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Samuel M. Taylor

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***Austin v. Michigan Chamber of Commerce*: Addressing a “New Corruption” in Campaign Financing**

For nearly twenty years, Congress and the Supreme Court have struggled to define a comprehensive and effective system of campaign finance regulation. Many state legislatures have enacted parallel reform efforts.¹ Yet, until recently, the constitutionality of regulations governing corporate spending in candidate elections remained uncertain.

In *Austin v. Michigan Chamber of Commerce*² the Supreme Court held that governments may restrict the right of many corporations to make independent expenditures³ on behalf of political candidates.⁴ The *Austin* Court articulated a new constitutional standard for evaluating campaign finance regulation. Such regulation, the Court held, is constitutionally justified because of the distorting effects of corporate wealth on the marketplace of ideas.⁵ This Note examines the *Austin* opinion in its historical context. The Note concludes that the Court's decision to permit regulation on the basis of a speaker's wealth and corporate form constitutes a significant departure from previous campaign finance jurisprudence and may well spark efforts to regulate other forms of speech on similar grounds.

In 1985 leaders of the Michigan Chamber of Commerce, a nonprofit corporation,⁶ decided to use funds from the Chamber's general treasury to place a newspaper advertisement urging voters to support a particular candidate in an upcoming special election to the Michigan State House.⁷ The advertisement would have violated Michigan campaign finance laws prohibiting the expendi-

1. For a list of state statutes regulating political speech by corporations, see Note, *Corporate Political Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 470-72. For a list of state statutes restricting corporate expenditures on behalf of candidates for political office, see *infra* note 8.

2. 110 S. Ct. 1391 (1990).

3. Most campaign finance statutes distinguish between contributions, which are payments or other benefits paid or delivered directly to the candidate or his committee, and independent expenditures, which are payments or other activities undertaken on behalf of a candidate, but not under his direction or control. See 2 U.S.C. § 431(8), (17) (1988). Typical examples of independent expenditures are newspaper and television advertisements endorsing a candidate, but placed and paid for by persons unconnected with the candidate's campaign. This Note uses the terms "independent expenditure" and "expenditure" synonymously. For a discussion of the constitutional significance of the distinction between contributions and independent expenditures, see *infra* notes 45-50 and accompanying text.

4. *Austin*, 110 S. Ct. at 1402. Many state statutes distinguish candidate elections from ballot issue elections. Candidate elections involve the election of a candidate to office. Ballot issue elections generally are referred to as referenda and involve voter approval or disapproval of a particular proposition, such as an amendment to a state's statutes or constitution. See, e.g., MICH. COMP. LAWS §§ 169.202(1), .205(1) (1990).

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

6. At the time of filing, the Michigan Chamber consisted of 8,000 members, three-quarters of whom were corporations. *Id.* at 1395.

7. *Id.* at 1396. The Chamber proposed to place a quarter-page advertisement in the Grand Rapids Press. *Id.* Entitled "Michigan Needs Richard Bandstra to Help Us Be Job Competitive Again," the text of the advertisement included a short summary of the goals of the Michigan Chamber, its concerns about state economic and regulatory policy, and an endorsement of Bandstra as a candidate with "the background and training to do the best job" in the state house. *Id.* at 1427. A

ture of corporate funds in state candidate elections.⁸ Arguing that these restrictions were unconstitutional under the first and fourteenth amendments, the Chamber brought suit seeking injunctive relief against enforcement of the law in federal district court.⁹ The district court upheld the statute,¹⁰ but the Sixth Circuit Court of Appeals reversed on the ground that the restrictions violated the first amendment.¹¹ A divided Supreme Court reversed the appellate court,

copy of the advertisement, which would have cost approximately \$1,100, is appended to the Court's opinion in *Austin*. *Id.*

8. Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388 (codified at MICH. COMP. LAWS §§ 169.201-282 (1990)). The Act provides:

Sec. 54 (1) Except with respect to the exceptions and conditions in subsection (2) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a).

MICH. COMP. LAWS § 169.254(1) (1990). An independent expenditure is defined as an expenditure "not made at the direction of, or under the control of, another person," and not made as a contribution. *Id.* § 169.209(1). The prohibition does not apply to independent corporate expenditures relating to ballot issues. *Id.* § 169.254(3). Violation of the law is a felony. *Id.* § 169.254(4).

The statute also provides that, while barred from making direct expenditures of general treasury funds, a corporation may establish a segregated fund to be used for political purposes. *Id.* § 169.255(1). Corporations may spend general treasury funds to establish, administer, and solicit contributions to the fund. *Id.* When such a fund is established by a nonprofit corporation, contributions to the fund may be solicited from members of the corporation who are individuals, stockholders of members of the corporation, officers or directors of members of the corporation, and certain employees of members of the corporation. *Id.* § 169.255(3)(a)-(d).

The Michigan statute is similar to provisions of the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 490-92 (codified at 2 U.S.C. § 441b (1988)), which prohibit corporate and labor union contributions and expenditures in connection with candidates for federal office. 2 U.S.C. § 441b (1988). At least eighteen states place similar restrictions on corporate contributions and expenditures. *See* ALA. CODE §§ 10-2A-70, 10-2A-70.1, 10-2A-70.2 (1987 & Supp. 1990); CONN. GEN. STAT. ANN. § 9-333 (West Supp. 1989); IOWA CODE ANN. § 56.29 (West Supp. 1990); KY. REV. STAT. ANN. §§ 121.025, 121.035 (Michie/Bobbs-Merrill 1982 & Supp. 1990); MINN. STAT. ANN. § 211B.15 (West Supp. 1991); MISS. CODE ANN. § 97-13-15 (Supp. 1988); MONT. CODE ANN. § 13-35-227 (1989); N.H. REV. STAT. ANN. § 664:4(I) (1986); N.Y. ELEC. LAW § 14-116 (McKinney 1978 & Supp. 1991); N.C. GEN. STAT. § 163-278.19 (1987); OHIO REV. CODE ANN. § 3599.03 (Anderson Supp. 1989); PA. STAT. ANN. tit. 25, § 3253 (Purdon Supp. 1990); TEX. ELEC. CODE ANN. § 251.010 (Vernon 1986); W. VA. CODE §§ 3-8-8, 3-9-14 (1990); WIS. STAT. ANN. § 11.38 (West 1986 & Supp. 1990). Several states have statutes that, though not expressly prohibiting corporate independent expenditures on behalf of candidates, might be construed to impose such restrictions. *See* N.D. CENT. CODE § 16.1-08-02(1) (Supp. 1989); OKLA. STAT. ANN. tit. 74, § 4219 (West Supp. 1991); S.D. CODIFIED LAWS ANN. § 12-25-2 (1982); TENN. CODE ANN. § 2-19-132 (Supp. 1990); WYO. STAT. § 22-25-102 (Supp. 1990).

9. *Austin*, 110 S. Ct. at 1396. Notably, the Chamber had already established, and was administering successfully, a separate political fund of the type authorized by Michigan law. *Id.*; *see supra* note 8. Indeed, the Chamber's segregated fund was expected to contain more than \$140,000 in time for use in the 1986 elections. *Austin*, 110 S. Ct. at 1396.

10. Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 405-06 (W.D. Mich. 1986), *rev'd*, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 110 S. Ct. 1391 (1990). The district court found that while the statute "strikes at speech within the traditional core of the First Amendment," the restriction was justified by a compelling state interest in "preventing the appearance of corruption in elections for public office." *Id.* at 403. Specifically, the court found that the "great aggregations of capital" amassed with the aid of the corporate form, combined with the "faceless nature of corporations" could "create an atmosphere of distrust or the appearance of corruption in the electoral process." *Id.* The court rejected claims that the statute violated the Chamber's equal protection rights by distinguishing between the Chamber, in its capacity as a corporation, and persons expending funds as individuals. *Id.* at 404-05. The court also held that the statute's provisions exempting publications by broadcast and print media did not discriminate between media corporations and other corporations because any corporation "may avail itself of the exemption." *Id.* at 405.

11. Michigan State Chamber of Commerce v. Austin, 856 F.2d 783, 790 (6th Cir. 1988), *rev'd*, 110 S. Ct. 1391 (1990). The circuit court held that the Chamber did not "surrender its first amend-

holding the statute constitutional under both the first and fourteenth amendments.¹²

Justice Marshall, writing for a six-member majority, found that although the statute burdened political expression,¹³ it was constitutional because it was "narrowly tailored to further a compelling state interest."¹⁴ Specifically, Justice Marshall noted that the Michigan statute sought to control "the corrosive and distorting effects" of wealth accumulated through the special advantages of the corporate form and having "little or no correlation to the public's support for the corporation's political ideas."¹⁵ This objective, he added, was consistent with previous decisions recognizing a compelling government interest in restricting "the influence of political war chests funnelled through the corporate form."¹⁶ Further, Justice Marshall pointed out that the statute was narrowly tailored to the extent that it did not "impose an *absolute* ban on all forms of corporate political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds."¹⁷ Justice Marshall rejected arguments that the statute was overbroad in including close corporations and underinclusive in excluding unincorporated labor unions.¹⁸

ment rights merely by assuming the corporate form of organization." *Id.* at 787 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978)). Further, the court found the statute was not justified by a compelling government interest. *Id.* at 790 (citing *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (striking a similar federal statute as applied to a nonprofit corporation)); see *infra* notes 80-99 and accompanying text. The court of appeals in *Austin* found that the state could have no justification for restricting the Chamber's political speech rights as a nonprofit group. *Austin*, 856 F.2d at 789-90.

12. *Austin*, 110 S. Ct. at 1401-02.

13. *Id.* at 1396-97. The Court reiterated earlier holdings regarding the nature of political and corporate speech, writing:

Certainly, 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.'" The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.

Id. at 1396 (citations omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

14. *Id.* at 1396, 1398.

15. *Id.* at 1397. Justice Marshall acknowledged previous decisions which held that legislative concern over financial quid pro quo corruption was insufficient to justify restrictions on independent expenditures, but suggested that the Michigan statute concerned "a different type of corruption in the political arena." *Id.*

The Court was careful to emphasize that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the statute]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." *Id.* at 1398.

16. *Id.* at 1397 (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985) and citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

17. *Id.* at 1398. The Court noted that such expenditures were permissible "[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes." Thus, "the speech generated accurately reflects contributors' support for the corporation's political views." *Id.*

18. *Id.* at 1398, 1400. The Court explained that close corporations, though usually possessed of relatively small amounts of capital, are nevertheless endowed with the corporate form and, therefore, have the potential for amassing significant capital. *Id.* at 1398. Justice Marshall pointed out that unincorporated labor unions, by contrast, lack the corporate form. *Id.* at 1400. Justice Marshall further noted that previous holdings of the Court have made it clear that unions cannot use compelled fees for political activities if contributing union members object. *Id.* (citing *Communications*

Justice Marshall also dismissed assertions that the statute was unconstitutional as applied because of the Chamber's nonprofit status. The majority acknowledged that it had exempted an ideological nonprofit corporation from the requirements of a similar statute in *Federal Election Commission v. Massachusetts Citizens for Life*.¹⁹ Justice Marshall, however, held that the Chamber's corporate membership,²⁰ its nonideological purposes,²¹ and its members' potential reluctance to withdraw from the organization because of its political expenditures²² distinguished the Chamber's structure and operations from those of *Massachusetts Citizens for Life*.²³

Finally, the majority addressed the fourteenth amendment challenge to the statute. The Court noted that the same compelling state interests that supported the statute's constitutionality under the first amendment applied to any equal protection analysis as well.²⁴ Thus, Justice Marshall again rejected arguments that the statute's restrictions were underinclusive in omitting unincorporated associations such as labor unions.²⁵ Justice Marshall also dismissed arguments that the statute's exemption for media organizations²⁶ violated the equal protection clause, noting that "[a]lthough the press' unique societal role may not entitle the press to a greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."²⁷

The majority's holding sparked bitter dissents from Justices Scalia and Kennedy.²⁸ Justice Scalia mockingly dubbed the Court's "corrosive and distorting effects" language "The New Corruption"²⁹ and lambasted the majority as endorsing "the principle that too much speech is an evil that the democratic

Workers of Am. v. Beck, 487 U.S. 735 (1988) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

19. 479 U.S. 238, 263 (1986); see *infra* notes 80-99 and accompanying text.

20. *Austin*, 110 S. Ct. at 1400 ("As we read the Act, a [for-profit] corporation's payments into the Chamber's general treasury . . . would not be subject to the Act's limitations. Business corporations therefore could circumvent the Act's restrictions by funnelling money through the Chamber's general treasury.").

21. The Chamber's bylaws enumerate both political and nonpolitical purposes. *Id.* at 1395-96.

22. *Id.* at 1399 ("The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter.").

23. *Id.* at 1400.

24. *Id.* at 1401.

25. *Id.*

26. The statute provides that "an expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office or a ballot question in the regular course of publication or broadcasting" does not qualify as an expenditure for the purposes of the Act. MICH. COMP. LAWS § 169.206(3)(d) (1990).

Federal election campaign law contains a similar exemption for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i) (1988).

27. *Austin*, 110 S. Ct. at 1402.

28. See *id.* at 1408 (Scalia, J., dissenting); *id.* at 1416 (Kennedy, J., dissenting). Justice Brennan put a separate concurrence supporting the majority and addressing in detail many of the arguments put forward in the dissents. *Id.* at 1402 (Brennan, J., concurring).

29. *Id.* at 1411 (Scalia, J., dissenting). Justice Scalia argued that the majority posits "a hitherto

majority can proscribe."³⁰ Justice Scalia repudiated the notion that the "special advantage" of corporate form could be a basis for regulating corporate speech³¹ and reminded the majority that the Court's previous decisions had rejected specifically the proposition that "expenditures must 'reflect actual public support for the political ideas espoused.'"³² Moreover, Justice Scalia argued that allowing regulation of close corporations on the basis of their "potential" for amassing wealth severely undermined the Court's well-established "clear and present danger" test for limiting political speech.³³ "The premise of our system," Justice Scalia wrote, "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."³⁴

Justice Kennedy's dissent, in which Justices O'Connor and Scalia joined, was equally biting.³⁵ Justice Kennedy argued that the statute's clear discrimination on the basis of the speaker's corporate identity constituted "the rawest form of censorship."³⁶ He also challenged the majority's willingness to accept a spe-

unrecognized genus of political corruption" which may be identified by its politically corrosive effects. *Id.* at 1410-11 (Scalia, J., dissenting).

30. *Id.* at 1408 (Scalia, J., dissenting).

31. *Id.* (Scalia, J., dissenting) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) and *Speiser v. Randall*, 357 U.S. 513 (1958)); see also *id.* at 1418-19 (Kennedy, J., dissenting) (stating that regulation on the basis of the speaker's corporate identity is the "rawest form of censorship") (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)).

32. *Id.* at 1411 (Scalia, J., dissenting) (quoting *Austin*, 110 S. Ct. at 1397 (majority opinion) (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976))); see also *id.* at 1420-21 (Kennedy, J., dissenting) (arguing that independent expenditures cannot foster corruption because corruption involves the prospect of financial gain on the part of a candidate) (citing *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 496-97 (1985); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam)).

33. *Id.* at 1413 (Scalia, J., dissenting) (citing cases in support of this test).

34. *Id.* at 1416 (Scalia, J., dissenting). Scalia argued as follows:

Despite all the talk about "corruption and the appearance of corruption"—evils that are not significantly implicated and that can be avoided in many other ways—it is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing, but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen). The premise of our system 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. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak and who may not.

Id. (Scalia, J., dissenting).

35. Justice Kennedy wrote:

With the imprimatur of this Court, it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union, or the Michigan State Chamber of Commerce, to advise the public how a candidate voted on issues of urgent concern to their members. In both practice and theory, the prohibition aims at the heart of political debate.

Id. at 1418 (Kennedy, J., dissenting). For a discussion of the issues surrounding Justice Kennedy's assertion, see *infra* notes 124-36 and accompanying text.

36. *Austin*, 110 S. Ct. at 1419 (Kennedy, J., dissenting).

cial statutory distinction for media corporations, reminding the majority that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." ³⁷

Though legislative efforts to control campaign contributions and expenditures in the United States began as early as 1907,³⁸ modern federal campaign finance jurisprudence centers largely in the Federal Election Campaign Act of 1971³⁹ and amendments to that Act adopted by Congress in 1974⁴⁰ and 1976.⁴¹

37. *Id.* at 1425 (Kennedy, J., dissenting) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 784 (1985)). Justice Kennedy continued: "The argument relied on by the majority, that media corporations are in the business of communicating and other corporations are not, is unsatisfying. All corporations communicate with the public to some degree, whether it is their business or not." *Id.* (Kennedy, J., dissenting).

In his separate dissent, Justice Scalia observed:

[I]f one believes the Court's rationale of "compelling state need" to prevent amassed corporate wealth from skewing the political debate, surely [the] "unique role" of the press does not give Michigan justification for *excluding* media corporations from coverage, but provides especially strong reason to *include* them. Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere.

Id. at 1414 (Scalia, J., dissenting) (quoting *Austin*, 110 S. Ct. at 1402) (majority opinion) (emphasis in original).

38. In 1907 Congress adopted the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907), prohibiting corporate contributions to federal campaigns. A chief proponent of the Act was President Theodore Roosevelt, whose support reflected concern over the ability of large companies to buy influence in the political process. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 60 (1987). The Act was only marginally effective however, *id.* at 60-61, and in 1925 Congress moved to strengthen regulation of campaign financing through the Federal Corrupt Practices Act of 1925 (FCPA). Pub. L. No. 68-506, § 301-19, 43 Stat. 1053, 1070-74 (1925) (codified in scattered sections of 2, 18, and 47 U.S.C.), *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972). Nahra, *supra*, at 62. Although intended as a comprehensive regulation of federal campaign financing, loopholes in the FCPA rendered it largely ineffective. *Id.*

39. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in §§ 2, 18, and 47 of U.S.C.) [hereinafter FECA of 1971]. Enactment of the 1971 Act was prompted by scholarly and political concern over the ineffectiveness of the Federal Corrupt Practices Act. Nahra, *supra* note 38, at 64. "The 1971 Act imposed a number of significant restrictions on federal campaign spending, including requirements for low-cost political advertising, ceilings on media expenditures by candidates, limitations on a candidate's personal expenditures, a strengthening of the prohibitions on corporate and labor union contributions, . . . and mandatory disclosure of campaign contributions." *Id.* (footnotes omitted). The constitutionality of the provisions was "questioned extensively subsequent to their passage." *Id.* at 65; *see* R. WINTER, WATERGATE AND THE LAW 25 (1974). The Act, however, never was challenged in court, primarily because of the demonstrated need for further reform in the wake of the Watergate scandal. Nahra, *supra* note 38, at 65.

40. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, and 47 of U.S.C.) [hereinafter FECA of 1974]. "The 1974 Act . . . targeted four primary goals: disclosure of campaign financial activity, prevention of corruption stemming from the influence of large contributors, reduction of campaign spending so as to bring about an equality of spending among candidates for federal office, and invigoration of the election process." Nahra, *supra* note 38, at 66.

41. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 2, 18, and 26 U.S.C.) [hereinafter FECA of 1976]. Of particular relevance to corporate campaign finance regulation were provisions of the 1976 Act that consolidated and clarified federal restrictions on corporate campaign contributions and independent expenditures. *See* FECA of 1976, *supra*, § 321, 90 Stat. 475, 490-92 (codified as amended at 2 U.S.C. § 441b). The operative statute, which has remained substantially unaltered since its enactment, provides:

It is unlawful for any national bank, or any corporation organized by authority of any law

Among the most controversial of the reform measures were statutes limiting campaign contributions by groups and individuals to a single candidate to 1,000 dollars per election⁴² and establishing a similar limit of 1,000 dollars per year for independent expenditures "relative to a clearly identified candidate."⁴³

The new contribution and expenditure limitations, and other provisions of the Federal Election Campaign Act, were challenged in the landmark Supreme Court case, *Buckley v. Valeo*.⁴⁴ In *Buckley* the Court struck down substantial portions of the new regulatory scheme as unconstitutional constraints on first amendment freedoms of speech and association.⁴⁵ In particular, the *Buckley* Court found that while government interests in campaign finance regulation justify limitations on campaign contributions, similar restrictions on independent expenditures do not outweigh individual and societal interests in free speech and the unimpeded exchange of political ideas.⁴⁶

The rationale behind the *Buckley* Court's distinction between contributions and independent expenditures was twofold. First, though firmly stating that all campaign-connected spending constitutes protected speech,⁴⁷ the Court asserted that restrictions on independent expenditures "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."⁴⁸ In contrast, the Court classified contributions as a significantly more symbolic form of speech, the limitation of which entails only marginal restrictions upon the contributor's ability

of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section.

2 U.S.C. § 441b(a) (1988). The section specifically exempts from the phrase "contribution or expenditure" expenditures for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation [or] labor organization." *Id.* § 441b(b)(2)(C).

42. FECA of 1974, *supra* note 40, § 101(a), 88 Stat. 1263, 1263 (current version at 2 U.S.C. § 441a (1982)).

43. *Id.*, § 101(a), 88 Stat. 1263, 1265 (codified at 18 U.S.C. § 608) (repealed 1976) (held unconstitutional in *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam)).

44. 424 U.S. 1 (1976) (per curiam).

45. *Id.* at 143.

46. *Id.* at 23-51. In addition to rejecting statutory restrictions on independent expenditures, the *Buckley* Court overturned limits on campaign expenditures by candidates from their personal funds and limits on overall campaign expenditures. *Id.* at 51-58. The Court upheld provisions of the Act limiting campaign contributions to candidates from individuals and political groups, *id.* at 58, requiring disclosure of contributions and expenditures, *id.* at 84, and providing public financing for presidential campaigns, *id.* at 108.

47. *Id.* at 16. The Court rejected the conclusion of the Court of Appeals for the District of Columbia that campaign spending limitations constitute restrictions on conduct rather than speech, and thus are subject to a lower standard of scrutiny. *Id.* The Court noted that it had "never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.*

48. *Id.* at 19.

to communicate.⁴⁹ The Court concluded that "although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."⁵⁰

By far the more significant aspect of the Court's analysis is its exploration of government interests that might justify limitations on campaign spending. Concerning restrictions on contributions, the Court had little trouble upholding the statute on the basis of its "primary purpose," that of "limit[ing] the actuality and appearance of corruption."⁵¹ The Court reasoned that large contributions "given to secure a political *quid pro quo* from current and potential office holders" clearly threaten the integrity of representative democracy.⁵² Additionally, the Court expressed serious concern for "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."⁵³

The Court found these governmental interests insufficient to support the restrictions on independent expenditures, however. These limitations, the Court held, constrain political expression " 'at the core of our electoral process and of the First Amendment freedoms.' "⁵⁴ Moreover, the Court reasoned that the potential difficulty in coordinating independent expenditures with the candidate's campaign would hamper the effectiveness of these expenditures, which might, in fact, prove counterproductive.⁵⁵ For these reasons and others, the Court concluded, "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures."⁵⁶ The Court also rejected arguments that the government interest in

49. *Id.* at 20-21. The Court further explained:

A contribution serves as a general expression of support for the candidate and his views but, does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. at 21.

50. *Id.* at 23. The conceptualization of contributions as "proxy speech," as it is now termed, has drawn substantial criticism. Nahra, *supra* note 38, at 82-83. Indeed, in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1984), Justice Marshall, who wrote for the majority in *Austin*, abandoned the "proxy speech" view stating that the distinction makes no constitutional difference. *Id.* at 519 (Marshall, J., dissenting).

51. *Buckley*, 424 U.S. at 26.

52. *Id.* at 26-27.

53. *Id.* at 27.

54. *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

55. *Id.* at 47. The Court explained:

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

Id.

56. *Id.* at 45. The Court rejected Congress' practical rationale for the independent expenditure limitation. As expressed in the Senate Report on the 1974 amendments: "[T]o prohibit a \$60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor

equalizing the relative ability of individuals and groups to influence elections could justify the statute. Such a concept, the Court held, "is wholly foreign to the First Amendment."⁵⁷

Though the *Buckley* decision did not address regulation of campaign spending by corporations specifically, it laid the groundwork for consideration of the corporate spending question in the Court's next major campaign finance decision, *First National Bank v. Bellotti*.⁵⁸ In *Bellotti* a group of Massachusetts business corporations brought suit contesting the constitutionality of a state statute prohibiting the expenditure of corporate treasury funds on ballot issues not "materially affecting" the corporation's business.⁵⁹ In a five-four decision, the Supreme Court struck down the law.⁶⁰

Significantly, the Court refused to decide *Bellotti* on "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."⁶¹ Instead, the Court noted that the first amendment protects corporate speech if its impairment would undermine society's interest in free and open discussion.⁶² Holding that the expression barred by the

to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance." S. REP. NO. 689, 93d Cong., 2d Sess. 19, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5587, 5604-05.

57. *Buckley*, 424 U.S. at 48-49. The Court wrote:

[T]he 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 from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" The First Amendment's protection against government abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. (quoting *New York Times v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957))) (citations omitted).

58. 435 U.S. 765 (1978).

59. MASS. GEN. LAWS. ANN. ch. 55, § 8 (West 1977) (amended 1986) (held unconstitutional in *Bellotti*, 435 U.S. at 795). The statute, in relevant part, provided:

No business corporation incorporated under the laws of or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend, or contribute . . . any money or other valuable thing for the purpose of aiding promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Id. The statute had a checkered past. Massachusetts courts had struck down previous versions in suits arising from corporate expenditures opposing statewide tax referenda proposed by the legislature. *Bellotti*, 435 U.S. at 769 n.3. The version of the statute at issue in *Bellotti* had been amended only one month before the Massachusetts legislature voted to submit to voters a constitutional amendment authorizing the imposition of a graduated personal income tax. *See id.*

60. *Bellotti*, 435 U.S. at 795.

61. *Id.* at 777.

62. *Id.* The Court wrote: "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." . . . The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether a corporation, association, union, or individual." *Id.* at 776-77 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Massachusetts law was clearly "the type of speech indispensable to decisionmaking in a democracy,"⁶³ the Court concluded that the statute "plainly offended" the first amendment.⁶⁴ Further, the Court noted that Massachusetts could not deny corporations this protection merely on the basis that as creatures of statute, the corporations possess only rights granted them by the state.⁶⁵

The *Bellotti* Court rejected arguments that Massachusetts had a compelling state interest in protecting the rights of shareholders who disagree with views expressed by the corporation.⁶⁶ The statute, the Court concluded, was underinclusive for this purpose because it did not bar other forms of corporate political expression, such as lobbying or discussion of public concerns not connected with a particular election.⁶⁷ Moreover, the Court reasoned, the statute was overinclusive for the purpose because it prevented corporate expression even with respect to issues on which all shareholders agreed.⁶⁸ The Court also rejected suggestions that the statute was a constitutional attempt to limit massive corporate spending that might "unduly influence" elections.⁶⁹ "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."⁷⁰ The *Bellotti* Court acknowledged, however, that concerns over undue influence, when combined with the appearance of corruption in a candidate election, might justify government regulation.⁷¹

63. *Id.* at 777.

64. *Id.* at 785.

65. *Id.* at 778 & n.14. In an extensive footnote rebutting the proposition that corporate form could be the basis for denial of first amendment rights, the Court wrote:

The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment. . . . In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved. Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, . . . but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. . . . Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

Id. n.14 (citations omitted).

66. *Id.* at 792-95.

67. *Id.* at 793.

68. *Id.* at 794-95.

69. *Id.* at 788-92.

70. *Id.* at 790-91. The Court held that "the risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* at 790. Even if such a risk could be found, the Court asserted, proponents of the statute had not shown that corporations were an "overwhelming or even significant" force in influencing referenda, or that corporate expenditures had undermined citizen confidence in the government. *Id.* at 789-90.

71. *Id.* at 788 n.26. In a footnote to its undue influence discussion, the Court noted:

The importance of the governmental interest in preventing [corruption] . . . has never been

The Court's next major campaign financing decision involving a corporation was *Federal Election Commission v. National Right to Work Committee*.⁷² In this case, the Federal Election Commission (FEC) sought to enforce statutory limitations on the class of persons from whom the National Right to Work Committee (NRWC), a nonstock corporation, might solicit contributions for its segregated political fund.⁷³ A unanimous Court concluded that though the challenged restrictions burdened the NRWC's first amendment associational freedoms, they served a compelling government interest in "ensur[ing] that substantial aggregations of wealth amassed by the special advantages [of] . . . the corporate form of organization . . . not be converted into political 'war chests.'" ⁷⁴ This reasoning, the Court asserted, was consistent with its affirmation in *Buckley* of the "importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."⁷⁵

In reaching its conclusion, the Court in *National Right to Work Committee* gave considerable weight to the corporate form of the regulated entity.⁷⁶ Noting that the challenged statute represented a careful refinement of previous federal restrictions on corporate campaign contributions, the Court concluded that it owed "considerable deference" to the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."⁷⁷

The *National Right to Work Committee* Court also found the statutory restrictions justified on a second ground, that of protecting individual shareholders of corporations from unwillingly funding speech with which they disagree.⁷⁸ The Court did not, however, articulate a clear rationale for the shareholders' interest.

In 1986, four years after its decision in *National Right to Work Committee*,⁷⁹ the Court returned to the subject of corporate campaign spending in *Fed-*

doubted. . . . [O]ur consideration of a corporation's right to speak . . . implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Id.

72. 459 U.S. 197 (1982).

73. *Id.* at 198-99.

74. *Id.* at 207.

75. *Id.* at 208.

76. *See id.* at 208-11.

77. *Id.* at 209-10.

78. *Id.* at 207-08. The FEC argued that the statute protected individuals who had paid money into a corporation for economic purposes from having that money used to support candidates whom they would ordinarily oppose as individuals. The Court "agree[d] with the petitioners" that this purpose, and the purpose of limiting "corruption or the appearance of corruption," were sufficient to justify the statute. The Court then went on to deliver a considered explanation of the corruption rationale, but did not treat further the notion of shareholder protection.

79. Three years after *National Right to Work Committee* and a year before deciding *Massachusetts Citizens for Life*, the Court handed down a major campaign finance regulation opinion in *Federal Election Commission v. National Conservative Political Action Commission*, 470 U.S. 480 (1985). In that case, the Court struck down a federal statute limiting independent expenditures by

eral Election Commission v. Massachusetts Citizens for Life.⁸⁰ At issue in *Massachusetts Citizens for Life* was the right of a nonprofit ideological corporation to expend general treasury funds to influence elections for federal office.⁸¹ In a judgment that belied the opinion's significance, the Court held the prohibition, a provision of the Federal Election Campaign Act (FECA),⁸² unconstitutional as applied.⁸³

Significantly, the Court refrained from deciding the case on the basis of the "corporate form" rationale applied in its holding in *National Right to Work Committee*. *National Right to Work Committee*, the Court held, involved restrictions on solicitation of contributions by incorporated political committees that in turn funnelled the collected funds to candidates in the form of campaign contributions.⁸⁴ Thus, the Court asserted, while the holding in *National Right to Work Committee* was a logical extension of the contribution analysis in *Buckley*, similar reasoning could not be applied directly in *Massachusetts Citizens for Life*, in which the challenged activity involved independent expenditures.⁸⁵

The Court, however, did not abandon its *National Right to Work Committee* reasoning entirely. In an extensive analysis of the federal law governing independent expenditures, the Court recast the corruption-based rationale articulated in *National Right to Work Committee* as an interest in assuring that funds amassed through the corporate form would not distort the "the political marketplace."⁸⁶ "The resources in the treasury of a business corporation," the Court wrote, "are not an indication of popular support for the corporation's political ideas."⁸⁷ Instead, the Court reasoned, such funds "reflect . . . the economically motivated decisions of investors and customers."⁸⁸ The Court held that FECA had sought to eliminate the potential for corporate spending not

political action committees. *Id.* at 501. Though the National Conservative Political Action Committee (NCPAC) was incorporated, the Court focused primarily on the organization's character as a political committee. The Court specifically noted that it did not reach "the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *Id.* at 496.

80. 479 U.S. 238 (1986).

81. *Id.* at 241.

82. FECA of 1971, *supra* note 39, Pub. L. No. 92-255, 86 Stat. 3 (codified as amended in scattered sections of 2, 18, and 47 U.S.C.). See *supra* note 39 for the relevant portion of the statute.

83. *Massachusetts Citizens for Life*, 479 U.S. at 263.

84. *Id.* at 259.

85. See *id.* at 259-60.

86. *Id.* at 257-58. The Court wrote:

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make the corporation a formidable presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. (citations omitted).

87. *Id.* at 258.

88. *Id.*

based on popular support by requiring corporations to speak only through segregated funds whose resources were based on noncorporate contributions.⁸⁹ These restrictions, the Court wrote, were "meant to ensure that competition among actors in the political arena is truly competition among ideas."⁹⁰

Having thus outlined the nature of government interests supporting the regulation of corporate independent expenditures, the Court explained that such justifications could not support application of expenditure limitations to *Massachusetts Citizens for Life* (MCFL). "Some corporations," the Court asserted, "have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status."⁹¹ MCFL in particular, the Court held, possessed three "essential" characteristics that placed it beyond the statute's constitutional boundaries.⁹² First, MCFL was an ideological corporation "formed for the express purpose of promoting political ideas" and did not participate in business activities.⁹³ Thus, its resources could not be disproportionate to popular support for the ideas it espoused.⁹⁴ Second, MCFL had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings."⁹⁵ Therefore, the *National Right to Work Committee* rationale of protecting corporate shareholders from unwillingly supporting speech with which they disagreed⁹⁶ could not be applied to MCFL because "persons connected with the organization [would] have no economic disincentive for disassociating with it."⁹⁷ Finally, the Court noted that MCFL was not established by a business corporation and did not accept corporate contributions. Thus, MCFL could not serve as a conduit for business corporations to spend treasury funds in the political marketplace.⁹⁸

Thus, by carefully distinguishing MCFL from ordinary business corporations, the Court exempted the organization from FECA restrictions on corporate expenditures.⁹⁹ In doing so, however, the *Massachusetts Citizens for Life* Court also established an important new rationale for regulating the political speech of business corporations outside the narrow MCFL exception—that of protecting the marketplace of ideas from the distorting effects of corporate wealth.

The Supreme Court's holding in *Austin* represents the latest in a line of cases beginning with *Buckley* in which the Court has struggled to define a consistent rationale for determining which forms of corporate political speech justi-

89. *Id.*

90. *Id.* at 259.

91. *Id.* at 263.

92. *Id.* at 263-64.

93. *Id.* at 264.

94. *Id.*

95. *Id.*

96. See *supra* note 78 and accompanying text.

97. *Massachusetts Citizens for Life*, 479 U.S. at 264.

98. *Id.* at 264.

99. *Id.* at 263.

fiably may be regulated by campaign finance statutes and which may not.¹⁰⁰ Although not addressing the corporate speech question directly, the *Buckley* Court's enduring contribution to this framework is the notion that state regulation can be justified if narrowly tailored "to limit the actuality and appearance of corruption."¹⁰¹ Yet the *Buckley* corruption rationale, which was based essentially in the notion of quid pro quo reciprocation by grateful candidates,¹⁰² proved too blunt an instrument to address the corporate independent expenditures issue with which the Court wrestled in *Massachusetts Citizens for Life* and *Austin*. In particular, use of the *Buckley* corruption rationale to uphold government regulation of corporate expenditures in candidate elections would have been tantamount to overruling a portion of *Buckley* itself because without some qualification limiting the corruption rationale to the corporate form, the same reasoning might apply to expenditures by individuals as well.¹⁰³

Thus, the Court in *Austin* was forced to posit a "different type of corruption in the political arena,"¹⁰⁴ identified by two essential elements: "the corrosive and distorting effects of immense aggregations of wealth";¹⁰⁵ and the accumulation of that wealth through the special advantages of the "corporate form."¹⁰⁶ Though foreshadowed in *Massachusetts Citizens for Life*,¹⁰⁷ the *Austin* Court's application of both elements of this "new corruption" rationale to regulation of corporate independent expenditures constitutes a significant departure from previous holdings.

As the dissents in *Austin* pointed out, the Court historically has rejected attempts to regulate political speech on the basis of the wealth of the speaker.¹⁰⁸ The *Buckley* Court gave clear voice to this sentiment in the widely quoted passage: "[T]he 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."¹⁰⁹ Also, in *Bellotti*, the Court specifically rejected arguments that the ability of wealthy corporations to unduly influence the outcome

100. See Nahra, *supra* note 38, at 76-85. In discussing the Court's campaign finance jurisprudence up to *Massachusetts Citizens for Life*, Nahra observed:

The inability of the Court to reach a principled resolution of the contradictions inherent in the contribution/expenditure distinction reflects a broader confusion that has plagued the Court throughout these cases. The issue, simply put, is when should the Court allow political reality to influence its first amendment analysis. From the start, the Court has faced the issue of how much deference it owes to Congress' judgment on the political risks presented by the potential for campaign abuse, and the Court has shown a wavering deference to Congress' arguable expertise.

Id. at 83-84 (footnotes omitted).

101. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam).

102. See *supra* text accompanying notes 51-53.

103. *Buckley* struck down federal restrictions on independent expenditures by individuals, finding that such spending could not reasonably be connected with "corruption or the appearance of corruption." *Buckley*, 424 U.S. at 45; see *supra* notes 56-57 and accompanying text.

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

105. *Id.*

106. *Id.*

107. See *supra* notes 86-90 and accompanying text.

108. See *Austin*, 110 S. Ct. at 1411 (Scalia, J., dissenting); *id.* at 1420-21 (Kennedy, J., dissenting); *supra* note 32.

109. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

of elections could be a basis for limiting corporate speech with respect to ballot issues.¹¹⁰ Though the *Bellotti* Court left open the possibility that fear of undue influence combined with the "danger of real or apparent corruption" in the election process might warrant legislative restrictions on corporate spending,¹¹¹ its primary concern seemed to be the preservation of voter confidence in the integrity of the election process.¹¹²

The majority in *Austin* acknowledged the Court's previous unwillingness "to equalize the relative influence of speakers," but distinguished its new rule as designed only to "ensure[] that expenditures reflect actual public support for the political ideas espoused."¹¹³ Yet the assertion that a speaker's resources should be proportionate to popular support inherently implies an assumption that each individual is entitled to an equal voice when speech is aggregated. If this is so, it is but a short step to suggest that a wealthy individual's speech should be limited on the ground that her wealth is not proportionate to popular support for her ideas.

The *Austin* Court recognized the inherent difficulty in upholding the challenged statute as an attempt to assure proportionality between campaign spending and popular support for political ideas espoused, for it quickly limited this proposition with the second element of its "new corruption" test—that of corporate form.¹¹⁴ The Court stated that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the law]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."¹¹⁵ As the dissents note, however, the suggestion that corporate form may be a basis for regulation of independent expenditures is not supported by the Court's prior first amendment jurisprudence.¹¹⁶ In *Bellotti*, in particular, the Court specifically rejected the notion that first amendment rights could be withheld on the basis that corporations are "creatures of the state" possessing only those rights granted by the

110. First Nat'l Bank v. Bellotti, 435 U.S. 765, 788-92 (1978); see *supra* notes 69-70 and accompanying text.

111. *Bellotti*, 435 U.S. at 788 n.26.

112. See *supra* note 71.

113. *Austin*, 110 S. Ct. at 1397-98. The full text of the Court's rebuttal on this point is as follows: "The Act does not attempt 'to equalize the relative influence of speakers on elections,' rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.* (quoting Justice Kennedy's dissent, *id.* at 1421 (Kennedy J., dissenting)).

114. See *id.* at 1397.

115. *Id.* at 1398.

116. See *id.* at 1408 (Scalia, J., dissenting); *id.* at 1418-19 (Kennedy, J., dissenting); see *supra* note 31. Justice Scalia, noting the majority's efforts to link its wealth-based "corruption" rationale with the limiting requirement of the special privileges of corporate form, issued a particularly biting criticism:

[The majority attempts] to make one valid proposition out of two invalid ones: When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.

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

state.¹¹⁷

The majority's rationale in *Austin* does not abrogate the *Bellotti* admonition by suggesting that a state may withhold a corporation's constitutional rights. Instead, the *Austin* Court returned to the arguments offered in *National Right to Work Committee*,¹¹⁸ and affirmed in *Massachusetts Citizens for Life*,¹¹⁹ to suggest that the corporate form of a speaker lowers the threshold that government interests must reach to justify regulation of speech. In this respect, the *Austin* Court avoided the basic question of whether corporations possess the same basic speech rights as individuals. The Court simply concluded that whatever rights a corporation may have, they are subject to more exacting scrutiny and higher levels of regulation than individuals because of the "special advantages"¹²⁰ of the corporate form. This differentiating principle established, the Court posited the newly articulated concern for the "corrosive and distorting effects of immense aggregations of wealth"¹²¹ as a government interest sufficient to meet the reduced constitutional threshold for speech regulation. Through this line of reasoning, the Court overcame both the *Bellotti* admonition against withholding speech rights and the *Massachusetts Citizens for Life* Court's decision that traditional *quid pro quo* corruption,¹²² even when associated with a corporate speaker, cannot justify limitations on corporate independent expenditures.¹²³

The most immediate issue left unresolved by *Austin* is the exact scope of the *Massachusetts Citizens for Life* exemption for certain noncommercial corporations.¹²⁴ The key to the exemption is the three-part *Massachusetts Citizens for Life* test that provides that expenditure regulations will be unconstitutional as applied to corporations that are ideological in purpose, present no economic disincentives to members wishing to disassociate themselves with the corporation's speech, and are incapable of serving as conduits for political spending by traditional business corporations.¹²⁵ All three elements of the test were described as

117. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978); see *supra* note 65.

118. 459 U.S. 197 (1982); see *supra* notes 76-78 and accompanying text.

119. 479 U.S. 238 (1986); see *supra* notes 86-89.

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

121. *Id.*

122. See *supra* notes 51-53 and accompanying text.

123. In *Massachusetts Citizens for Life* the Court held that restrictions on corporate expenditures could not be justified by legislative concern for the type of *quid pro quo* corruption identified in *Buckley*, even when the challenged restrictions were applied to corporate speakers. Because of this holding, the *Massachusetts Citizens for Life* Court was forced to posit the more compelling government interest in limiting the "corrosive influence of concentrated corporate wealth," *Fed'l Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986), which was ultimately applied to uphold the statute in *Austin*.

124. Justice Kennedy, in his dissent, suggested that the majority's holding also brings organizations such as the Sierra Club and the American Civil Liberties Union within the constitutionally permissible scope of corporate expenditure regulation. *Austin*, 110 S. Ct. at 1418 (Kennedy, J., dissenting); see *supra* note 35.

125. In a footnote to his concurrence Justice Brennan wrote this capsule summary of the three-part *Massachusetts Citizens for Life* test: "If a nonprofit corporation is formed with the express purpose of promoting political ideas, is not composed of members who face an economic incentive for disassociating with it, and does not accept contributions from business corporations or labor unions, then it would be governed by our [*Massachusetts Citizens for Life*] holding." *Austin*, 110 S. Ct. at 1405 n.4 (Brennan, J., concurring). For a full discussion of the *MCFL* test, see *supra* notes 91-98 and accompanying text.

"essential" in both *Massachusetts Citizens for Life*¹²⁶ and *Austin*,¹²⁷ implying that all three elements must be met for a corporation to qualify.¹²⁸ It is not certain, however, that the test must be applied so mechanically. Because the *Austin* Court held that the Michigan Chamber failed all three elements of the test,¹²⁹ the holding does not support the proposition that failure to meet a single element of the test will be fatal. Further, one can argue that the three elements do not constitute a test at all, but rather are designed to serve as guidelines. This interpretation is supported by the fact that both the *Massachusetts Citizens for Life* and *Austin* Courts prefaced their discussion of the exemption by noting that corporations should not be burdened by expenditure restrictions if their "features [are] more akin to voluntary political associations than business firms."¹³⁰ Likewise, in its assessment of the Michigan Chamber under the test's second element, the *Austin* Court noted that members of the Chamber are "more similar to shareholders of a business corporation than to the members of MCFL."¹³¹ This language implies that application of the *Massachusetts Citizens for Life* exemption involves an overall assessment of an organization's characteristics in an effort to determine whether it is essentially commercial or noncommercial in character.

In addition to questions surrounding the general application of the *Massachusetts Citizens for Life* test, the Court left itself considerable flexibility in the application of at least two of the test's elements—the necessity of an ideological purpose¹³² and the requirement that members not have an economic disincentive for disassociating themselves from the corporation. With respect to the "ideological purpose" element, the Court has clearly indicated that its objective is to "ensure[] that [an organization's] political resources reflect political support."¹³³ Whether such "corporate purposes" are sufficiently narrow or focused to qualify in this regard is a subjective matter entailing considerable judicial flexibility.

The requirement that members of the corporation face no economic disincentive to withdrawal from the corporation also engenders judicial flexibility. The *Massachusetts Citizens for Life* Court originally posited this element of the test as the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings."¹³⁴ The Michigan Chamber's nonstock status forced the *Austin* Court to cite the Chamber's "educational and outreach" pro-

126. *Massachusetts Citizens for Life*, 479 U.S. at 263.

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

128. In *Massachusetts Citizens for Life* the Court found that *Massachusetts Citizens for Life* met all three of the test's requirements. *Massachusetts Citizens for Life*, 479 U.S. at 263-64.

129. *Austin*, 110 S. Ct. at 1398-1400.

130. *Id.* at 1398 (quoting *Massachusetts Citizens for Life*, 479 U.S. at 263).

131. *Id.* at 1399.

132. Specifically, the *Austin* and *Massachusetts Citizens for Life* Courts held that to qualify under the first element, a corporation must be "'formed for the express purpose of promoting political ideas, and cannot engage in business activities.'" *Austin*, 110 S. Ct. at 1399 (quoting *Massachusetts Citizens for Life*, 479 U.S. at 264).

133. *Massachusetts Citizens for Life*, 479 U.S. at 264, quoted in *Austin*, 110 S. Ct. at 1399.

134. *Id.*

grams as economic benefits violative of the member disassociation test.¹³⁵ This broad reading of the test goes considerably beyond the *Massachusetts Citizens for Life* Court's original "claim on earnings" thesis and expands the range of activities that will disqualify corporations from the *Massachusetts Citizens for Life* exception. Yet Justice Brennan, in his concurrence in *Austin*, dismissed as "inaccurate" assertions that the majority's holding would encompass such organizations as the Sierra Club, which provide educational programs and other assistance to their members.¹³⁶ Though Justice Brennan articulated no clear rationale for distinguishing such organizations, his comments suggest that the Court may have more to say regarding the nature of "economic disincentives" in future holdings.

Though the exact nature of the *Massachusetts Citizens for Life* exception represents the most obvious question resulting from *Austin*, the decision also has significance in other respects. In particular, *Austin* casts considerable doubt on the continuing validity of the *Bellotti* ban on regulations prohibiting corporate expenditures in ballot issue elections. The *Bellotti* Court expressly rejected arguments that government regulation could be justified as an appropriate attempt to limit corporate spending which might "unduly influence" elections.¹³⁷ Yet it is exactly this corporate influence—denominated in *Austin* as "the corrosive and distorting effects of immense aggregations of wealth"¹³⁸—that *Austin* holds adequate as a justification for government regulation of corporate expenditures.¹³⁹ In neither *Bellotti* nor *Austin* did the wealth of the corporate defendants bear a demonstrable relationship to popular support for the positions they espoused.¹⁴⁰ Further, while *Bellotti* is distinguishable from *Austin* on the basis of the type of election involved, the objective of preventing distortion of the political marketplace would apply equally to either candidate or ballot issue elections. Thus, *Austin* arguably has established a new ground on which governments may regulate corporate expenditures in any election process—that of assuring that campaign expenditures for political speech reflect popular support for the ideas espoused.¹⁴¹

135. *Austin*, 110 S. Ct. at 1399.

136. *Id.* at 1405 n.4 (Brennan, J., concurring). Justice Brennan was addressing Justice Kennedy's dissenting opinion which suggested that under the *Austin* rationale, organizations such as the Sierra Club and the American Civil Liberties Union would be prohibited from making independent expenditures. *Id.* at 1418 (Kennedy, J., dissenting); see *supra* note 35.

137. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-92 (1978); see *supra* notes 69-71 and accompanying text. The *Bellotti* Court hinted that the potential for undue influence, combined with the potential for corruption might justify government regulation of expenditures. *Id.* at 788 n.26. The *Austin* Court, however, makes no mention of the prevention of traditional *quid pro quo* corruption as an element necessary to its upholding of the Michigan statute.

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

139. *Id.* at 1397-98.

140. *Cf. id.* at 1402 (Michigan Chamber of Commerce does not exhibit characteristics that would require exemption from the statute); *Bellotti*, 435 U.S. at 811 (White, J., dissenting) (noting that corporate expenditures against subject ballot issue in *Bellotti* far exceeded private expenditures in support of the issue). *But cf. id.* at 789 n.28 (suggesting that campaign spending records for the ballot issue in *Bellotti* were inadequate to support an accurate picture of contributions and expenditures for and against the issue).

141. In his concurrence in *Austin*, Justice Brennan distinguished the holdings in both *Austin* and *Massachusetts Citizens for Life* from the *Bellotti* holding in that the statute at issue in *Bellotti* made

Finally, *Austin* may have implications for corporate speech in other contexts. The Court has expanded widely the scope of corporate speech rights in recent years.¹⁴² The *Austin* Court's use of the "special advantages" of corporate form as a rationale for restricting corporate speech in the context of elections may pave the way for the use of similar reasoning with respect to government regulation of currently protected corporate speech. *Austin*'s impact on speech by corporate media organizations also will be of interest. The majority in *Austin* acknowledged the apparent inconsistency in exempting media corporations from the Michigan statute's expenditure restrictions, but explained that media corporations differ from other corporations in their devotion to "collection of information and its dissemination to the public."¹⁴³ On this basis, the majority noted that the Court has "consistently recognized the unique role that the press plays in 'informing and educating the public.'"¹⁴⁴ While the majority's reasoning may explain why the statute's media exemption does not violate equal protection, it does not, as Justice Scalia observed, articulate a constitutional ground for exempting media corporations from government regulation under the "new corruption" rationale.¹⁴⁵

In the decade and a half since Congress's enactment of a comprehensive campaign finance law in 1974, the Supreme Court has labored to forge an integrated system of jurisprudence that fairly addresses the application of those laws to corporate and individual speakers. As the latest expression of this effort, the Court's holding in *Austin* melds two controversial concepts—the notions of regulation on the basis of wealth and regulation on the basis of corporate form—to devise a rule that permits regulation of corporate independent expenditures without impairing similar rights in individuals. The Court's holding upholds a well-established legislative judgment that in the realm of campaign finance regulation corporations warrant closer scrutiny and tighter regulation than individuals. Yet this accommodation of legislative judgment has a price. In considering the "corrosive effects" of wealth amassed through the advantages of corporate form, the Court reverses its historic refusal to allow economic considerations to

no provision for corporate political action committees, thereby effecting a "complete foreclosure of any opportunity for political speech." *Austin*, 110 S. Ct. at 1402 n.1 (Brennan, J., concurring) (citing *Massachusetts Citizens for Life*, 479 U.S. at 259 n.12). While this observation certainly distinguishes *Bellotti* factually, it also is a tacit admission that in the presence of a statutory option to create a corporate political action committee, regulation of corporate expenditures in ballot issue elections is valid under the "new corruption" rationale advanced in *Austin*.

142. See Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 611-18 (1990). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 16.26-16.31, at 904-24 (3d ed. 1986) ("Until recently it has been commonly assumed that all commercial speech . . . is excluded from the coverage of the first amendment. Now commercial speech appears to be vested with extensive first amendment protection. The state can issue reasonable time, place, or manner regulations of such speech.").

143. *Austin*, 110 S. Ct. at 1401-02.

144. *Id.* at 1402 (quoting *Bellotti*, 435 U.S. at 781).

145. *Id.* at 1414 (Scalia, J., dissenting); see *supra* note 37. Justice Scalia goes on to opine:

Members of the institutional press, despite the Court's approval of their illogical exemption from the Michigan law, will find little reason for comfort in today's decision. The theory of New Corruption it espouses is a dagger at their throat. The Court today holds merely that media corporations may be excluded from the Michigan law, not that they must be.

Id. (Scalia, J., dissenting).

color or restrict first amendment rights to political speech.¹⁴⁶ By linking the validity of this wealth-oriented campaign finance regulation to speakers adopting the corporate form, the Court, for the present, has limited the applicability of the new rationale to the corporate context. Yet in so doing, the Court also has established firmly the principle that the corporate form of a speaker may be considered in determining the potency of its first amendment rights.¹⁴⁷ The *Austin* Court stated emphatically that these twin precepts of the new corporate expenditure rule operate only in tandem, and that consideration of a speaker's financial assets, in particular, is relevant only with respect to regulation of the corporate form. It seems likely, however, that the Court will face pressure to extend both elements of its new rationale to other contexts. Whether such pressures can be resisted well may compose the next chapter in the Court's campaign finance jurisprudence.

SAMUEL M. TAYLOR

146. See *supra* notes 108-09 and accompanying text.

147. See *supra* notes 118-20 and accompanying text.

