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Controlling Campaign Spending and the "New Corruption": Waiting for the Court

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Controlling Campaign Spending and the "New Corruption": Waiting for the Court

Gerald G. Ashdown*

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I. INTRODUCTION

[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.¹

This statement by the United States Supreme Court appears to present its position on campaign finance restrictions. It must be viewed, however, in juxtaposition to other often quoted language of the Court

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1. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

concluding that restricting the speech of one in an effort to enhance that of another is contrary to the first amendment.² These conclusions led the Court to the dichotomous holding in *Buckley v. Valeo*³ that campaign contribution restrictions contained in the Federal Election Campaign Act (FECA)⁴ constitutionally were permissible, but that similar limitations on independent expenditures violated first amendment free speech guarantees. The Court in *Buckley* defined corruption as the improper exchange of large contributions for commitments from the candidate.⁵ The Court concluded that corruption was a sufficient governmental concern and validated the contribution restrictions in FECA.⁶ It also found, however, that independent expenditures did not pose a similar risk of corruption.⁷ The Court's refusal even to consider a possible governmental interest in equalizing the relative influence of speakers on elections constitutionally left sacrosanct independent expenditures.

Unfortunately, *Buckley* and its progeny have left campaign finance even more troubled than it was prior to attempts at legislative reform.⁸ It is now more difficult for nonwealthy candidates to raise money; simultaneously, massive spending by wealthy candidates and organizations goes uncontrolled.⁹ Unregulated expenditures not only have

2. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (reasoning that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

3. *Id.*

4. Federal Election Campaign Act (FECA), Pub. L. No. 92-225, 86 Stat. 8-20 (1972) (codified as amended in scattered sections of 2, 18, and 26 U.S.C.).

5. *Buckley*, 424 U.S. at 26-27.

6. *Id.* at 45-48. The Court's per curiam opinion concluded:

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

Id. at 47. It is puzzling that the Court substituted its own judgment for that of Congress, whose members are involved intimately in the electoral process and should have more insight into what improperly may influence candidates. See *id.* at 260-61 (White, J., concurring in part and dissenting in part).

7. *Id.* at 23-38.

8. Some commentators have viewed the decision in *Buckley v. Valeo* as a compromise. See, e.g., Ashdown, *Buying Speech: Campaign Spending, the New Politics, and Election Law Reform*, 23 NEW ENG. L. REV. 397, 404 (1988); Fleishman & McCorkle, *Level-up Rather Than Level Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211, 222-23 (1984).

9. The interplay of money and politics hardly can be overstated. Political action committee (PAC) contributions to congressional campaigns increased from \$12 million in 1974 to \$132 million in 1986-1987. CONG. RES. SERV., REPORT ON CAMPAIGN FINANCING 6 (Update, July 2, 1987). Total congressional campaign expenditures increased from \$194.8 million in 1977-1978 to over \$450 million in 1985-1986. *Congressional Spending Tops \$450 Million in 1986*, 13 Fed. Election Comm. 2 (1987). The price of a seat in the United States Senate now averages \$3 million. N.Y. Times, Aug.

increased the cost of running for office, but also have fueled the political action committee (PAC) phenomenon.¹⁰ Limits on the amount of contributions and the impracticality of individual expenditures on behalf of candidates have made the lure of PACs as effective campaign spenders even more attractive.

While expenditures remain constitutionally untouchable, reformers have looked to either public financing of congressional elections¹¹ or constitutional amendment¹² to alleviate the deleterious effect of unlimited campaign spending. The only other apparent remedial measure is the demise of the *Buckley* decision itself. Although in the past the Supreme Court has remained intransigent with respect to its holding in *Buckley* that independent expenditures are protected by the first amendment,¹³ the Court now may be showing signs of wavering.

Both the profundity and potential of the Supreme Court's decision in *Austin v. Michigan Chamber of Commerce*¹⁴ academically titillate critics of the Court's conclusions in *Buckley*. In *Austin* the Court for the first time upheld expenditure restrictions, validating a Michigan statute that prohibits corporations from making independent expenditures in connection with state candidate elections.¹⁵ In doing so, the majority continued to avoid addressing the equalization interest expressly. Instead, it relied on *Buckley*'s corruption rationale, but now with a new and different face. Although the "new corruption"¹⁶ discovered by the *Austin* majority did focus on the special nature of the cor-

30, 1987, at E4, col. 1. The Federal Election Commission has reported that when there is a greater than two-to-one spending advantage it translates into a 93% chance of election. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 622 (1982).

10. For example, the number of political action committees increased from 608 in 1974 to 3525 in 1984. M. STONE, *FACTS ON PACS: POLITICAL ACTION COMMITTEES AND AMERICAN CAMPAIGN FINANCE* 10 (1984).

11. Statutes providing for public funding of congressional elections have the salutary feature of limiting campaign expenditures. In *Buckley v. Valeo* the Supreme Court validated the Presidential Election Campaign Fund Act of 1966, which contains a similar limitation in a scheme providing for public financing of presidential elections. See *Buckley*, 424 U.S. at 85-109.

12. The United States Senate recently has considered two resolutions amending the Constitution to permit campaign expenditure limitations. See S.J. Res. 26, 101st Cong., 1st Sess. (1989); S.J. Res. 48, 101st Cong., 1st Sess. (1989).

13. See *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

14. 110 S. Ct. 1391 (1990).

15. *Id.* at 1401-02 (approving MICH. COMP. LAWS ANN. § 169.254(1) (West 1989)). The Michigan statute was modeled on a provision of FECA, 2 U.S.C. § 441b (1988), requiring corporations and labor unions to use segregated funds to finance independent expenditures made in federal elections. *Austin*, 110 S. Ct. at 1395 n.1.

16. This is the term used by Justice Antonin Scalia in his dissenting opinion in *Austin*. See 110 S. Ct. at 1414 (Scalia, J., dissenting).

porate form, the compelling governmental interest that justified the Michigan expenditure restriction was based on a broader definition of corruption than that found in *Buckley*. A careful look at the *Austin* decision is necessary to determine whether it is a narrow holding or a signal that a Supreme Court majority may be willing to utilize an expanded corruption analysis to sidestep *Buckley*'s conclusions regarding independent expenditures. If the Court is not yet ready to remedy the campaign finance morass that it created fifteen years ago, then it is time for reformers seriously to consider the other available options.

Part II of the Article discusses the narrow and broad interpretations of the new corruption theory and argues that at the very least the Court has undermined its earlier holding in *First National Bank of Boston v. Bellotti*.¹⁷ Part II also analyzes the application of new corruption thinking to noncorporate campaign spending. Part III concludes that the *Austin* analysis should extend beyond the business corporation.

II. THE NEW CORRUPTION

A. *The Narrow View*

In *Buckley* the Supreme Court found that corruption and the appearance of corruption were constitutionally sufficient justifications for the contribution limitations imposed by the Federal Election Campaign Act.¹⁸ In later cases, the Court stated unequivocally that corruption was the only legitimate and compelling reason for restricting campaign finances.¹⁹ The corruption to which the Court referred was limited to the most obvious kind—political benefits given in exchange for campaign contributions. As Chief Justice William Rehnquist stated in *Federal Election Commission v. National Conservative Political Action Committee*:

Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.²⁰

Restrictions on campaign expenditures have not fared as well. First, the *Buckley* per curiam opinion concluded that expenditure limitations constituted a greater restriction on free expression interests

17. 435 U.S. 765 (1978).

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

19. *National Conservative Political Action Committee*, 470 U.S. at 496-97; *Citizens Against Rent Control*, 454 U.S. at 297.

20. *National Conservative Political Action Committee*, 470 U.S. at 497.

than did contribution limits.²¹ Crucial to the Court's opinion was the conclusion that expenditure limits represented a direct restraint on political expression because the only means of effective contemporary communication is through spending—money-is-speech.²²

Second, the Supreme Court has not accepted limitations on campaign expenditures under the quid pro quo view of corruption. The Court consistently has concluded that independent spending creates little risk of return political favors.²³ Because the Court likewise rejected the governmental interest in leveling the relative ability of individuals and groups to influence the outcome of elections, independent spending became invulnerable.

The first hint that the Justices might be wavering in their intransigence regarding independent expenditures came in 1986 in *Federal Election Commission v. Massachusetts Citizens for Life*.²⁴ *Massachusetts Citizens for Life* involved an enforcement action by the Federal Election Commission (FEC) under section 316 of the Federal Election Campaign Act. This section prohibits corporations from using treasury funds to make expenditures in candidate elections.²⁵ It also requires

21. *Buckley*, 424 U.S. at 19-23. The Court felt that the limits on contribution implicated associational interests more than speech. Even though contributions were limited by the Act, the opportunity to contribute nevertheless allowed both association and expression of support for a candidate or group. To the contrary, the Court concluded that the expenditure limitations represented substantial restraints on the quantity and diversity of political speech. *Id.*

22. The per curiam opinion stated:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19 (footnote omitted).

23. In *National Conservative Political Action Committee*, the Court stated:

Unlike contributions, . . . 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.

National Conservative Political Action Committee, 470 U.S. at 497 (quoting *Buckley*, 424 U.S. at 47). The Court in *Buckley* also concluded that expenditure limitations placed a greater restriction on first amendment interests than did contribution limits. *Buckley*, 424 U.S. at 19-23. *But see* Ashdown, *supra* note 8, at 411 (arguing that independent expenditures may well be made, especially by political action committees, in exchange for political benefits—the ideological quid pro quo).

24. 479 U.S. 238 (1986).

25. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 316 (formerly § 321), 90 Stat. 490-92 (codified as amended at 2 U.S.C. § 441b (1988)).

that any expenditure be financed by voluntary contributions to a separate segregated fund.²⁶ The FEC had determined that the "Special Election Edition" of the Massachusetts Citizens for Life (MCFL) newsletter, published and circulated from general treasury funds, violated section 316.²⁷

Although the Supreme Court agreed with the lower federal courts that section 316 was unconstitutional as applied to MCFL,²⁸ Justice William Brennan's opinion revealed for the first time that some limitations on independent campaign expenditures might be acceptable to a majority of the Justices. Speaking both of the effect of large aggregations of wealth on elections and the special advantages of the corporate form, Justice Brennan suggested in dicta that corporate spending from the general treasury could be regulated to prevent distortion of the political process.²⁹ The perimeters of this new analysis, however, were circumscribed somewhat by the holding itself.

MCFL was incorporated as a nonprofit, nonstock corporation with a stated purpose of "defend[ing] the right to life of all human beings" through educational and political activities.³⁰ The organization had engaged in a variety of educational and legislative actions and considered its members to be those persons who either had contributed or indicated support for its activities. Given this characterization of MCFL, a majority of the Court concluded that the organization did not pose the danger of corruption in which resources amassed in the economic marketplace provide an unfair advantage in the political marketplace.³¹ On the contrary, the Court felt that the resources available to MCFL were a function of the popularity of its ideas; consequently, the restrictions in section 316 could not be applied constitutionally to it.³² Thus, the corruption from the unfair deployment of wealth for political purposes to which the Court referred was conceptualized more narrowly than

26. *Id.*

27. *Massachusetts Citizens for Life*, 479 U.S. at 244-45. The "Special Election Edition" of the MCFL newsletter was prepared and distributed prior to the 1978 primary elections. Although no more than 6000 copies of any one issue of MCFL's regular newsletter ever had been published, more than 100,000 copies of the "Special Edition" were printed for distribution. This edition of the newsletter urged readers to vote prolife and identified candidates supporting and candidates opposing this position. In addition, a coupon was included that could be clipped and taken to the polls to remind voters of the name of the prolife candidates. *Id.* at 243-44.

28. *Id.* at 245-51. The Court also found that the statute was applicable to MCFL's "Special Edition" newsletter. *Id.*

29. *Id.* at 258-59.

30. *Id.* at 241.

31. *Id.* at 259.

32. Justice William Brennan's opinion held that § 441b's requirement that corporate campaign expenditures be made only through a separate segregated fund unfairly discouraged protected speech. *Id.* at 251-56.

some would hope.

Justice Brennan's allusions to corporate spending polluting the political process apparently were intended to suggest the constitutional validity of section 316 only as it applied to for-profit corporations. The concern was that money amassed from economic activity could be diverted and spent in the political arena in ways that would promote the corporate interest, but whose accumulation and impact would have little correlation with the political popularity of the corporate position.³³ The economic decisions of individuals do not reflect political choices. In other words, the purchase of a company's stock or products does not indicate support for the political positions of the company's board of directors.

The foundation of this analysis flows from the conclusion in *Buckley* that money spent in the course of an election campaign is protected political expression.³⁴ After rejecting the Court of Appeals' holding that FECA's contribution and expenditure provisions regulated conduct, not speech,³⁵ the Supreme Court's per curiam opinion concluded that virtually every means of communicating political viewpoints required the expenditure of money—money-is-speech.³⁶ Although it is not stated specifically in either *Massachusetts Citizens for Life* or *Austin*, this reasoning must have led to the new corruption analysis. Justice Thurgood Marshall's majority opinion in *Austin* characterizes the new corruption as a compelling governmental interest that justifies Michigan's restriction on corporate expression.³⁷ Actually, however, the analysis suggests that in the case of political spending from the general corporate treasury, money is not speech. Thus, those who are the source of corporate funds—investors and customers—were not engaging in political expression when they parted with their money. The ability of the

33. This concern is clarified by the following juxtaposition in Justice Brennan's opinion for the Court:

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.

Id. at 257-58 (citing *National Conservative Political Action Committee*, 470 U.S. at 480, and *Buckley*, 424 U.S. at 39-51). Justice Brennan then stated:

The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258.

34. See *supra* note 22 and accompanying text.

35. *Buckley*, 424 U.S. at 15-18.

36. *Id.* at 19.

37. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397-98 (1990).

corporate structure to leverage funds from the economic sector, where money does not talk (at least in the political sense),³⁸ to the political arena, where it speaks loudly, breaks down the *Buckley* money-is-speech logic.

Austin confirmed this view of the new corruption thesis.³⁹ Although the Supreme Court developed its suggestions in *Massachusetts Citizens for Life* about the legitimacy of limiting corporate campaign spending into a firm constitutional holding, the majority opinion in *Austin* was crafted narrowly. Justice Marshall emphasized that the mere fact that corporations may accumulate large amounts of wealth did not sufficiently justify upholding the Michigan restriction on corporate independent campaign expenditures.⁴⁰ Moreover, the statute did not attempt "to equalize the relative influence of speakers on elections."⁴¹ Rather, his opinion stressed not only the unfair impact of economically generated wealth on political campaigns, but also the special advantages of the state-created corporate form.⁴² The compelling state interest justifying Michigan's regulation was a type of corruption resulting from "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."⁴³ In other words, the expenditure of money in the economic arena does not amount to political expression.

Both MCFL and the Michigan Chamber of Commerce, as nonprofit corporations, enjoyed the advantages of the corporate form. While MCFL was exempt from restrictions on independent campaign expenditures, the Chamber could be regulated because of its business and economic orientation. According to Justice Brennan, "the Chamber *and other business corporations*" could be regulated to prevent them "from using funds of other persons for purposes that those persons may not support."⁴⁴

38. Some spending on communication in the economic sector, nevertheless, is entitled to constitutional protection. In the commercial speech cases, the Supreme Court held that the interest of the public in receiving commercial information entitled such communication to first amendment protection. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Linmark Assocs. v. Township of Wil-lingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Communication of this type of information was not involved in *Massachusetts Citizens for Life* or *Austin*.

39. See *Austin*, 110 S. Ct. at 1397-98.

40. *Id.* at 1398.

41. *Id.* at 1397-98 (quoting *id.* at 1421 (Kennedy, J., dissenting)).

42. *Id.* at 1397. The special advantages mentioned by Justice Marshall were limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. *Id.*

43. *Id.*

44. *Id.* at 1404 (Brennan, J., concurring) (emphasis in original).

In *Massachusetts Citizens for Life* the Court concluded that the nonprofit organization was more akin to a voluntary political association than a business; thus, its independent spending should not be restricted solely because of its corporate form. The Court identified three features essential to its holding. First, MCFL was formed exclusively to promote political ideas, not to engage in business. Its purpose ensured that its resources would reflect its political support. Second, it had no shareholders or other parties with a claim to its assets. This guaranteed that those associated with the organization would have no reason to continue support if they disagreed with its politics. Third, MCFL was not established by a business or labor group. Moreover, it did not accept contributions from such entities. Thus, MCFL could not serve as a conduit for the spending that created the previously identified threat to the political interchange of ideas and opinions.⁴⁵ In *Austin* the Court concluded that the Michigan Chamber of Commerce possessed none of these characteristics. Especially damning was the fact that more than three-quarters of the Chamber's members were business corporations. Thus, the Chamber easily could have acted as a conduit for distortional corporate spending.⁴⁶

Consequently, what the Court suggested in *Massachusetts Citizens for Life* and held in *Austin* is that money accumulated in the economic marketplace, through the advantages of corporation law, can be regulated when diverted and spent in the political arena.⁴⁷ In other words, the corporation's investors and customers—the source of funds in the corporate treasury—may not support the content of corporate political speech. Money given for one purpose but spent for another undermines the money-is-speech logic of *Buckley*. As such, the state has a compelling interest to regulate corporate independent expenditures because the restrictions themselves serve a first amendment goal.⁴⁸

45. *Massachusetts Citizens for Life*, 479 U.S. at 263-64.

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

47. See Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Spending*, 38 CASE W. RES. L. REV. 589, 602-06 (1988). Professor Nicholson was one of the first to recognize the potential of the Court's dicta in *Massachusetts Citizens for Life*.

48. This analysis is somewhat similar to that employed in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and more recently, *Communications Workers v. Beck*, 487 U.S. 735 (1988). These cases involved "agency shop" arrangements or union-security clauses under which nonunion members obtaining the benefits of collective bargaining were required to pay the union either dues or agency fees. The Supreme Court held in each case that compelling nonmember employees to contribute to union activities beyond those germane to collective bargaining was an infringement of employees' first amendment rights. *Beck*, 487 U.S. at 744-62; *Abood*, 431 U.S. at 232-37; *Street*, 367 U.S. at 746-49. Apparently, these decisions also apply to dissenting union members who cannot be required to support union political activities unrelated to collective bargaining. See *Austin*, 110 S. Ct. at 1400

Given this realization, one wonders where the Court's analysis is headed. Although the precise holding in *Austin* is limited to business corporations or organizations with ties to them, the Court's logic seemingly also invalidates *First National Bank of Boston v. Bellotti*,⁴⁹ another post-*Buckley* holding based on the constitutional sanctity of independent expenditures.⁵⁰ Expanding the definition of corruption beyond the financial quid pro quo to include the corrosive effects of accumulated wealth should be encouraging to opponents of *Buckley v. Valeo*. Recognizing that corporate campaign spending which does not reflect the power of corporate political ideas distorts and corrupts the political process reveals some sensitivity to the equalization rationale.

B. The Broad View

1. *First National Bank of Boston v. Bellotti*

As students of campaign finance law well know, the Supreme Court reaffirmed its *Buckley* holding in *Bellotti*.⁵¹ *Bellotti* invalidated a Massachusetts statute that prohibited corporations from spending money to influence or affect the vote on questions submitted to the voters, other than questions materially affecting the corporation's property, business, or assets.⁵² Stating that the prohibited speech was at the heart of first amendment protection, the majority held that political speech which otherwise would fall within the protection of the first amendment does not lose that protection simply because its source is a corporation.⁵³

(citing *Beck*, 487 U.S. at 735, and *Abood*, 431 U.S. at 209, for this proposition).

49. 435 U.S. 765 (1978).

50. In *Bellotti* the Court invalidated a Massachusetts criminal statute that prohibited business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 767-68 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

51. *Id.* at 775-95.

52. *Id.* at 767-68; see MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977). The appellants in *Bellotti* wanted to spend corporate funds to publicize their views against a proposed constitutional amendment that would have permitted the legislature to impose a graduated individual income tax. The Supreme Judicial Court of Massachusetts concluded that the statute was constitutional as written because the first and fourteenth amendments protected corporate speech only with respect to matters materially affecting the business of the corporation. The Supreme Judicial Court also concluded that a ballot question concerning the taxation of individuals could not materially affect the interests of a corporation. *Bellotti*, 435 U.S. at 769-73. The United States Supreme Court failed to address this latter question because it held that the Massachusetts court's interpretation of a corporation's first amendment rights was too narrow. *Id.* at 775-86.

53. The majority opinion stated:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the

Of the state interests advanced in *Bellotti* to justify the statute under a strict scrutiny analysis, one sounds remarkably similar to the justification relied upon by the *Austin* majority to uphold Michigan's restriction on corporate expenditures. The Massachusetts Attorney General argued that the statute protected corporate shareholders by preventing the use of corporate resources for the promotion of views with which some shareholders might disagree.⁵⁴ The *Bellotti* majority, however, found the Massachusetts law both underinclusive and overinclusive. The statute was underinclusive because it failed to address corporate lobbying and did not apply to other organized groups with members whose status was similar to that of stockholder, such as real estate investment trusts and labor unions.⁵⁵ It was deemed overinclusive because (1) the statutory prohibition would apply even if the shareholders unanimously approved corporate spending on a referendum issue, and (2) the statute ignored other controls on corporate spending available to shareholders.⁵⁶

In *Austin* a majority of the Court adopted the reasoning of Justice Byron White in his *Bellotti* dissent.⁵⁷ The *Austin* majority accepted a variation of the Massachusetts Attorney General's argument as a compelling interest justifying the state's prohibition on independent corporate expenditures in candidate elections. Although the *Austin* majority did not characterize the restriction on corporate spending as one furthering first amendment goals, as did Justice White,⁵⁸ the Court did find compelling the state's interest in preventing corporations from corrupting the political and electoral process.⁵⁹ As Justice White reasoned in *Bellotti*, corruption results from the corporate spending of funds, amassed largely through the aid of favorable state laws, on views that may not be supported by corporate contributors—investors and customers.⁶⁰

public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted).

54. The first state interest relied upon in support of the statute was that corporate spending on a referendum issue would exert an undue influence on the outcome of the vote; consequently, public confidence in the electoral process would be undermined. The Court found no evidence of undue influence. It rejected this contention based on the *Buckley* rationale that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 788-92 (quoting *Buckley*, 424 U.S. at 48-49).

55. *Id.* at 793.

56. *Id.* at 794-95.

57. *Austin*, 110 S. Ct. at 1396-98.

58. *Bellotti*, 424 U.S. at 803-04, 813-14 (White, J., dissenting).

59. *Austin*, 110 S. Ct. at 1396-98.

60. *Bellotti*, 424 U.S. at 809-10, 812-22 (White, J., dissenting).

Thus, concern for dissenting shareholders was expanded by the *Austin* majority to state a broader philosophical principle, which could be described as a first amendment interest. Wealth amassed in the economic marketplace through the aid of the corporate form can distort the political process when used to promote views that do not reflect public support. The Court rejected the notion that this type of corporate leveraging of funds was entitled to first amendment protection.

Justice Marshall's majority opinion in *Austin* shrugged off the overinclusiveness argument.⁶¹ It also rejected the contention that the Michigan law was underinclusive because of its failure to regulate the independent expenditures of unincorporated labor unions. Justice Marshall found two crucial differences between unions and corporations. First, even though unions can develop large treasuries, they do so without the special state-conferred advantages of the corporate structure. It is the desire to counterbalance these advantages that provides the compelling interest for state regulation.⁶² Second, union members who disagree with the political activities of the union need not completely disassociate themselves from the union in order to renounce those activities. An employee who objects to the union's political activities can refuse to contribute to those activities but still receive the benefits of union membership with respect to collective bargaining and related functions.⁶³ The Court thus rejected an underinclusiveness argument that it had accepted earlier in *Bellotti*.⁶⁴

61. The overinclusiveness argument made by the Michigan Chamber of Commerce in *Austin* was somewhat different than that given by the Court in *Bellotti*. In *Bellotti* the majority found the Massachusetts' statute overinclusive because it prohibited corporate expenditures even when all shareholders were in favor of such spending, and because the policy of protecting dissenting shareholders ignored other remedies available to shareholders objecting to the actions of corporate management. See *supra* text accompanying note 56. In responding to the broader policy justification given for the Michigan statute, however, the Chamber argued in *Austin* that the statute was substantially overinclusive because it applied to closely held corporations that did not possess large capital reserves. The Court responded to this contention by concluding that although some corporations have not accumulated significant amounts of wealth, they still enjoy the special benefits of the corporate structure conferred by state law and potentially can distort the political process. *Austin*, 110 S. Ct. at 1398.

62. *Austin*, 110 S. Ct. at 1400.

63. *Id.* at 1400-01 (citing *Communications Workers v. Beck*, 487 U.S. 735 (1988) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), discussed *supra* at note 48 and *infra* at note 90). The Court evidently has concluded that a dissenting union member cannot be forced to contribute to union political activities outside of collective bargaining.

64. See *Bellotti*, 435 U.S. at 788-95. The other aspect of underinclusiveness mentioned in *Bellotti*—that the regulation did not apply to corporate lobbying—was not raised by the parties or discussed by the Court. Justice Brennan's concurring opinion incidentally raised this underinclusiveness point. He noted that the statute obviously was underinclusive because it did not ban other political expenditures to which a dissenting shareholder might object. The example that he gave, however, was the statute's failure to apply to the spending of general corporate treasury funds in a state referendum. Nevertheless, Justice Brennan found this underinclusiveness acceptable because

Although the Michigan restriction in *Austin* differed from the restriction in *Bellotti*, the Court made no real effort to distinguish the two provisions. The section of the Michigan Campaign Finance Act challenged in *Austin* prohibits corporations from using general treasury funds to make independent expenditures in support of or opposition to any candidate for state office. Corporations are permitted to make such expenditures only from segregated funds used exclusively for political purposes.⁶⁵ In contrast, the restriction in *Bellotti* applied to ballot measures. Thus, the Court simply could have upheld the Michigan statute based on its potential for financial quid pro quo corruption in the form of campaign spending for political favors. This type of corruption was recognized in *Bellotti* as a possible legitimate governmental interest for restricting the expenditures of corporations in candidate elections.⁶⁶

Clearly, this "comparable problem," not presented in *Bellotti*, was put before the Court in *Austin*. The Michigan statute applied only to candidate elections. Nevertheless, the majority quickly sidestepped the opportunity to utilize this governmental interest as a justification for the regulation. It relied instead on the broader "new corruption" theory. Justice Marshall stated for the majority:

[The Court] has recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections. Regardless of whether this danger of "financial *quid pro quo*" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth

he felt that candidate elections, to which the statute applied, were at the heart of speech interests, and thus, the State's decision to focus on them was justified. *Austin*, 110 S. Ct. at 1402-07 (Brennan, J., concurring). He failed to explain, however, why speech interests were more profound in candidate elections than in ballot measures or referenda. Justice Brennan also suggested that this underinclusiveness was dictated and, thus, justified by the Court's earlier *Bellotti* decision. *Id.* at 1407 (Brennan, J., concurring). As is explained in the Article, however, *Bellotti* apparently was overruled by the majority opinion in *Austin* itself, in which Justice Brennan joined. *See infra* text accompanying notes 65-73.

65. *See* MICH. COMP. LAWS ANN. § 169.255(1) (West 1989). The Michigan law is patterned on a provision of the Federal Election Campaign Act, 2 U.S.C. § 441b (1988) (original version at tit. III, §§ 301-311, 86 Stat. 3, 11 (1972)), requiring corporations and labor unions to make all expenditures in federal elections through separate segregated funds. *See supra* note 15.

66. Justice Lewis Powell's opinion for the Court in *Bellotti* provided:

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no *comparable problem*, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Bellotti, 435 U.S. at 788 n.26 (emphasis added) (citations omitted).

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.⁶⁷

Actually, the Court in *Austin* would have had some difficulty relying on the financial quid pro quo corruption mentioned in the *Bellotti* opinion. The Michigan restriction applied only to independent expenditures: the Court in *Buckley* previously had rejected the quid pro quo argument as a justification for limitations placed on this type of campaign spending.⁶⁸

Irrespective of whether the *Austin* majority specifically intended to overrule *Bellotti* silently, the logic of the new corruption analysis significantly undermines the latter holding. Whether candidate or hallot measure elections, the state has a compelling interest in preventing the distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that bear no relationship to the level of support behind the corporation's political ideas. The corruptive corporate leveraging occurs in either case.

The Court's only effort to distinguish the *Bellotti* holding from the new corruption analysis was presented in *Massachusetts Citizens for Life*. In *Massachusetts Citizens for Life* Justice Brennan, speaking of the corrupting influence of corporate wealth, observed that "[t]he regulation imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*]."⁶⁹ Justice Brennan was referring to the fact that the regulation involved in *Massachusetts Citizens for Life*, section 316 of the Federal Election Campaign Act,⁷⁰ permitted corporate spending through a separate, segregated political campaign fund financed by voluntary contributions.⁷¹ The conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds in ballot measures as well as candidate elections.⁷² These restrictions will ensure

67. *Austin*, 110 S. Ct. at 1397 (citations omitted).

68. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

69. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 259 n.12 (1986); see also *Austin*, 110 S. Ct. at 1402-03 n.1 (Brennan, J., concurring).

70. 2 U.S.C. § 441b (1988).

71. The Michigan statute in *Austin* also permitted independent expenditures from segregated funds. See MICH. COMP. LAWS ANN. § 169.255(1) (West 1989).

72. It should be pointed out that of the six-Justice majority, Justice John Paul Stevens concurred on the ground that the challenged Michigan statute applied only to candidate elections, *Austin*, 110 S. Ct. at 1407-08 (Stevens, J., concurring), and Justice Brennan is no longer on the Court. Conceivably, however, Justice Anthony Kennedy would have accepted the majority's new corruption thesis as it applies to for-profit corporations because his dissenting opinion consistently refers to "nonprofit corporations." *Id.* at 1416-26 (Kennedy, J., joined by O'Connor, J., and Scalia, J., dissenting). Although Justice Scalia joined Justice Kennedy's opinion along with Justice Sandra Day O'Connor, he also filed his own separate dissent. Interestingly, both Justices O'Connor and

that "the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source."⁷³

2. The New Corruption and Noncorporate Independent Expenditures

The Supreme Court's decision in *Austin* is puzzling. Read together, *Buckley* and *Bellotti* invalidate limitations or restrictions placed on independent corporate campaign expenditures. *Austin* now has overruled at least one aspect of those decisions, making restrictions on corporate independent expenditures in election campaigns constitutionally permissible. The question is whether the new corruption concept will further limit *Buckley*.

Because Justice Marshall used both broad and narrow language in *Austin*, it may be premature to speculate whether a majority of the Justices is now poised to make further assaults on the sanctity of independent expenditures. This depends, it seems, on what significance is accorded the two parts of the Court's analysis.

a. *Diversion—Corporate Leveraging*

If the focus of the new corruption rationale is the correlation between money spent in political campaigns and public support for the views on which the funds are expended, it becomes difficult to confine the majority's analysis to corporations. Although Justice Marshall's majority opinion in *Austin* eschews the equalization notion,⁷⁴ the majority's theory actually amounts to reducing the speech of those attempting to speak beyond the popularity of their views. Moreover, when disproportionate speech is restricted the speech of others necessarily is enhanced. This appears to be a form of equalization. The dissenting opinions of Justices Antonin Scalia and Anthony Kennedy certainly suggest this conclusion.⁷⁵ If avoiding disproportionality is the linchpin of the *Austin* holding, then it may well be applicable to the independent expenditures of individuals and groups other than corporations. Consequently, one can make only a guarded prognosis for the continued

Scalia joined the portion of the Court's opinion in *Massachusetts Citizens for Life* that formulated the new corruption argument.

73. See *Massachusetts Citizens for Life*, 479 U.S. at 258 (citing *Pipefitters v. United States*, 407 U.S. 385, 423-24 (1972)).

74. See *supra* text accompanying note 41.

75. *Austin*, 110 S. Ct. at 1411, 1415 (Scalia, J., dissenting); *id.* at 1421 (Kennedy, J., joined by O'Connor, J. and Scalia, J., dissenting).

vitality of the Supreme Court's remaining independent expenditure holdings.⁷⁶

Essential to the new corruption theory is the possibility that funds given, invested, or spent for an economic purpose might be diverted to a political purpose. It is in this way that money expended on a political cause may not reflect the level of support for or popularity of the particular view on which it is spent. Thus, money is not "talking" in the *Buckley* sense. Whether this diversion concept limits the new corruption analysis depends on the extent of its application.

All monies to some extent are diverted from their source to other uses. That is the nature of a free market economy. The concept applies to the corporate investor as well as the laborer who contributes fifty dollars to a particular candidate's campaign. The only difference is the number of steps in the diversion. Clearly, the laborer's employer did not necessarily intend to contribute to the employee's candidate of choice, just as the corporate investor or purchaser of corporate products does not necessarily support the corporation's favorite candidates. The distinction apparently is that the employer pays the laborer with the understanding that the salary will be used for whatever myriad purposes the laborer desires. The same can be said, however, of corporate benefactors. Especially in the case of the corporate shareholder, the money is given to the corporation with the complete understanding that the investment will be utilized in whatever way is beneficial to the corporation. This understanding must include spending in election campaigns in order to further corporate interests.⁷⁷ In this sense the investment in the corporation is unrestricted.⁷⁸ Why does money talk when it comes from an individual's paycheck, but not when its source is the corporate treasury?

76. *Buckley*, 424 U.S. at 1, invalidated the independent expenditure limitations placed by FECA on persons. FECA broadly defines "person" to mean "an individual, partnership, committee, association, corporation, or any other organization or group of persons." 18 U.S.C. § 591(g) (1988). *Austin* appears to have overruled the part of this holding that applies to corporations. The remaining question is how far the *Austin* analysis extends through the above definition. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), struck down a Berkeley, California ordinance that placed a \$250 limitation on contributions to committees formed to support or oppose ballot measures. In addition to finding that there was no risk of *Buckley*-type corruption in ballot measure elections, the Court concluded that the contribution limits also inherently operated as limits on the expenditures of those wishing to join others to advocate common views. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), invalidated a provision of the Presidential Election Campaign Fund Act making it a criminal offense for any political committee to expend more than \$1000 to further the election of any candidate receiving public financing.

77. See *Austin*, 110 S. Ct. at 1412 (Scalia, J., dissenting).

78. Similarly, a corporate customer buys a corporation's products without thought or restriction on the use to which the purchase price will be put. When the activities of the corporation do become an issue, the conscientious consumer simply may refuse to buy the corporation's products. In such a case, this money, then, is not available for corporate use.

The Court's decision in *Massachusetts Citizens for Life*, holding unconstitutional the federal restriction on corporate spending as it applied to an ideological, nonprofit corporation,⁷⁹ evidently circumscribes the diversion theory. It suggests that when the contributor of funds specifically authorizes their use for political purposes, no distortion of the electoral process occurs; thus, the spending is protected constitutionally. This explanation at least facially distinguishes the funds available to a business corporation from contributions to an ideological or political organization, but it does not identify the point of demarcation in the distribution of capital when the economic and political spheres intersect. The money available to a political group necessarily originates somewhere in the economic sector.

Even this narrower view of the diversion notion creates problems in attempting to limit the new corruption analysis to corporations. Superficially, it could be argued that a wealthy individual who makes large independent expenditures on behalf of a candidate or his own candidacy has made a clear decision to spend his money in this way. Consequently, there is no diversion and corruption. This argument poses at least two problems. First, many affluent persons acquire or compound their wealth through corporations. One reason that the Supreme Court invalidated the expenditure restrictions as applied to MCFL but upheld them with respect to the Michigan Chamber of Commerce was that MCFL did not accept corporate funds whereas the Chamber of Commerce did. If an organization that receives corporate contributions potentially can distort the political process, it is difficult to see why an individual who receives corporate dividends, interest, or income is not also a source of corruption.⁸⁰ Second, and more important, large expenditures by an individual in an election campaign, either independently or as a candidate, are even less a reflection of public support than a corporation's expenditures from its general treasury. To some extent it can be assumed that contributors to a corporation would support corporate spending on matters that would further the corporate interest and thus the value of their investment.⁸¹ Spending by a wealthy individual may have no correlation to public support for his position.⁸² Consequently, the disproportionality rationale easily could be applied here. While the independent expenditures of most individuals probably

79. See *supra* text accompanying notes 24-27. The decision in *Austin* emanated from the language and analysis of the *Massachusetts Citizens for Life* opinion.

80. Justice Kennedy's dissent in *Austin* recognizes this parallel. See *Austin*, 110 S. Ct. at 1422 (Kennedy, J., joined by O'Connor, J., and Scalia, J., dissenting).

81. See *supra* text accompanying notes 77-79.

82. Justice Scalia's dissent in *Austin* recognizes this parallel. See *Austin*, 110 S. Ct. at 1411 (Scalia, J., dissenting).

have little effect in political campaigns, restricting the spending of wealthy candidates from their personal resources could have a tremendous impact on elections.⁸³

Another difficulty with limiting the Court's distortion theory to business corporations is that many ideological groups, whether themselves incorporated or not, receive corporate contributions. Under *Massachusetts Citizens for Life* and *Austin*, incorporation is not the determining factor. Receipt of corporate money is the key. Of the three factors that must be met by an organization in order to avoid legislative restrictions on spending, the third requires that no money be generated or received from the business activity of corporations. The Court concluded that this prevented corporations "from serving as conduits for the type of direct spending that creates a threat to the political marketplace."⁸⁴ This factor most notably distinguished the Michigan Chamber of Commerce from MCFE, permitting application of expenditure restrictions to the former but not the latter.⁸⁵ One only needs to peruse the amici curiae briefs in *Austin* on behalf of the Chamber to recognize the potential reach of the Court's decision.⁸⁶

The *Massachusetts Citizens for Life* holding may shield some of these groups from their main concern—application of spending restrictions to all organizations using the corporate form.⁸⁷ Nevertheless, any group accepting contributions from business corporations, whether itself incorporated or ideological in orientation, theoretically is subject to expenditure regulation under *Massachusetts Citizens for Life* and *Austin*.⁸⁸ Thus, Justice Brennan apparently was correct when he stated at

83. FECA originally contained these restrictions. Presidential and Vice Presidential candidates were limited to spending \$50,000 from personal or family funds; senatorial candidates were limited to \$35,000; and most candidates for the House of Representatives were limited to \$25,000. These limitations were declared unconstitutional in *Buckley*, 424 U.S. at 51-54.

It would be more difficult to place overall limits on a candidate's campaign expenditures (as did FECA) under the diversion theory since most of these funds probably come from contributors who have made a clear political choice.

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

85. See *Austin*, 110 S. Ct. at 1400.

86. The list of parties submitting amici curiae briefs included the American Civil Liberties Union (ACLU), the Center for Public Interest Law, the American Medical Association, the National Association of Realtors, the American Insurance Association, the National Organization for Women, Greenpeace Action, the National Abortion Rights Action League, the National Right to Work Committee, the Planned Parenthood Federation of America, the Fund for the Feminist Majority, the Washington Legal Foundation, and the Allied Educational Foundation. *Id.* at 1424 (Kennedy, J., joined by O'Connor, J., and Scalia, J., dissenting).

87. Justice Kennedy's suggestion that the *Austin* holding applies to the Sierra Club and the ACLU, and that their independent expenditures may now be restricted along with the Michigan Chamber of Commerce, is not accurate simply because the former organizations operate under the corporate form. *Id.* at 1418 (Kennedy, J., joined by O'Connor, J., and Scalia, J., dissenting). They may well fall under the Court's holding in *Massachusetts Citizens for Life*.

88. In other words, Justice Kennedy's conclusion would be correct if the Sierra Club and the

the end of his opinion constitutionally exempting MCFL from spending restrictions: "It may be that the class of organizations affected by our holding today will be small."⁸⁹

Even if an organization is able to avoid corporate money, it will not necessarily be immune to the new distortion and corruption analyses. Whenever an individual contributes to an association there is no guarantee that the money will be used for the specific cause for which it was contributed. It may be diverted by the group for some other purpose. Once the contribution is made, the contributor totally delegates authority to the organization to spend the money in whatever way the organization sees fit. This is a result strikingly similar to that of the investor who buys stock in a corporation.⁹⁰

The Federal Election Commission made this argument with respect to groups such as MCFL.⁹¹ The majority in *Massachusetts Citizens for Life* rejected rather cavalierly this variation of the distortion concept. Justice Brennan distinguished groups like MCFL, whose contributors authorize use of their money for political purposes, from investment funds or union dues that are contributed for economic gain.⁹² Actually, however, the two sides of this dichotomy tend to merge. On the one hand, corporate investors must realize that their money will be utilized for a variety of purposes, including political activity that potentially

ACLU, irrespective of their corporate form, accepted contributions from business corporations. *See id.* at 1405 n.4 (Brennan, J., concurring).

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

90. The labor cases are distinguishable. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that nonunion member employees who were required to pay dues or fees to the union under "agency shop" arrangements or union-security clauses for representation in collective bargaining could not be compelled through such fees to support the union's political activity unrelated to the collective bargaining function. The primary difference between payments made to a collective bargaining unit and contributions to or investments in other organizations is that in the latter case the payments are completely voluntary. Fees paid to a union for representation in collective bargaining are voluntary only in the sense that the person does not have to seek employment from an employer who is a party to a collective bargaining agreement. The economic coercion, however, is obvious.

To the extent that *Abood* and *Beck* apply to union members, *see Austin*, 110 S. Ct. at 1400-01, the analysis probably runs closer to the voluntary contributor or corporate investor: unions presumably engage only in activities that further union interests and, consequently, would be supported by the membership. Nevertheless, for a variety of reasons, federal law since 1907 has prohibited the contribution of union dues (as well as corporate funds) to political campaigns. *See Tillman Act of 1907*, Pub. L. No. 59-36, 34 Stat. 864-65. FECA permits unions (and corporations) to establish separate segregated funds to be used for political spending. 2 U.S.C. § 441b(b)(2)(c) (1988). Presumably, independent expenditures by unions in election campaigns are still protected by *Buckley*, with the first amendment rights of dissenting members being shielded by *Abood* and *Beck*.

91. *Massachusetts Citizens for Life*, 479 U.S. at 260-61.

92. *Id.*

may benefit the corporation.⁹³ This realization clearly applies to lobbying if not outright investment in political campaigns. On the other hand, although the motivation of contributors to ideological associations primarily is political, these organizations from time to time may engage in activities not supported by some of their contributing members.⁹⁴ The American Civil Liberties Union's defense of the Nazi Party's right to march in Skokie, Illinois⁹⁵ presents the ultimate example. At the very least, some distortion of the political process occurs because the leadership of these groups may choose to support a candidate or cause that would not have achieved the same level of support from contributors acting individually.⁹⁶ The only situation in which there is a relatively direct correlation between dollars and ideas is the case of the one-cause or one-issue organization, such as MCFL.⁹⁷ Again, to paraphrase Justice Brennan, the class of organizations fitting this description will be small.

b. Special Advantages—The Corporate Form

The other way to view the *Massachusetts Citizens for Life-Austin* theory is to focus on the corporate form—the special legal characteristics provided by state law that facilitate the accumulation of wealth and leverage from which the corporation can parlay money into the political process. In other words, the true concern of the above opinions may be state-created corporate power that fosters the aggregation of large treasuries.

Even if the focus on the corporate form is the fulcrum for permit-

93. The understanding of the dues-paying union member may be somewhat different because of the heavy regulation of union activity and court decisions requiring union officials to account for money spent on political activity. See *Beck*, 487 U.S. at 735; *Abood*, 431 U.S. at 209.

94. Justice Brennan also distinguished political organizations such as MCFL by the ease with which dissenting contributors can withdraw. *Massachusetts Citizens for Life*, 479 U.S. at 260-61. Although it is true that corporate shareholders have an economic incentive for investing, particular corporate stock is not such a unique commodity as to make disassociation and reinvestment a major sacrifice. Correspondingly, those who disagree with the expenditures of a political organization can refuse to contribute further, but at this point their money has been spent. In this sense they are much like the purchasers of corporate products who discover that they are not comfortable with the politics of the corporation.

95. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 915 (1978); *Village of Skokie v. National Socialist Party of Am.*, 69 Ill.2d 605, 373 N.E.2d 21 (1978).

96. This does not ignore freedom of association. It can be argued that the individuals have not associated for the purpose of supporting a particular candidate selected by the committee without consulting contributors.

97. The one-issue political committee can be distinguished from individuals in terms of the potential distortion between spending and public support. Whereas an individual could make enormous expenditures without any relation to public support, contributions by individuals to political committees are limited by FECA to \$1000. 2 U.S.C. § 441a (1988). Therefore, the amalgamated funds of a one-issue committee are a rough indication of support for that issue.

ting restrictions on independent spending, the analysis cannot end with corporations. Corporations are not the only source of distortion; likewise, they are not the only recipients of legally created advantages. Justice Scalia notes that both associations and private individuals are given all kinds of special advantages by the state, including tax breaks, contract awards, public employment, and outright cash subsidies.⁹⁸ Although the state-accorded corporate advantages mentioned by the Court—limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets⁹⁹—are not insignificant, they may be no more significant than Justice Scalia's list. Certainly they are no more influential in amassing large treasuries than the legal advantages accorded other institutions such as charitable and religious organizations. These groups not only enjoy tax exempt status,¹⁰⁰ but contributions are also tax deductible for their benefactors,¹⁰¹ an obvious encouragement to donate. It is hard to imagine a more substantial governmentally created advantage.¹⁰²

One final observation must be made about this special advantages prong of the new corruption analysis. Clearly, Justice Scalia is correct when he points out in his dissent that the Court consistently has held that the state cannot condition special advantages on the forfeiture of constitutional rights.¹⁰³ The most plausible argument for ignoring this principle is that it is inapplicable to corporations, which are creatures of the state and as such are regulated and restricted in ways that individuals and other organizations are not. Although Chief Justice Rehn-

98. *Austin*, 110 S. Ct. at 1408 (Scalia, J., dissenting). One can argue that the Supreme Court itself has conferred special advantages on political action committees by the decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). By holding that the independent expenditures of political committees were not subject to limitation or restriction, the Court made it possible for these groups to engage effectively in campaign spending. Individuals, by the Court's own admission, are likely to be rather ineffectual and possibly counterproductive in making their own independent expenditures in election campaigns. See *Buckley*, 424 U.S. at 47.

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

100. See I.R.C. § 501(c)(3) (1990). Lobbying by these organizations is restricted, see *id.* § 501(h), but apparently no limitations are placed on campaign spending.

101. See *id.* § 170.

102. Interestingly, the inverse, albeit somewhat disingenuous, way of looking at the special advantages point is to argue that because Congress has granted no special benefits to corporations they are immune from the expenditure restrictions in federal law. The response to this, I suppose, would be that the Court was speaking of governmentally created advantages generally and not those created by any particular governmental entity.

103. *Austin*, 110 S. Ct. at 1408 (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 *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (stating that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege") (footnote omitted).

quist expressed this view in his dissenting opinion in *Bellotti*,¹⁰⁴ the Court consistently has rejected this notion.¹⁰⁵ In *Bellotti*, *Massachusetts Citizens for Life*, and *Austin* the Court found the particular corporate political speech at issue to be at the core of first amendment protection, requiring any restrictions to withstand a strict scrutiny analysis.¹⁰⁶ Thus, allowing state-created special advantages to become part of the compelling interest justification for restrictions on corporate speech is inconsistent with these earlier Court pronouncements.

The conclusion to be drawn from *Massachusetts Citizens for Life* and *Austin* might be that corporations, as fictitious (and powerful) creatures of state law, should not be entitled to the same freedom of political expression as other groups and individuals. If this is the case, the Court should have so stated in a forthright manner.

III. CONCLUSION

Ensuring that money spent in political campaigns has some relation to public support and has not been diverted from another source may not be the absolute equivalent of restricting the speech of some in order to enhance the voice of others. It is at least, however, an attempt to avoid the political pollution that uncontrolled infusions of money can cause. Although the *Austin* majority disavowed any effort to level the relative influence of speakers on elections, the new corruption notion that campaign expenditures should reflect popular support is not entirely foreign to this rationale. The policy underlying the equalization argument is not that money is bad for elections but that money should not be spent disproportionately by those who happen to have it. Heavy spending by the financially advantaged may bear little correlation to public support of the viewpoints or candidates on which the money is spent. A majority of the Court has now recognized this phenomenon.

The *Austin* majority was not concerned merely with disproportionate expenditures. It was concerned also with the political utilization of funds diverted from another source. It is this latter limitation that has

104. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 822-28 (1978) (Rehnquist, J., dissenting).

105. The corporate speech cases have not focused so much on the rights of the corporate speaker as they have on the function served by corporate speech. The Court has stressed that the role of corporate speech—whether from the press, from corporations in the business of communication or entertainment, or commercial—is the dissemination of information and ideas to the public. See, e.g., *Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

106. *Austin*, 110 S. Ct. at 1396; *Massachusetts Citizens for Life*, 479 U.S. at 251-52; *Bellotti*, 435 U.S. at 775-86.

the potential to temper *Austin's* holding. Nevertheless, some things are clear. Importantly, *Austin* permits legislatures to restrict the independent campaign expenditures of business corporations. The restrictions can apply not only to General Motors, AT&T, and the First National Bank of Boston, but to all corporations generating funds in the economic sector.¹⁰⁷ Beyond this, the *Austin* analysis apparently permits restrictions on the spending of any organization, whether incorporated or not, that accepts corporate contributions or donations.¹⁰⁸ Again, reflection on the amici curiae briefs in *Austin* indicates the profundity of this conclusion.¹⁰⁹ In other words, *Austin* seems to apply to ideological or politically based organizations (especially if incorporated) that accept corporate contributions.

The other conclusion which can be reached with a relative degree of confidence is that the new corruption concept does not apply to the independent expenditures of one-issue political organizations such as MCFL that do not accept corporate contributions. For these groups, independent spending remains constitutionally protected.¹¹⁰

Between the above conclusions, doubt remains with respect to the future of the new corruption framework. Nonetheless, skepticism regarding its further potential may be premature. The prognosis for expansion must incorporate the votes of the various Justices who have passed on the question. For example, in *Massachusetts Citizens for Life*, the case source of the new corruption theory, four Justices dissented on the ground that campaign expenditure restrictions constitutionally could be applied to nonprofit political corporations such as MCFL. Chief Justice Rehnquist, writing for the dissent, argued that differences among corporations are differences in degree rather than kind; consequently, the Court should defer to Congress's judgment in regulating the expenditures of all corporations. Despite this reasoning, it is hard to see much of a distinction between the nonprofit ideological corporation in *Massachusetts Citizens for Life* and other political associations or committees with large treasuries at their disposal. In the case of political organizations such as MCFL little is gained by the corporate form.

107. This would include, for example, law firms, banks, real estate agencies, and all small closely held corporations.

108. Again, the Court cast this broad net in order to prevent such organizations from serving as conduits for the type of direct spending that threatens the political marketplace. See *Massachusetts Citizens for Life*, 479 U.S. at 264.

109. Although these groups all are incorporated and now fall under the corporate aspects of the Court's holding, the conduit point clearly applies to any organization receiving corporate money, regardless of whether the recipient group itself is incorporated.

110. This is, of course, the holding in *Massachusetts Citizens for Life*. See 479 U.S. at 263-64.

In *Austin* the new corruption dicta ripened into constitutional doctrine with the addition of Justices Brennan and Marshall to the four *Massachusetts Citizens for Life* dissenters. Even though the new corruption concerns of Justices Brennan and Marshall are related more to business corporations, the Michigan Chamber of Commerce is hardly a classic example of corporate leveraging.¹¹¹

Whether or not the new corruption analysis has a future, the beneficial feature of *Massachusetts Citizens for Life* and *Austin* is that the grip of *Buckley* and the old corruption theory on the sanctity of independent expenditures has weakened.¹¹² If the new corruption analysis effectively can circumvent the outright overruling of this aspect of *Buckley*, it may not be necessary for Congress to continue to struggle with the troublesome issue of election law reform, or with the more drastic and difficult remedy of a constitutional amendment to permit legislative limitations on independent campaign expenditures.

111. Another interesting voting pattern is depicted by the votes of Justices O'Connor and Scalia. Both joined the portion of Justice Brennan's opinion for the Court in *Massachusetts Citizens for Life* that articulated the new corruption rationale. Both, however, then dissented in *Austin* when the analysis was utilized to uphold spending restrictions applied to the Michigan Chamber of Commerce. Justice Kennedy, who also dissented in *Austin*, was not yet a member of the Court when *Massachusetts Citizens for Life* was decided. Justice Brennan has since retired. His seat on the Court has been filled by Justice David Souter.

112. A further indication of the Supreme Court's increased willingness to permit government regulation of campaign finance can be found in the denial of certiorari in *Gard v. Wisconsin State Elections Board*, 456 N.W.2d 809, cert. denied, 111 S. Ct. 512 (1990). The Wisconsin statute upheld by the Wisconsin Supreme Court placed a cap on the total amount of contributions a candidate for state or local office could accept from all committees, including party-related committees and political action committees. Once the cap is reached, the candidate cannot accept any further contributions from committees. Because this cap effectively nullifies the associational and speech rights of committees wishing to contribute (and individuals desiring to associate and contribute through committees), the principles of *Buckley v. Valeo* would appear to be violated.