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FRANKENSTEIN'S MONSTER HITS THE CAMPAIGN TRAIL: AN APPROACH TO REGULATION OF CORPORATE POLITICAL EXPENDITURES

JILL E. FISCH*

I. INTRODUCTION

Since states began to grant corporate charters, the corporate form has been viewed by many with suspicion and distrust. Corporations have been perceived as dangerous because of their size, their ability to concentrate the power to control large amounts of capital in the hands of a few managers, and their influence on the lives of most citizens through control of consumer, investment, and employment markets. This fear of the corporate form, which led Justice Brandeis to describe the industrial corporation as a "Frankenstein monster,"¹ prevailed for many years and caused states to impose limitations on the size,² powers,³ and

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1. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting).

2. Statutes limited corporations to a certain amount of authorized capital. Under the state corporation laws in effect in the mid-1800's, provisions limiting the capital stock of a corporation to \$100,000 or even less were common. *See id.* at 550-54 (Brandeis, J., dissenting).

3. Before the adoption of modern corporation statutes, corporate charters were required to contain a statement of the purpose for which the corporation was formed. This purpose provision was generally viewed as a limitation on the corporation's powers; actions by the corporation that were outside the corporation's stated objectives were deemed ultra vires, literally beyond the corporation's power. Stockholders or third parties could attack such actions on the ground that the corporation had acted in an unauthorized manner. For a discussion of the classical ultra vires doctrine, see H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 184 (3d ed. 1983); Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1662-72 (1988).

The amendment of corporation laws to permit general purpose clauses, that is, charter provisions that permit the corporation to engage in any lawful business, has virtually erased the classical ultra vires doctrine. For example, see § 102(a)(3) of the Delaware Code:

It shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any.

DEL. CODE ANN. tit. 8, § 102(a)(3) (1988). Most states adopted such modern statutes in the mid-1800's. *See Liggett*, 288 U.S. at 555 n.27. In addition, most states have limited the application of the ultra vires doctrine by statute. *See, e.g.*, DEL. CODE ANN. tit. 8, § 124.

duration⁴ of corporations.

In spite of the warnings by Justice Brandeis and others about the corrosive power of the corporate form, corporations gradually gained acceptance and were given increased powers, including the power to own other corporations, the power to make charitable contributions, and the power to invoke the attorney-client privilege. In the 1990's, corporations have become an acceptable business form for the large multinational business, the small shop owner, and the public interest group. That is not to say, however, that the historic fear of the corporate form has disappeared.

The Supreme Court's recent decision in *Austin v. Michigan Chamber of Commerce*⁵ serves as a reminder that the "Age of Corporate Mistrust" is not dead. In *Austin*, the Court upheld against first amendment challenge a Michigan law prohibiting corporations from making independent expenditures that support or oppose a candidate for state political office.⁶ *Austin* represents a significant cutback on the corporation's right to engage in political speech. Previous Supreme Court decisions established that independent expenditures constitute political speech and that corporate political speech, like that of individuals, is protected by the first amendment.⁷ *Austin* rejected neither of those principles, but concluded that the Michigan statute was legitimate because the prohibition on corporate political speech served a compelling state interest: the interest in preventing the "corrosive and distorting effects" of corporate speech on political campaigns.⁸

Corporations have historically been subjected to greater restrictions than unincorporated entities. Nevertheless, the Court's willingness to find an evil inherent in speech based simply on the speaker's "corporateness"⁹ is troubling.¹⁰ More importantly,

4. In the early 1900's, many states limited the duration of corporate existence to periods from 20 to 50 years. See *Liggett*, 288 U.S. at 555 n.29.

5. 110 S. Ct. 1391 (1990).

6. *Id.* at 1401.

7. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (per curiam).

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

9. The evil addressed by regulations such as the Michigan statute appears to be an evil associated with the corporate form, not the political involvement of businesses in general. *Id.* at 1418 (Kennedy, J., dissenting).

10. Equally troubling are *Austin's* implications for the first amendment protection of group or associational speech. This issue was a primary subject of Justice Kennedy's dissent in *Austin*. See *id.* at 1416 (Kennedy, J., dissenting).

the Court decided *Austin* in a vacuum, divorced from any consideration of the special powers and limitations associated with use of the corporate form.¹¹ In determining that the Michigan statute was "narrowly tailored" to its goal,¹² the Court thus did not find it necessary even to consider whether state corporation law, the traditional method of regulating corporate conduct, might be a more appropriate and less restrictive method of preventing the evils perceived by the Michigan legislature.

This Article argues that the Court's decision in *Austin* is an unjustified departure from case precedent. It surveys the policies behind extending first amendment protection to independent campaign expenditures. In so doing, the Article reviews the basis for the Court's decision that campaign expenditures, both by individuals and entities, constitute protected political speech and reviews the Court's subsequent retraction from the reasoning of its earlier decisions, a retraction that culminated in the *Austin* opinion.

The Article then examines the effect of the Michigan statute and its federal counterpart¹³—both of which virtually outlaw corporate political speech in an election contest—on the policies that the first amendment protects. It analyzes the reasoning employed by the Court in *Austin* and explains how *Austin* deviates from both the logic and the values embraced by prior decisions. The Article reviews the interests advanced in support of the regulation of corporate speech and considers whether a ban on corporate political expenditures serves the governmental interests of fairness and integrity in the electoral process. Finally, the Article questions whether the statutory prohibitions on corporate political speech are narrowly tailored to serve these governmental interests.

The Article concludes that the outright prohibition of corporate political speech is not justified and that the refinement of state corporation law is a less intrusive and more appropriate way of regulating corporate political speech. Based on the rationale that corporate political speech adds to the open marketplace of ideas protected by the first amendment, prohibition of that speech cannot be considered a narrowly tailored means of addressing

11. See *infra* notes 226-51 and accompanying text.

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

13. The Michigan statute is modeled after a corresponding provision of the Federal Election Campaign Act, 2 U.S.C. § 441b(a) (1988). See *infra* notes 133-38 and accompanying text.

the evils that the Court has identified unless the Court analyzes the existing framework of corporate regulation and evaluates the ability of a corporate law approach to address those evils.

II. THE RELEVANT BACKGROUND—CAMPAIGN EXPENDITURES AND CORPORATE SPEECH

A discussion of the first amendment protection of corporate political expenditures must start with *Buckley v. Valeo*,¹⁴ the leading case on the limitations that the first amendment imposes on government attempts to regulate political speech.¹⁵ In 1971, Congress passed the Federal Election Campaign Act (FECA),¹⁶ a comprehensive set of statutes aimed at reducing corruption in the political process.¹⁷ FECA imposed numerous limitations on

14. 424 U.S. 1 (1976).

15. The Court has distinguished between political speech, which it said is at the "core of the First Amendment," *Boos v. Barry*, 485 U.S. 312, 318 (1988), and other forms of speech such as commercial speech, which it held to merit a lesser degree of protection. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); *see infra* note 76. In *Buckley*, the Court made it clear that the statute at issue regulated core political speech: "[I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

16. As originally enacted, FECA amended sections of titles 2, 18, and 47 of the United States Code. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., and 47 U.S.C.); *see Buckley*, 424 U.S. at 144 app. Subsequently, Congress amended and renumbered FECA. FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; FECA Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. FECA's prohibition of independent corporate spending in connection with a federal election is currently contained in 2 U.S.C. § 441b (1988), which prohibits national banks, corporations, and labor unions from making a contribution or expenditure in connection with any election for federal office.

Before the adoption of FECA, corporations had been subject to varying restrictions in connection with election spending dating back to 1907, when Congress enacted the Tillman Act, which made it unlawful for corporations "to make a money contribution in connection with any election to any political office." Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907). In 1925, Congress extended the Tillman Act's prohibitions to contributions of "anything of value," *id.* ch. 368, tit. III, § 302(d), 43 Stat. 1070 (1925), and subsequently, in 1947, to expenditures on behalf of candidates, Labor Management Relations (Taft-Hartley) Act, ch. 120b, § 304, 61 Stat. 136, 159 (1947). For a detailed review of the history of congressional regulation of corporate spending in connection with federal elections, *see United States v. UAW—CIO*, 352 U.S. 567, 570-87 (1957).

17. The Court described FECA as "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress." *Buckley*, 424 U.S. at 7 (citing *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975)).

spending in connection with federal political campaigns.¹⁸ In particular, FECA prohibited¹⁹ any person²⁰ from making a contribution of over \$1,000 to a political candidate²¹ and further limited independent expenditures by any person in connection with the campaign to \$1,000.²² FECA thus imposed two different forms of limitations on political spending: contribution limits and expenditure limits.²³

Buckley involved an extensive challenge to FECA on the basis that FECA's restrictions violated the first amendment right of candidates and their constituencies to engage in (and hear) political speech.²⁴ The Court agreed that both contribution²⁵ and

18. The 1974 amendments to FECA also established the eight-member Federal Election Commission (FEC) and vested it with primary responsibility for administering and enforcing the statute. *See id.* at 109.

19. Violation of the statute was a crime punishable by imprisonment of not more than one year, a fine of not more than \$25,000, or both. 18 U.S.C. § 608(i) (Supp. IV 1970) (current version at 2 U.S.C. § 437(d)(1)(A) (1988)).

20. "Person" includes "an individual, partnership, committee, association, corporation, or any other organization or group of persons." *Id.* § 591(g) (current version at 2 U.S.C. § 431(11)).

21. *See id.* § 608(b)(1) (current version at 2 U.S.C. § 441a(a)(1)(A)) ("no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000").

22. 18 U.S.C. § 608(e) limited aggregate expenditures by any person "relative to a clearly identified candidate during a calendar year" to \$1,000. *Id.* § 608(e)(2) (repealed 1976). The statute defined expenditures relative to a "clearly identified" candidate as those in which the candidate's name or picture was used or the candidate's identity was "apparent by unambiguous reference." For current definitions of "independent expenditure" and "clearly identified," see 2 U.S.C. § 431(17)-(18).

23. FECA also contained a direct prohibition on contributions or expenditures by corporations, a continuation of the restrictions described in note 16, *supra*. 18 U.S.C. § 610 made it unlawful for any corporation to make a contribution or expenditure "in connection with any election to any [political] office." 18 U.S.C. § 610 (current version at 2 U.S.C. § 441b(a)). The expenditure limitations of § 610 were neither challenged nor addressed in *Buckley*.

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

25. The Court distinguished expenditures from contributions in two ways. First, the Court held that a contribution is only an indirect form of speech. *Id.* at 20-21. Although the contribution indicates support for a candidate and his or her views, it indicates only general support without articulating the basis for such support. *Id.* at 21. Moreover, the Court found that limiting contributions would not diminish political dialogue because candidates were able to acquire adequate campaign funds through public funding and small contributions. *Id.* at 21-22. Second, the Court found that Congress had a compelling interest in restricting campaign contributions: the prevention of corruption in political campaigns, particularly the actuality and appearance of political quid pro quos or bribery in connection with large contributions to a political candidate. *Id.* at 25. The Court found that the possibility of such corruption was a valid justification for the regulation of campaign contributions. *Id.* at 26. Accordingly, although the Court found that limitations on expenditures violated the first amendment, the Court upheld the corresponding contribution limits as constitutional. *Id.* at 29.

expenditure limitations implicated fundamental first amendment interests.²⁶ Importantly, the Court rejected the finding by the court of appeals that the statute's provisions regulated conduct rather than speech, a finding premised on the fact that campaign expenditures involve the expenditure of money rather than speech alone.²⁷ The Court stated that a communication's dependence on the expenditure of money does not itself introduce a nonspeech element into the communication.²⁸

The Court then found that by limiting independent expenditures²⁹ to \$1,000, the Act essentially precluded most individuals and groups from communicating in any significant way.³⁰ According to the Court, the expenditure limitations made it a "federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper."³¹

The government attempted to justify the limitation on such expenditures with the claim that the statute was aimed at preventing corruption in political campaigns.³² Although the Court accepted this rationale to support regulating campaign contributions,³³ it found that a comparable threat of corruption was

26. *Id.* at 23.

27. *Id.* at 16-17.

28. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.* at 16.

29. "Independent expenditures" are those expenditures that are not coordinated with a candidate or made at his or her request. The Senate Committee on Rules and Administration described the concept of independent expenditures as follows:

"Independent expenditures" refer to sums expended on behalf of a candidate without his authorization, as distinct from contribution of money, goods or services put at the disposal of his campaign organization.

For example, a person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent[,] that would constitute an "independent expenditure on behalf of a candidate". . . .

However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both.

S. REP. NO. 689, 93d Cong., 2d Sess. 1, 18 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5587, 5604.

30. *Buckley*, 424 U.S. at 39-40.

31. *Id.* at 40 (quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1970) (repealed 1976)).

32. *Id.* at 25. The government also identified two "ancillary" interests served by the limitations: equalizing the relative ability of all citizens to affect the election process and curbing the "skyrocketing cost of political campaigns." *Id.* at 25-26.

33. *See supra* note 25.

not present in connection with independent expenditures neither requested by nor coordinated with the candidate.³⁴

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.³⁵

The government also sought to defend the FECA expenditure limitations on the basis that those limitations served the important purpose of ensuring equality in the political process by "equalizing the relative ability of individuals and groups to influence the outcome of elections."³⁶ In other words, limiting campaign expenditures would prevent a wealthy individual or group from "buying" an election. The Court gave little credence to this argument, finding that the expenditure limitation was a virtual prohibition on political speech.³⁷ Equal speech is hardly the equivalent of no speech; even if equalizing the relative influence on an election were a valid legislative goal, simply preventing speech is not a valid way to achieve this goal. The Court however, went further. In a footnote, the Court appeared to reject the defendants' position that the legislature could abridge the first amendment rights of some persons to engage in political expression "in order to enhance the relative voice of other segments of our society."³⁸

For the purposes of this Article, the primary significance of the decision in *Buckley* is the Court's conclusion that independent expenditures are protected political speech.³⁹ Moreover, *Buckley*

34. See *Buckley*, 424 U.S. at 74-82. The Court also held that the statutory prohibition applied only to those independent expenditures that expressly advocate the election or defeat of a particular candidate. *Id.* at 80.

35. *Id.* at 47.

36. *Id.* at 48.

37. *Id.* at 48-49.

38. *Id.* at 49 n.55.

39. *Id.* at 48-49. Such a conclusion is far from obvious. Several commentators, including Judge Skelly Wright (the court of appeals judge whose decision the Supreme Court reversed in *Buckley*), have argued that spending money does not constitute speech and is not subject to first amendment protection. See Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609

addressed the statutory regulation of political campaign spending without regard to the identity of the speaker. As such, at least one issue in *Buckley* was simple: individual citizens⁴⁰ who were subject to FECA's expenditure limitations clearly had a first amendment right to engage in political speech. Indeed, participation by individual voters in the public debate about political candidates is at the core of protected first amendment values. As the Court observed in *Buckley*, "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."⁴¹

The holding in *Buckley* is not limited to individual citizens. Groups, as well as individuals, possess a constitutionally protected right to engage in free speech.⁴² Indeed, the Court explicitly awarded first amendment protection to corporate speech in its first consideration of the issue.⁴³ Two years after *Buckley*, the

(1982); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Indeed, to a certain extent, spending money to publicize one's political views may be analogized to using a bullhorn in a public forum—it allows the views to be amplified so as to reach a wider audience, but it does not contribute to the marketplace of ideas directly. As the Court recognized in *Buckley*, however, it is virtually impossible to speak audibly in modern society without spending money. *Buckley*, 424 U.S. at 19. A single newspaper advertisement involves a greater expenditure of money than that permitted by FECA. See *supra* text accompanying note 31. Similarly, printing and distributing a newsletter or mailing that expresses one's viewpoint, hiring television or radio time, and even telephoning individual voters to communicate views directly all involve spending money. *Buckley*, 424 U.S. at 19. It seems naive to believe that one can "make a difference" in the political process through the communication of ideas without spending money to convey those ideas to the public.

40. Group participation in political dialogue raises an additional issue not present in *Buckley*: Is the speech of a group subject to the same kind of first amendment protection? Groups clearly have some first amendment rights. Indeed, the rights of association granted to individuals may, by implication, result in protection of the actions of groups. Moreover, the mere fact of an individual's participation in a group may enhance the quality of his or her speech by rendering that speech more credible, more powerful, or seemingly more legitimate. See, e.g., *NAACP v. Button*, 371 U.S. 415, 428 (1963) (NAACP may invoke first amendment rights); *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936) (newspaper corporation has a first amendment liberty right to free speech).

41. *Buckley*, 424 U.S. at 14.

42. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association"); see also *Button*, 371 U.S. at 428 ("We think petitioner may assert this right [of association] . . . because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail."). In addition, limitations on political contributions and expenditures impact on protected associational freedoms. See *Buckley*, 424 U.S. at 25.

43. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Court decided *First National Bank v. Bellotti*,⁴⁴ which held that such speech was constitutionally protected.⁴⁵

Bellotti involved a Massachusetts statute that prohibited business corporations (for-profit corporations) from making contributions or expenditures for the purpose of influencing the outcome of any ballot measure "other than one materially affecting the property, business or assets of the corporation."⁴⁶ Plaintiffs, including three Massachusetts business corporations,⁴⁷ sought to spend money to oppose a ballot question dealing with a proposed amendment to the Massachusetts Constitution that would have permitted the legislature to impose a graduated tax on the income of individuals.⁴⁸

In a five-to-four decision, the Court held that the Massachusetts statute unconstitutionally burdened protected speech.⁴⁹ Although explicitly declining to premise its holding on a finding that corporations have a first amendment right to engage in political speech,⁵⁰ the Court found that the Massachusetts statute "abridge[d] expression that the First Amendment was meant to protect."⁵¹ The Court found that the ballot issue was a matter of public importance, that the corporate speech had a capacity to inform the public, and that the corporation's status as a corporation did not affect the public value of its speech:

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

44. 435 U.S. 765 (1978).

45. *Id.* at 795.

46. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

47. The three business corporations were The Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co. *Bellotti*, 435 U.S. at 768 n.1.

48. *Id.* at 769.

49. *Id.* at 765.

50. The Court explicitly rejected the issue as being whether and to what extent corporations have first amendment rights. *Id.* at 776-77.

51. *Id.* at 776. Rather than basing its decision on whether a corporation has a first amendment right to engage in political speech, the Court in *Bellotti* focused on the value of political speech, from whatever source, in the marketplace of ideas. *Id.* at 776-77. Scholars have interpreted this approach to corporate speech cases as a realization not of the corporation's right to speak, but of the public's right to hear. See, e.g., Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1246-52 (1986).

public does not depend upon the identity of its source, whether corporation, association, union, or individual.⁵²

Accordingly, the Court had to use the strict scrutiny test in its evaluation of the Massachusetts statute.⁵³ Massachusetts proffered two interests served by the statute: "the State's interest in sustaining the active role of the individual citizen in the electoral process" and "the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."⁵⁴ In the Court's view, neither of these interests justified the regulation.⁵⁵

The Court initially appeared to give some deference to the State's first rationale for the statute, which deference reflected a retreat from *Buckley*.⁵⁶ Stating that this argument would merit the Court's consideration if it were "supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests,"⁵⁷ the Court concluded that the State had made no such showing. "[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts."⁵⁸

The Court went on, however, to state that the mere ability of corporate speech to influence the outcome of an election does not make such speech improper; indeed, persuasion is the purpose of political speech.⁵⁹ Moreover, the Court found that ballot measures do not present the same potential for corruption as election

52. *Bellotti*, 435 U.S. at 777 (footnotes omitted).

53. First amendment jurisprudence provides for evaluation of a statute that burdens constitutionally protected speech according to the strict scrutiny test. This test allows the statute to stand if a compelling governmental interest justifies the government's interest in regulating the speech *and* if the statute is the least restrictive means of achieving the governmental goal. *Id.* at 786. Commentators have suggested that strict scrutiny is inappropriate in evaluating campaign finance laws and that courts should test such laws with a more lenient analysis. *See, e.g.,* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985).

54. *Bellotti*, 435 U.S. at 787.

55. *Id.* at 788.

56. In footnote 55 in *Buckley*, the Court explicitly rejected equalization as a valid basis for rejecting protected speech. *See Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (per curiam); *supra* text accompanying note 38.

57. *Bellotti*, 435 U.S. at 789.

58. *Id.*; *cf. infra* note 207 (citing articles hypothesizing that corporate spending does affect voting patterns).

59. *Bellotti*, 435 U.S. at 790.

contests.⁶⁰ Finally, the Court reaffirmed its statement in *Buckley* that the first amendment prohibits restricting the speech of some for the purpose of equalizing the relative voice of others, and it condemned the paternalism espoused by this approach.⁶¹

The State's second proffered justification for the statute was more a matter of corporate law than first amendment law. Appellees claimed that the statute protected dissenting shareholders from the use of corporate funds in support of views with which they disagree.⁶² The Court's response to this issue in *Bellotti* was twofold. First, the Court noted that the corporation can engage in many forms of political activity, including lobbying, suggesting that the statute was highly underinclusive if the protection of shareholders was its goal.⁶³ Second, the statute contained no exception for expenditures that were ratified by a shareholder vote, rendering the statute overinclusive.⁶⁴ The Court also alluded to the body of corporate law through which shareholders presumably have the ability to protect themselves against improper expenditures by management, including election of directors, protective charter amendments, the shareholder derivative suit, and ultimately the sale of the corporation's stock.⁶⁵

In view of its finding that corporate political speech was subject to first amendment protection, that the Massachusetts statute burdened that speech, and that no compelling state interest justified the statute, the Court held that the statute was unconstitutional.⁶⁶ In dissent, Justice Rehnquist argued that this deci-

60. *Id.* ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). The Court expressly stated that the question of whether Congress or the state legislatures could constitutionally regulate corporate spending in connection with elections was not before it. *Id.* at 788 n.26.

61. *Id.* at 790-92 ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.") (footnote omitted). Accordingly, although the Court seemed to waver, its final analysis appeared to be a reaffirmation of footnote 55 in *Buckley*. See *supra* text accompanying note 38.

62. *Bellotti*, 435 U.S. at 792-93.

63. *Id.* at 793. Indeed, the freedom of corporations to engage in lobbying raises broader questions. Corporate political advertising is, at a minimum, readily ascertainable as such by the public. Lobbying, on the other hand, takes place behind closed doors, leaving the public unaware of the extent of influence that a corporation may be having on the political process. Moreover, corporate spending on lobbying is substantial. See, e.g., *IRS Administration of Tax Laws Relating to Lobbying, Part I: Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives*, 95th Cong., 2d Sess. 383 (1978) (business annually spends \$1 billion on grassroots lobbying).

64. *Bellotti*, 435 U.S. at 794.

65. *Id.* at 794-95.

66. *Id.* at 795.

sion was contrary to principles of corporate law. Specifically, Rehnquist observed that corporations are creations of state law, empowered with only those rights conferred by their creators: "Being the mere creature of law, [a corporation] possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.'" ⁶⁷ If then, the State wishes to create corporations that lack the power to engage in political speech, it should be free to do so. ⁶⁸

The majority opinion did not directly address Rehnquist's argument because that opinion did not reach the broad question of whether corporations have a first amendment right to engage in political speech. Rehnquist's argument has two flaws, however. First, the Massachusetts statute was a campaign finance law, not a part of the state corporation law. As such, the statute did not attempt to limit the powers of Massachusetts corporations to engage in political speech. Nor was the statute a general prohibition or limitation on corporate powers; rather, it singled out a particular circumstance in which it prohibited the exercise of powers that such corporations, in general, legally possessed. Second, because the Massachusetts statute was not part of the state corporation law, it applied to corporations doing business in Massachusetts, not merely to those incorporated in the state. ⁶⁹

67. *Id.* at 823 (Rehnquist, J., dissenting) (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

68. *Id.* at 828 (Rehnquist, J., dissenting).

69. In general, the law of the state of incorporation determines the powers of a corporation. H. HENN & J. ALEXANDER, *supra* note 3, § 86, at 160. This principle is known as the "internal affairs doctrine" and provides that the law of the state of incorporation determines internal matters of corporate governance, such as voting rights, powers, and the validity of charter provisions. *Id.* "[A] corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987) (upholding Indiana antitakeover statute based on finding that it applied only to corporations incorporated in Indiana). The principle is one of conflicts of law as well as logic: a corporation subject to the corporation laws of more than one state might be subject to conflicting demands. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982). Other states must accept the powers that the laws of a corporation's state of incorporation grant to it. See *Bank of Augusta v. Earle*, 13 U.S. 519, 588 (1839).

Although the internal affairs doctrine has no concrete basis in constitutional law, both scholars and courts have recognized some constitutional limitation on the ability of a forum state to apply its domestic corporation law to an out-of-state corporation. They have attributed this limitation to the commerce clause, the full faith and credit clause, and the due process clause. See Beveridge, *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW 693, 709-15 (1989). Although a number of states have passed "foreign corporation laws" which attempt to regulate at least some of the internal affairs of out-of-state corporations, these statutes apply only if the corporation does a

Its prohibition thus extended to corporations that Massachusetts had not created and over which it lacked the type of creator's authority contemplated by Rehnquist.

The *Bellotti* decision was controversial.⁷⁰ One reason for this controversy was that, in spite of the Court's clearly articulated basis for its holding, *Bellotti* seemed to establish a corporation's first amendment right to engage in political speech.⁷¹ Actually, the decision did not go so far. The objections to *Bellotti* are significant, however, because they are relevant to the broad issue the Court eventually reached in *Austin v. Michigan Chamber of Commerce*:⁷² the validity of statutory prohibitions on corporate expenditures in connection with a political campaign.

Commentators raise three principal objections to extending first amendment protection to corporate political speech. The first argument contends that corporate speech is an illusion.⁷³ The corporation as an entity cannot speak at all; it is an artificial being. Many therefore suggest that the corporation has no first amendment right to speak because corporate speech does not exist. Such speech is simply the speech of the corporation's managers.

The legitimacy of a corporation's first amendment free speech right is a troubling challenge to *Bellotti*. The literature is filled with discussions of the validity of granting to corporations first amendment rights in general and political speech rights in particular.⁷⁴ Although a review of this literature is beyond the scope of this Article, the denial of first amendment protection to corporate speech raises a number of troubling issues, including the implication of the associational freedoms of individuals.⁷⁵

majority of its business in the state, and they generally exempt corporations whose shares are listed on a national exchange. These provisions therefore do not govern large, publicly held corporations. See, e.g., CAL. CORP. CODE § 2115 (West Supp. 1990); N.Y. BUS. CORP. LAW § 1320 (McKinney 1986).

70. The commentary on the *Bellotti* decision includes Fox, *Corporate Political Speech: The Effect of First National Bank v. Bellotti on Corporate Referendum Spending*, 67 KY. L.J. 75 (1978-79); Hart & Shore, *Corporate Spending on State and Local Referendums: First National Bank v. Bellotti*, 29 CASE W. RES. L. REV. 808 (1979); Schneider, *supra* note 51. See also Garrison, *Corporate Political Speech, Campaign Spending, and First Amendment Doctrine*, 27 AM. BUS. L.J. 163, 178 n.91 (1989) (citing additional scholarly commentary).

71. See, e.g., Miller, *On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti*, 38 WASH. & LEE L. REV. 21, 22 (1981) (describing the corporation as a constitutional person with first amendment rights).

72. 110 S. Ct. 1391 (1990).

73. See Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 653 (1990).

74. See *supra* note 70.

75. Some of the most difficult problems associated with denying a corporation the right

Moreover, if corporations do have some first amendment right to free speech, why should that protection not extend to political speech? One need not view corporate political speech as distinct from commercial speech, the general body of corporate speech which courts have previously held is subject to first amendment protection.⁷⁶ Indeed, one can argue that corporate speech is, by definition, always commercial speech⁷⁷ in that legitimate corpo-

to free speech result from the fact that many nonprofit organizations for which political speech is a fundamental aspect of their *raison d'être*, including organizations with a direct political agenda, are organized in the corporate form. A limitation on corporate speech thus affects not merely IBM and AT&T, but also the NAACP, the NRA, Common Cause, and Planned Parenthood. Preventing these organizations from communicating the ideas that they were formed to further is a direct restriction on the associational freedom of their members. It is also a limitation on the ability of those members to communicate effectively. The organizations cited above provide examples of the undeniable fact that group speech is frequently more powerful than individual speech because of the ability of the group to aggregate popular and financial support.

76. Although subject to first amendment protection, courts have given commercial speech less protection than political speech. *See supra* note 15. Rather than employing traditional strict scrutiny, the Court has developed a four-part test for applying the first amendment to commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). Justice Brennan termed the standards the Court should apply to government regulation of commercial speech "relaxed." *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting). For a comparison of this test with strict scrutiny, see Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 637 n.27 (1985). Furthermore, in order for commercial speech to be constitutionally protected, it must be truthful and concern lawful activity. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 658 (1985); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387-88 (1973).

The Court has justified the lesser protection given to commercial speech on the basis that commercial speech is more "durable"; that is, intrusive government regulation will be less likely to chill or inhibit it. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). The commercial nature of the speech is not, however, a sufficient basis for banning it, and the Court has stated that legislation cannot ban commercial speech that is truthful and not misleading, even though the speech may have as its only objective the sale of goods or services, because it nonetheless conveys information. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990).

77. The line between commercial speech and political speech is not particularly bright. First, the fact that speech is motivated by pecuniary motives or takes the form of an advertisement does not automatically make it commercial speech. As one commentator has observed, "[E]ven the most core political speech can be impelled by a jumble of inseparable motives. Greed, Glory, the Greater Good: each informs the senator on his stump, the preacher in his pulpit, the car dealer in his commercial." Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1837 (1988) (footnote omitted). Nor does speech that deals with issues of public concern automatically become noncommercial. The tobacco industry has been vocal in discussing the connection between cigarette smoking and illness. Similarly, the egg industry has recently attempted to address the public's growing concern about the link between consumption of eggs and heart disease. *See id.* at 1838-39; *see also Farber, Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 386 (1979).

rate speech is designed to further the corporation's objectives, which, for a business corporation, should primarily be achieving a profit.⁷⁸ Nevertheless, is it reasonable to find that a state may ban corporate speech altogether absent a compelling state interest? Even in the area of advertising, it is clear that publication of the corporation's speech is a contribution to the marketplace of ideas.⁷⁹ This leads to the same conclusion that the Court reached in *Bellotti*: corporate political speech may legitimately be entitled to first amendment protection because of the value of the speech,⁸⁰ rather than the rights of the speaker.⁸¹

78. The notion that management's conduct is substantially constrained by the requirement that management adhere to a goal of profit maximization is clearly simplistic. See Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1309-12 (1984) (corporate management's responsibility to shareholders has been reduced to a "slogan" of profit maximization that fails to operate as a real constraint on management authority). Even if management is assumed to act in good faith, its attempts to maximize profits may be hampered by problems of inadequate information, subjective values that differ from those of its stockholders, differing time frames, and the difficulties in distinguishing personal from professional motivations. See Mundheim, *A Comment on the Social Responsibilities of Life Insurance Companies as Investors*, 61 VA. L. REV. 1247 (1975) (arguing that the profit maximization model is too permissive with respect to many management decisions and too restrictive with respect to corporate attempts to be socially responsible).

79. The theory that the first amendment protects speech because of its contribution to the marketplace of ideas is generally attributed to Justices Holmes and Brandeis. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

80. As appellants argued to the Court in *Bellotti*,

A voter in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new business into the state, might be just as interested in hearing [a corporation's views on a proposed tax] as say the views of . . . the editorial staff of the *Boston Globe* on this same subject.

Brief for Appellants at 42, *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172).

81. Three purposes underlie the first amendment protection of speech. See, e.g., Note, *Pacific Gas and Electric Co. v. Public Utilities Commission: The Right to Hear in Corporate Negative and Affirmative Speech*, 73 CORNELL L. REV. 1080, 1081-82 (1988). First, free speech furthers the objectives of the speaker through personal expression or self-actualization. Second, speech protects the democratic system, including the communication of minority viewpoints. Third, the first amendment serves as a tool to further the free exchange of ideas; through expression of ideas, the public will become more completely and truthfully informed. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-63 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Scholars have identified this third purpose as the foundation of the holding in *Bellotti*. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 795 (1988). Although a corporation arguably has an interest in speaking, particularly when speaking increases its profits, the public has a separate interest in that speech, which has been termed the right to hear. See, e.g., Schneider, *supra* note 51, at 1246. Commentators have justified the first amendment protection of this right to hear on the theory that regardless of whether a corporation has a "self" or any interest in self-expression, the corporation's speech

The second principal objection to extending first amendment protection to corporate political speech, an objection raised in *Bellotti*, is that allowing a corporation to engage in political speech infringes upon the first amendment rights of its stockholders, who may disagree with that speech.⁸² According to this argument, corporate political speech forces the stockholders of a corporation to associate with and to sponsor a political view they may not share. Stockholders, however, may disagree with other corporate practices, such as the corporation's hiring policies, its advertising, its choice of research and development projects, or even its charitable donations.⁸³ The structure of the corporation is designed to permit the directors and officers to manage the corporation's day-to-day operations, regardless of the popularity of management decisions. If such decisions are consistently objectionable, stockholders can replace management through their voting power. Moreover, if an individual stockholder strongly disagrees with management policies, the stockholder has a readily available remedy: to sell the stock of the offending company.

Finally, commentators argue that corporations have too much money and that states have a valid interest in controlling the disproportionate influence that corporations can wield on the election process. Indeed, in recent years, a substantial body of scholarship has debated whether the influence of monied inter-

enhances the public's ability to become informed. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) (quoting *Bellotti*, 435 U.S. at 777) ("[T]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source."). Some commentators have taken the position that the only justification for granting first amendment protection to corporate speech is the public right to hear. See, e.g., Note, *Integrating the Right of Association with the Bellotti Right to Hear*—Federal Election Commission v. Massachusetts Citizens for Life, Inc., 72 CORNELL L. REV. 159, 187 (1986) ("The right to hear provides the sole first amendment protection for a commercial corporation's speech . . .").

82. See Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 294 (1981); Mayer, *supra* note 73, at 653.

83. See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459, 467-69, 170 N.W. 668, 671 (1919) (stockholder challenge to corporation's charitable donation policy). Recent challenges to the practice of many large corporations of making donations to Planned Parenthood have focused renewed attention on corporate philanthropic policies that do not reflect the opinions of the corporations' constituencies, including customers as well as stockholders. See, e.g., McDonough, *Pro-lifers seeking corporate boycotts*, Wash. Times, Aug. 9, 1990, at A3, col. 1 (pro-life group calls for boycott of corporations, including American Express, that give money to Planned Parenthood); Swisher, *Backing Away From Controversy; Abortion Issue causes AT&T to Pull Funds*, Wash. Post, Apr. 5, 1990, at E1, col. 4 (AT&T announces that it will stop donations to Planned Parenthood due to pressure from antiabortion forces); see also *Cahill v. Public Serv. Comm'n*, 76 N.Y.2d 102, 114, 556 N.E.2d 133, 138, 556 N.Y.S.2d 840, 845 (1990) (upholding customer's first amendment challenge to public utility's corporate charitable contributions).

ests, such as corporations, on the electoral process is harmful. Many scholars have advocated campaign finance reform both to limit the overall influence of money in elections and to prevent money from rendering certain voices particularly influential in the political process.⁸⁴

Based on the holding in *Buckley* that FECA's limitations on independent expenditures were unconstitutional and the conclusion in *Bellotti* that corporate political expenditures were entitled to first amendment protection despite the identity of the speaker, one might have concluded that section 441b of FECA, which prevents corporations from making independent expenditures in election contests, was unconstitutional.⁸⁵ Yet for almost twenty years, no Supreme Court case dealt explicitly with the legality of such independent expenditures.⁸⁶

84. See, e.g., Nichol, *Money, Equality and the Regulation of Campaign Finance*, 6 CONST. COMMENTARY 319 (1989). The fundamental issue may be whether money and the corresponding influence money can buy should have any role in the political process. To some extent, the Court's decision in *Buckley* thwarted the congressional attempt to minimize the role of monied interests in elections. *Id.* at 323. The merits of devising a system that incorporates overall spending limitations need not be resolved here, for the limitations dealt with herein do not prevent the use of money in the election process; they merely prevent the use of funds by corporate entities. Indeed, the greatest impact of wealth on the political process can be attributed to the growth of political action committees (PACs). See, e.g., *Common Cause v. Schmitt*, 512 F. Supp. 489, 491 (D.D.C. 1980), *aff'd by equally divided Court*, 455 U.S. 129 (1982) (NCPAC collected more than \$7.6 million in 1979-80 for use in the 1980 campaigns). The emerging role of PACs in political campaigns is documented in H. ALEXANDER, *FINANCING THE 1980 ELECTION* (1983) and E. DREW, *POLITICS AND MONEY* (1983). See also Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083 (1984) (reviewing H. ALEXANDER, *supra* and E. DREW, *supra*).

Moreover, even the current restrictions on corporate expenditures present some avenues of escape, such as when expenditures are made by corporate officers and directors or by related noncorporate entities. See NEW YORK STATE COMM'N ON GOV'T INTEGRITY, *THE MIDAS TOUCH: CAMPAIGN FINANCE PRACTICES OF STATEWIDE OFFICEHOLDERS* 15 (June 1989) [hereinafter *THE MIDAS TOUCH*] (limits on corporate campaign contributions are easy to circumvent by making donations "through family, employees, clients or customers, PACs, and so forth").

85. Read together, the two opinions have been described as the "'Magna Carta' for corporate spending in the political process." Garrison, *supra* note 70, at 189-90 (quoting Dorsen & Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 212); see Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 946 (1980) (recent Supreme Court decisions "cast serious doubt upon the constitutionality of [FECA]"); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 171 (1978) (footnotes omitted) ("*Bellotti* places in immediate question the constitutionality of several federal and state bans on corporate political contributions and expenditures.").

86. The validity of § 441b and its predecessors was challenged on four occasions dating back to 1947; in each case, the Court avoided reaching the constitutional question. See *Cort v. Ash*, 422 U.S. 66, 69-70 (1975); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 400 (1972); *United States v. UAW-CIO*, 352 U.S. 567, 592 (1957); *United States v. CIO*, 335 U.S. 106, 124 (1948).

Although it did not address the constitutionality of the section 441b limitations on independent expenditures, the Supreme Court addressed an attack on section 441b in *Federal Election Commission v. National Right to Work Committee (NRWC)*.⁸⁷ NRWC dealt with the provisions of section 441b that regulate contributions to corporations for political expenditures. Although the Court in *NRWC* did not consider the expenditures themselves, NRWC claimed that the portion of the statute under attack imposed limitations that interfered with a corporation's associational first amendment rights.⁸⁸

The Court found that, although the statute implicated the right to associate, this right was not absolute. Rather, the Court held that two interests justified the regulation: (1) ensuring "that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions";⁸⁹ and (2) protecting individuals who have paid money into a corporation for reasons other than supporting candidates "from having that money used to support political candidates to whom they may be opposed."⁹⁰ The Court found these interests sufficient to justify the regulation.⁹¹

The opinion in *NRWC* went beyond simply evaluating the contribution issue in the case. The Court reviewed the seventy-five-year history of the regulation of corporate political contributions and concluded that the gradual development of this regulatory scheme was a reasonable response to congressional perception that "the special characteristics of the corporate struc-

87. 459 U.S. 197 (1982). *NRWC* involved the provision of § 441b that limits a corporation's ability to solicit contributions for its segregated political fund to the corporation's "members" only. *Id.* at 198. NRWC was a nonprofit corporation organized for the purpose of opposing compulsory unionism and publicizing its opposition thereto. *Id.* at 199-200. It had established a segregated fund in accordance with the statute. *Id.* at 200. The FEC claimed that NRWC was violating § 441b by soliciting contributions too broadly—in effect by soliciting contributions from anyone who "evidence[d] an intention to support NRWC in promoting voluntary unionism." *Id.* at 202 (quoting *National Right to Work Comm. v. Federal Election Comm'n*, 665 F.2d 371, 373 n.1 (D.C. Cir. 1981), *rev'd*, 459 U.S. 197 (1982)). The case was therefore about FECA's contribution limitations rather than its expenditure limitations.

88. *Id.* at 206-07. The court of appeals' decision in *NRWC* had held that the statute infringed upon associational freedoms protected by such cases as *NAACP v. Button*, 371 U.S. 415 (1963). See *NRWC*, 665 F.2d at 374-75.

89. *NRWC*, 459 U.S. at 207.

90. *Id.* at 208.

91. *Id.*

ture require particularly careful regulation.”⁹² Although the Court never considered whether the special attributes of the corporate form were tied to this type of regulation in any way, or whether treating organizations differently from individuals bore a reasonable relationship to preventing corruption in political campaigns, it concluded that the governmental interest in preventing corruption could be accomplished by imposing special restrictions on the political contributions of corporations, unions, and other organizations.⁹³ Accordingly, it upheld the application of the statute to NRWC’s activities.⁹⁴

Although one can view *NRWC* exclusively as a contributions case,⁹⁵ the decision was clearly a movement away from the decisions in *Buckley* and *Bellotti*. First, the Court recognized a legitimate governmental interest in regulating corporate political activities based solely on the actor’s use of the corporate form. Without identifying any connection between the corporate form and the evils that Congress supposedly feared, the Court concluded that it could infer such a connection from the longstanding tradition of regulating the corporate form.⁹⁶ Second, the opinion distinguished *Bellotti* on the sole basis that *Bellotti* did not involve a candidate election.⁹⁷ The Court thus failed to acknowledge that *Bellotti* had explicitly reserved the question of whether corporate political speech in candidate elections raises the same first amendment concerns as speech in connection with state referenda.

The Court reaffirmed constitutional protection for group political speech in *Federal Election Commission v. National Conservative Political Action Committee (NCPAC)*,⁹⁸ in which the Court was faced with a challenge to the validity of 26 U.S.C. § 9012(f), a provision of the Presidential Election Campaign Fund Act.⁹⁹ Under the Fund Act, a presidential candidate could elect to receive public financing for his or her campaign.¹⁰⁰ The Act, however, prohibited independent political committees, such as political action committees, from making independent expendi-

92. *Id.* at 209-10.

93. *Id.* at 210-11.

94. *Id.*

95. The Court never addressed the issue of NRWC’s expenditures from the fund or the implications of its decision on constitutionally protected speech.

96. *NRWC*, 459 U.S. at 209-10.

97. *Id.* at 210 n.7.

98. 470 U.S. 480 (1985).

99. See 26 U.S.C. § 9012(f) (1988).

100. *Id.* § 9003.

tures of more than \$1,000 to further the election of a presidential candidate who had elected to receive such financing.¹⁰¹ The FEC challenged a number of expenditures made by two political committees, NCPAC and the Fund for a Conservative Majority (FCM),¹⁰² to purchase radio and television advertisements to encourage voters to vote for Ronald Reagan in his 1980 presidential campaign.¹⁰³

The Court upheld its commitment to the *Buckley* principle that political expenditures constitute core first amendment speech.¹⁰⁴ The Court also reiterated the distinction between contribution limits and expenditure limits, affirming that although the former present a threat of corruption through the traditional quid pro quo of "dollars for favors," independent expenditures do not present a comparable threat.¹⁰⁵ In addition, the Court rejected the argument that group speech constitutes "speech by proxy," the kind of indirect speech generated by candidate contributions.¹⁰⁶ Instead, the Court found that groups such as NCPAC provided an opportunity for individuals to band together in order to amplify their voices and allowed those of modest means to participate meaningfully in the political process.¹⁰⁷ Accordingly, the PACs' expenditures merited first amendment protection.¹⁰⁸

101. *Id.* § 9012(f).

102. Both NCPAC and FCM were corporations, and both were registered with the FEC as political committees. *NCPAC*, 470 U.S. at 490.

103. *Id.* The Court found that the expenditures were

"independent" in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents. Indeed, there [were] indications that the efforts of these organizations were at times viewed with disfavor by the official campaign as counterproductive to its chosen strategy.

Id.

104. *Id.* at 493.

105. *Id.* at 497-98.

106. *Id.* at 494.

107. *Id.* at 494-95.

108. The Court went on to conclude that no sufficiently compelling governmental interest justified the statute's restrictions on that speech. *Id.* at 497. The Court made it clear that the type of corruption that justified governmental intervention in the political campaign process was "quid pro quo" corruption: "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* The Court then relied on the conclusion it had reached in *Buckley*, "that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.*

Finally, the Court concluded that, even if the statute addressed the potential for corruption presented by the large financial resources of the PACs, it was fatally overbroad. *Id.* at 501. The statute applied to groups with limited resources as well as those with multimillion dollar war chests, neighborhood discussion groups as well as national organizations. *Id.* at 498. Accordingly, the Court held the statutory restriction on group expenditures unconstitutional. *Id.* at 501.

In striking down the statutory limitation on group speech, the Court did not consider corporate speech directly. In fact, the Court made clear that the validity of imposing expenditure limitations on corporate speech in connection with candidate elections had not yet been addressed.¹⁰⁹ The Court warned that this was not a "'corporations' case," even though NCPAC and FCM were corporations, because the statute in question applied to all group expenditures regardless of whether the group utilized the corporate form.¹¹⁰ Accordingly, it was able to distinguish cases such as *NRWC*, which, according to the Court in *NCPAC*, "turned on the special treatment historically accorded corporations."¹¹¹

The Court repeated the observation it had made in *NRWC* that corporations present a plainly recognizable potential for evil and that this potential justifies governmental "restriction of the influence of political war chests funneled through the corporate form."¹¹² The Court alluded to corporate participation in the political process as an area in which "the evil of potential corruption had long been recognized."¹¹³ As in *NRWC*, however, the Court never explained precisely what evil the use of the corporate form presented; instead, the Court appeared again to be referring to the historical distrust of the corporate form as justification for its regulation.

The Court had an opportunity to consider the question that it had reserved in the *Bellotti* decision¹¹⁴ in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*.¹¹⁵ A non-profit, issue-oriented corporation, MCFL challenged the constitutionality of section 441b's restrictions on corporate independent expenditures in connection with an election contest. Specifically, prior to the September 1978 primary elections, MCFL published a special election issue of its newsletter in which it discussed the positions of various candidates for Massachusetts

109. "In *Bellotti*, of course, we did not reach, nor do we need to reach in these cases, the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *Id.* at 496.

110. *Id.* The Court repeated the observation it made in *NRWC* that "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forego some of the rights they have as individuals." *Id.* at 495 (citing *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209-10 (1982)).

111. *Id.*

112. *Id.* at 500-01.

113. *Id.* at 500.

114. *See supra* note 60.

115. 479 U.S. 238 (1986).

public office with respect to abortion.¹¹⁶ The newsletter included the photographs of thirteen candidates described as having a particularly strong pro-life position.¹¹⁷ MCFL distributed this newsletter to its contributors, as well as to others whom it viewed as sympathetic to the pro-life cause.¹¹⁸ The corporation spent approximately \$10,000 to publish and distribute the newsletter, all of which was taken from its general treasury funds.¹¹⁹

The FEC brought suit against MCFL, claiming that the publication of the newsletter violated section 441b and seeking a civil penalty.¹²⁰ MCFL defended its actions on a number of bases: it claimed that the statute did not apply to its conduct because the publication was not within the statutory definition of prohibited "expenditures"; that the publication was subject to the exemption for press publications; and that if the statute did apply to MCFL's conduct, the statute was unconstitutional.¹²¹

The Court could have avoided the constitutional issue by holding that section 441b does not apply to the type of conduct at issue in *MCFL*, but declined to do so. Rather, it held that the publication of the newsletter was within the statutory definition of "expenditures" and that the newsletter did not constitute the normal publication of a regular newsletter or periodical.¹²² Accordingly, the Court reached the issue of the statute's constitutionality.

While reiterating the holding in *Buckley* that "[i]ndependent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms' "¹²³ and applying strict scrutiny to the statute, the Court noted the long history of regulation of corporate political speech, which regulation was justified by the great wealth and "'special advantages which go with the corporate form of organization.' "¹²⁴ The Court acknowledged legitimate governmental interests in regulating the political speech of corporations, including preventing an unfair advantage in the political marketplace and assuring that the

116. *Id.* at 243.

117. *Id.* at 244.

118. *Id.*

119. *Id.* at 243-44.

120. *Id.* at 244-45.

121. *Id.* at 245.

122. *Id.* at 249-51.

123. *Id.* at 251-52 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), quoted in *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam)).

124. *Id.* at 257 (quoting *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982)).

resources used for political speech reflect popular support for those ideas.¹²⁵ The Court also expressed concern that corporate political speech has the potential for "diverting" funds from corporate treasuries to political purposes.¹²⁶

The Court went on, however, to find that the application of section 441b to MCFL did not implicate those governmental interests. The Court distinguished MCFL from traditional business corporations in three ways:¹²⁷ it was formed for the express purpose of promoting political ideas and could not engage in business activity; it lacked shareholders or other constituencies who might be economically damaged by the corporation's political activity; and it was completely independent of traditional business corporations.¹²⁸ According to the Court, MCFL's resources resulted from the popularity of its ideology, not its economic success. MCFL's political speech, therefore, accurately reflected the degree of popular support for its ideas and did not corrupt the political process. Consequently, the Court rendered a narrowly written opinion,¹²⁹ in which it held that the statute could not constitutionally be applied to this particular corporation.¹³⁰ The implication in *MCFL* was that section 441b was constitutional as applied to business corporations. The Court explicitly stated, however, that it had not decided this issue:

We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace. Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, a question not

125. *Id.* at 257-59.

126. *Id.* at 258 (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 423-24 (1972)).

127. *Id.* at 263-64.

128. MCFL had a policy of not accepting funds from traditional business corporations. *Id.* at 264. The FEC has taken the position that a single dollar of corporate funding presents sufficient danger of corruption to bar independent expenditures by a corporate advocacy group or association that receives such funding. See Advisory Opinion 1987-7, Fed. Election Camp. Fin. Guide (CCH) ¶ 5880 (Apr. 6, 1987).

129. "It may be that the class of organizations affected by our holding today will be small." *MCFL*, 479 U.S. at 264.

130. *Id.* at 263. Subsequent courts have read the test promulgated in *MCFL* literally. For example, the court in *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428, 435 (D.D.C. 1989), appeared to find the prohibitions of § 441b applicable to the National Organization for Women's use of corporate treasury funds, even though "less than 1% of NOW's overall budget comes from contributions from corporations or labor unions." *Id.* at 430-31.

before us, that justification does not extend uniformly to all corporations. Some corporations 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.¹³¹

III. THE *AUSTIN* DECISION

This was the state of the law that awaited the Supreme Court in *Austin v. Michigan Chamber of Commerce*.¹³² The Court seemed to have upheld regulation of independent political expenditures by business corporations only implicitly, by recognizing a potential for evil in the use of the traditional corporate form. The Court had never actually considered the regulation of expenditures by traditional for-profit corporations in connection with a candidate election.

In *Austin*, the Court considered a Michigan statute¹³³ analogous to FECA.¹³⁴ As applied to corporations, the Michigan statute, like its federal counterpart,¹³⁵ prohibited corporations from making independent expenditures in support of or in opposition to the election of a candidate for Michigan office. Like FECA, the Michigan statute also allowed corporations to establish separate political funds¹³⁶ that could make political expenditures and to support and administer such segregated political funds, but the statute prohibited corporations from spending their own treasury funds, either directly or through the segregated fund, to support or oppose political candidates. Violation of the statute was a felony.¹³⁷

131. *MCFL*, 479 U.S. at 263.

132. 110 S. Ct. 1391 (1990).

133. MICH. COMP. LAWS ANN. § 169.254(1) (West 1979).

134. The Michigan statute was modeled after § 441b of FECA. See *Austin*, 110 S. Ct. at 1395 n.1.

135. FECA makes it unlawful for a corporation or labor union "to make a contribution or expenditure in connection with" any federal election. 2 U.S.C. § 441b(a) (1988). It defines an "expenditure" as the provision of anything of value "for the purpose of influencing any election for Federal Office." *Id.* § 431(9)(A)(i).

136. Contributions to the fund may be solicited from the corporation's members, stockholders, officers, directors, and executive and administrative employees. MICH. COMP. LAWS ANN. § 169.255(2)-(3).

137. Section 54(4) currently provides:

A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than \$5,000.00 or imprisonment for not more than 3 years, or both, or, if the person is not an individual, by a fine of not more than \$10,000.00.

Id. § 169.254(4).

Although the statute did not apply to media corporations, it did not exempt nonprofit corporations.¹³⁸

The statute was challenged by the Michigan State Chamber of Commerce, a nonprofit corporation whose objectives and purposes include "promoting conditions conducive to economic development, training and educating its members, encouraging the maintenance and observance of ethical business practices, and receiving expenditures and making contributions for political purposes."¹³⁹ The Chamber of Commerce wanted to place a paid advertisement in the newspaper in support of a candidate for the Michigan House of Representatives.¹⁴⁰ Although it had a separate political fund, the Chamber of Commerce sought declaratory and injunctive relief that would enable it to pay for the advertisement with general treasury funds.¹⁴¹

The Supreme Court did not question the body of case law holding that the expenditures in question, although made by a corporation, constitute protected political speech.¹⁴² Nor did the Court retreat from its previous finding that restrictions on independent expenditures constitute direct burdens on speech;¹⁴³ it accepted, without discussion, the premise that the Michigan statute burdened protected political speech.¹⁴⁴ Accordingly, the very question that the Court had reserved in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*¹⁴⁵ was now before it. The

138. Michigan law excludes from the Act's coverage any "news story, commentary, or editorial in support of or opposition to a candidate" by any "broadcasting station, newspaper, magazine, or other periodical or publication." *Id.* § 169.206(3)(d).

Although the legitimacy of the media exclusion is beyond the scope of this Article, the role of the institutional press in election contests might easily be described as "corrosive." The press appears to wield considerably more power in the political process than any single commercial corporation. See *Austin*, 110 S. Ct. at 1414 (Scalia, J., dissenting).

139. *Michigan State Chamber of Commerce v. Austin*, 856 F.2d 783, 784-85 (6th Cir. 1988), *rev'd*, 110 S. Ct. 1391 (1990).

140. *Austin*, 110 S. Ct. at 1396.

141. *Austin*, 856 F.2d at 785.

142. See *Austin*, 110 S. Ct. at 1396-97. The Court explained:

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 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), *quoted in* *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (*per curiam*)).

143. See *Buckley*, 424 U.S. at 39.

144. See *Austin*, 110 S. Ct. at 1396-97.

145. 479 U.S. 238, 263 (1986) (plurality opinion) ("Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, a question not before us, that justification does not extend uniformly to all corporations.").

Court's precedents required it to apply strict scrutiny to determine whether the regulation of political expenditures by business corporations¹⁴⁶ advanced a compelling state interest and, if so, whether the statute was narrowly tailored to serve that interest.¹⁴⁷

In support of the regulation, Michigan claimed that the special structure of a corporation justified special regulation.¹⁴⁸ In particular, Michigan noted that state law granted corporations a number of advantages: "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."¹⁴⁹ According to the State, these advantages allowed corporations to "use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"¹⁵⁰

The Court accepted this argument.¹⁵¹ Terming the economic wealth of a business corporation a "'political war chest,'"¹⁵² the Court found that the influence of such war chests was a form of political corruption.¹⁵³ The Court noted that this was not the quid pro quo type of corruption¹⁵⁴ recognized in *Buckley v. Valeo*,¹⁵⁵ but rather "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."¹⁵⁶ According to the Court,

146. The Court found that the Chamber of Commerce, although technically a nonprofit corporation, did not come under the narrow *MCFL* exclusion because, *inter alia*, its membership consisted primarily of business corporations. See *Austin*, 110 S. Ct. at 1400; cf. *infra* note 160 (nonprofit corporations do not present much risk of corruption).

147. This standard required the Court to determine whether the prohibition "burdens political speech, and, if so, whether such a burden [was] justified by a compelling state interest." *MCFL*, 479 U.S. at 252 (citing *Buckley*, 424 U.S. at 44-45).

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

149. *Id.*

150. *Id.* (quoting *MCFL*, 479 U.S. at 257).

151. *Id.*

152. *Id.* (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985)).

153. *Id.*

154. The Court had previously described the corruption addressed by FECA as "a subversion of the political process [whereby] 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." *NCPAC*, 470 U.S. at 497.

155. 424 U.S. 1, 47 (1976) (*per curiam*).

156. *Austin*, 110 S. Ct. at 1397. Commentators had been suggesting for some time that the Court's view of corruption in *First National Bank v. Bellotti*, 435 U.S. 765 (1978), was too narrow and that corporate political spending presented a serious and ascertainable threat to the electoral process. See, e.g., Hart & Shore, *supra* note 70, at 809-10; Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 383-85 (1985).

the prevention of this type of corruption was a sufficiently compelling interest to justify the Michigan statute.¹⁵⁷

The Court then considered whether the statute was narrowly tailored. First, the Court found that the Michigan statute did not "impose an *absolute* ban on all forms of corporate political spending" because of the provision that allowed corporations to make expenditures through separate committees.¹⁵⁸ The Court then concluded that the statute was not overbroad as applied to corporations that lacked "vast reservoirs of capital" because those corporations too enjoyed the special advantages of the corporate structure, which gave them the "potential for distorting the political process."¹⁵⁹ After determining that neither the nonprofit status of the Chamber of Commerce¹⁶⁰ nor the statutory exemption of press corporations created constitutional difficulties, the Court upheld the statute.¹⁶¹ State prohibition of independent expenditures by corporations in an election contest does not violate the first amendment.¹⁶²

IV. THE COURT'S REASONING IN *AUSTIN*

Even superficial scrutiny of the opinion in *Austin* reveals that it stands in absolute contradiction to the principles set out in *Bellotti*. Indeed, reviewing the Court's findings in *Austin* leaves the reader with the conclusion that a state may limit, or indeed ban, virtually all corporate speech, whether or not political in nature and whether connected with an election contest, a refer-

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

158. *Id.*

159. *Id.* The Court never explained how corporations that lack those resources can corrupt the political process. It simply observed that such corporations enjoy the "unique state-conferred corporate structure that *facilitates* the amassing of large treasuries." *Id.* (emphasis added). See *infra* notes 226-51 and accompanying text.

160. *Austin's* applicability to nonprofit corporations generated a dissent by Justice Kennedy in which he argued that nonprofit corporations in particular presented none of the risks of corruption at which the statute was aimed and that the burden on free speech imposed by applying the Michigan statute to these corporations was substantial. See *Austin*, 110 S. Ct. at 1416-26 (Kennedy, J., dissenting).

Federal law already imposes certain limitations on the political activity of nonprofit corporations. A corporation organized in accordance with 26 U.S.C. § 501(c)(3) (1988) is prohibited from making partisan political expenditures, whereas a corporation organized in accordance with 26 U.S.C. § 501(c)(4) must primarily engage in activities that promote social welfare rather than activities such as political campaigning. See Rev. Rul. 81-95, 1981-1 C.B. 332. In addition, all political expenditures by a § 501(c) corporation are subject to a special penalty tax. See 26 U.S.C. § 527(f).

161. *Austin*, 110 S. Ct. at 1398-1402.

162. *Id.* at 1401-02.

endum, or simple lobbying. *Austin* thus stands as a marked affront to the fifteen years of history that precede it.¹⁶³ Nevertheless, *Austin* neither overruled, questioned, nor explicitly narrowed the *Buckley* and *Bellotti* decisions. Instead, the Court justified its holding on rationales that it specifically rejected in the prior decisions.¹⁶⁴

Apart from the apparent inconsistency of the *Austin* decision with the Court's earlier rulings, an issue that goes more to legitimacy than accuracy, the opinion leaves the reader with the distinct impression that the Court has pulled something (perhaps this new breed of "corruption") out of its hat. In *Austin*, the Court seemed to be operating on the premise that there is something inherently evil or dangerous in corporate political speech,¹⁶⁵ whereas just fourteen years earlier the Court found that political speech served core first amendment values, regardless of the identity of the speaker.¹⁶⁶ If it does serve such values, by informing the public, communicating ideas, airing both sides of controversial issues, or otherwise,¹⁶⁷ a premise that the Court did not reject in *Austin*, then a state can regulate (or ban) such speech only if the regulation is supported by a compelling state interest *and* if the regulation is narrowly tailored to support that interest.¹⁶⁸

A. *Compelling State Interests—A Closer Look*

As a preliminary matter, it is necessary to consider the scope of the regulation at issue in *Austin*, a regulation analogous to

163. See *supra* notes 14-131 and accompanying text.

164. See *infra* notes 173-83 and accompanying text.

165. See *Austin*, 110 S. Ct. at 1398.

166. See *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976) (per curiam).

167. Section 441b may also be objectionable because of its chilling effect on a broader class of political speech. The FEC has taken the position that the application of the statute to "express advocacy," see *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), is to be read broadly and has repeatedly brought injunctive actions against advocacy groups that discuss the political position or voting record of a politician in connection with issue-oriented communications. See, e.g., *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 48-51 (2d Cir. 1980); *Federal Election Comm'n v. National Org. for Women*, 713 F. Supp. 428, 430-32 (D.D.C. 1989). Although courts have refused to apply the prohibitions of § 441b to communications that do not "present[] a clear plea for action," *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the FEC's continued attempts to apply § 441b whenever such communications mention a political candidate threaten the national commitment to "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

168. *Austin*, 110 S. Ct. at 1396.

that in FECA.¹⁶⁹ Essential to the Court's holding in *Austin* was its finding that the Michigan statute does not stifle corporate speech entirely because the corporation still may make political expenditures through a specially segregated fund.¹⁷⁰ This finding is insupportable. Although provisions that allow the use of segregated corporate political funds grant management some ability to engage in political speech, expenditures through a segregated fund cannot in any realistic sense be speech attributed to the corporation.¹⁷¹ Independent political contributions, rather than the corporation, have funded the corporate political fund's speech. No logical or legal link therefore connects the needs of the corporation and the issues upon which its fund may speak. Nor are independent contributions to the fund linked in any way to the problems for which the corporation's speech may be important. At the outset then, what the Court was countenancing in *Austin* was not a restriction on, but an outright ban of, corporate political speech.¹⁷²

In *Austin*, the Court concluded that treating corporate political speech differently based solely upon the identity of the speaker is permissible.¹⁷³ This holding was premised on the "special advantages" that state law gives to the corporate form.¹⁷⁴ Justice Scalia demonstrates one flaw in this reasoning in his dissent by observing that although many associations and individuals receive special advantages from the State,¹⁷⁵ case law specifically rejects

169. 2 U.S.C. § 441b (1988).

170. See *Austin*, 110 S. Ct. at 1398. The Michigan statute, like FECA, allows corporations to establish a segregated political fund that may make political expenditures. MICH. COMP. LAWS ANN. §§ 169.254-255 (West 1989). The fund may not spend money from the corporation's general treasury, however, but may use only money that has been donated separately to the political fund. *Id.* Moreover, the statute permits the corporation to solicit contributions to the fund only from members, stockholders, officers, and directors, rather than from the general public. *Id.*

171. See *Austin*, 110 S. Ct. at 1409 n.* (Scalia, J., dissenting) ("The corporation as a corporation is prohibited from speaking.").

172. Cf. Nicholson, *supra* note 85, at 1010 (advocating a limitation on independent expenditures by corporations "set at a level that permits corporate and labor views to enter the marketplace of ideas without creating an incentive for corruption").

173. See *Austin*, 110 S. Ct. at 1401-02. This conclusion is an interesting contrast to the reasoning in *Bellotti*, in which the Court stated that the content of the speech, rather than the identity of the speaker, was the relevant consideration. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

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

175. *Id.* at 1408 (Scalia, J., dissenting). Moreover, incorporation is not a privilege reserved for an exclusive few. Virtually any business can choose to incorporate. See H. HENN & J. ALEXANDER, *supra* note 3, § 68, at 125-27. For a discussion of the "special advantages" of the corporate form, see *infra* notes 227-39 and accompanying text.

the notion that the State can exact the forfeiture of first amendment rights as the price for those advantages.¹⁷⁶ The Court's holding, however, contains a second and more insidious problem: its supposition that corporate speech is harmful precisely because of the identity of the speaker.¹⁷⁷

In order to arrive at its conclusion that corporate speech presents the threat of corruption, the Court journeyed down an interesting logical path. Step one on this journey was the Court's finding that corporations present opportunities for the accumulation of great wealth.¹⁷⁸ Although this is true, many other individuals and groups also have amassed great wealth.¹⁷⁹ *Buckley* specifically rejected the notion that legislatures can limit political speech on the basis that, absent regulation, wealthy people will speak too loudly.¹⁸⁰

Moreover, the regulation at issue is tied to corporate speech, not speech by those with great wealth. The Court itself noted that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54."¹⁸¹ Most corporations do not have large "war chests." Although some very large corporations do exist, the vast majority of businesses utilizing the corporate form are close corporations, which are relatively small in size and number of shareholders and do not differ significantly in their operation from sole proprietorships or partnerships.¹⁸² Even if restraining the speech of the wealthy were

176. *Austin*, 110 S. Ct. at 1408 (Scalia, J., dissenting) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958)).

177. *Id.* at 1396-97.

178. *See id.* at 1398.

179. Nor is there an automatic logical link between large expenditures and corruption. Even a small bribe is corrupt; a large and truly independent expenditure is not.

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

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

182. *See, e.g.*, L. SOLOMON, D. SCHWARTZ, & J. BAUMAN, *CORPORATIONS LAW & POLICY* 7 (2d ed. 1988) (citing Statistical Abstract of the United States 516 (1985)); A. CONARD, *CORPORATIONS IN PERSPECTIVE* 100-01 (1976) (in 1981, fewer than 10% of United States corporations had assets of over one million dollars, and in 1976, the median corporation had assets of less than \$100,000); UNITED STATES BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1990*, at 521 (Table 858) (in 1986, over 750,000 U.S. corporations had gross revenues of less than \$25,000); *see also* W. CARY & M. EISENBERG, *CORPORATIONS CASES AND MATERIALS* 194 (6th ed. 1988) (based on 1970's data, 94% of all corporations have 10 or fewer stockholders).

By contrast, Lloyd's of London and many large New York law firms present examples of large powerful organizations that utilize the partnership rather than the corporate form. *See The Am Law 100*, AM. LAW. 10 (July/Aug. 1989) (special insert) (reporting that gross revenues of top 100 law firms for 1988 ranged from \$52 million to over \$440 million). The National Collegiate Athletic Association is a particularly large and wealthy organi-

valid, a statute that focuses on corporate status rather than wealth is a highly inept tool for achieving that objective.¹⁸³ Indeed, precisely this type of overbreadth justified overturning the restriction on group political expenditures in *Federal Election Commission v. National Conservative Political Action Committee*.¹⁸⁴

Apart from the limitations that the Court struck down in *Buckley*, regulation of political speech has never been tied to the speaker's wealth. Corporate status, on the other hand, has long justified regulation of political speech. Why is that? The response that the corporate form presents special risks of corruption or social irresponsibility is too facile. Although much social regulation—such as minimum wage laws, pollution control legislation, and workplace safety requirements—has been designed to prevent evils associated with big business, those evils are not limited to business done in corporate form. A sole proprietorship sweatshop that employs children at starvation wages for twelve-hour days is no less an affront to our social consciousness because it is not a corporation. Accordingly, it too is subject to laws that prohibit such conduct.

By contrast, laws such as FECA and the analogous Michigan statute¹⁸⁵ regulate the corporate speaker qua corporation. They do not apply to businesses organized in another form. It is therefore necessary to reflect directly on the corporate status to ascertain what makes corporate speech in particular a special form of evil. The Court addressed this question in the second step of its corruption analysis by finding that corporate speech is "unfair."¹⁸⁶

What exactly did the Court mean by unfair? Did it mean that corporations should not be permitted to engage in political speech because they do not have a valid interest in influencing political elections? Clearly some political issues and candidate elections

zation that is structured as an unincorporated association. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988).

Moreover, as Justice Scalia explained, a legislature could readily tailor a statute to address the problem of political speech by corporations that possess great wealth, either by prohibiting "independent expenditures above a certain amount, or . . . by limiting the expenditures of only those corporations with more than a certain amount of net worth or annual profit." *Austin*, 110 S. Ct. at 1413 (Scalia, J., dissenting).

183. As Scalia observed in his dissent, the Court explicitly found wealth-based restrictions on independent campaign expenditures to be unconstitutional in *Buckley*. *Austin*, 110 S. Ct. at 1409-10 (Scalia, J., dissenting) (citing *Buckley*, 424 U.S. at 45).

184. 470 U.S. 480, 498 (1985).

185. MICH. COMP. LAWS ANN. §§ 169.254-255 (West 1989).

186. *Austin*, 110 S. Ct. at 1397-98.

materially affect a corporation's business, and a corporation may take a legitimate interest in them; international trade barriers, commercial rent control, and parental leave legislation are a few issues that come to mind. Recall also the Massachusetts statute challenged in *Bellotti*, which specifically excluded from its expenditure ban referenda involving issues that materially affected a corporation's business.¹⁸⁷ Moreover, state corporation law bars a corporation from making political expenditures unless those expenditures further its business objectives. A corporate officer who authorizes expenditures in support of his favorite political candidates is guilty of wasting corporate assets unless those expenditures benefit the corporation as well.

If a corporation has valid reasons to engage in political speech, why is its speech unfair? One might argue that because a corporation cannot vote and is not a part of the democratic process, allowing the corporation to attempt to influence the vote is unfair.¹⁸⁸ The right to speak, however, is not limited to those who can vote. Aliens, minors, citizens of other states, and convicted felons are all allowed to air their political views in an attempt to influence the votes of others. Free speech is not reserved for those qualified to vote. Indeed, one of the attributes of political speech is its ability to convey the needs of those whom the political process does not fully represent, so that a voter can consider a candidate's position on children's rights, prison overcrowding, or corporate income tax. Moreover, one component of the first amendment is the protection of the right to hear.¹⁸⁹ The first amendment protects political speech not simply because the speaker is entitled to speak, but also because the listener is entitled to hear.¹⁹⁰

Corporate political speech seems no less fair than anyone else's speech merely because it issues from a corporation. MCFL's

187. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767-68 (1978) (citing MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). The exclusion implied that the Massachusetts legislature found that some referendum issues materially affect a corporation's business.

188. See *Schneider*, *supra* note 51, at 1270 ("[A] more powerful inference from the nature of democratic government is not that we protect people's right to speak because they may say something useful, but that we protect their right to speak because they have a right to govern.").

189. See, e.g., *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 766 (1977) (Brennan, J., dissenting); *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1968).

190. One can appreciate corporate contributions to the marketplace of ideas merely by reviewing the amici briefs filed in *Austin* by corporations, including the American Civil Liberties Union, The American Medical Association, the National Organization for Women, Greenpeace Action, and the Planned Parenthood Federation of America.

newsletter that informed the public of various candidates' voting records on abortion¹⁹¹ was no less informative because a corporation prepared it. The Michigan State Chamber of Commerce's statement that it believed Richard Bandstra would support lower regulatory costs and personal income taxes,¹⁹² issues that were important for big business investment in the state,¹⁹³ was a statement that was relevant to the Chamber's mission of promoting state business interests.

Nor is corporate speech unfair because it is inherently wrong. States regulate much corporate/business activity because of a natural law view that certain activities are simply wrong. For example, nineteenth-century railroad corporations were criticized for not paying their workers a living wage. The railroads justified their actions by claiming that they were in business to generate profits for their stockholders and that paying workers a higher wage than necessary to induce them to work would reduce such profits.¹⁹⁴ As legislation later evidenced, American society held the view that permitting businesses to pay workers less than it was possible to live on for a full day's work was morally wrong, *even though such action appeared to be in the company's best interests*.¹⁹⁵ Accordingly, legislatures developed a variety of social regulations to curb businesses' tendency to engage in wrongful actions. These social regulations applied to all businesses, not merely to the corporation.¹⁹⁶

Is it inherently or morally wrong for a corporation to engage in political speech¹⁹⁷ if such speech furthers its business objec-

191. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 243 (1986).

192. Austin v. Michigan State Chamber of Commerce, 110 S. Ct. 1391, 1427 app. (1990).

193. *See id.*

194. *See generally* I. STONE, THE ORIGIN: A BIOGRAPHICAL NOVEL OF CHARLES DARWIN (1980) (detailing the legal struggle of the railroads and other big businesses against reducing the profits to their stockholders by paying their workers higher wages).

195. *See, e.g.*, 29 U.S.C. § 206 (1988) (federal minimum wage law).

196. *Cf. Schneider, supra* note 51, at 1255 ("A central problem of modern law continues to be the search for ways to control the corporation.").

197. One objection to corporate political speech is based on the argument that, because a corporation is "soulless," no sense of morality constrains it to speak in a way that it believes will further justice or good government. *See Nesteruk, Bellotti and the Question of Corporate Moral Agency*, 1988 COLUM. BUS. L. REV. 683, 687-99 (corporation is not a "moral agent," and therefore corporate speech distorts the dynamics of reason); *see also Schneider, supra* note 51, at 1261 ("[E]ven good people operating in large organizations work under circumstances that can be un conducive to seeing and telling truth" because "[t]here are . . . pressures on the managers of large corporations which have nothing to do with telling the truth, and these pressures are institutionalized and strong far beyond those on most individuals."). One would be naive to believe that any substantial percentage of noncorporate political speech is the result of the speaker's desire to achieve objective justice rather than goals of a more personal nature.

tives?¹⁹⁸ Until the decision in *MCFL*, the primary evil associated with excessive political spending was the risk of creating the appearance or actuality of bribery.¹⁹⁹ Candidates whose elections are funded directly or indirectly by wealthy individuals and/or businesses may be beholden to those constituencies. This type of corruption, in the Court's view in *Buckley*, justified the FECA limits on political contributions.²⁰⁰

198. Many categories of speech are objectionable and generate attempts to bar the speech directly, either because it is offensive in that it is perceived as harmful to minors or others or because it may generate violence or ill will. *See, e.g.,* Lufkin, *The Free Speech Argument—Challenges to First Amendment may become the issue of the '90s*, San Francisco Chron., June 22, 1990, at B3, col. 1 (describing many areas in which controversial speech has resulted in bar attempts, such as the sexually explicit song lyrics of 2 Live Crew, racial slurs on college campuses, and the sexually and racially offensive comments in the comedy routine of Andrew "Dice" Clay).

Although one may justifiably consider hateful speech, obscenity, and racial slurs to be evil and lacking in any social utility whatsoever, most such speech is protected under the first amendment. *See, e.g.,* United States v. Eichman, 110 S. Ct. 2404, 2407-08 (1990) (declaring that "flag-burning constitute[s] expressive conduct" that "enjoy[s] the full protection of the First Amendment"); Texas v. Johnson, 491 U.S. 397, 407-10 (1989) (holding statute prohibiting desecration of flag violated first amendment); *How to Handle Hate on Campus*, N.Y. Times, Dec. 13, 1989, at A30, col. 1 (describing settlement of suit between student and University of Connecticut for infringement of first amendment rights after student was expelled for "hanging a handmade poster on the outside of her door listing 'homos,' among others, as unwelcome"). In spite of their perceived evils, hateful and other offensive speech cannot be regulated "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1342, 269 Cal. Rptr. 882, 890 (1990) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Clearly, whatever threat of corruption corporate political speech presents, its regulation cannot be justified on the same basis.

199. Commentators criticized the Court's "narrow" view of corruption, arguing that the large sums of money spent on political issues caused corporate spenders to dominate the political process, giving them undue influence and undermining public confidence in the integrity of the democratic system. *See, e.g.,* Shockley, *supra* note 156, at 384. It is difficult to argue with the conclusion that wealth dominates the political process, but the connection between corporate speakers and excessive spending is less obvious. *See* THE MIDAS TOUCH, *supra* note 84, at 1 (18-month study on political contributions in New York state election process found that wealthy contributors—including individuals, partnerships such as law firms, and businesses—have substantial influence on elections; "Wealthy contributors easily dominate the fund-raising scene.").

200. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). The Court in *Bellotti* distinguished this quid pro quo form of corruption on the basis that corporate spending in connection with referenda did not implicate the specter of bribery. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978). Although real or apparent indebtedness of public officials to special interest groups might justify restrictions on contributions, it is far from obvious that independent expenditures present the same threat. As Justice Scalia observed in his dissent in *Austin*, independent advocacy by a corporation is not necessarily beneficial to a candidate's campaign and may well run counter to it: "I expect I could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT&T or General Motors." *Austin v. Michigan*

A second type of corruption that we may associate with excessive political spending is the notion that money corrupts the political process itself, resulting in "unjust" election results. Those who would have absolute limits on political spending express this view. The idea is twofold. First, to have expenditures for political campaigns running into millions of dollars is not socially valuable. Second, excessive spending tends to allow those with the greatest wealth to buy acceptance of their ideas.²⁰¹

Both of these viewpoints are valid, but whether they are sufficiently compelling state interests to ban corporate political speech is far from clear. First, as a matter of social utility, the economic marketplace operates as a far more efficient limitation on corporate political speech than do campaign finance laws. If a corporation wastes a large amount of money on political speech, it will hinder its ability to compete in the traditional business markets and in the stock market. The cost to the corporation of making political expenditures must be justified in terms of overall economic benefit; that is, expenditures should result in lower prices and higher profits—socially optimal results.²⁰² Second, the

State Chamber of Commerce, 110 S. Ct. 1391, 1410 (1990) (Scalia, J., dissenting).

In addition, it appears that massive political spending may be more effective when employed against a political candidate than when employed on his or her behalf. Studies of political spending in connection with ballot proposals show that money is much more successful in defeating such proposals than in ensuring their success. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV. 505, 511, 542-47 (1982); Shockley, *supra* note 156, at 393. If the same effect holds in election contests, corporate political spending poses the greatest threat to incumbents. This reasoning may explain legislators' readiness to enact campaign finance reforms that bar such spending.

201. Many scholars have suggested that the infusion of large amounts of corporate funding into the political process has corrupted the process to the point at which individuals are actually discouraged from participating. Limiting or equalizing speakers' ability to engage in political speech, scholars argue, will enhance the quality of debate. For a sampling of articles addressing the equalization argument, see BeVier, *supra* note 53, at 1046 n.5. Based on this analysis, they argue that the first amendment's purpose is served by limiting or forbidding speech that "'supplant[s], disrupt[s], or coerce[s]' politics." Schneider, *supra* note 51, at 1270 (quoting A. BICKEL, *THE MORALITY OF CONSENT* 63 (1975)); see also Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 540 (1979) (suggesting that limitations on spending for "campaign speech" are acceptable when they promote fairness). Professor Tribe makes the argument that if FECA's restrictions have the effect of enhancing the quality of political debate, then they actually enhance freedom of speech; accordingly, the strict scrutiny review the Court has applied to the regulations, which is typically applied to abridgements of free speech, is inapposite. L. TRIBE, *supra* note 81, §§ 13-27, at 801-03.

202. Although one might argue that corporate political spending is an example of market failure—a case in which the market does not deter wasteful spending by corporate managers—the Court did not premise its decision in *Austin* on such a finding. As the

paternalistic notion that corporate spending should be regulated because otherwise large corporate spenders would be able to "buy"²⁰³ the political system is unpersuasive.²⁰⁴ Such a concept is clearly contrary to the first amendment; the notion that speech can be regulated on account of its ability to persuade is an anathema to the Constitution.²⁰⁵ More importantly, however, this notion is implausible.²⁰⁶ Every day the average citizen views examples of overwhelming corporate spending for the purpose of persuasion in the form of commercial advertising. Although corporations obviously advertise with the expectation that they will succeed in persuading consumers, the tombs of television are filled with the remains of expensive advertising campaigns that failed, that did not persuade consumers to buy product "x"

Court observed in *Bellotti*, in cases in which first amendment issues are at stake, raising the possibility of a threat is insufficient, and the Court must require concrete evidence in the form of record or legislative findings before accepting the argument that an outright prohibition is the most narrowly tailored means available. See *Bellotti*, 435 U.S. at 788-90.

203. Even advocates of campaign finance limitations agree that the distinction between speech that is persuasive and speech that is "dominating" is a difficult one. See Shockley, *supra* note 156, at 388-89.

204. This is not to deny that wealth is probably the prime factor in obtaining access to the electronic media that serve as the most important modern means for communication of ideas. For example, commentators have harshly criticized the use of television advertising in political campaigns as fostering a political process in which voters make their decisions based on images rather than on issues. See, e.g., Note, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892 (1984). Congressional concern about voter reactions to superficial political advertising was one of the motivating factors behind the increase in the regulation of campaign financing. See *id.* at 919 (citing legislative history of FECA). The role of television advertising in the electoral process is a serious problem; it is, however, one that is tied to the overall use of wealth in political campaigns, not to the participation by corporations in particular.

The role of wealth and the ability of those with wealth to obtain media access raises social issues that go far beyond the debate over corporate political speech and that implicate the role of advertising in political campaigns, the commitment of media time to issues of public concern, and the role of the institutional press in policymaking. See Carter, *Technology, Democracy, and the Manipulation of Consent* (Book Review), 93 YALE L.J. 581 (1984). For a chilling view of the impact that the institutional press can have on political policy through the manipulation of the electronic media, see T. WOLFE, *THE BONFIRE OF THE VANITIES* (1987).

205. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Supreme Court rejected the view that a paternalistic concern for the ability of voters to evaluate conflicting arguments justifies limitations on speech. "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." *Id.* at 426 n.7 (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

206. Finally, this notion is impractical as a method of attempting to regulate speech. If we may regulate excessive spending because it produces speech that is too persuasive, what is the next step? Is it appropriate to prohibit political speech by sports heroes or movie stars because they are "unduly" able to influence the public? See *Austin v. Michigan State Chamber of Commerce*, 110 S. Ct. 1391, 1416 (1990) (Scalia, J., dissenting).

instead of product "y." If the mere expenditure of funds does not guarantee persuasive success in the sale of products, why should such expenditure be any more of a threat in the sale of politicians,²⁰⁷ an issue that presumably involves more than a determination of which "tastes great" and which is "less filling."²⁰⁸ As Justice Scalia succinctly stated, "The advocacy of such entities . . . will be effective only to the extent that it brings to the people's attention *ideas* which—despite the invariably self-interested and probably uncongenial source—strike them as true."²⁰⁹

207. A number of scholars have ascertained that corporate spending does have an effect on voting patterns. See, e.g., Hart & Shore, *supra* note 70, at 819-21; Lowenstein, *supra* note 200, at 518; Mastro, Costlow, & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315, 319-27 (1980); Shockley, *supra* note 156, at 391-400. One should not assume, however, that this effect was the result of corporate indoctrination. The effect of corporate spending might as well be explained by the theory that corporate spending addressed ideas not previously communicated to voters, ideas that were sufficiently important to affect those voters' decisions.

208. The evidence suggests that political incumbents are heavy favorites for reelection. See NEW YORK STATE COMM'N ON GOV'T INTEGRITY, *THE ALBANY MONEY MACHINE: CAMPAIGN FINANCING FOR NEW YORK STATE LEGISLATIVE RACES 24-25* (Aug. 1, 1988) (incumbents in both state Senate and Assembly races are able to raise and spend significantly more money than challengers in their campaigns); *THE MIDAS TOUCH*, *supra* note 84, at 6-11 (the high cost of political campaigns and the difficulty of achieving name recognition makes incumbents heavy favorites for reelection); Note, *supra* note 204, at 927-28 (incumbents are able to raise more money and also use their present position to campaign more effectively). In addition to their demonstrably superior ability to raise campaign funds, incumbents have the advantage of greater visibility. An incumbent can appear on television not just through his or her advertising campaign but also in connection with political events.

Consequently, incumbent legislators, as a group, are most directly threatened by well-funded corporate advocacy which may, as a practical matter, be in a far better position to challenge the incumbent than the campaign of his or her adversary. Current legislators have a substantial personal stake in removing such advocacy from the political forum. Silencing the most influential potential opposition assures that the present legislators will not become victims of "corporate persuasion."

209. *Austin*, 110 S. Ct. at 1410 (Scalia, J., dissenting).

The persuasive power of corporate speech is not limited to political speech. Commentators have suggested, for example, that tobacco advertising is largely responsible for the use of tobacco, one of the leading causes of death in the United States. See Mayer, *supra* note 73, at 614 nn.187 & 190. Battles to ban the advertising of tobacco (and alcohol) have been controversial, but to date have failed to result in an absolute ban of such speech, despite the claim that tobacco advertising is actually causing people to die. See, e.g., Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1211-16 (1988) (citing studies demonstrating that advertising increases the incidence of smoking); see also *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 348 (1986) (upholding legislative ban on advertising by gambling establishments); cf. *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082, 1104 (D.C. Cir. 1968) (sustaining Federal Communication Commission's ban on cigarette advertising on television). But see Note, *supra* note 76, at 633 (questioning the constitutionality of legislative bans

In order to justify finding unfairness in corporate political speech, one must turn to the third step of the Court's reasoning in *Austin*. In step three, the Court explained that corporate political speech is unfair because it does not reflect popular support for the ideas expressed:

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.²¹⁰

The Court appears to be of the view that the first amendment protects political speech based on popular support for the ideas expressed. Even if this notion, which is contrary to two centuries of constitutional law, were valid, it raises some interesting questions. Public support by whom? A corporation is not run on the theory that specific management decisions are subject to stockholder review or approval. In fact, the opposite is true. The delegation of management to the board of directors denies stockholders a role in corporate decisionmaking.²¹¹ So long as management acts on an informed basis, in good faith, and in the reasonable belief that its decisions are in the best interests of the corporation, stockholder support for those decisions is irrelevant, and the decisions are immune from attack, even in court.²¹²

on liquor and cigarette advertising). The threat posed by advertising of liquor, tobacco, and gambling is frequently articulated as the concern that advertising increases consumption and that the state has a legitimate, albeit paternalistic, interest in limiting the consumption of harmful substances. See *Posadas de Puerto Rico Ass'n*, 478 U.S. at 342 (accepting the view that advertising of casino gambling "would serve to increase the demand for the product advertised"). Moreover, the Court has noted that regulation of such advertising may be justified on the theory that its purpose is not to inform but to mislead. For example, commentators have repeatedly criticized cigarette advertising for distorting the dangers of smoking. See Lowenstein, *supra*, at 1219-23.

Despite the proven harmful effects of tobacco and alcohol and the evidence linking advertising of these products with increased consumption, legislative regulation of such advertising has been minimal. A comparison of the costs and benefits of corporate tobacco advertising with those of corporate political advertising suggests that FECA's absolute ban on the latter may be excessive even if such advertising has considerable persuasive power.

210. *Austin*, 110 S. Ct. at 1397 (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)).

211. See, e.g., *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N.H. 85 (1880) (statute provides that corporation is to be managed by its directors, not by its stockholders).

212. Judicial deference for management decisions made in accordance with these

In *Austin*, the Court suggested that corporate speech with which the corporation's stockholders disagree is the equivalent of compelled speech by unwilling stockholders (or employees indirectly).²¹³ "Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union."²¹⁴ The Court attempted to create a Catch-22 argument: a corporation's constituencies who disagree with its political agenda may be unwilling to withdraw from the corporation in order to disassociate themselves from that agenda. Nevertheless, if corporations are allowed to make political expenditures, then such persons have notice of this possible disagreement prior to becoming associated with a corporation; arguably, their subsequent association indicates implicit assent to or at least tolerance of such conduct.²¹⁵ Furthermore, political spending is not necessarily dis-

principles is known as the "business judgment rule." The business judgment rule presumes that management is acting in the corporation's best interests absent evidence of self-dealing, conflict of interest, bad faith, or fraud, and the courts will not second-guess management decisions. See, e.g., *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 768-69 (2d Cir. 1980); *Asarco Inc. v. Court*, 611 F. Supp. 468, 473 (D.N.J. 1985); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). As the Third Circuit explained in *Johnson v. Trueblood*, 629 F.2d 287, 292 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981), the business judgment rule "achieves . . . [its] purpose by postulating that if actions are arguably taken for the benefit of the corporation, then the directors are presumed to have been exercising their sound business judgment rather than responding to any personal motivations." Courts will apply this presumption as long as they can attribute management's actions to "any rational business purpose." To overcome the presumption of regularity, a plaintiff must establish more than mixed motives on behalf of management, but must show that "impermissible motives predominated in the making of the decision in question." *Panther v. Marshall Field & Co.*, 646 F.2d 271, 294 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (quoting *Johnson*, 629 F.2d at 292) (emphasis added by the court in *Panther*).

213. *Austin*, 110 S. Ct. at 1399; see also *MCFL*, 479 U.S. at 260 ("such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends"); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (protection of persons who put money into a corporation or union for reasons other than support of political candidate provides sufficient justification for regulating such corporate expenditures); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414-15 (1972) (concern for protecting dissenting stockholder or union member).

214. *MCFL*, 479 U.S. at 260.

215. *Austin*, 110 S. Ct. at 1412 (Scalia, J., dissenting). A shareholder implicitly agrees that the corporation in which he or she invests may take any legal action authorized by its corporate charter. By assenting to the corporate form, he or she waives the right even to vote on (much less to veto) particular aspects of the corporation's operation. As Justice Scalia observed:

Thus, in joining [a for-profit corporation], the shareholder knows that management may take any action that is ultimately in accord with what the

tinct from the corporation's primary objective of seeking economic gain. This is a major logical flaw in the Court's reasoning; the opinion ignores the fact that corporations engage in political expenditures precisely because management perceives those expenditures as beneficial to the corporation.²¹⁶ Otherwise such expenditures are *ultra vires*.²¹⁷ If a corporation's stockholders (and other constituencies) have authorized the management to use all legal means to generate profits, then political expenditures should not be materially different from any other profit-seeking activity.²¹⁸

Nor is there any justification for the Court's suggestion that corporate speech should enjoy broad public support. The Court quotes the argument from *MCFL* that the size of the corporate treasury, and thus the corporation's potential for influence, is the result of economically motivated decisions rather than support for the corporation's political views.²¹⁹ The same is true,

majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock.

Id. (Scalia, J., dissenting).

216. *Cf. supra* note 46 and accompanying text (describing Massachusetts statute prohibiting most corporate campaign expenditures).

217. The Court could have based its decision on a finding that corporate political expenditures are wasteful and do not further legitimate corporate objectives, a conclusion that would have brought the Michigan statute within the class of provisions that regulate waste. *See* Brudney, *supra* note 82, at 245-52 (arguing that corporate political speech is waste and can constitutionally be regulated in the same manner as excessive executive salaries). The Court, however, did not do so. Moreover, regulating corporate political speech as waste would presumably permit a corporation to avoid the prohibition by stockholder authorization or by a showing that the speech materially affected its business.

218. In addition, the statute prohibits corporate political speech even if a unanimous shareholder vote has authorized such speech. *See* *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 (1978) (suggesting that applicability of Massachusetts prohibition in cases in which "shareholders unanimously authorized" the speech constituted a significant flaw in the statute). Even the prohibitions on corporate waste generally provide that unanimous shareholder approval can "cure" such waste. *See* Brudney, *supra* note 82, at 249.

219. "[T]he 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." *Austin*, 110 S. Ct. at 1397 (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)).

however, of all corporate spending; the corporation's resources for that spending are the result of the corporation's economic success. One could argue analogously that "Pepsi" should be restricted to spending less money on advertising than "Coke," regardless of the companies' respective economic health, because consumers prefer Coke.²²⁰ More importantly, why is the Court imposing a requirement that a corporation have the ideological support of its customers? A corporation is a separate legal entity and does not purport to speak on behalf of its customers, or even for its stockholders or employees.²²¹ If, as discussed above, a corporation as an entity can make a meaningful contribution to the marketplace of ideas by spending money on political issues that are of interest to it, nothing in law or logic requires that the various constituencies with which the corporation deals support its views. The only limitation on the speech should be the requirement of a sufficient nexus between a corporation's legitimate objectives, such as profitmaking, and its political expenditures. As discussed below, however, the absence of such a nexus would subject the expenditure to attack under principles of corporate law.²²²

Indeed, this nexus refutes the Court's suggestion that corporate political speech presents a tool for management abuse—specifically, management's use of corporate funds to further per-

220. See Nichol, *supra* note 84, at 329 ("Can the McDonald's advertising budget be checked in order to afford equal economic opportunity to a mom and pop diner?"). Moreover, as Dean Nichol states, "[I]f wealth is not 'germane' to participation in politics, what goes for organizations should go for individuals as well." *Id.* at 327.

221. The Court's statement raises another problem: What about speech that one corporate constituency supports but to which another objects? In the controversy over AT&T's charitable donations to Planned Parenthood, for example, AT&T decided to cease making the \$50,000 annual donation because of customer complaints, in spite of the fact that stockholders overwhelmingly defeated a proposal forbidding such donations. See Keppel, *AT&T Holders Take Stand on Abortion Issue*, L.A. Times, Apr. 19, 1990, at D2, col. 3. Several large stockholders, including the Trustees of the New York City Employees' Retirement System, a holder of three million shares of AT&T stock, objected vocally to the company's decision. See Buder, *Large Pension Fund Criticizes A.T.&T. Over Family Agency*, N.Y. Times, Apr. 18, 1990, at B3, col. 1.

222. Scholars have seriously questioned the effectiveness of corporate law methods of disciplining management. See *infra* notes 259-63. In addition, the business judgment rule prevents stockholders from obtaining judicial redress for many violations of management's duty of care. See, e.g., Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591 (1983). Professor Cohn observed that although successful derivative suits for simple negligence are rare, the derivative suit is a much more effective monitor of management behavior in cases involving fraud, self-dealing, conflicts of interest, or violations of the federal securities laws. *Id.* at 596.

sonal political objectives.²²³ An investment in a corporation involves a degree of delegation of authority; the stockholders delegate to management by contract the power to make business decisions. So long as the corporation's political expenditures do not leave the realm of appropriate business decisions, they are within the scope of management's delegated authority.²²⁴ If management abuses that delegation and begins acting in its own self-interest, stockholders have available all of the standard remedies of corporate governance, including the election process and the derivative suit.

In sum, the rationale for the Court's holding that corporate speech presents a threat of corruption boils down to a determination that eliminating corporate speech will tend to level the playing field, making political speech "fairer" for the individual. The first amendment directly forbids the legislature from acting as the judge of how to make speech more fair.²²⁵ Moreover, if

223. Note that such allegations would not necessarily take this situation out of the purview of the business judgment rule. In cases in which management acts with a mixture of permissible and impermissible motives, the business judgment rule will apply unless the impermissible motives predominate. *Johnson v. Trueblood*, 629 F.2d 287, 292-93 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

224. The comparison is often made between corporate political spending and corporate charitable contributions. See, e.g., Note, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 458-59. Whereas a certain similarity exists between the two in that stockholders may also find charitable spending objectionable as a waste of corporate funds or as contrary to their personal views, charitable contributions have a far more tenuous link to corporate profits than does political spending. See *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960) (quoting *Bogardus v. Commissioner*, 302 U.S. 34, 41 (1937)) (suggesting that tax deductions for corporate charitable donations would be allowed only for donations that do not result from the "incentive of anticipated benefit" of an economic nature"). As one commentator observed, a strict application of this test would permit a tax deduction only for corporate charitable donations that constitute a breach of management's fiduciary duties. Note, *Corporate Charitable Contributions: Expanding the Judicial Analysis in a Post-Economic Recovery Act World*, 58 IND. L.J. 161, 174 n.97 (1982). Yet charitable spending is allowed, generally without objection. Cf. *supra* note 83 (citing cases involving challenges to charitable contributions). Furthermore, as Justice Scalia noted, stockholders in a commercial corporation are unlikely to be surprised by corporate action that is contrary to their personal ideologies, although members of a nonprofit corporation such as the American Civil Liberties Union may well find certain political activity by the association objectionable. See *Austin v. Michigan State Chamber of Commerce*, 110 S. Ct. 1391, 1412 (1990) (Scalia, J., dissenting).

225. Consider the implications of accepting the rationale that legislation will promote fairness of speech as a sufficiently compelling interest to justify infringement of protected speech. A legislature could determine that political speech is "unfair" when spoken by those who have a financial interest in the election results. Incumbents could find that campaign speech by challengers during an election contest is often filled with distortions and inaccuracies and could ban such speech as unfair. Indeed, the promulgation of laws

fairness were an acceptable basis for restricting protected speech, the legislature could simply ban all political speech. Regulations that attempt to value speech and reject certain speech as less valuable are directly antithetical to the first amendment.

B. Is The Regulation Narrowly Tailored?

The Court's decision in *Austin* was based on principles of constitutional rather than corporate law. In considering whether Michigan sufficiently narrowly tailored its regulation, the Court did not find it necessary to consider the attributes of the corporate form. This is a major shortcoming in the *Austin* opinion. One cannot consider regulation of corporate political speech in isolation when, unlike individuals, corporations are subject to a pervasive general system of regulation: state corporation law.²²⁶

Unlike many less formal groups and associations, such as partnerships, the corporation is created by an affirmative act of the state. A certificate of incorporation must be filed with the Secretary of State before the special attributes of the corporate form are secured. Moreover, the formation of a corporation includes the corporation's explicit agreement to be subject to state corporation law, a body of regulation that may specify a corporation's powers and obligations, set forth certain formal requisites for corporate action, and regulate corporate activities that impact the state. In return for a corporation's agreement to subject itself to this body of regulation, which agreement is evidenced by the act of incorporating under that state's laws, state law gives a corporation certain attributes, including limited liability for the corporation's stockholders, perpetual duration, the capacity to sue and to be sued in the corporate name, free transferability of

restricting corporate political expenditures has the effect of removing one of the only classes of speakers able to compete effectively with the government in referenda and with incumbents in election contests. See M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 156 (1983) ("There is the danger that the prestige and status of government will give its utterances an advantage in competition with private-sector communications."). Perhaps this effect accounts, in part, for the popularity of campaign finance reform among legislators.

226. Substantial commentary exists on whether and to what extent the system of corporate law functions effectively to monitor management and further the interests of stockholders. See *infra* notes 259-63. This Article is cognizant that the effectiveness of corporate law may be imperfect and suggests not that state corporate law is a panacea, but that it is a fundamental starting point in assessing the validity of statutes addressed to corporate conduct. Because the Court's opinion in *Austin* is bereft of any analysis of the corporate law framework, the Court has failed to conduct the kind of exacting scrutiny that a prohibition on speech mandates.

ownership interests, and treatment as a separate entity for tax purposes.²²⁷

In order to appreciate state regulation of the corporate form, it is necessary to consider two separate aspects of this regulation: the corporation law limitations on corporate conduct and the special benefits of the corporate form. The special benefits of the corporate form are the attributes of "corporateness" upon which

227. H. HENN & J. ALEXANDER, *supra* note 3, §§ 73-76, at 130-38. State corporation law provides the source for corporate creation, yet it typically does not enumerate the full range of rights and powers that a corporation possesses after formation. This principle has its roots in the historic case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which held that the State of New Hampshire's revocation of a corporate charter violated the contracts clause of article I of the federal Constitution. *Id.* at 712.

Scholars have articulated numerous theories that attempt to describe the corporate entity. These include the "personhood" theory, which views the corporation as a natural entity with an existence and rights separate from its shareholders and other constituencies; the artificial entity theory, which views the corporation as an artificial creation of the state subject to state-imposed limitations; the trust theory, which analogizes the managers of a corporation to trustees and the shareholders to beneficiaries; and the description of a corporation as a nexus of contracts between management, stockholders, employees, and other constituencies. See, e.g., Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449 (1989) (describing trust theory and nexus of contracts theory); Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing development of different conceptions of the corporation as association, artificial person, and "organist real person/real entity"). The development of these descriptive theories is not solely an academic exercise. The treatment of the corporation under the law, whether statutory, common, or constitutional, is dependent in large part on its proper characterization. See Coffee, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989) (implications of the different models for judicial behavior).

For example, courts have struggled for over a century with the question of how properly to characterize a corporation for purposes of the federal Constitution. The Supreme Court first declared the corporation a person for purposes of the fourteenth amendment in *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886). This personhood view of the corporation has enjoyed general acceptance in judicial decisions, and the Court subsequently has held that corporations have protected liberty and property interests under the fourteenth amendment, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778-79 (1978), privacy interests under the fourth amendment, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), double jeopardy and due process rights under the fifth amendment, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Noble v. Union River Logging R.R.*, 147 U.S. 165, 176 (1893), and the right to a jury trial, *Ross v. Bernhard*, 396 U.S. 531, 543 (1970). Virtually the only constitutional protection that the Court has denied corporations is the fifth amendment privilege against self-incrimination. See *Bellis v. United States*, 417 U.S. 85, 90 (1974); *Hale v. Henkel*, 201 U.S. 43, 51 (1906). The Court has also denied corporations the privileges of citizens under the privileges and immunities clause. See *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945). For a detailed discussion of the application of Bill of Rights protections to corporations, see generally Mayer, *supra* note 73.

the Court justifies its distinctive treatment of corporate political speech.²²⁸ Within these special benefits, the attribute of limited liability traditionally receives the most attention. Commentators have defined limited liability as "the rule that shareholders are not liable for the obligations of the corporation beyond their capital investment."²²⁹ Limited liability is the characteristic primarily responsible for the prevalence of the corporate form among large United States businesses and the characteristic to which commentators have attributed the success of United States business.²³⁰ It permits those wishing to invest in a corporation to limit their exposure to the amount of their investment. For example, an individual can purchase one hundred shares of Exxon stock secure in the knowledge that even if Exxon causes an enormous oil spill which results in millions of dollars of liability, the individual cannot lose more than the amount of his initial investment. Corporations thus allow investors to participate in the earnings of a business without being personally responsible for the consequences of failure, an attribute that makes it easier to raise equity capital through use of the corporate form. Not surprisingly, this attribute makes the corporation the vehicle of choice for many businesses of substantial size.²³¹

Although limited liability is a valuable attribute of the corporate form, one should not overestimate its importance. Limited partnerships provide the same shelter for the assets of their passive investors and provide favorable tax treatment as well.²³² Moreover, although limited liability protects the stockholder/investor, it does not shield the conduct of the corporate controllers, such as its officers and directors, from the threat of personal liability.²³³ Most importantly, limited liability does not offer any sort of government subsidy to the corporation's business. The

228. See Baldwin & Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209, 240 n.218 (1983) (special benefits of the corporate form include "the privilege of limited liability, perpetual existence, use of the corporate name to sue and be sued, and potential tax advantages for shareholders").

229. P. BLUMBERG, *THE LAW OF CORPORATE GROUPS*, SUBSTANTIVE LAW § 1.02, at 7 (1987).

230. *Id.* at 7-8.

231. For a detailed analysis of the theoretical and economic advantages and disadvantages of limited liability to the business enterprise, see *id.* §§ 4.01-5.02, at 63-101.

232. The State of Michigan, for example, permits investors to limit their liability in the same manner as corporate shareholders through the use of a limited partnership. MICH. COMP. LAWS ANN. §§ 449.1108, 449.1301a (West 1989).

233. Limited partners in Michigan, like shareholders, have the right to bring derivative suits. *Id.* § 449.2001.

corporation itself, as actor, does not share the shield of limited liability and is responsible for the full extent of any debts and obligations it incurs.²³⁴ For corporations with substantial assets, therefore, limited shareholder liability is unlikely to have a substantial impact on corporate decisionmaking.

Nor, upon reexamination, do the other attributes of the corporate form suggest a particularly favored legal status. Corporations do, by virtue of state law, enjoy perpetual life and do not dissolve automatically upon the death of a partner or founder, but businesses that do not operate in the corporate form can achieve the same permanence by contract. Similarly, although corporations often are distinguished from other forms of businesses by the fact that equity interests—shares of stock—are freely transferable in the corporation, the partnership form can likewise achieve such flexibility through contractual provisions. Indeed, limited partnership interests generally are considered to be securities²³⁵ and often are quoted and traded in much the same manner as stocks.

The ability to sue and to be sued in the corporate name results in judicial recognition of the corporation as an entity. Although useful in that it would be difficult and burdensome for a business with many diverse owners to deal with joinder issues, the class action lawsuit and other procedural devices would enable a corporation to obtain recourse in the courts without this attribute. And of course, judicial recognition of the corporate form does not substantially affect the corporation's ability to function as an economic unit.

Finally, separate taxation of the corporation as an entity can be either a benefit or a detriment to the business organized in the corporate form. Indeed, the Internal Revenue Code recognizes that taxation as a corporation is often a burden for small corporations and provides such businesses with the option of being taxed as a partnership through election of subchapter S status.²³⁶

234. Commentators who wish to present the view of corporations as powerful yet unaccountable frequently ignore this aspect of limited liability. *See, e.g.*, Mayer, *supra* note 73, at 658-59. Professor Mayer states that "corporations enjoy limited liability for industrial accidents such as nuclear power disasters," omitting the explanation that the only individuals shielded from that liability are the stockholders. *Id.* at 658. Neither the employees who negligently cause such accidents to occur, the management whose lax supervision permits the accident, nor the corporation itself receives any special treatment with respect to their liability for the accident, despite the corporate form.

235. *See, e.g.*, *People v. Graham*, 163 Cal. App. 3d 1159, 1164-65, 210 Cal. Rptr. 318, 322 (1985).

236. *See* 26 U.S.C. §§ 1361-1363 (1988).

Apparently the primary significance of the corporate form is not its special legal attributes; the dichotomy between the corporation and the partnership or alternative business form tends to be overstated. Rather, the distinctive attribute of the corporate form, particularly for large, publicly held corporations, is its organizational structure: the separation in a true corporation of ownership from management.²³⁷ Unlike the partnership or sole proprietorship, the owners of a corporation, the stockholders, are not responsible for managing the corporation; they elect directors who in turn select a corporation's management, its officers. The stockholders' elected agents make the decisions that normally would be made by owners, such as what products to sell, whom to employ, and what type of advertising to purchase.²³⁸ This separation of ownership and responsibility for day-to-day decisions is, in reality, the main attribute distinguishing the large, publicly held corporation from other forms of business.²³⁹

Because hired agents rather than owners of large corporations carry on corporate management, state corporation law provides limitations on the activities of those agents. The most important of these limitations is the corporate charter. The charter is often

237. Commentators also refer to this attribute as the "separation of ownership and control." Scholars have blamed the separation of ownership and control for many of the evils associated with the corporate form. See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1967); R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); see also Hovenkamp, *supra* note 3, at 1684 (discussing implications of the Berle & Means theory and, in particular, the effect that separation of ownership and control has on the presumption that corporations are profit maximizers).

Unlike limited liability, the separation of ownership and control is not an attribute common to all corporations. Corporations with few stockholders, in which the stockholders also participate in the corporation's business as management, directors, and employees, lack this characteristic. Such corporations, known as close corporations, present an organizational structure more nearly analogous to that of an unincorporated business entity, such as a partnership. H. HENN & J. ALEXANDER, *supra* note 3, § 257, at 694-97.

238. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); see Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1758-63 (1989) (discussing principal/agent theory of corporate law and transaction costs imposed by using and monitoring agents).

239. Delegating corporate control to management results in a certain inherent conflict of interest. No matter how responsive management is to the needs of the corporation's stockholders, management views will not reflect those of stockholders on many issues due to fundamental economic differences in their relative positions. For example, management and stockholders are in direct conflict with respect to management compensation, antitakeover charter provisions, and many other areas. For a detailed discussion of the conflict engendered by the separation of ownership and control and a proposed solution, see Dent, *Toward Unifying Ownership and Control in the Public Corporation*, 1989 WIS. L. REV. 881, 886-92.

characterized as a contract between the stockholders and management; it is, in essence, the contract for that agency relationship.²⁴⁰ Through the corporate charter, stockholders can prevent management from taking certain actions, require actions to be subject to stockholder vote, and affect management's accountability to the corporation.²⁴¹

A second, although less significant, limitation is the state corporation law. At one time corporation law was a substantial constraint on corporate activity. Corporations were limited by statute in size and duration. In addition, corporations could engage only in activities that state law authorized. Today, corporation law is generally permissive in nature, providing some minimal constraints by deeming some charter provisions contrary to public policy and by requiring stockholder votes for important corporate activities such as merger or dissolution. State corporation law, however, does impose certain duties upon management: management's fiduciary duty. Both the common law and state corporation law statutes require that management exercise a fiduciary standard of care;²⁴² that is, management must act in good faith and with that degree of care that an ordinarily prudent person would use under similar circumstances.²⁴³ In addition, statutes specify that in taking action, management must consider the interests of the corporation and its stockholders.²⁴⁴

Advocates of a more intrusive system of statutory regulation argue that the contract theory of corporations is inadequate because corporations have an effect on third parties whose rights will not be protected by the contractual charter between stockholders and the company.²⁴⁵ These advocates suggest that a more rigorous body of state incorporation law is necessary to guard against perceived corporate "evils." This approach has not gained

240. See H. HENN & J. ALEXANDER, *supra* note 3, § 122, at 279-82.

241. For example, statutes such as DEL. CODE ANN. tit. 8, § 102(b)(7) (1988) allow stockholders to release directors from personal liability for violating their duty of care to the corporation.

242. The common law fiduciary duty that corporate management owes to the corporation's stockholders is based on principles of agency law. See W. KLEIN & J. COFFEE, *BUSINESS ORGANIZATION AND FINANCE, LEGAL AND ECONOMIC PRINCIPLES* 19-37, 118 (4th ed. 1990).

243. See, e.g., N.Y. BUS. CORP. LAW §§ 715(h), 717(a) (McKinney 1986).

244. See, e.g., *id.* § 717(b) (McKinney Supp. 1990).

245. See, e.g., Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1549-55 (1989); cf. Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599, 1615-17 (1989) (contract theory of corporation is also inadequate because of the corporation's power to amend its corporate charter).

acceptance in the states, in large part because of the so-called "race for the bottom," a term coined by Professor William Cary²⁴⁶ to describe state legislatures' proclivity to make their corporation statutes increasingly lax and permissive in an attempt to encourage more corporations to incorporate in the state.²⁴⁷

The third limitation on corporate managerial conduct is the common law doctrine of fiduciary duty. The common law and case development both explain and supplement the statutory concept of fiduciary duty. Under the prevailing cases, management has a duty to remain informed, to run the corporation in a prudent manner, and, in so doing, to act in the best interests of the corporation, free from personal motives, self-dealing, and neglect.²⁴⁸ Management has a duty to act lawfully²⁴⁹ and an obligation not to enrich itself at the corporation's expense.²⁵⁰ Such doctrines as fiduciary duty, the duty of loyalty, the duty to act lawfully, and the doctrine of waste have their source in common law limitations on management actions.²⁵¹

What implications does the separation of ownership and control have for the regulation of corporate political speech?

C. *Better Alternatives*

The preexistence of a system of corporate regulation suggests that, in order to ascertain whether statutes such as FECA are

246. See Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). The phenomenon observed by Professor Cary was first described by Justice Brandeis in his dissent in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558-59 (1933), in which he described the competition between states for corporate charters as a race "of laxity." For a description of the development of the term and a compendium of adherents to the principle it reflects, see Macey & Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 469 n.1 (1987).

247. The race for the bottom is generally attributed to interstate competition for corporate franchise taxes. See Macey & Miller, *supra* note 246, at 470. The relatively small State of Delaware has, through the attractiveness of its corporation laws, become the state of incorporation for many major United States businesses. See *id.* at 478 (43% of New York Stock Exchange firms are incorporated in Delaware). Delaware pays for 16% of its annual budget through corporate franchise taxes. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1506 n.206 (1989) (citing UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, GOV'T FINANCES—STATE GOV'T FINANCES IN 1987, at 12 (1988)); see Cary, *supra* note 246, at 684 ("Perhaps there is no public policy left in Delaware corporate law except the objective of raising revenue.").

248. See, e.g., *Joy v. North*, 692 F.2d 880, 895 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985); *Francis v. United Jersey Bank*, 87 N.J. 15, 32, 432 A.2d 814, 822 (1981).

249. E.g., *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 762 (3d Cir. 1974).

250. E.g., *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 272-73, 5 A.2d 503, 511 (1939).

251. E.g., *Bates v. Dresser*, 251 U.S. 524, 529 (1920).

narrowly tailored to meet the governmental interest involved, the Court should determine if the evils reputedly presented by corporate political speech can be regulated by traditional corporate law. In other words, is an alternative method of regulating corporate political speech equally effective without intruding so deeply on first amendment values?

1. *Fiduciary Duty Law*

Before endorsing a statutory restriction on corporate political speech, one should understand what restrictions already exist by virtue of common law limitations on management's actions.²⁵² The common law provides several important restrictions on corporate political speech that the Court seemed to overlook in *Austin*. First, management cannot spend corporate funds on political issues that further its political objectives rather than those of the corporation.²⁵³ Such spending constitutes self-dealing and waste, and the corporation's stockholders have a cause of action in the name of the corporation to recover amounts wrongfully spent.²⁵⁴ Second, management cannot cause the corporation to engage in political speech unless management believes in good faith that such speech will further the corporation's interests. The relationship between the expenditure and the corporation's overall benefit need not be direct; indeed, corporations have long made charitable contributions based on the theory that corporate

252. The common law has been supplemented in name, although probably not in effect, by statutory provisions enacting a standard of due care, e.g., CAL. CORP. CODE § 309(a) (West 1990); N.Y. BUS. CORP. LAW § 717 (McKinney 1990), or setting forth procedures to be followed when a director has a possible conflict of interest, e.g., DEL. CODE ANN. tit. 8, § 144 (1988). Whether these provisions add anything to the common law principles from which they are derived is unclear. See, e.g., *Marciano v. Nakash*, 535 A.2d 400, 403-04 (Del. 1987).

253. The distinction between spending that furthers the corporation's interests and waste is not always obvious. For a discussion of the legal principles applicable to the doctrine of waste and the inherent difficulty in applying these principles to comparable subjects, such as executive compensation, see W. CARY & M. EISENBERG, *supra* note 182, at 604-32. Courts generally consider as valid expenditures that further any legitimate corporate objective, even if motivated by personal reasons. The difficulty in distilling from any corporate political spending management's personal motives lends support to Professor Brudney's position that corporate political spending is generally wasteful and therefore that state law may constitutionally restrict it. See Brudney, *supra* note 82, at 256-65.

254. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) ("minority stockholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management").

social responsibility provides an intangible benefit to the corporation, through enhanced reputation or such.²⁵⁵ Nonetheless, such a relationship must exist; otherwise, courts consider the expenditure a waste of corporate assets and deem it wrongful, rendering management personally liable.²⁵⁶ Third, management must pursue, as its primary objective, the achievement of corporate profits.²⁵⁷ Although various statutory amendments have expanded the scope of interests that management may consider in making decisions to include employees, suppliers, and community interests,²⁵⁸ management that fails to place the needs of the stockholders first²⁵⁹ will, in the long run, find itself voted out of office.²⁶⁰

Two distinct mechanisms, the derivative suit and the stockholder vote, enforce the common law limitations on management conduct. The literature on the effectiveness of both as tools for enforcing compliance with management's duties to the corpora-

255. See W. CARY & M. EISENBERG, *supra* note 182, at 115-30 (tracing the development of statutory provisions relating to charitable contributions and examining relation of such contributions to corporate welfare).

256. See, e.g., H. HENN & J. ALEXANDER, *supra* note 3, § 234, at 622-23. This is true even if a majority of the stockholders consent to the wasteful action; see Brudney, *supra* note 82, at 244 n.40 (citing cases).

257. See, e.g., AMERICAN LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 (Tent. Draft No. 2, 1984) ("A business corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain . . .").

258. E.g., N.Y. BUS. CORP. LAW § 717(b) (McKinney 1990); 15 PA. CONS. STAT. § 511(B) (1988).

259. The extent to which corporations consider social policy and choose goals that favor social responsibility at the expense of corporate profits remains an area of debate. See generally Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 3-4 (1979) (suggesting that the pursuit of social ends at the expense of corporate profits is socially undesirable, except in certain specified areas); Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287, 1288 (1979) (asserting that "corporate managers [should] take account of the total consequences of their decisions in determining company policies and practices"); Rappaport, *Let's Let Business Be Business*, N.Y. Times, Feb. 4, 1990, § 3, at 13, col. 2 (arguing that corporate participation is an inefficient way to solve social problems and that the corporation's only social responsibility should be to increase its value to "stakeholders").

260. Commentators have termed the mechanism that supposedly aligns the interests of stockholders and management "the market for corporate control." See Eisenberg, *supra* note 247, at 1497-99. They claim that this market addresses concerns about management wrongdoing or inefficiency by functioning in such a way that managers who do not perform satisfactorily are replaced. Commentators are divided, however, as to whether the market for corporate control actually functions successfully. See, e.g., Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145 (1984); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1173-82 (1981); Herman, *The Limits of the Market as a Discipline in Corporate Governance*, 9 DEL. J. CORP. L. 530 (1984).

tion is extensive, and this Article will not review it in detail.²⁶¹ Suffice it to say that an ample body of scholarship takes the position that stockholders' tools for disciplining their agents are, in large part, ineffective.²⁶² The combination of stockholder apathy, inability of small stockholders to communicate and coordinate with one another, lack of access to full information, and procedural hurdles to stockholder derivative suits²⁶³ permits management to undertake many objectionable activities with impunity.

These tools would work better if corporate political speech were sufficiently visible. One substantial limitation on a stockholder's ability to discipline his or her managers is the inability to discover what kind of political expenditures the corporation is making and in what amount. A modest addition to the federal securities laws could readily address this problem on the federal level. The Securities Exchange Act of 1934²⁶⁴ and the Securities Exchange Commission (SEC) rules thereunder²⁶⁵ require large, publicly held companies to disclose certain information about their

261. For a sampling of the literature addressing the derivative suit, see Fischel & Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 262 n.2 (1986). For scholarship dealing with the effectiveness of shareholder voting and access to the proxy machinery, see Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 99 n.8 (1988).

262. See, e.g., Fischel & Bradley, *supra* note 261, at 292 ("Many analyses of corporate law assume that liability rules enforced by derivative suits play a fundamental role in aligning the interests of managers and investors. We have shown that this widespread assumption is not supported by either the theory of liability rules, the available empirical evidence, or the structure of corporate law."); Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 136 (1987) ("In most cases, the collective action problem faced by dispersed shareholders renders voting relatively ineffective as a monitoring mechanism."); Exchange Act Release No. 34-24623, 52 Fed. Reg. 23,665 (June 22, 1987) (Commission recognizes that the "collective action" limitations on shareholder voting make voting an ineffective tool for shareholders to resist management proposals); see also Coffee & Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 264-65 (1981) (discussing the impairment of shareholders' mechanisms for enforcing corporate accountability); Easterbrook & Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395-97 (1983) (comparing assertions that shareholders should take back their lost control over the decisionmaking process with contentions that shareholders do not have the ability to govern); Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1490 (1970) (suggesting that managers rather than shareholders control corporate actions).

263. Procedural hurdles to shareholder derivative suits include the requirements of contemporaneous ownership, a demand on the board, and the posting of security for expenses. See H. HENN & J. ALEXANDER, *supra* note 3, §§ 362, 365, at 1058-65, 1069-70.

264. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1988).

265. General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. §§ 240.0-1 to .31-1 (1990).

annual operations to the SEC and to shareholders.²⁶⁶ Congress or the SEC could amend the disclosure requirements to mandate specific disclosure of all corporate political expenditures.²⁶⁷

Providing a disclosure mechanism within the federal securities laws has several advantages over the current system of regulation. The first advantage is that the disclosure remedy is tied more precisely to the situations in which corporate political speech represents a potential threat. Political speech by small businesses organized as close corporations is not, as we have discussed, materially different from speech by partnerships, sole proprietorships, or other businesses that do not utilize the corporate form.²⁶⁸ The potential danger in corporate speech comes at the level at which a substantial separation of ownership and management exists. The danger is aggravated at the level of the large, publicly held corporation in which the tools designed to monitor and discipline management function imperfectly. Because the securities laws require disclosure from precisely these corporations, the suggested provision will enable regulation of the potential harm without burdening small entities that do not present analogous risks.

Second, disclosure will render management more accountable in the area of political expenditures by making corporate political speech more visible to stockholders and the public. Increased visibility will enable market forces governing corporations to function more efficiently. Among these forces is the market for stock prices. If a corporation spends a large amount of money to influence elections, rather than on salaries, research and development, and raw materials, Wall Street is likely to view it with suspicion. The market thus will join with Congress in discouraging expenditures that are not socially valuable. Disclosure and

266. Large, publicly held companies are required to register under § 12 of the Exchange Act. 15 U.S.C. § 78l (1988). Section 13 requires registered issuers to file periodical reports with the SEC. *Id.* § 78m; see 17 C.F.R. §§ 240.13a-1 to -17 (1990). SEC rules prohibit such issuers from soliciting proxies for the election of directors unless the issuer has distributed an annual report to stockholders. See *id.* § 240.14a-3.

267: This Article takes the position that the required disclosure should include the amount of corporate political expenditures, the medium in which such expenditures were made (such as television or distribution of letters), and the specific candidates to whom the expenditures related. Although disclosure of specific candidates' names may engender adverse publicity for the candidates, it is the most effective way of bringing home to stockholders the nature of the corporate political speech and of enabling stockholders to control speech with which they disagree through the corporate process.

268. Nor is political speech by large corporations different in kind from speech by large unincorporated businesses.

its attendant visibility also are likely to have a direct impact on management conduct. Requiring management to disclose expenditures to stockholders and to the investing public is generally viewed as deterring irresponsible or excessive expenditures; the mere element of accountability improves management performance by discouraging such conduct.

Third, accounting for political expenditures through the federal system of periodic disclosure provides stockholders with information on expenditures in connection with their proxy materials, encouraging stockholders to monitor their corporation's speech more directly by choosing not to reelect those directors who permit excessive or unpopular political expenditures. Tying disclosure to the federal proxy process results in a system that encourages management's political expenditures to be responsive to stockholder opinion.²⁶⁹

2. *State Corporation Law Statutes*

If a direct statutory restriction on corporate political speech is necessary, the obvious alternative to a regulation like FECA is the alternative indirectly referenced in Justice Rehnquist's dissent in *Bellotti*: state corporation statutes that limit or regulate corporate political speech.²⁷⁰ As Rehnquist observed, because such statutes are the constitutive instruments for the artificial entity that is a corporation, limitations on corporate speech in those statutes have an added legitimacy.²⁷¹ Although even an outright ban on corporate speech might be legitimate under a state corporation statute, legislatures are unlikely to implement such a ban because modern state corporation laws have failed to serve as significant regulatory tools due to the race to the bottom and the acceptance by state legislators of the lure of flexibility over the sword of Damocles. Expecting states to utilize state corpo-

269. Increased disclosure may be particularly effective at a time when stockholders are taking an increasingly active role in monitoring and attempting to influence the social policy of their corporations. See, e.g., *Shareholder activism replacing divestment as social tool*, METAL WEEK, Apr. 16, 1990, at 3 (describing shareholder resolutions on issues including abortion, pollution, and South Africa); *Staff Acts on Shareholder Proposals on Directors, Stock Buybacks, Charities*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 212-13 (Feb. 15, 1991) (describing various shareholder proposals for spring 1991 annual meetings, including proposals about corporate charitable contributions, election of directors, and director stock ownership).

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

271. See *id.* at 823-25 (Rehnquist, J., dissenting).

ration law as a check on corporate political speech is thus not reasonable. At best, a statutory provision might require or expressly permit corporate charter provisions to deal with the issue of political expenditures.

3. *Charter Provisions*

A third way to handle corporate political speech is through the charter as corporate contract. Scholars have recently come to view the corporate contract as a far more potent tool for addressing issues of corporation law and policy.²⁷² This view is premised on the perception that a corporation is based on consensual relationships between investors, managers, and employees and that the terms of the agreements between these constituencies should govern the corporation. For example, if stockholders decide that they will not hold the directors whom they elect personally liable for breaching their fiduciary duty to the corporation, that decision is within the province of the stockholders and, assuming they make it on an informed basis and without any procedural deficiencies, statutory law should not deem it invalid.²⁷³

The justification for allowing this freedom of contract is the notion that contractual provisions that are not socially and economically efficient will not endure in a market economy.²⁷⁴ If it thus turns out that a contractual provision like the one described above harms the corporation by causing directors to act carelessly and irresponsibly, the corporation will be at a competitive disadvantage to similar companies without that provision. The corporation's value, and ultimately its stock price, will suffer. Accordingly, the harmful effect on their investment will discourage stockholders from entering into such contractual provisions.²⁷⁵

The contract theory of corporate law suggests an alternative approach to dealing with the perceived problems of corporate political speech. State corporation statutes could require corporations to address the political expenditures issue explicitly in

272. See, e.g., Easterbrook & Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

273. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (1988).

274. See Easterbrook & Fischel, *supra* note 272, at 1428-34 (discussing the mechanism by which the terms of corporate governance affect the stock price).

275. Cf. Gordon, *supra* note 245, at 1554-85 (arguing that full contractual freedom in corporate law will not necessarily lead to wealth maximization and that some mandatory legal rules are needed to limit corporate behavior).

their charters. For example, statutes could permit corporations to engage in political speech only if they have a charter provision that expressly authorizes such speech. The charter provision might limit the total amount the corporation could spend on political speech or the amount spent on any single candidate or issue.²⁷⁶ In the alternative, the provision might require that all corporate political speech be authorized by stockholder vote. A corporation's management would thus have to submit to the stockholders any proposed expenditure in favor of a political candidate.

Charter provisions offer several advantages over direct regulation of corporate political speech. First, they do not result in state interference with constitutionally protected speech. Any limitations imposed on a corporation's speech are imposed by the corporation itself; they are a decision by the potential speaker not to speak. Second, charter provisions deal specifically with the potential for management abuse. Stockholders who are concerned that management will waste corporate funds on political expenditures can limit such expenditures or require their submission for stockholder approval. Third, charter provisions address the Court's concern in *Austin* that political speech be publicly supported. Stockholders must either approve the political expenditure directly or, by expressly delegating to management the authority to make political expenditures, indirectly.

V. CONCLUSION

This Article began by recognizing the widespread perception that corporations are evil and that corporate political speech is still viler. Although it questions some of the foundations upon which that perception is based, this Article did not attempt to rebut that view. Nor did it attempt to justify corporate political speech based on the conception of the corporation as person or citizen. Based instead on the premise that corporate political speech, like other political speech, furthers first amendment values such as free trade in the marketplace of ideas, this Article questioned whether an outright prohibition of corporate political speech in connection with candidate elections is justified or necessary. In particular, it asked whether the Supreme Court can legitimately uphold such prohibitions without considering the

276. The provisions could contain an absolute dollar limitation or a limitation based on a percentage of earnings.

availability of other, less intrusive methods of regulating corporate political speech.

A review of the Court's analysis in *Austin* compels the conclusion that the Court's perception of the potential evil arising from corporate political speech is overstated. Moreover, based on the strict scrutiny with which the Court must examine the prohibition, the potential evil does not justify the ban. Rather, traditional corporation law offers a multitude of less intrusive methods for dealing with the corrosive effect of corporate speech, and the first amendment compels the Court to consider those alternatives.