluing the political rights that the rest of society, in the non-corporate form, must use.

Justice Kennedy stated that *Austin* 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."[108] Yet, bribery and theft laws dictate that the source of funds is relevant to a candidate's ability to use the funds.[109] The Supreme Court's recent distinction between "expending" $1 million on a candidate and "contributing" $1 million to a candidate indeed finds the source of a speaker's funds relevant to the speaker's ability to use the money. Since the first bribery law and the first campaign finance statute, society has considered the source of a speaker's funds relevant to that speaker's right to use the funds. Certainly, no person or entity may rob a bank to further free speech rights, even though

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105. *Id.* at 672 (Brennan, J., concurring).

106. *Id.* at 699 (Kennedy, J., dissenting).

107. *Id.* at 706 (Kennedy, J., dissenting). Justice Kennedy stated that the fact that "[t]he speech suppressed in this case was spoken by the Michigan Chamber of Commerce, and not a man or woman standing on a soapbox, detracts not a scintilla from its validity, its persuasiveness, or its contribution to the political dialogue." *Id.* However, the Michigan Chamber can stand on a soapbox and speak. By fighting restrictions on corporate political contributions, the Chamber indicates that campaign contributions are the most effective political tool. The Chamber does not want to have to use less effective tactics available to the rest of society, such as standing on a soapbox.

108. *Austin*, 494 U.S. at 707 (Kennedy, J., dissenting).

109. 18 U.S.C.A. § 201(b) (West Supp. 1992) (prohibiting bribery of public officials).

this may sometimes seem to be the best way to exercise those rights. The courts will require the party to give back the "speech." Thus, even prior to *Austin*, the source of funding has been examined and has been found relevant.

Finally, Justice Kennedy stated that "PAC's suffer from a poor public image," but if a corporation could spend directly on campaigns, rather than merely controlling and directing the PAC, the public would grant them more "credibility" and "less distrust."[110] However, Justice Kennedy failed to offer empirical evidence for this conclusion.

VI. THE USE AND ABUSE OF FOUNDING AND LEGAL HISTORY BY BOTH JUSTICE SCALIA AND JUSTICE KENNEDY

Crucial to the dissents of Justices Scalia and Kennedy are claims that *Austin* is (1) "for the first time since Justice Holmes left the bench, a direct restriction upon speech,"[111] (2) the "most severe restriction upon political speech ever sanctioned by this Court,"[112] and (3) inconsistent with the intent of the Framers, the First Amendment, and de Tocqueville's observations on the role of voluntary associations in American democracy. Analysis of these claims indicates that both Justices are engaged in hyperbole and that neither their analogies to Holmes-era cases[113] nor their appeal to the intent of the Framers and de Tocqueville are accurate.

In Part II of Justice Scalia's dissent, the Justice passes quickly from arguing that the *Austin* holding is a restriction upon speech content to showing how such a restriction is comparable to the holdings and restrictions in *Schenck v. United States*,[114] *Abrams v. United States*,[115]

110. *Austin*, 494 U.S. at 708 (Kennedy, J., dissenting).

111. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 689 (1990) (Scalia, J., dissenting).

112. *Id.* at 713 (Kennedy, J., dissenting).

113. *Id.* at 689 (Scalia, J., dissenting).

114. 249 U.S. 47 (1919). In *Schenck*, the defendant was convicted of criminal conspiracy as defined by the Espionage Act because he mailed circulars out to draftees urging them to resist conscription. *Id.* at 48-49. Despite no evidence that his speech was "false" or that his action disrupted conscription, he received a 20 year sentence that the Supreme Court upheld. *Id.* at 53.

115. 250 U.S. 616 (1919). In *Abrams*, the named defendant and several other individuals were charged with four violations of the 1918 Espionage Act when they distributed 5000 circulars that urged people to cease assisting the war effort. *Id.* at 621-22. The four charges were that the defendants (1) used "scurrilous and abusive language" to characterize the American

Gitlow v. New York,[116] and *Whitney v. California*.[117] There are several problems with this argument. First, the *Austin* holding does not represent a restriction upon the content of speech. It is merely a regulation upon how corporations may finance certain types of speech. The holding does not preclude a company from articulating its political views. Rather, the holding merely defines how corporations may finance these views by precluding disbursement from a company's general treasury. More specifically, corporations can speak without restriction, but if they want to spend money to support their political views, corporations need only set up a PAC or separate account. Further, *Austin*, and the Michigan Act it upholds,[118] do not prevent officers or individuals within a corporation from engaging in political speech. The Michigan Act does not impose criminal penalties upon these individuals for speaking their views, although corporate violation of the law is a felony.

The Holmes-era cases that Justice Scalia refers to are not proper analogies to the *Austin* holding. The Holmes-era cases clearly represent restrictions upon the content of speech via the "clear and present

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government, (2) brought the government disrespect, (3) intended to encourage war resistance, and (4) advocated curtailment of the production of war materials. *Id.* at 617. Abrams and his collaborators' convictions on all four counts were upheld despite free speech concerns. *Id.* at 624.

116. 268 U.S. 652 (1925). In *Gitlow*, the defendant was convicted of violating a New York criminal anarchy statute that fined and imprisoned those who advocated the overthrow of the United States government. *Id.* at 654. Gitlow violated the statute by publishing the *Left Wing Manifesto*. *Id.* at 655-59. The New York statute was clearly meant to control the content of Gitlow's speech. No evidence was needed to show that people acted upon the speech to overthrow the United States government. *Id.* at 656. Also, the Supreme Court indicated in dicta that while the Fourteenth Amendment does incorporate First Amendment free speech restrictions towards the states, such protection does not extend to speech that advocates the overthrow of the United States government. *Gitlow*, 268 U.S. at 666-67. Moreover, the Supreme Court concluded that legislation behind this law was aimed at preventing a "single revolutionary spark" of speech from kindling into a destructive fire. *Id.* at 669. For his offense, Gitlow was fined and received a prison sentence. *Id.* at 672.

117. 274 U.S. 357 (1927). In *Whitney*, the California Criminal Anti-Syndicalism Act provided for a fine or imprisonment for promoting "any doctrine or precept advocating, teaching, or aiding and abetting . . . sabotage or other unlawful acts of force or violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change." *Id.* at 359-60. Under the Act, it was also a crime to assist or join any group that advocated, taught, or abetted in criminal syndicalism. *Id.* at 360. Whitney was convicted of violating this law because she was a member of the Communist Labor Party and attended a meeting that adopted a program similar in content to that found in Gitlow's *Left Wing Manifesto*. *Id.* at 363-65. She too received a harsh prison term, which the Supreme Court upheld. *Whitney*, 274 U.S. at 372.

118. MICH. COMP. LAWS § 169.254(1) (1979).

danger" test. Also, the defendants in the Holmes-era cases all faced severe criminal sanctions for their views.[119] The Supreme Court upheld the constitutionality of these prior prohibitions on free speech. Consequently, it is difficult to understand why Justices Kennedy, Scalia, and O'Connor considered the Michigan Act "the most severe restriction on political speech ever sanctioned by this Court."

Thus, Justice Scalia's appeal to these prior First Amendment cases is not appropriate. The First Amendment cases involved individual speech and not corporate money. The criminal sanctions on individuals were severe and the restrictions limited the very content of their speech. Both Justices Kennedy and Scalia appear ready to place regulation of corporate money on the same plane as regulation of individual political speech. This is in opposition to an existing trend giving federal and state governments more leeway to regulate corporate money and speech as compared to individual political speech.[120] Additionally, when Justice Kennedy declares that *Austin* was the "most severe restriction upon political speech ever sanctioned by this Court,"[121] he too ignores the factual differences between the applicable law in *Austin* and the laws behind *Schenck* and its progeny.

Even if one overlooks these cases, the Supreme Court's history of restricting speech content has been uneven and inconsistent at best.

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119. For instance, § 3 of Title I of the Espionage Act of 1917 was the basis of the criminal sanctions imposed upon the defendants in *Schenck* and *Abrams*. *Abrams*, 250 U.S. at 617; *Schenck*, 249 U.S. at 48. This Act provided that:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with the intent to interfere with the operation or success of military or naval forces . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Espionage Act of 1917, ch. 33, tit. 1, § 3, 40 Stat. 217, 219 (1917) (repealed). This Act also provided for conspiracy to commit the above and other related activities. *Id.* *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 130-49 (Jaime Kalven ed., 1988) (commenting on Holmes-era cases as they contribute to development of freedom of speech in America).

120. *See The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 217 (1990) (explaining that Supreme Court has traditionally felt more comfortable placing restrictions on corporations because corporations are state-made inventions); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3(5), at 893-895 (2d ed. 1988) (discussing status of commercial speech and its First Amendment protections); *cf.* Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico, 478 U.S. 328, 348 (1986) (upholding regulation on casino advertisements even though arguably restriction on commercial free speech rights); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 583-606 (1980) (Rehnquist, J., dissenting) (criticizing majority decision which invalidated state ban on promotional advertising which encouraged electricity use imposed during energy crisis).

121. *Austin*, 494 U.S. at 713 (Kennedy, J., dissenting).

In fact, the Court has upheld numerous individual speech restrictions based on content far more restrictive than the funding limitation imposed in *Austin*.[122] It was not until *Brandenburg v. Ohio*[123] that many criminal advocacy laws were disallowed and restrictions upon mere content overthrown. However, even as recently as the flag-burning decisions,[124] a badly split Supreme Court almost upheld restrictions on speech content or, more accurately, symbolic speech-related conduct. Thus, Justice Scalia's and Justice Kennedy's claims that the *Austin* holding is an unprecedented restriction upon the content of speech are somewhat strained.

A second argument that Justices Scalia and Kennedy employed to attack the *Austin* majority opinion is that the majority holding is aimed at rooting out a "New Corruption," a campaign activity inconsistent with the intent of the Framers.[125] For example, in section II of his dissent, Justice Scalia stated:

> I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a desirable objective . . . . Those Founders designed, of course, a system in which popular ideas would ultimately prevail . . . . I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did, they would have turned them in the opposite direction.[126]

Additionally, both Justice Scalia and Justice Kennedy appeal to de Tocqueville and his discussion of voluntary associations.[127] They link

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122. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding conviction of draft card burners despite argument that act was "symbolic speech" protesting Vietnam War); Dennis v. United States, 341 U.S. 494, 508 (1951) (affirming prohibition on Communist party's speech promoting overthrow of United States government on basis of "clear and present danger" test); Debs v. United States, 249 U.S. 211, 216 (1919) (upholding censoring presidential candidate who opposed United States involvement in World War I).

123. 395 U.S. 444 (1969). In *Brandenburg*, the Supreme Court contemplated the validity of an Ohio statute which imposed criminal sanctions upon persons for speaking about using force and violating the law, even when the advocacy was not directed at inciting immediate action. *Id.* at 449. Since no immediate danger was threatened by such speech, the Supreme Court held that the statute was violative of the First and Fourteenth Amendments. *Id.*

124. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

125. *Austin*, 494 U.S. at 693 (Scalia, J., dissenting); *id.* at 702-06 (Kennedy, J., dissenting).

126. *Id.* at 693 (Scalia, J., dissenting).

127. *Id.* at 693-94 (Scalia, J., dissenting); *id.* at 710-11 (Kennedy, J., dissenting).

these associations to corporations, democracy, and the expression of free ideas.[128] From there, the Justices reason that a restriction upon the means of financing corporate speech is a threat to the content of speech.[129]

Justice Scalia's willingness to second guess the wisdom of a state legislature and appeal to the intent of the Framers is clearly at odds with what some political scientists claim to be his federalism.[130] More importantly, Justice Scalia's and Justice Kennedy's respective appeals to the Framers and de Tocqueville to oppose a funding scheme for corporate speech are a selective misinterpretation of the Framers' concerns and de Tocqueville's theory of voluntary, political organizations.

Justice Scalia first defines the aim of the Michigan Act as rooting out "New Corruption," which the Justice defines as the suppression of unpopular speech through the calibration of speech to public support.[131] Yet, the Michigan Act is not aimed at suppressing unpopular or popular speech. If it were, Justice Scalia could rightly enlist James Madison and Thomas Jefferson to his defense.[132] However, overlooking Justice Scalia's definition of corruption and his construction of the Michigan Act, one should ask whether the Framers really would oppose a restriction upon corporate funding of speech to preserve the marketplace of ideas.

One way to approach this question is to return to the idea of corruption that Justice Scalia raises. There is no doubt that the Framers were concerned with systematic corruption. American political thought is characterized, in part, by an on-going preoccupation with eliminating political corruption. Such a concern has been well noted in historical scholarship[133] and is also reflected in the recent "republi-

128. *Id.* at 710-11 (Kennedy, J., dissenting).

129. *Austin*, 494 U.S. at 710-11 (Kennedy, J., dissenting).

130. *See* Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 21 (1990) (explaining that Justice Scalia believes that national government should respect choices of state and local officials elected by their respective constituencies). *But see id.* at 24 (stating that Justice Scalia has not indicated support for former Attorney General Edwin Meese III's historical approach of interpreting Constitution based on Constitution's original purposes).

131. *Austin*, 494 U.S. at 693 (Scalia, J., dissenting).

132. *Cf.* LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 19 (1963) (criticizing Jefferson's commitment to free speech and press despite his otherwise pristine reputation as ardent defender of these rights).

133. *See, e.g.*, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLIT-

can revival" that has been the subject of numerous law review articles and legal commentary.[134]

Among the characteristics of this fear of corruption is a concern with the evils that attend excesses of wealth and the power that could be wielded by the wealthy.[135] The concern of many of the Framers, then, was not to give free rein to money but to find ways to place limits upon it and other excessive and self-interested desires that could be politically destructive to public virtue on an institutional basis.[136]

For example, Justice Scalia was correct to cite Jefferson as defending free speech, the free expression of ideas, and the importance of a Bill of Rights to protect citizens' liberties. In a 1787 letter to Madison, Jefferson criticized the proposed new United States Constitution because of the "omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, [and] freedom of the press. . . ."[137] However, Jefferson was not disposed to supporting

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ICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION 506-53 (1975) (tracing historical concerns about political corruption); J.G.A. Pocock, *Between Gog and Magog: Republicanism and Ideologia Americana*, 48 J. HISTORY OF IDEAS 325, 325-46 (1987) (discussing republican nature of American political thought); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-87 107-08 (1969) (noting that excesses in wealth and luxury also led to moral corruption which in turn sparked social revolution).

134. *E.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1057-70 (1984) (tracing historical development of republicanism and this country's "legal past"); Richard H. Fallon, Jr., *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1695 (1989) (stating that constitutional scholarship is experiencing a "republican revival"); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 57 (1987) (discussing republican thought as early concept); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986) (discussing republican tradition); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (recognizing that republican revival is now rooted in legal scholarship).

135. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION 506-07 (1975) (noting that familiar concerns of corruption by moneyed interests dates back substantially prior to American Revolution); Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA L. REV. 411, 416-17 (1989) (discussing commentator's analysis of market structure or political liberty).

136. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 79 (1990) (describing political plan to have government branch of poor check government branch of rich); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION 527 (1975) (finding that American thought is shaped by struggle between search for virtue and temptations of corruption).

137. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* THOMAS JEFFERSON: WRITINGS, at 915-16 (Merrill D. Peterson ed., 1984); *cf.* Letter from Thomas Jeffer-

the interests of wealthy and powerful individuals or corporations. In a letter to John Adams, Jefferson described the Virginia landed oligarchy as a threat to the public affairs of the state.[138] Elsewhere, throughout his pre-Constitution writings, Jefferson indicated a preference for the virtuous life of rural self-sufficient farmers as compared to the corrupting interests of urban manufacturers.

In a letter to George Washington, Jefferson stated that "the wealth acquired by speculation and plunder is fugacious in its nature and fills society with the spirit of gambling."[139] In the same letter Jefferson described how manufacturing interests produce not real wealth, happiness, or good morality, but the contrary.[140] Additionally, in his famous Query XIX, Jefferson stated that "[t]hose who labour in the earth are the chosen people" and that "[m]anufacture must therefore be resorted to of necessity and not of choice."[141] Here, as well as elsewhere in his writings, Jefferson displayed a reluctance to let the excesses of wealth take their course. Among other things, Jefferson feared how the urban wealthy, or other factions, would corrupt government through money and other resources. Jefferson stated:

> The people cannot assemble themselves; their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests.[142]

Jefferson, then, was fearful of wealthy interests dissuading legislatures from adhering to the public good. His solution to this threat was to place his faith in the virtues of the common man. Yet, his solution to

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son to Alexander Donald (Feb. 7, 1788) *in* THOMAS JEFFERSON: WRITINGS, at 919 (Merrill D. Peterson ed., 1984) (stating again that constitutional declaration of rights was desired).

138. *See* GARRETT W. SHELDON, THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON 80 (1991) (describing Jefferson's distrust of wealthy rulers who acquired status by birth, fortune, and fame instead of wisdom and virtue).

139. Letter from Thomas Jefferson to George Washington (Aug. 14, 1987) *in* 12 THE PAPERS OF THOMAS JEFFERSON, 1787-88, at 38 (Julian P. Boyd ed., 1955).

140. *Id.*

141. *Query XIX*, *in* THOMAS JEFFERSON: WRITINGS, at 290 (Merrill D. Peterson ed., 1984).

142. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THOMAS JEFFERSON: WRITINGS, at 963 (Merril D. Peterson ed., 1984); *cf.* Letter from Thomas Jefferson to John Adams (Feb. 18, 1796) *in* THOMAS JEFFERSON: WRITINGS, at 1034 (Merrill D. Peterson ed., 1984) (expressing similar concerns about corruptibility of legislatures unless entrusted to "good morals" of people).

breaking political control by the wealthy also included land redistribution, such as the repeal of entail and primogeniture.

Jefferson argued for moderate redistributions of wealth to promote political participation by all groups in society. Jefferson also favored placing limits upon the power of any one class to threaten public virtue. Apparently, Jefferson would not have taken a laissez-faire attitude towards the political power of the wealthy as Justice Scalia contends. Instead, Jefferson was enough of a republican to endorse restricting the wealthy's power in order to protect the public good.

Even more than Jefferson, Madison demonstrated a clear concern for institutional corruption. Madison neglected to contemplate so fully as Jefferson how economic and political power relate.[143] When Madison did discuss this issue, he too feared the corrupting influence that manufacturing interests and the wealthy could have upon the polity.

Federalist Nos. 10 and *51*, which the dissents incorrectly apply, are clear statements about the threat of corruption and the evils that flow from the pursuit of private interests. According to Madison, the primary danger to a republic comes from factions, "majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the whole community."[144] Among those defined as factions, Madison listed landed, manufacturing, mercantile, and moneyed interests.[145]

Interests of the wealthy were considered a threat to the public interest and the poor. For example, Madison stated that "there are various ways the rich oppress the poor; in which property may oppress liberty . . . the poor should have a defense against this danger."[146] Elsewhere he contended that

> [a] government operating by corrupt influence; substituting the motive of private interest in place of public duty; converting its pecuniary dispensations into bounties to favorites, or bribes to opponents; accommodating its measures to the avidity of a part of the nation instead of the

143. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 144 (1990) (stating that Madison's failure to understand relationship between economic and political power was embodied in 1787 Constitution).

144. THE FEDERALIST No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

145. *Id.* at 59.

146. JAMES MADISON, THE COMPLETE MADISON: HIS BASIC WRITINGS 37 (Saul K. Padover ed., 1953).

> benefit of the whole . . . may support a real domination of the few, under an apparent liberty of the many. Such a government, wherever to be found, is an imposter.[147]

Further, Madison argued that

> the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society . . . . A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations and divide them into different classes . . . . The regulation of these various and interfering interests form the principal task of modern legislation.[148]

Thus, factions are a clear threat to the public good and the rights of the majority. Some type of limits upon these factions is necessary. However, such factions arise from the natural differences in men and they cannot be suppressed without damaging liberty. Instead, the goal is to control the effects of the factions by having them compete against each other.[149]

Madison's concern with corruption and the destructive potential of private interests would not lead him to support restrictions upon the content of speech. However, Madison's writings at least suggest that he would not have been unequivocally opposed to some minimal restrictions on private corporate groups seeking to influence public affairs. In effect, containing the influence of these factions would be well within the spirit, if not the expressed intent, of Madison's constitutionalism.

The dissenting Justices' appeals to de Tocqueville are similarly disingenuous. First, de Tocqueville agreed with the Framers that excesses of wealth can be a threat to popular government because the wealthy bourgeoisie would tend to pursue private interests and abuse their economic and political power.[150] In a bourgeois society, excesses of wealth destroy public life by atomizing and isolating people.[151] Should wealth control or rule in America, popular

147. *Id.* at 36.

148. *Id.* at 52.

149. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

150. ROGER BOESCHE, THE STRANGE LIBERALISM OF ALEXIS DE TOCQUEVILLE 85-87 (1987) (describing de Tocqueville's concern that wealth would cause individuals to abandon public pursuits).

151. *Id.* at 87-88.

participation, which de Tocqueville described as important to the maintenance of a public life, would be threatened.[152]

Additionally, de Tocqueville states that "private citizens, by combining together, may constitute great bodies of wealth, influence, and strength corresponding to the persons of an aristocracy."[153] In *Democracy in America*, the Frenchman even describes the new manufacturers in negative terms, contending their aim was to "use" citizens.[154] To check these early nineteenth century manufacturers, who are clearly different from the large corporations of the late twentieth century,[155] de Tocqueville advocated the use of public or government institutions.[156]

Justices Scalia's and Kennedy's characterizations of de Tocqueville's voluntary associations as akin to modern corporations are not accurate. De Tocqueville's associations were not private groups serving private interests. Instead, de Tocqueville's associations pursued ideas for the public good and serve public ends.[157] For example, in describing the public nature of these groups, de Tocqueville included towns and cities as examples of political associations.[158] Their activities included establishing hospitals, prisons, and schools. The associations also served other activities that furthered the public good

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152. *Id.* at 85-87.

153. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 387 (Henry Reeve trans., Shocken 1st ed. 1961) (1974).

154. *Id.* at 193.

155. Among the ways modern corporations differ from early 19th century counterparts is that modern corporations are incorporated in one state but operate in one or more states. RALPH T. BYRNS & GERALD W. STONE, ECONOMICS 95 (2d ed. 1984). Modern corporations have assets in the millions and billions of dollars and, in some cases, employ thousands of people. *Id.* They have ownership that is distinct from managerial control of the company, and they have other legal privileges and rights that were not contemplated in the early 19th century. *Id.*

156. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 130-31 (Henry Reeve trans., Schocken 1st ed. 1961) (1974) (explaining that though government may play part in protecting against power of big business, government should not usurp place of private companies entirely).

157. *See* ROGER BOESCHE, THE STRANGE LIBERALISM OF ALEXIS DE TOCQUEVILLE 128 (1987) (arguing that associations serve public needs in addition to private interests); EDWARD PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS 59-62 (1978) (describing de Tocqueville's influence upon voluntary association and types of public purposes those associations served).

158. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 216 (Henry Reeve trans., Schocken 1st ed. 1961) (1974).

in the nineteenth century.[159] Thus, de Tocqueville's discussion of interest groups was not an unequivocal defense, but a critique of pluralist interest group politics. While these associations could help promote participation and protection of interests, these groups were primarily publicly minded and dedicated to furthering societal goals. However, even these groups needed to be regulated. De Tocqueville anticipated occasions when these associations could threaten popular government. Consequently, de Tocqueville required checks upon the groups via popular suffrage.[160]

Contrary to Justices Scalia and Kennedy, de Tocqueville praised voluntary political associations. However, the French philosopher disdained private groups or civil associations similar to large corporations that seek to further their own interests through groups such as local chambers of commerce.[161] These groups are more like Madison's benign factions, which in Madison's mind did not threaten the public good by pursuing private interests. However, while describing the composition of political associations, de Tocqueville depicted the private groups as "private individuals" and "citizens,"[162] not corporations. Large commercial interests, as they exist today, did not exist in 1840[163] and certainly were not considered "citizens" in de Tocqueville's time. Legal recognition of corporations as citizens did not occur until much later.[164] Thus, de Tocqueville's voluntary association label does not apply to the types of groups that the Michigan Act has in mind.

However, even if it did, de Tocqueville was sufficiently aware of the destructive threat of wealthy manufacturers and private interests to republican, popular government. Therefore, de Tocqueville might also endorse some restrictions upon the means used to finance political

159. *See id.* at 217 (noting that associations "promote public order, commerce, industry, and morality").

160. *See id.* at 224 (stressing that universal suffrage mitigates excesses of political associations).

161. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 128 (Henry Reeve trans., Schocken 1st ed. 1961) (1974) (distinguishing public nature of political associations from private nature of civil associations).

162. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 217-18 (Henry Reeve trans., Schocken 1st ed. 1961) (1974).

163. *See* EDWARD PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY AND POLITICS 113-21 (1978) (outlining status of early 1800 industries).

164. *See* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (noting counsel's argument that corporations qualify as persons under 14th Amendment).

speech.[165] It is strange, then, that both Justices Scalia and Kennedy quote de Tocqueville in support of their view that business and non-profit corporations should be allowed to finance political campaigns from corporate treasuries. Indeed, why the Justices would use de Tocqueville in support of their arguments is not entirely clear.

A final, but important, illustration of Justice Scalia's unique use of legal precedent is in the group the Justice attempts to protect against tyranny. In his *Austin* dissent Justice Scalia states that eliminating the voice of powerful associations impoverishes public debate.[166] Again, the holding in *Austin* does not threaten public debate because it does not eliminate corporate speech. No evidence suggests that placing limits upon the voice of these powerful associations would eliminate the corporate voice as Justice Scalia claims. The argument Justice Scalia propounds serves to protect the wealthy and well-financed organization against the majority in society. In many ways, the *Austin* decision serves to protect wealthy corporations and other powerful constituencies that cannot be considered "discrete and insular minorities" or alienated from the political process.[167]

While in this instance Justice Scalia is unwilling to defer to the electorally accountable branches to make policy, on other occasions Justice Scalia has no problem deferring. For example, in *Employment Division, Department of Human Resources v. Smith*,[168] Justice Scalia explicitly states that it is the responsibility of the political process and legislatures to protect religious minorities against majoritarian excess.[169] Thus, while Justice Scalia is willing to defer to the political process to protect Native Americans, he is not willing to do so for corporations. Instead, the Justice is quite content to raise corpora-

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165. John Stuart Mill, *Introduction* to 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA xx, xiv (Henry Reeve trans., Schocken 1st ed 1961) (1974) (indicating that de Tocqueville correctly noted influence that rising commercial class and bourgeoisie could have upon limiting freedom of thought and opinion). Mill was also attentive to the threat the advent of a business class posed to free speech and thought. *See* JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 85, 170-71 (1950) (commenting upon energy one must expend on business pursuits as opposed to those more philanthropic).

166. *See generally Austin*, 494 U.S. at 679-95 (Scalia, J., dissenting) (defending corporations' right to participate in political debate).

167. *See Croson v. Richmond*, 488 U.S. 469, 506 (1989) (requiring proof of past discrimination against minority before allowing affirmative action).

168. 494 U.S. 872 (1990).

169. *Id.* at 890 (enforcing state law prohibiting peyote ingestion, despite religious practice of Native Americans).

tions to the status of discrete and insular groups and to second guess legislatures.

VII. CONCLUSION

That three justices on the Supreme Court would go to such lengths to support increased political powers for business corporations may bode ill for the future as the Court changes personnel during the next decade. As Owen Fiss and many others have noted, democracy, unlike plutocracy, gains its legitimacy and dignity from the idea that political rights and equality can be kept autonomous from economic inequality.[170] Of course, that autonomy has never been complete. However, that three justices are ready to further weaken the barriers separating economic inequality from political equality may be cause for alarm.

The Justices' decision to adopt so powerfully the metaphor that money is speech and deserving of constitutional protection allows the Justices to appear as champions of free speech and civil liberties. It also hides the consequences of the Justices' metaphorical leap. In fact, the Justices are defending the rights of corporations and the wealthy to continue to exercise those "corrosive and distorting effects" upon our political process, moving us toward plutocracy rather than democracy. The dissenting Justices misinterpret the Framers on corporate wealth, turning mistrust into support. They misinterpret de Tocqueville's views on associations and economic power, both altering definitions and changing fear into support. These misinterpretations greatly weaken the Justices' arguments, scholarship, and defense of free speech.

The dissenting Justices in *Austin*, by conflating money and speech, fail to heed a distinction made by John Stuart Mill. Mill argued that the "doctrine of Free Trade . . . rests on grounds different from, though equally solid with, the principle of equal liberty."[171] Mill warned society not to confuse the regulation of the economic marketplace with the marketplace of ideas.[172] Justices Scalia and Kennedy

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170. *See generally* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) (recognizing relationship between wealth and speech liberties).

171. JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 85, 202-03 (1950).

172. *See id.* at 102-04 (discussing necessity of free thought and opinion); *id.* at 202-03 (outlining underlying principles of free trade); *cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 95-129 (1983) (formulating argument similar to

fail to realize the two are not the same. According to Mill, to regulate trade is to limit those actions which affect or harm others.[173] To regulate speech is to limit ideas which do not harm another but which are suppressed for their own sake.

Thus, if the barrier between political equality and economic inequality becomes even more permeable; if, to paraphrase Michael Walzer's language, money is allowed to commodify goods such as free speech;[174] and if society does accept the logic found in the dissents of *Austin*, then our political philosophies may gradually be reduced to what will be most important and unfortunate, our political philosophies of money.

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that of Mill). Walzer contends that the logic of a liberal society is to draw boundaries or lines of separation between distinct spheres of social existence so that one cannot dominate another. MICHAEL WALZER, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 321 (1984). For Walzer, one of the most important lines of separation that needs to be drawn is one that places limits upon the role of money in society. *Id.* at 325. The reason for this limit is that there are some things that money should not be able to dominate, such as free political speech. *See id.* (discussing limits that should be placed on monetary powers).

173. JOHN STUART MILL, *On Liberty, in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 85, 203 (1950).

174. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97-103 (1983).