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Beyond Bellotti

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BEYOND *BELLOTTI*

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I. INTRODUCTION

In the two decades since the United States Supreme Court first held unconstitutional a state ban on corporate political speech concerning ballot initiative measures in *First National Bank of Boston v. Bellotti*,[1] the importance of the initiative[2] process in state governance has grown remarkably. In the last decade alone, the number of state ballot measures decided by voters has more than doubled from forty-one to ninety.[3] Over that same period, the Court has unsettled the legal landscape of corporate electoral speech doctrine. In the notable decisions in *FEC v. Massachusetts Citizens for Life (MCFL)*[4] and *Austin v. Michigan Chamber of Commerce*,[5] the Court has seemingly undermined the rule and reasoning of *Bellotti*. Due to doctrinal shifts, it is unclear whether and to what extent states can now regulate corporate speech relating to ballot initiatives—that is whether

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1. 435 U.S. 765 (1978).

2. The terms "initiative," "referendum," "ballot measure," and "ballot proposition" are often used interchangeably. To be technically precise, initiatives and referendums are two different means of governing through the mechanisms of direct democracy. The initiative allows voters to propose a law or constitutional amendment by petition, which is then voted on directly by the people. *See* DANIEL H. LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 259 (1995). In contrast, the referendum allows voters to approve or reject a law either already passed by the legislature or proposed by the legislature. *See id*; *see also* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 2 (1989).

3. *See* Peter Schrag, *California Here We Come*, ATLANTIC MONTHLY, Mar. 1998, at 20.

4. 479 U.S. 238 (1986).

5. 494 U.S. 652 (1990).

corporate electoral speech doctrine has moved beyond *Bellotti* and, if so, how far and in which direction.

The purpose of this Article is to assess the Court's doctrinal movement and answer the questions of whether and how far the constitutional law of corporate political speech on ballot initiatives has moved beyond *Bellotti*. These questions are significant because state lawmakers and lawyers remain uncertain as to the appropriate scope of regulation in the ever-increasing sphere of popular government known as the initiative process. Although neither *MCFL* nor *Austin* purported to overrule *Bellotti*,[6] numerous scholars argue that these cases—which stand for the proposition that states can prohibit business corporations from financing independent expenditures relating to candidates from general treasury funds[7]—"stand[] in absolute contradiction"[8] to the rationale of *Bellotti*. Whereas *Bellotti* reasoned that political speech does not lose its protection "simply because its source is a corporation,"[9] *Austin* found that "the unique legal and economic characteristics of corporations"[10] can legitimize regulation on how corporations finance their political speech to influence elections. Because *Bellotti* dealt with corporate speech on initiatives and *MCFL* and *Austin* with corporate speech regarding candidates, no one can be certain if *Bellotti*'s rule survives *MCFL*'s and *Austin*'s reasoning.

This uncertainty is put in bold relief by a lawsuit pending in Montana over that state's recently enacted law requiring corporations to finance initiative speech through segregated, not general treasury, funds. In *Montana Chamber of Commerce v. Argenbright*,[11] several business entities have challenged this provision of Montana's

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6. *See Austin*, 494 U.S. at 657, 659 (citing *Bellotti* as binding precedent).
7. *See id.* at 668-69.
8. Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 613 (1991) (noting *Austin*'s contradiction to *Bellotti*); *see also* Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption" Waiting for the Court*, 44 VAND. L. REV. 767, 780 (1991) (distinguishing both *Austin* and *MCFL* from *Bellotti*).
9. *Bellotti*, 435 U.S. at 784.
10. *Austin*, 494 U.S. at 658.
11. CV 97-6-H-CCL (D. Mont. Feb. 18, 1998).

election code.[12] The Montana law was modeled after the Supreme Court's reasoning in *Austin* and directly poses the thorny question of whether corporate electoral speech doctrine has moved beyond *Bellotti*, and if so, how far.[13] The Montana litigation invites us to examine critically the post-*Bellotti* developments in both legal doctrine and electoral politics to determine the boundaries of constitutionally permissible regulation of the corporate voice in the initiative process.

This Article contends that *Bellotti* rested on three pillars of reasoning: conceptual, evidentiary, and theoretical. Conceptually, the Justices based their judgment of the corporate initiative speech ban on a particular understanding of "corruption"—one that encompassed only financial *quid pro quo* deals between candidates and contributors, and hence was inapplicable to ballot measure campaigns.[14] The second pillar was evidentiary, as the Court found the record in that case to lack evidence that corporations exerted a significant influence in ballot elections to justify their silencing.[15] The third pillar was the Court's theoretical approach to the constitutional principle of freedom of speech, which focused on the informational needs of recipients of corporate speech and extended corporate speech rights accordingly.[16]

Since *Bellotti*, each of these three pillars of reasoning have been weakened, modified, or supplemented by developments in both judicial doctrine and electoral politics. With regard to corruption, the growth of the initiative process, issue advocacy, and the now frequent ties between candidates and ballot measures means that ballot expenditures may in fact pose a risk of financial *quid pro quo* corruption. Moreover, as others have noted, the Court's conception of "corruption" has been supplemented by *MCFL* and *Austin.* I argue, however, that commentators have misinterpreted the Court's rulings. These cases do not stand for the proposition that states can attempt to equalize the voices of participants in political debate, as commentators have claimed. Rather, they hold that corruption can be found when a corporation uses shareholders' money to support electoral

12. *See* MONT. CODE ANN. § 13-35-236 (1997).
13. *See infra* notes 32-73 and accompanying text.
14. *See Bellotti*, 435 U.S. at 790.
15. *See id.* at 789-90.
16. *See id.* at 783.

politics they have not agreed to. *MCFL* and *Austin* establish a new conception of "corruption" that I term "other people's money" corruption.

The evidentiary basis for the *Bellotti* Court's decision has also been undermined over the past two decades. In numerous articles, scholars have attempted to show that there is evidence proving that corporations can overwhelm the initiative process. I contend, however, that these scholars have often settled for data analyses that cannot support the conclusions scholars derive from them. To comprehend the potential for corporate influence over ballot measures requires a broader view of the mechanisms of communication in elections, which can indeed pose a threat of electoral manipulation by large corporate media conglomerates. Yet even this broader view defies the specificity and concreteness necessary to satisfy a court of law and the threat remains potential rather than actual. Nevertheless, by shifting the focus of the "corruption" inquiry in *MCFL* and *Austin*, the Court has made the evidentiary question of corporate dominance moot. Now the relevant evidentiary question should be whether a corporation has shareholder consent for its political expenditures in elections.

The theoretical pillar of *Bellotti* is in need of adjustment to reflect "other people's money" corruption. I show that the *Bellotti* Court's listener-based theoretical framework is too infirm to support unlimited corporate initiative speech rights. I then argue that a popular theoretical alternative which is also said to protect unlimited corporate political speech—Martin Redish's constitutive theory—rests on faulty assumptions. Indeed, constitutive theory actually supports the conception of "other people's money" corruption at the heart of *MCFL* and *Austin*. I then propose an alternative theoretical framework to support "other people's money" corruption based on long-standing principles of political association found in organizational mandatory fees cases (involving union dues, state bar dues, and student fees).

Having established the ways in which doctrine and electoral politics have moved beyond *Bellotti*, I next consider the impact of these moves on several current corporate electoral influence controversies. First, I assess the constitutionality of the Montana law and conclude that it is of questionable validity due to substantial overbreadth. Then I examine how moving beyond *Bellotti* may justify other campaign finance reforms related to business corporations, including regulation of corporate political action committee (PAC) fund-raising, bans on corporate financing of PAC administrative expenses, and limitations on corporate soft money contributions to political parties.

The Article proceeds as follows. Part II offers a brief introduction to the initiative process and its historical background. It then provides an overview of the Montana corporate speech regulation at issue in *Montana Chamber of Commerce v. Argenbright* and of the most significant precedents that will determine its outcome: *Bellotti*, *MCFL*, and *Austin*. Part III identifies and analyzes the three pillars of the Court's reasoning in *Bellotti* and shows how these pillars have been affected by doctrinal and political developments. Finally, in Part IV, I consider the effect of moving beyond *Bellotti* on the Montana law and other corporate-centered campaign finance reforms.

II. CORPORATE ELECTORAL SPEECH AND THE CONSTITUTION

A. Business Corporations and the Initiative Process

Instituted in twenty-three states around the beginning of the twentieth century,[17] the citizen initiative was part of a larger politics of progressive governmental reform in the West and Midwest. The primary objective of this reform movement was to reclaim governmental power from "special interests"—a vague term used at the time to describe the all-powerful railroads, the industrial, manufacturing, and agricultural trusts, and the large modern corporations emerging from the post-Civil War industrialization.[18] Among the reforms achieved by this movement were the Seventeenth Amendment (providing for direct election of Senators),[19] the Nineteenth Amendment

17. *See* CRONIN, *supra* note 2, at 51.

18. For discussion of California's experience with the Southern Pacific Railroad, see Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1184-85 (1998). For a broader history of the period and of the underlying societal changes giving rise to reform, see ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967).

19. *See* U.S. CONST. amend. XVII.

(enfranchising women),[20] the busting up and regulation of combinations in the Sherman Antitrust Act,[21] the outlawing of political patronage,[22] the institution of laws banning a host of "corrupt practices" in electoral politics, and the creation of state-wide citizen initiatives.

While each of these efforts sought to enhance the power of the people, the initiative was designed to be an especially effective way to circumvent legislatures many viewed as captured by moneyed interests.[23] The initiative would provide the citizenry with the ability to legislate directly, without threat of the legislature later reversing the citizenry's action.[24] Not only would voters decide policy issues directly, but the measures they voted on would be sponsored by the people themselves; they, not the special interests, would control the political agenda of the initiative. To obtain placement on the ballot, supporters would be required to obtain a specified number of signatures—usually around five percent of the total number of voters in the previous gubernatorial election—thus insuring the agenda was set by the grass-roots instead of by moneyed interests.

Both critics and proponents of the initiative process now admit that, in practice, the initiative has not lived up to its promise of restoring the power of the people. "It was supposed to be something to give people the right to circumvent the stranglehold that the special interests had on the legislature," says one commentator. "But now what's happened is that the special interests are the ones that can afford to do the initiatives."[25] A study by the California Commission on Campaign Financing conducted in 1992 concluded that the average cost of obtaining the signatures required to earn a place on the

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20. *See* U.S. CONST. amend. XIX.

21. For histories of the remarkable passage of the Sherman Antitrust law, see WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTI-TRUST ACT (1965); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963).

22. *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1374 (1987).

23. *See* CRONIN, *supra* note 2, at 43-50.

24. *See, e.g.*, Manheim & Howard, *supra* note 18, at 1197-98 (describing how initiatives in California are protected from later reversal by the legislature).

25. Todd S. Purdum, *When Lawmakers Waffle, and Sometimes Before, Voters Turn to the Ballot Measure*, N.Y. TIMES, Mar. 31, 1998 at A18 (quoting California State Senator John Burton).

ballot was over $1 million.[26] Only sixteen years earlier, the cost was considerably less, at $45,000.[27] Professional circulating firms have been established, rendering the process of gathering signatures more like a commercial transaction than a political movement—a process devoid of political debate and often achieved without the signatories even knowing anything substantive about the measure.[28] Some firms even offer a money-back guarantee that they can gather the necessary signatures for virtually any ballot proposition. Consequently, "anyone willing to put up the funds can buy a place on the ballot."[29] Now the initiative agenda is determined more by corporations or interest groups than by ordinary people operating among the grass-roots.[30]

Corporate influence on the initiative process is also felt after the ballot has been set. As initiative activity increased since the 1970s, the amount of money spent by business corporations to sway voters has also increased. Each election year, voters are bombarded with fifteen and thirty-second television advertisements, billboards, and direct-mail designed to garner their votes. In California, more money is spent lobbying voters on a handful of ballot propositions than is spent lobbying legislators on the hundreds of bills that come to the Assembly floor.[31] Initiatives have become big business—and big business has integrated itself into the initiative process.

It is therefore not surprising to see a rekindling of efforts to regulate the corporate voice in politics. Yet any such regulation must pass the exacting First Amendment scrutiny of the courts, which

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26. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 13 (1992).

27. *See id.*

28. *See* CRONIN, *supra* note 2, at 63-64.

29. Daniel H. Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 199 (1989).

30. Another adverse consequence of modern initiative practice is its penchant for laws whose harm is felt disproportionately by racial, ethnic, or social minorities. *See e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); *but see* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1364-66 (1985) (disagreeing with Professor Bell's analysis of initiatives).

31. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 26, at 15.

have often looked unfavorably—if inconsistently—upon restrictions of political speech sponsored by corporate enterprises.

B. Montana Chamber of Commerce v. Argenbright

Montana shares in the long history of fighting corporate influence in the political process. In 1906, Montana became one of the twenty-three states of the Progressive Era that adopted the initiative mechanism as a method of reasserting the citizenry's political authority.[32] A few years later, in 1912, Montana passed the Corrupt Practices Act to further limit the political power of corporations, banning corporate spending intended to promote or defeat any political party or candidate.[33] For sixty years, the law was interpreted to ban corporate spending on initiatives until the Montana Supreme Court found the Act ambiguous in its scope in 1972.[34] In response, the Montana legislature amended the Corrupt Practices Act to clarify that corporate initiative spending was unlawful on penalty of loss of charter, a substantial fine, or prohibition on conducting business in the state.[35]

Although the complete ban on corporate spending on ballot campaigns was subsequently overturned by the courts,[36] in 1997 Montana adopted a new law regulating the source of corporate political expenditures used to influence ballot measures.[37] The 1997 law provides that "a business corporation, nonprofit corporation, religious corporation, professional corporation, business trust, [among other enumerated business entities] . . . may not make a contribution or an expenditure in connection with a ballot issue or to a political committee that supports or opposes a ballot issue."[38] The law further states that it "does not prohibit the establishment or administration of

32. *See* CRONIN, *supra* note 2, at 51. Since the Progressive Era, another four states have adopted some form of direct democracy to enable voters to approve or reject laws or constitutional amendments. *See id.*

33. *See* MONT. CODE ANN. §§ 23-4744, 94-1469 (1947).

34. *See* State *ex rel.* Nybo v. District Court, 492 P.2d 1395, 1399 (Mont. 1972).

35. *See* MONT. CODE ANN. §§ 23-4744, 23-4768 (1975).

36. *See* C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254, 1266 (D. Mont. 1976), *aff'd*, 583 F.2d 421, 425 (9th Cir. 1978).

37. *See* MONT. CODE ANN. § 13-35-236 (1997).

38. *Id.* § 13-35-236(1).

a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from individuals who are shareholders, employees, or members" of a covered organization.[39] There are no limits to the amount of money a segregated fund can spend in attempting to influence the outcome of a ballot measure. However, corporations cannot use general treasury funds to support or oppose ballot measures.

Soon after enactment, the law was challenged in court by the Montana Chamber of Commerce, a construction company, several industry associations, and other businesses. The plaintiffs claim, among other things, that the law is an unconstitutional infringement of their First Amendment speech rights. The federal district judge in this case, Charles Lovell, has recently rejected the plaintiffs' motion for summary judgment and trial is slated to begin in November, 1998. The ultimate outcome of the Montana case will turn on how District Judge Lovell, the judges on the court of appeals, and perhaps ultimately the Justices of the Supreme Court understand and interpret the tangled web of precedents on campaign finance, corporate political speech, and ballot initiative expenditures. Several Supreme Court precedents impinge on and supply countervailing pressures on the Montana law, which occupies the unsettled doctrinal area between *First National Bank of Boston v. Bellotti*[40] and the Court's more recent rulings in *Federal Election Commission v. Massachusetts Citizens for Life*[41] and *Austin v. Michigan Chamber of Commerce*.[42]

Bellotti is the case with the most similar facts: a state law restricting corporate speech in ballot campaigns. In *Bellotti*, two banks challenged a Massachusetts law making it illegal for business corporations and banks to finance political speech on ballot measures, unless they were directly affected by the measures.[43] Massachusetts' ban was an outright prohibition. It made no exception for corporate speech funded by PACs. As the Court would later characterize it, the

39. *Id.* § 13-35-236(3).
40. 435 U.S. 765 (1978).
41. 479 U.S. 238 (1986).
42. 494 U.S. 652 (1990).
43. *See Bellotti*, 435 U.S. at 767.

Massachusetts law amounted to a "complete foreclosure of any opportunity for political speech"[44] by the corporation.

The Court, per Justice Lewis Powell Jr., invalidated the Massachusetts law on First Amendment grounds. The Court's reasoning rested on three determinations. First, the Court rejected Massachusetts' claim that the speech of "wealthy and powerful" corporations might corrupt the political process by "drown[ing] out other points of view."[45] According to the Court, this was not the type of corruption states had a substantial interest in preventing.[46] Second, the Court determined that the record evidence was insufficient to justify the broad prohibition on corporate initiative speech. The evil the state wished to prevent was merely hypothetical because there was "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government" due to corporate political participation.[47] Finally, the Court reasoned that the silencing of corporations offended the First Amendment value of providing the public with a diversity of views and information.[48] According to the Court, it was irrelevant to the First Amendment whether the speaker was a corporation or a natural person.[49]

Bellotti remains the Court's seminal ruling on corporate speech in ballot campaigns. But while it is undoubtedly relevant to determining the constitutionality of *Montana Chamber of Commerce*, it does not necessarily require the courts to invalidate the Montana law. *Bellotti* is distinct from the Montana case in one essential respect. Unlike the Massachusetts law invalidated in *Bellotti*, which imposed a complete ban on corporate initiative speech,[50] the Montana law allows corporate political speech so long as it is financed through

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44. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259 n.12 (1986); *see also* Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE W. RES. L. REV. 589, 600 (1988).
45. *Bellotti*, 435 U.S. at 789.
46. *See id.* at 789-90.
47. *Id.* (citation omitted).
48. *See id.* at 777.
49. *See id.* at 776.
50. *See MCFL*, 479 U.S. at 259 n.12.

segregated funds or PACs. By making this allowance, the framers of the Montana law attempted to satisfy the reasoning of the Supreme Court in two post-*Bellotti* corporate electoral speech cases: *MCFL* and *Austin.*

If *Bellotti* stood for broad protection for corporate political participation, *Federal Election Commission v. Massachusetts Citizens for Life*[51] represented a significant step towards the constitutionality of restrictions on corporate political speech in elections. Section 441b of the Federal Election Campaign Act (FECA) made it illegal for all corporations to use general treasury funds to finance independent expenditures expressly advocating the defeat or election of candidates for federal office.[52] To the extent corporations wished to fund independent expenditures to support candidates, the law required them to establish separate segregated funds, or PACs.[53] The Federal Election Commission (FEC) filed a complaint against MCFL after the non-profit corporation formed to advance the anti-abortion cause published a newsletter financed with general treasury funds prior to the 1978 primary elections identifying candidates who supported MCFL's pro-life position.[54] The Court, per Justice William Brennan, held section 441b unconstitutional as applied to MCFL's publication.[55]

The Court's decision is significant for two reasons: its recognition of the potentially corrupting influence of business corporations on the political process, and its distinct First Amendment treatment of the speech of non-profit advocacy corporations as compared to that of business corporations.[56] With regard to the corrupting influence of corporations on the political process, Justice Brennan's opinion explains that:

> [d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. . . . The resources in the treasury of a

51. 479 U.S. 238 (1986).
52. *See* Federal Election Campaign Act, 2 U.S.C. § 441b (1997).
53. *See id.* § 441b(a), (b)(2)(C) (1997).
54. *See MCFL*, 479 U.S. at 243-45.
55. *See id.* at 263.
56. *See infra* notes 58-60 and accompanying text.

> 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.[57]

The Court in *MCFL* realized that the potential for business corporations to amass immense holdings of capital from people who do not necessarily support corporations' political agenda can have a distorting effect on elections.

As quickly as he recognized the political dilemma posed by corporate wealth, Justice Brennan made an important distinction between non-profit advocacy corporations and business corporations.[58] Unlike business corporations, the general treasury funds of non-profit advocacy corporations do reflect political support for the group's political ideas. A non-profit advocacy group, "MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."[59] Thus, MCFL's use of general treasury funds to finance political speech in support of candidates did not carry the risk of "unfair deployment of wealth"[60] gained through the corporate form. As a result, MCFL could not be required to establish a separate segregated fund for electoral speech.

In *Austin*, the Court applied *MCFL*'s reasoning to uphold a state ban on business corporations financing electoral speech designed to help candidates through general treasury funds.[61] The Court in *Austin* upheld provisions of Michigan's Campaign Finance Act prohibiting independent expenditures by business corporations in connection with candidate elections, unless those expenditures were financed through segregated funds or PACs. The Michigan Chamber of Commerce, a non-profit corporation formed to promote local

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57. *MCFL,* 479 U.S. at 257-58.
58. *See id.* at 259.
59. *Id.*
60. *Id.*
61. *See Austin,* 494 U.S. at 668-69.

businesses and financed by business interests, unsuccessfully challenged the Michigan law.[62] While noting the important speech interests at stake for the Chamber of Commerce, the Court held that Michigan had a compelling interest in preventing business corporations from unfairly diverting their economic resources to political ends.[63] Borrowing heavily from *MCFL*, Justice Thurgood Marshall, writing for the majority, explained that the restriction on corporate independent expenditures was necessary to alleviate "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."[64]

Although the Chamber of Commerce itself was a non-profit corporation, the Court reasoned that it was more akin to a business corporation than an advocacy corporation—such as MCFL—on the basis of three distinguishing features. First, the Chamber of Commerce's explicit purpose, as reflected in its corporate bylaws, was not purely political advocacy.[65] Unlike MCFL, whose articles of incorporation specified the organization's core ideological and political nature, the Chamber of Commerce's articles identified many purposes, including providing group insurance and litigation activities, and staging politically neutral educational seminars for local businesses.[66] Second, the Chamber of Commerce had members who might disagree with the organization's political agenda but who had economic disincentives from disassociating.[67] In contrast, MCFL's members joined specifically to further that organization's political agenda and thus would be unlikely to dissent.[68] Finally, MCFL accepted no contributions from businesses and was "independen[t] from the influence of business corporations,"[69] whereas three-quarters of the members of the Chamber of Commerce were business

62. *See id.* at 656.
63. *See id.* at 659-60.
64. *Id.* at 660.
65. *See id.* at 662.
66. *See id.* at 662-63.
67. *See id.* at 663.
68. *See id.*
69. *Id.* at 664.

corporations.[70] As a result, business corporations were able to circumvent legitimate limits on their ability to contribute to candidates "by funneling money through the Chamber's general treasury."[71]

Although much of the rhetoric of *Austin* was broad, the ruling itself was more narrow. The Michigan law did not ban all corporate political speech expenditures for candidates, only those funded by the corporation's general treasury. Under the Michigan law, business corporations remained free to establish segregated funds or PACs to finance electoral speech to which managers, officers, employees, or shareholders could contribute money in the corporation's name.[72] The law upheld in *Austin* did not prohibit corporate speech for candidates; it only required that corporations avoid using general treasury funds to finance their speech.[73]

The method by which corporate initiative speech is permitted under the Montana law—through segregated funds—mirrors the *MCFL* and *Austin* Courts' reasoning that prohibitions on the business corporation's use of general treasury funds for electoral speech are legitimate, so long as segregated funds or PACs are available alternatives. Yet *MCFL* and *Austin*, because they involved limits on corporate speech to support candidates, not ballot measures, are no more directly on point than *Bellotti.*

In other words, Montana's law occupies the middle ground between the complete ban on corporate initiative speech stricken in *Bellotti*, and the source-of-funding requirements for corporate candidate speech upheld in *Austin*. To resolve the constitutional controversy, the courts will either have to construe each of the relevant decisions so that they form a coherent and consistent body of rules, or

70. *See id.*

71. *Id.*

72. Because a corporate PAC will be controlled and operated by corporate managers, it is essentially the same people deciding what the corporation will say, where it will say it, and how much to spend to say it. Moreover, there is no reason to believe that corporations forced to resort to PACs will cease speaking. Indeed, many large corporations currently funnel their political speech through active PACs. Thus, in my view, it is incorrect to conclude that *Austin* kept a highly relevant voice from being heard at all "or silenc[ed] an important voice entirely." *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 74 (1997).

73. *See Austin*, 494 U.S. at 669 (Brennan, J., concurring).

have to sort out which of the cases provides the most persuasive legal principles. The judges and Justices must determine if the law of corporate initiative speech has moved beyond *Bellotti* and, if so, how much.

III. *BELLOTTI* AND BEYOND

Making sense of the doctrinal entanglements on the issue of corporate political speech in elections is not the courts' job alone. For anyone interested in the state of the law on corporate initiative speech, determining the permissible scope of corporate electoral speech regulation remains undone. Part III is an attempt to discern the state of the law, coupled with an analysis of the dilemmas posed by corporate influence on ballot measures and a prescription of how to make the best sense of the relevant cases. Because *Bellotti* remains the Court's most enduring decision on corporate speech in ballot campaigns, the discussion below is framed in terms of the three main pillars of *Bellotti*'s reasoning. Examining the fundamental bases of the *Bellotti* Court's reasoning provides a useful way of assessing the continued validity of the decision and helps to contextualize post-*Bellotti* developments in politics and doctrine.

The earlier summary of *Bellotti* identified three main pillars to the Court's reasoning. The first was conceptual; the Court reasoned that the state had a compelling interest in preventing corruption of the political process, but found that Massachusetts' law did not aim to prevent the proper type of corruption. The second pillar was evidentiary; the Court found that there was no evidence in the record of corporations dominating or even significantly influencing the outcome of initiative campaigns. Absent such evidence, the state's belief that corporate initiative speech needed to be restrained was mere conjecture. The third pillar was theoretical; the Court posited an understanding of the free speech guarantee of the First Amendment that rested on the rights of listeners of corporate speech. The perspectives of corporations add to the information available to the public, and therefore warrant constitutional protection.

Twenty years after *Bellotti* was handed down, it is necessary to analyze each of its three pillars to determine if they continue to provide sound support for the Court's conclusion that corporate initiative speech deserves to be secured by the First Amendment.

Furthermore, the resolution of the Montana dispute will likely turn on these three aspects of *Bellotti*'s reasoning and how they have been construed, clarified, strengthened, or contradicted by later cases and political developments.

A. Corruption as Contested Concept: From Quid Pro Quo *to Other People's Money*

The courts have consistently held that states have a compelling interest in preserving the integrity of the electoral process, which includes preventing corruption. Yet exactly what the courts have meant by "corruption" has shifted and evolved. This section, traces how the concept of corruption used to judge the Massachusetts law in *Bellotti* has been transformed by subsequent cases and political developments. With regard to its conceptualization of corruption, the Court has unambiguously moved beyond *Bellotti*, but the precise contours of the new conceptualization remain unclear and subject to debate. The prevailing view among scholars and Justices is that the "New Corruption" is designed to insure equality in the political process. Yet, this dominant understanding of the "New Corruption" is incorrect; we can make the most sense of post-*Bellotti* developments by understanding the new conception of corruption to be based instead on the inappropriate use of shareholders' money in electoral politics by corporate managers.

1. *Quid pro quos*, independent expenditures, and ballot campaigns

The *Bellotti* Court centered its discussion on the version of corruption articulated first in the seminal campaign finance case of *Buckley v. Valeo.*[74] According to *Buckley*, corruption occurs when a candidate owes political debts to those who have backed the candidate with financial support.[75] Due to such backing, a candidate may come to feel as if his votes on legislation must follow his supporters' interests, rather than the candidate's exercise of independent judgment. Perhaps the best articulation of this conception of corruption

74. 424 U.S. 1 (1976) (per curiam).
75. *See id.* at 45.

was offered in *Federal Election Commission v. National Conservative Political Action Committee*:[76] "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[77] To the *Bellotti* Justices, this financial *quid pro quo* version of corruption was not applicable to corporate expenditures on ballot campaigns. Since no candidates are involved, expenditures on ballot measures pose no threat of improperly influencing the votes of public officials.[78]

If the courts adopt *Bellotti*'s view that the only type of corruption subject to governmental regulation is the financial *quid pro quo* kind, there is little chance the Montana restrictions on corporate expenditures will survive constitutional scrutiny. Although the Montana law does not mirror the Massachusetts law invalidated in *Bellotti*, to the extent it can be supported only by reference to *quid pro quo* corruption, the statements in *Bellotti* and other cases that ballot measures cannot be subject to this type of corruption will likely hold sway. That is not to say that the courts have no discretion. While unlikely, they could rule that *Bellotti* was wrong about the corrupting force of corporate initiative expenditures on candidates—that, indeed, initiative expenditures can threaten financial *quid pro quo* corruption of public officials.

How can spending on ballot measures corrupt candidates? With the growth in popularity of the initiative mechanism over the past two decades, it is increasingly common for political candidates or office-holders to sponsor ballot measures or to make initiatives central themes in their campaigns. Californians, for example, have witnessed several high-profile candidacies in which initiatives have been prominent parts of campaigns for public office. Governor Pete Wilson made the anti-immigrant Proposition 187 the centerpiece of his successful 1994 re-election campaign; the anti-affirmative action

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76. 470 U.S. 480 (1985).

77. *Id.* at 497.

78. *See Bellotti*, 435 U.S. at 790; *see also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 297-98 (1981) (no threat of corruption from expenditures designed to influence ballot measures).

Proposition 209 played a similar role in his aborted bid for President. Dan Lungren, California's Attorney General, spearheaded the drive to defeat Proposition 215, which legalized the medical use and possession of marijuana. His effort was widely seen as the start to his bid for the California Governor's office in the 1998 election. In the Houston anti-affirmative action initiative of 1997, Mayor Bob Lanier played an active role in the campaign to oppose passage of the initiative, appearing in commercials and making public appearances.[79] In the era of the initiative, politicians are willing to tie their political careers to ballot measures they think will engender popular support.[80]

Part of this linkage is the candidates' efforts to define themselves vis-à-vis hot button issues. Another aspect is the attempt by candidates to ride the "coat-tails"[81] of initiatives that capture the public mind and shape people's voting behavior. Sponsoring the right initiative can lead to name recognition and can generate contributions from initiative supporters.[82] Because of this symbiotic relationship between candidates and ballot propositions, candidates who have made a ballot measure a primary theme in their campaigns may feel beholden to private groups that spend large sums advocating favored initiatives. If a candidacy is furthered by an initiative's success, a candidate may find herself subject to the same political debt arising from large direct contributions.

The threat of *quid pro quo* corruption arising from independent expenditures of all types—in support of ballot measures or candidacies—may in some senses be even greater than that posed by direct candidate contributions, particularly in light of contribution limits. If a candidate is required to raise campaign funds in small increments—such as the $1,000 limit for contributions to candidates for federal

79. *See* Sam H. Verhovek, *Referendum in Houston Shows Complexity of Preferences Issue*, N.Y. TIMES, Nov. 6, 1997, at A1.

80. *See* Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393, 408 (noting potential of ballot spending to threaten *quid pro quo* corruption of candidates).

81. *See* John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence and Declining Voter Confidence Be Found?* 39 U. MIAMI L. REV. 377, 386 (1985).

82. *See id.* at 385-86.

office[83]—she may perceive expensive independent advertising campaigns more valuable than fund-raising efforts. Nor is it inconceivable that a private group might make expenditures supporting a candidate in such proportions that the candidate feels a sense of obligation to the needs of that group. As constitutional scholar Owen Fiss has warned, "[a] candidate is likely to adopt policies that are especially responsive to the desires and interests of the persons who are spending the money or who are in a position to spend the money to further the candidacy."[84] The candidate might be strapped for money, running against an incumbent with a sizable war chest, and the advertising campaign of a private party might be enough to tip the balance in favor of electoral victory. To the extent the candidacy is linked to a ballot measure, such spending may advance his candidacy.

Indeed, recent elections have witnessed remarkable growth in independent groups taking out ads ostensibly to advance issues, but often supporting or opposing candidates.[85] It is not inconceivable that an independent group that wishes to help a candidate who has linked his campaign to a ballot measure would view ballot advertisements as a way of buying influence and access to the candidate.

The Supreme Court in *Buckley* rejected the argument that independent expenditures posed a substantial risk of traditional, *quid pro quo* corruption. "[S]uch independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive,"[86] the Court predicted. At least some recent

83. *See* 2 U.S.C. § 441a(a)(1) (1997).

84. Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478 (1997).

85. Perhaps the bellwether change marked by the 1996 election cycle was the sudden emergence of private groups taking out advertisements nominally to advance political debate on issues, but really to express support of or opposition to candidates albeit indirectly. Issue advocacy advertising grew from a trickle to over $262 million in 1996. Robert Dreyfuss, *Harder Than Soft Money*, AM. PROSPECT, Jan.-Feb. 1998, at 30. Among the most significant issue advocacy campaigns designed to further candidacies was the notorious AFL-CIO barrage of advertisements in key congressional races in 1996. It is estimated that the organization spent approximately $35 million to fight against Republican congressional representatives that the AFL-CIO considered vulnerable. *See id.* at 31.

86. *Buckley*, 424 U.S. at 47.

experience with independent issue advertisements suggests the Court was right, although with the increasing importance of this type of expenditure it is far from clear what the future holds.

As of today, candidates seem to dislike independent issue advocacy expenditures, even when in support of their candidacies, because they cannot control the messages and may be held accountable for them nonetheless. Illustrative of this phenomenon is the 1998 special congressional election in Santa Barbara, in which the race between Democrat Lois Capps and Republican Tom Bordonaro was remarkable mainly for the amount spent by independent groups on issue advertisements. Hundreds of thousands of dollars were spent to blanket the airwaves with advertisements in support of the candidates by the Christian Coalition, a group favoring term limits, and abortion rights and pro-life groups.[87] The Capps-Bordonaro race is likely a sign of the future of electoral politics.

Yet, all of this independent spending did not necessarily help, nor was it appreciated by, the candidates it was intended to support. The National Republican Congressional Committee conducted a poll on the effect of anti-abortion advertisements designed to help Mr. Bordonaro and found that, after seeing the spots, 24% of viewers were more likely to vote for Ms. Capps than prior to seeing them.[88] Only 19% of viewers said they were more likely to vote for Mr. Bordonaro.[89] In a similar vein, heavy spending on issue advertisements by the AFL-CIO in the 1996 congressional elections has been cited by political strategists as one of the reasons Republicans retained control of the House and Senate.[90] Issue advocacy expenditures in the context of candidate campaigns can easily backfire.

Although she won her seat in the House and might have been helped by the issue advocacy (even that of her opponent), Rep. Capps has stated that her experience with outside spending convinced her of the need for campaign finance reform. "I don't know how much

87. *See* Todd Purdum, *Interest Groups Run Own Race in California*, N.Y. TIMES, Mar. 7, 1998, at A6 [hereinafter Purdum, *Interest Groups*]; Richard L. Berke, *Outside Help on Issues Raises G.O.P. Fears of Voter Backlash*, N.Y. TIMES, Mar. 25, 1998, at A19.

88. *See* Berke, *supra* note 87, at A19.

89. *See id.*

90. *See id.*

[issue advocacy] interferes [with the campaign], but it is very frustrating for me," she said. "It's all something that we're going to have to deal with."[91] And Rep. Capps is not the only politician who dislikes independent issue advocacy. The main campaign finance proposal currently under consideration by the House, the Shays-Meehan bill, would effectively outlaw issue advocacy expenditures in excess of $1,000.[92] McCain-Feingold, the companion reform bill in the Senate, would greatly expand the definition of express advocacy so that more expenditures currently deemed issue advocacy would be subject to regulatory limits.[93] Politicians on both sides of the political spectrum abhor political speech they cannot control.

In contrast, speech expenditures on ballot campaigns may be more likely to threaten *quid pro quo* corruption than independent spending intended to influence a candidate election. All spending in support of or opposition to an initiative measure is "outside" spending. Unless candidates wish to deplete their own reelection war chests, they are dependent upon the spending of outside sources if they wish to see a ballot measure pass. While any particular advocacy campaign might backfire in the same way as the pro-Bordonaro abortion advertisements, initiative-sponsoring candidates have few alternatives. Moreover, candidates can actively raise money for initiative expenditures from large contributors, such as corporations, and coordinate the spending to best suit their campaigns. In this scenario, the same threat of *quid pro quo* deals between candidates and contributors posed by direct contributions arises from ballot spending.

Thus, it is possible that *Bellotti* was simply wrong in concluding that ballot measure spending cannot corrupt candidates. Nevertheless, it remains unlikely that District Judge Lovell will take such a route in deciding the Montana case. Trial judges are properly hesitant to deem the Supreme Court plainly wrong on an issue,[94] even on

91. Purdum, *supra* note 87, at A6 (quoting Rep. Lois Capps).

92. *See* H.R. 493, 105th Cong. § 254 (1997).

93. *See* S. 25, 105th Cong. § 406(b) (1997) (proposing to amend 2 U.S.C. § 431).

94. For a discussion of this and other pressures imposed on trial judges by the institutional dynamics of the judiciary, see James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795 (1994).

an empirical question where the circumstances have changed drastically since the initial decision. Although this departure from precedent might be justified in light of these changed circumstances—the growth of the initiative process, the increasing ties between candidates and initiatives, and the development of issue advocacy—it is safe to assume District Judge Lovell will not take this approach in deciding the constitutionality of the Montana law. Indeed, he need not involve himself at all with the quagmire of *Bellotti*'s version of corruption; the Supreme Court itself has paved a way out by adding a new version of corruption to corporate electoral speech doctrine.

2. *Austin*, equality, and other people's money

The conceptual pillar of the *Bellotti* decision was rejected—or perhaps supplemented—by the Supreme Court in *Austin*,[95] where the Court upheld a Michigan law limiting corporate political expenditures in candidate elections based on a new conception of corruption.[96] While the traditional version required the threat of *quid pro quo* deal-making between legislators and financial contributors, *Austin* found a compelling state interest in preventing "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."[97]

This novel definition of corruption has sparked considerable controversy, in part because it has been misconstrued by both judges and scholarly commentators. The prevailing wisdom is that *Austin*'s notion of corruption is designed to insure some measure of equality of political influence in the electoral process. Justice Antonin Scalia began his scathing dissent in *Austin* by sarcastically rephrasing what he thought the majority opinion stood for:

> "Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any powerful group, your Government has decided that the following associations of persons shall be prohibited from

95. *See Austin*, 494 U.S. at 660.
96. *See id.*
97. *Id.*

> speaking or writing in support of any candidate." In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe.[98]

Later in his dissent, Justice Scalia insists that the "illiberal free-speech principle of 'one man, one minute'"[99] adopted by the majority was soundly rejected fourteen years earlier in *Buckley v. Valeo*,[100] where the Court famously remarked that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[101]

Academic commentators have similarly concluded that *Austin*'s conception of corruption is grounded in equality. Professor Dan Lowenstein argues that the "primary rationale" of *Austin* is insuring the "equality of inputs"[102]—i.e., "the idea that each person should have an equal opportunity to influence the campaign debate."[103] Professor Rick Hasen contends that *Austin* should be understood as promoting equality of voice in the political system.[104] Professors Henry Butler and Larry Ribstein similarly view *Austin* as based on a theory of equality,[105] as did the late Julian Eule.[106]

These analyses do not make the most sense out of *Austin* or pay sufficient attention to the importance of the corporate structure to the decision. The opinion itself insists that equality is not the guiding force for the decision and emphasizes throughout its reasoning instead a notion of corruption that I shall call "other people's money"

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98. *Id.* at 679 (Scalia, J., dissenting).

99. *Id.* at 684 (Scalia, J., dissenting).

100. 424 U.S. 1 (1976).

101. *Id.* at 48-49.

102. Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 412 (1992).

103. *Id.* at 393.

104. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice of Defense of Campaign Finance Vouchers,* 84 CAL. L. REV. 1, 41 (1996).

105. HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 69 (1995).

106. *See* Julian N. Eule, *Promoting Speaker Diversity:* Austin *and* Metro Broadcasting, 1990 SUP. CT. REV. 105, 108-11.

corruption. Moreover, since those commentators authored their criticisms, the Court has provided further support for the claim that *Austin* was about the illegitimate use of other people's money by corporate managers, not the equalization of political voices.

One reason to conclude that "equality of inputs" was not the basis of the *Austin* decision is that the Court emphatically declares that the Michigan law "does not attempt to equalize the relative influence of speakers on elections; rather it ensures that expenditures reflect actual political support for the political ideas espoused by corporations."[107] Perhaps *Austin*'s critics believe the Justices were being less than forthright, trying to make their decision more palatable to the reading public. Yet in light of the fact that popular opinion has, at least since the Progressive Era, been decidedly against the corporate influence in politics—and against the political misuse of shareholder money in elections by corporate managers[108]—this seems like proverbial "gilding the lilly."

A more profound reason to reject the equalization construction of *Austin* is that the holding in no way leads to a state of equality with regard to the corporate voice in politics. Corporations remain a prevalent influence on politics, due to non-electoral political speech, lobbying, and cultural influence through the economic market. If Michigan's law was designed to equalize political voices by restricting corporate candidate endorsements, it was hopelessly (and probably unconstitutionally) too narrow. It is hard to imagine that Michigan's law has (or could have) made much of a dent in corporate political influence.

Moreover, under *Austin*, different viewpoints can be supported by different amounts of money, and different contributors can give different amounts to PACs or segregated funds. If equality of inputs were key, it would seem to require that there be only a single set amount contributors could give PACs or segregated funds (say

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107. *Id.*

108. The Tillman Act, which banned corporate contributions to candidates, was justified by its backers as a measure to prevent diversion of shareholder money to politics by corporate managers. *See* 40 CONG. REC. 96 (1905); Hearings On Contributions to Political Committees in Presidential and Other Campaigns Before the House Committee on the Election of the President, 59th CONG., 1st Sess. 76 (1906) (remarks of Rep. Williams).

$100). This would ensure that every $100,000 spent by a PAC or segregated fund reflects the same amount of popular support as every other $100,000 expenditure by another PAC. Instead, as a result of the Court's holding, people can give within a range of amounts, from one dollar up to the limits on the PAC contributions in federal or state law. As a result, the $100,000 PAC *x* spends might represent the popular support of 100 people (giving an average contribution of $1,000), while the $100,000 PAC *y* spends might represent the popular support of 10,000 people—giving an average donation of ten dollars. Although this is allowed under the *Austin* reasoning, it is a far cry from equality of inputs. *Austin* allows *inequality* of inputs so long as corporate managers do not use shareholder money for political speech in elections.[109]

Threaded throughout the *Austin* decision, as well as earlier Supreme Court decisions,[110] is a strong guiding concern with inappropriate use of other people's money. In *Austin* that concern is voiced repeatedly, often in terms of corporate wealth not being "an indication of popular support"[111] for the corporation's political views.[112] When phrasing Michigan's asserted compelling interest, the Court cites "the corrosive and distorting effects of immense aggregations of wealth"[113] but immediately adds "*and* that have little or no correlation to the public's support for the corporation's political ideas."[114] There are two ways of interpreting the Court's emphasis on corporate wealth lacking public support for the corporation's political ideas. It could refer to either customers of the corporation or its shareholders. After all, the wealth in a corporate treasury is obtained from both sources. Shareholders provide the capital, but customers supply the

109. For a discussion of how *Austin*'s conception of corruption might affect the administration of corporate PACs, see *infra* notes 340-51 and accompanying text.

110. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-59 (1990); *see also* FEC v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238, 257 (1986); *National Conservative Political Action Comm.*, 470 U.S. at 496-97.

111. *Austin*, 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 258).

112. *See id.*

113. *Austin*, 494 U.S. at 660.

114. *Id.* (emphasis added).

income. In both cases, the money is transferred to the corporation with no intent to support corporate electoral politics.

If we look closely at the *Austin* Court's language, however, it becomes clear that only shareholder money satisfies the Court's definition of corruption. Here's how the Court phrased it in its most precise form:

> Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated *with the help* of the corporate form *and* that have *little or no correlation to the public's support* for the corporation's political ideas.[115]

To determine whether the deployment of corporate wealth is corrupting, the Court suggests that two requirements must be met: (1) the wealth must be accumulated with the help of the corporate form; and (2) must have little or no correlation to public support. Customer money does not meet the first requirement because it is not accumulated with the help of the corporate form. Customers of a business often do not know whether they are dealing with corporation, partnership, or sole proprietorship. Indeed, the business association's form is irrelevant to its ability to attract customers and sell services or products. The money a corporation makes from customers owes nothing to the corporate form.

In contrast, the money a corporation has from shareholders owes everything to the corporate form. Shareholders are attracted to investing in corporations because of their special characteristics of limited liability and favorable tax treatment. And shareholder investment does not reflect political support for the corporation's political ideas. Indeed, if we take *Austin*'s phrasing seriously, it is only the deployment of shareholder money that can be the basis of corruption; no other types of corporate wealth meet both of *Austin*'s requirements.

Such an interpretation also makes the most sense of the Court's emphasis on the unique state-conferred advantages corporations have in raising capital. As the Court explains:

115. *Id.* at 659-60 (emphasis added).

> [s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments.[116]

These attributes of the corporate form are relevant only to shareholders, and not at all to customers of the business. Thus, when the Court speaks of corporate wealth lacking a connection to public support, the "public" the Court is speaking of is not customers, but shareholders.

Not only does the *Austin* Court repeatedly emphasized that its conception of corruption arises from corporate expenditures that do not reflect public support, the Court's reasoning throughout the opinion rests on the concern for "other people's money" corruption. We can detect this concern, for instance, in the Court's analysis of the Michigan Chamber of Commerce's claim that the Michigan ban is over-inclusive to the extent the law applies to a non-profit organization such as itself.[117] The basis for the Chamber's contention was that, as a non-profit organization, it was more akin to a non-profit advocacy corporation, such as Massachusetts Citizens for Life, whose general treasury fund electoral expenditures the Court found protected in *MCFL*. Rejecting this claim, the *Austin* Court explained that, unlike the Massachusetts organization whose "narrow political focus . . . 'ensure[d] that [its] political resources reflect[ed] political support,'"[118] the Chamber had a diversity of "nonpolitical"[119] "varied purposes,"[120] such as providing group insurance, sponsoring outreach programs to encourage investment, and other "politically neutral" objectives.[121] Consequently, financial support from its associated members did not manifest ideological support for the Chamber's

116. *Id.* at 658-59.
117. *See id.* at 661-65.
118. *Id.* at 662 (quoting *MCFL*, 479 U.S. at 264).
119. *Id.* at 663.
120. *Id.* at 662.
121. *Id.* at 662-63.

political activities.[122] The Court then explicitly analogized the Chamber's members to shareholders of a business corporation.

The Court further distinguished the Chamber from the Massachusetts organization by looking at the disincentives members have from dropping out if they object to its electoral politics. Like a business corporation's shareholders, the Chambers' members may be "reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community."[123] This disincentive only matters if we recognize that some members join for nonpolitical purposes and that expending members' financial contributions for politics is in some sense abusive. Only by understanding *Austin*'s corruption rationale to be the misuse of "other people's money" does the Court's focus on members' disincentives for quitting make any sense.

We can further detect "other people's money" corruption in the Court's finding that the Michigan law was not under-inclusive for failing to include labor unions within its ambit. "[L]abor unions differ from corporations in that union members who disagree with a union's political activities"[124] have a constitutionally protected right to "decline to contribute to those activities, while continuing to enjoy the benefits derived from the union[] . . . ."[125] "As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a

122. This part of the Court's opinion could support a view of the Chamber's members as akin to customers of a corporation, rather than shareholders. Like customers of a business, Chamber's members purchase the services of the Chamber. Because customers have no residual claim to the Chamber's assets (as shareholders of a corporation do), a concern for customers would not reflect other people's money corruption. Whatever the merit of this argument, the Court itself analogizes the Chamber's members not to customers but to shareholders. *See id.* at 652 ("[W]e are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL.").

123. *Id.* at 663. Of course, customers would have no such disincentive.

124. *Id.* at 665.

125. *Id.* at 665-66. The constitutional right of union members to refuse to provide financial support for the union's political activities was established in *Abood v. Detroit Bd. Ed.*, 431 U.S. 209 (1977).

corporation's general treasury."[126] In other words, because union members can opt out, union expenditures are not corrupt in the sense of inappropriately converting members' money for political causes. Again, this distinction between union members and corporate shareholders only matters if we understand the Court's definition of "corruption" to be the misuse of "other people's money."

Finally, "other people's money" corruption can be seen as the basis of the *Austin* Court's acceptance of the Michigan law's exemption for media corporations.[127] If applied to media corporations, the Court explains, the law might be interpreted to apply to "election-related news stories and editorials."[128] Yet, the shareholders of media corporations fully expect those corporations to publish such material; indeed, that is an essential part of their purpose and value. As the Court states, "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public."[129] The law is not under-inclusive for exempting media organizations because those corporations do not misuse shareholder money in fulfilling their communicative goals. If *Austin* were concerned strictly with equality or immense aggregations of wealth, media corporations (which are often large and capable of exerting a forceful influence in electoral politics) would not be entitled to an exemption. It is a fair reading of the Court's analysis here to conclude that the Court is concerned with "other people's money" corruption.

The notion that it is wrong to spend other people's money to fund election speech is not created from whole cloth by the *Austin* majority. Indeed, it was the central tenet of *MCFL*, where the Court held that section 441b of the FECA was unconstitutional as applied to a non-profit advocacy corporation whose general treasury funds were an accurate reflection of the organization's "popularity in the

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126. *Austin*, 494 U.S. at 666.

127. For an insightful argument that media corporations should not be exempt from restrictions on corporate participation in electoral activity, see Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. (forthcoming 1999).

128. *Austin*, 494 U.S. at 668.

129. *Id.* at 667.

political marketplace."[130] Long before *MCFL*, the *Buckley* Court referred to this same concern. In rejecting the FECA provision that imposed ceilings on the amounts candidates could spend in running their campaigns, the Court reasoned: "There is nothing invidious, improper, or unhealthy in permitting" contributions from supporters to be spent "to carry the candidate's message to the electorate."[131] When the money used to fund political speech comes from supporters of the political agenda, there is no corruption threatened by the expenditures. If, however, other people's money is collected for another purpose, such as economic investment, it is a form of corruption to spend it on electoral speech that they may not support.

The Michigan law did not simply outlaw corporate speech for candidates, it required that speech to be financed by segregated funds, instead of general treasury funds.[132] If the business corporation raises money through a PAC, there were no limits on the amount of speech the corporation could finance.[133] The Michigan law was legitimate, according to the Court, because "it ensures that expenditures [through segregated funds or PACs] reflect actual public support for the political ideas espoused by corporations."[134] The accumulation of wealth in these separate funds is still enabled by the corporate form. It is only due to that form that the organization has potentially tens of thousands of shareholders from whom it can raise money.

A recent decision of the Court further supports the conclusion that *Austin* stands not for equality but for a conception of corruption based on the improper use of other people's money. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,[135] the FEC brought suit against the Colorado Republican Party for violating the FECA's party expenditure provision, which limited the amount parties could spend in Senate races to the greater of $20,000 or two cents for every voter of age in the state.[136] In

130. *MCFL*, 479 U.S. at 259.
131. *Buckley*, 424 U.S. at 56.
132. *Austin*, 494 U.S. at 654.
133. *Id.* at 652.
134. *Id.*
135. 518 U.S. 604 (1996).
136. *See* 2 U.S.C. § 441a(d)(3)(1994).

defense, the Colorado Republican Party challenged the constitutionality of the party expenditure limits, arguing that the expenditures should be treated like ordinary independent expenditures because they were not coordinated with any candidate.[137] Siding with the party, the Court held the party expenditure limits unconstitutional under the First Amendment.[138]

Justice Stephen Breyer, writing for a controlling plurality of Justices, reasoned that the uncoordinated spending of a political party "reflects its members' view about the philosophical and governmental matters that bind them together," hence there was nothing invidious or corrupting about such expenditures.[139]

This reasoning reflects the distinction made in *Austin* and *MCFL* between business corporations and non-profit advocacy corporations. Due to the fact that people join non-profit advocacy organizations to support their political vision, general treasury funds reflect those members' political and ideological views. In contrast, shareholders do not invest in business corporations to support corporate politics, but to pursue economic gain. While the Court in *Colorado Republican Federal Campaign Committee* makes a controversial holding that party spending is not inherently coordinated with candidates, the Court appropriately viewed political parties as more akin to non-profit advocacy groups than business corporations. People join parties and give them financial support specifically to promote shared political opinions or common allegiances. Political speech in support of those shared commitments financed with their money—given specifically for that purpose—raises no threat of "other people's money" corruption.

Nevertheless, if the prevailing "equality" view of *Austin* were correct, political parties should be subject to the same regulation as business corporations. Each of the two major parties spends more than any other organization on influencing electoral outcomes, and each owes its financial ability to special, state-conferred advantages. For example, each of the two major parties receives an enormous amount of financing for its presidential campaigns, freeing up

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137. *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 612.

138. *See id.* at 613.

139. *Id.* at 615.

resources for other use. Candidates vying for the parties' nomination can qualify for up to $30 million in matching funds;[140] each party receives $4 million to stage a national convention;[141] and the official presidential nominee of each party is given $60 million to run his campaign.[142] If inequality from immense aggregations of wealth gained through state-conferred advantages were the evil *Austin*'s version of corruption was designed to combat, then independent party spending should be subject to regulation. *Colorado Republican Federal Campaign Committee* supports the principle that corruption does not come from inequality of inputs, but must come from something else. That "something else," *Austin* tells us, is political conversion of other people's money.

The majority opinions of *MCFL* and *Austin* left unanswered the question of why shareholders need protection from corporate managers if shareholders own the corporation. One reason stems from the central problem of modern corporate law: the separation of ownership and control in the large public enterprise. As famously explained by Adolf Berle and Gardiner Means in *The Modern Corporation and Private Property*,[143] shareholders are the owners of the modern corporation, but management exercises nearly unfettered control over the corporation's assets.[144] Management's wide

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140. *See* 26 U.S.C. § 9037 (1994) (payments to eligible candidates).

141. *See id.* § 9008(b)(1) (payments for presidential nominating conventions).

142. *See id.* § 9006 (discussing payments to eligible candidates); FEDERAL ELECTION COMMISSION, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAWS 4 (1996).

143. ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

144. The "separation thesis" has been criticized by corporate law scholars who subscribe to the "nexus of contracts" theory of the corporation. Contractual theorists contend that if particular actions of management are inefficient or undesirable, shareholders will pay to include prohibitions in the management/shareholder contract. Alternatively, the market will reflect the inefficiency in the share price and undermine management's secure control of the corporation. *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 105, at 25-27; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1-22 (1991); NICHOLAS WOLFSON, THE MODERN CORPORATION 31-41, 45-55 (1984).

discretion and its potential abuse, has since become the animating dynamic of modern corporation law.[145]

Concern over corporate political expenditures may be viewed as a manifestation of this dynamic. When a "corporation" speaks, it is not the owners of the corporation (shareholders) who do so, it is those who exercise control of the corporation's assets (management). Management, not shareholders, makes the determination of what to say, where to say it, and how much to spend.[146] In terms of substance, corporate speech is really corporate management's speech. Yet it is the shareholders who pay for it.

Even if corporate electoral speech is understood as a form of managerial diversion of shareholder assets, however, the question remains: Why do shareholders need the state to protect them? Aren't they capable of protecting themselves?

In their dissents, Justices Scalia and Kennedy each argued that protecting shareholders was unnecessary. According to Justice Scalia, a shareholder can protect himself in two ways: (1) "persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken,"[147] or (2) "sell his stock."[148] Justice Kennedy agreed: shareholders "can seek change from within"[149] or "cease to associate with the group"[150] (presumably by selling their shares). In other words, shareholders can protect themselves either through the normal operation of corporate democracy or through free alienability of their shares.

If either of these methods adequately protect shareholders who dissent from a corporation's electoral speech, state laws purporting to protect shareholders would not be justifiable. Such laws could not be the least restrictive means of protecting dissenting shareholders, and thus the laws would succumb to strict scrutiny. But do these

145. *See* ROBERT CHARLES CLARK, CORPORATE LAW xxiii (1986) ("Most of corporate law is concerned with the array of substantive rules and procedural devices that are aimed at controlling managerial slack and diversion while preserving adequate discretion to carry out business operations efficiently.").

146. BUTLER & RIBSTEIN, *supra* note 105, at 63-64.

147. *Austin,* 494 U.S. at 687 (Scalia, J., dissenting).

148. *Id.* (Scalia, J., dissenting).

149. *Id.* at 710 (Kennedy, J., dissenting).

150. *Id.* (Kennedy, J., dissenting).

mechanisms work effectively to protect shareholders? There is reason to doubt that they do.

Consider first the mechanisms of corporate democracy. Dissenting shareholders may conceivably challenge the electoral speech expenditures of management through shareholder proposals or possibly proxy contests, inviting shareholders to vote to approve or reject management's actions. The problem for the dissenting shareholders is that these means of controlling managerial behavior are ineffective.[151] Many shareholders in a public company will be apathetic to the corporation's political speech (and some will no doubt support it).[152] Such apathy is hard to overcome if there is little cost to the shareholders from the managerial activity. Even if Microsoft spends $10 million on an initiative, the financial effect on shareholders will be insignificant in light of the enormity of the multi-billion dollar corporation's annual expenditures.

Moreover, management will likely fight hard to retain the privilege of making electoral expenditures. Principled managers might value the ability to make electoral expenditures as a means of furthering the interests of the corporation; less principled ones might value it as informal compensation—securing them access to politicians, with a potential pay-off in the managers' career future. In either case, management will value the ability more than the majority of shareholders will value the restraint. Even if shareholder voting was an effective way to restrain managers generally, it would be ineffective in restraining managerial decisions to fund corporate political speech in elections.

Justices Scalia and Kennedy might respond that even if shareholder voting is ineffective, those shareholders who dissent from the electoral speech of the corporation can always sell their shares on the open market. To see the flaws in this reasoning, one must first understand how individuals actually invest in public corporations. Although some investors keep a watchful eye on their stock portfolios and are capable of executing a trade easily once corporate political expenditures are discovered, most individuals who invest in public

151. Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 136 (1987).
152. *Cf. id.* at 134-35 (noting shareholder apathy).

companies do so through intermediaries, such as mutual funds and pension funds.[153] Consequently, they may have much less control over their shares than Justices Scalia and Kennedy imagine.

Take, for example, an employee whose money is invested in Corporation *X* through his pension fund. If Corporation *X* funds electoral speech with which the employee disagrees, the employee is incapable of selling his shares and disassociating himself from the speech.[154] He exercises virtually no control whatsoever over his pension plan; he may be able to withdraw altogether from the plan, but there are often penalties for doing so. How is the pensioned employee who disagrees with the corporate speech to sell his shares? The simple answer is that he cannot—at least not without substantial injury.

Investors in mutual funds pay less to withdraw their money in such a scenario, but they similarly exercise virtually no control over their money once they have invested in a fund. At any given moment, individuals with mutual fund investments do not know in which corporations their money is invested. Mutual fund managers move investments around depending upon market conditions and they do so without obtaining investor approval. Individuals can track their mutual fund's daily success or failure, but they do not know which corporations they own on a daily basis. Mutual fund investors, like pension fund investors, cannot simply sell their shares if they dislike a corporation's electoral speech.

For shareholders to be able to divest from business corporations that make unwanted political expenditures in elections from general treasury funds, the shareholders must be able to discover those political expenditures. Yet, contrary to Justice Kennedy's belief that divesting is an easy option, shareholders simply will not know when the corporations in which they have invested make political expenditures, much less make them to support causes they disagree with or

153. Indeed, over half of the equity held in American corporations is held by institutional investors, such as pension funds, mutual funds, insurance companies, foundations, and managed trust funds. *See* Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons From the Robber Barons,* 50 WASH. & LEE L. REV. 977, 977 (1993).

154. *See* Victor Brudney, *Business Corporations and Stockholder's Rights Under the First Amendment,* 91 YALE L.J. 235, 270 n.126 (1981).

make them with general treasury funds as compared to PACs or segregated funds. An investor in Florida will probably not know that Corporation *X* is spending money in Montana to oppose a ballot initiative to require mandatory bottle deposits. Indeed, it is safe to assume that shareholders will almost never know of the corporation's initiative-related expenditures, unless they happen to live in the area in which corporate-funded initiative advertising is directed. Even then, the corporate money may be "hidden" in the pooled resources of the interest group sponsoring the advertisements. Viewers of advertisements funded by "People for Better Democracy" or "Citizens for Sound Environmental Policy" are in the dark as to which corporate entities are contributing to such campaigns. Moreover, even an informed shareholder will not know whether the corporate spending is financed through general treasury funds or segregated funds.

Even assuming shareholders could easily sell their shares, this solution does not so much as solve the problem of dissenting shareholders as ignore it. Shareholders are not warned in advance of the corporation's political expenditures. Selling their shares is something shareholders can do only after the expenditure has been made and discovered. The danger the state seeks to prevent—corporate managers using other people's money for electoral causes they disagree with—occurs when the money is spent. A shareholder can sell his shares, but by then it is too late: he has already financially supported the corporate speech with which he disagrees. Selling shares may be a symbolic expression of disassociation, but it does nothing to prevent the corruption the state fears.

Thus, neither the mechanisms of corporate democracy nor selling shares effectively protect shareholders from corporate managers inappropriately spending shareholder money on electoral causes. The means Justices Scalia and Kennedy view as available for shareholders to protect themselves do not work as imagined. They may be nice in theory, but in practice they are not capable of protecting dissenting shareholders.

One objection to laws protecting dissenting shareholders from corporate political speech in ballot or candidate campaigns is that they are underinclusive. They do not cover all of the instances in which a corporation might spend shareholder money to advance political ends contrary to shareholder's desires.[155] For instance, they do not apply to corporate political lobbying, on which corporations often spend more money than they do on initiatives or candidate campaigns, or to general political speech about issues of the day outside of elections.

One possible response is that electoral debates are different from other types of political debates. Professor Frederick Schauer terms this idea "electional exceptionalism"[156]—the notion that the First Amendment might apply differently to speech impediments in the electoral arena. The Supreme Court gave voice to electional exceptionalism in *Arkansas Educational Television Commission v. Forbes,*[157] where it upheld a public broadcaster's exclusion of a candidate from a televised election debate. Because "[d]eliberation on the positions and qualifications of candidates is integral to our system of government,"[158] candidate debates were to be treated as an exceptional type of public television broadcasting in which viewpoint discrimination was inappropriate. Academics, too, have argued that elections warrant exceptional First Amendment treatment.[159] The special nature of elections is manifest in long-standing laws such as the Tillman Act of 1907 (now recodified as the Federal Corrupt Practices Act), which prohibits corporations and labor unions from making direct contributions to candidates.[160] Although contributing to candidates has been held to be a constitutionally protected act of free speech and association,[161] no one has seriously questioned the constitutionality of the ban on corporate and labor union contributions. Voting is an act of unparalleled symbolic significance in a

155. This was one argument marshaled by Justice Powell in *Bellotti*. *See Bellotti,* 435 U.S. at 793.

156. Frederick Schauer, Electional Exceptionalism and the First Amendment 1 (unpublished paper on file with author).

157. 118 S. Ct. 1633 (1998).

158. *Id.* at 1640.

159. *See, e.g.*, Hasen, *supra* note 104 (suggesting electoral speech in forms of contributions should be channeled through a voucher system); C. Edwin Baker, *Campaign Finance Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

160. 2 U.S.C. § 441(b) (1994).

161. *See Buckley*, 424 U.S. at 17-23.

democracy,[162] and although we allow interest groups and organizations to lobby legislatures and seek legal changes through the judiciary, only citizens have the right to vote in elections.

Professor Schauer argues that the conceptualization of electoral speech as an "exception" to "normal" First Amendment principles is itself erroneous.[163] Throughout First Amendment doctrine, speech is subject to different levels and forms of protection depending upon the institutional context in which it occurs. "Almost all of the law of contracts, warranties, labels, wills, deeds, trusts, fraud, and perjury, as well as much of antitrust law, securities law, and consumer law, is best seen as a regulation of speech in the literal sense of that word, yet exists without even a glimmer of First Amendment scrutiny."[164]

To the objection that electoral speech is *political* speech, and thus always entitled to the greatest First Amendment protection, Professor Schauer points out that even political speech rules are "highly institution-dependent." For instance, different forms of protection attach to political speech by broadcasters, by government employees, on government property, and in public schools.[165] Elections, too, might be seen as requiring particular, distinct First Amendment rules. "[P]olitical speech in the context of elections, like political speech in the contexts of billboards, posters, signs in windows, schools, colleges, government employment, and so on, is just one of numerous settings in which political speech occurs, and in which putative regulations are measured by domain-specific, and context-specific principles."[166]

There are other reasons we might have heightened concern for shareholders in the context of elections, as compared to other areas of corporate political activity such as lobbying or non-electoral speech. In his *Austin* concurrence, Justice Brennan indicates one such reason. Elections "lie at the heart of political debate. But just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to

162. On the symbolic meanings of voting, see Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 367-78 (1993).

163. Schauer, *supra* note 156, at 5-11.

164. *See id.* at 7.

165. *Id.* at 9.

166. *Id.* at 10.

subsidize that speech."[167] The associational right of shareholders to refrain from supporting the political agenda of corporate managers is particularly acute in the electoral context.

Moreover, it defies logic to insist that laws such as Michigan's are under-inclusive because they do not reach corporate political activity—such as non-electoral political speech[168]—that the Court has previously held to be entitled to First Amendment protection. Because the Court has found bans on non-electoral corporate political speech unconstitutional, certainly a state law cannot be condemned on the ground that it failed to reach that political activity.[169] Even if the state's asserted interest might be furthered by reaching constitutionally protected conduct, the failure to do so does not render the interest any less legitimate or sincere.

Some commentators have argued that protecting shareholders is not the true interest behind restrictions such as Michigan's because the laws are included in state election codes, rather than state corporations codes where shareholder protection laws are usually included.[170] This argument fails for three reasons. First, the location of a law within the state statutory codes is completely irrelevant to the law's constitutionality; it matters not if it is on page 5 or page 15.

More significantly, this argument fundamentally fails to comprehend the evil the state wishes to avoid: corruption of *its electoral process* by the misuse of other people's money by corporate managers. If the restriction were in the corporations code, rather than the elections code, all shareholders of Michigan corporations would be protected, but Michigan's political process would not be. A restriction on Michigan corporations would still allow non-Michigan corporations to corrupt Michigan electoral politics because they would not be bound by a rule applying solely to Michigan corporations.[171]

167. *Austin*, 494 U.S. at 677 (Brennan, J., concurring) (internal quotations and citations omitted).

168. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state prohibition on privately-owned utility's inclusion of political inserts in billing envelopes).

169. *See Austin,* 494 U.S. at 678 (Brennan, J., dissenting).

170. *See* Lowenstein, *supra* note 102, at 408-09. *Cf.* Fisch, *supra* note 8, at 598 n.69 (recognizing that corporate electoral speech restrictions are not found in corporations law of state).

171. Lowenstein, *supra* note 102, at 408.

To the extent corruption of electoral politics is the state's concern, the state can only protect its elections by a restriction on all corporations seeking to influence its electoral mechanisms. We must recall that the state interest is not the blanket protection of shareholders from corporate managers; it is the protection of state electoral politics from a particular type of corruption posed by corporate mangers spending shareholder money. Hence, the restrictions' location in the elections code, not the corporations code, does not undermine the state's asserted interest, it is essential to it.

Thirdly, underlying the argument that any shareholder protection law must be in the corporations code is the false belief that shareholder protection is the exclusive province of the state that charters the corporation. If this belief were true, then much of federal securities regulation would be unjustifiable. Few would doubt that many provisions of federal securities law are based on the sincere desire to protect shareholders from management abuse. Yet those laws apply to corporations that are chartered by the states. Federal securities laws make plain that it is not only the incorporating state that has a legitimate interest in protecting shareholders.

Once we understand that the *Austin* conception of corruption is the unauthorized political use by corporate managers of other people's money in the electoral arena it becomes comprehensible why the *Austin* Court did not feel it necessary to overrule *Bellotti*. The latter case involved a complete prohibition on corporate speech on certain topics.[172] Under *Austin*'s reasoning, such a ban would still be unconstitutional because on its face it covers methods of corporate electoral speech that pose no risk of corruption, defined as the inappropriate use other people's money in electoral politics. Although the reasoning of *Bellotti* and *Austin* is inconsistent,[173] the two cases can be read to form a single consistent rule of law. If a state prohibits corporate initiative speech without differentiating the source of funds, the law is unconstitutional under *Bellotti*. If, however, a state allows unlimited corporate political speech in elections so long as the

172. *See MCFL*, 479 U.S. at 259 n.12.

173. Indeed, the reasoning is inconsistent, as *Bellotti* specifically rejected the shareholder protection rationale. *See Bellotti*, 435 U.S. at 792-95. *Austin*, however, accepts that rationale. *See supra* notes 127-50 and accompanying text.

financing is through segregated funds or PACs, its prohibition on the corporation's use of general treasury funds is constitutional under *Austin*.

One remaining question the courts will have to answer is whether there is something distinct about initiative speech as compared to independent expenditures in the context of candidate elections that undermines the application of *Austin*'s version of corruption to ballot spending.

Professor Richard Briffault, for one, argues that *Austin* is strictly limited to candidate-related independent expenditures.[174] Because *Austin* did not overrule *Bellotti*, Briffault argues that the Court has "establish[ed] a sharp differentiation of campaign reform jurisprudence based on whether the election concerns candidates or initiatives."[175]

But there were ample reasons for the *Austin* Court to decline to overrule *Bellotti*. Unlike *Austin, Bellotti* involved a complete ban on corporate initiative spending. If, as *Austin* holds, the corruption states can seek to prevent is the unauthorized use by corporate managers of other people's money, then the Massachusetts law in *Bellotti* remains unconstitutional. In contrast to Massachusetts law, the Michigan law was upheld in *Austin* explicitly because "the Act [did] not impose an *absolute* ban on all forms of corporate political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds."[176]

Moreover, the Massachusetts law included content-based prohibitions on corporate initiative speech. For example, it banned corporate initiative speech on issues not "materially affecting" corporate property.[177] It also dictated that certain taxation issues were by law immaterial to corporate interests, even though any reasonable person would conclude—as the corporate plaintiffs in *Bellotti* did—that those tax issues were indeed material.[178] One should not under-estimate the importance to the *Bellotti* Court of the content

174. *See* Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 429-30 (1996).

175. *Id.* at 430.

176. *Austin*, 494 U.S. at 660 (emphasis added).

177. *Bellotti*, 435 U.S. at 768.

178. *See id.*

discrimination in the Massachusetts law; Justice Powell's opinion repeatedly stresses that the content-discriminatory aspects of the law render it clearly unconstitutional.[179] In sum, the law's content-based restrictions and overbroad reach suggest that it was not intended to protect dissenting shareholders, but to "silenc[e] corporations on particular subjects."[180]

Nor does anything in *Austin*'s reasoning indicate that "other people's money" corruption is limited to candidate-oriented independent expenditures.[181] If the corruption is in the use of other people's money to further electoral politics with which those people might disagree, there is no difference between corporate expenditures related to candidates and those related to ballot measures. The key difference between *Buckley* corruption and *Austin* corruption is that the former turns on the impact of funds on candidates, while the latter focuses on the source of funds used for electoral purposes. Because corporate expenditures on ballot measures financed through general treasury funds are tainted in just the same way as candidate-oriented expenditures, under *Austin*'s conception of corruption both should be treated as evils the state has a valid interest in preventing.

The Court has moved beyond *Bellotti*'s conception of "corruption." The growth of independent issue advocacy expenditures has made non-candidate spending a significant part of our political landscape. It would not be unreasonable now to conclude that this type of spending on ballot measures threatens the traditional *quid pro quo* corruption of politicians. Despite the link between politicians and the increasingly important initiative process, it is unlikely that the courts will conclude that the *Bellotti* Court was wrong in its earlier statements about ballot spending having no corrupting influence on politicians. Nevertheless, by adopting a second, additional understanding of "corruption"—corporate managers' use of other people's money to support politics those other people do not

179. *Id.* at 784-85, 793.

180. *Id.* at 793.

181. In his *Austin* concurrence, Justice Stevens stated that there is a "vast difference" between candidate elections and "debating public issues" as one might do in a ballot campaign. *Austin*, 494 U.S. at 678 (Stevens, J., concurring). He did not specify what the difference was nor offer any explanation for why such differences should lead to varying constitutional principles.

necessarily support—the Supreme Court itself has moved the doctrine of corporate electoral speech regulation beyond *Bellotti*.

B. Pillar Two: Evidence of Corporate Dominance

Writing for the Court in *Bellotti*, Justice Powell rejected Massachusetts' claim that the ban on corporate initiative spending was justified by the state's interest in preserving the integrity of the initiative process.[182] Justice Powell did not dismiss the state's argument out-of-hand nor find it improbable or pretextual. Rather, he wrote that Massachusetts had not come to court with any evidence that corporate spending hurt voter confidence in the initiative process or otherwise undermined the initiative process' integrity:

> According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.[183]

In the absence of evidence of corporate domination, the state's interest was purely conjectural.

In this section, I assess what remains of the evidentiary pillar of *Bellotti* and conclude that not much is left. Since Justice Powell's opinion, numerous scholars have attempted to provide evidentiary proof of corporate dominance in the initiative process. This section reviews and critiques several such attempts. I then suggest that perhaps the only way to comprehend the potential threat of corporate dominance in the initiative process is to look to the general social environment in which ballot campaigns take place: an environment marked by lack of voter sophistication, image-oriented politics, and corporate control over the mass media. Nevertheless, I conclude, the

182. *Bellotti*, 435 U.S. at 789-90.
183. *Id.* at 789-90 (citations omitted).

evidentiary inquiry should no longer be focused on corporate dominance. Rather, in light of *Austin*'s "other people's money" conception of corruption, the relevant evidentiary question should be whether a corporation's general treasury funded electoral speech has unanimous shareholder approval.

1. Evidence of corporate dominance: proposals and misfires

Perhaps there was no evidence that would have satisfied the *Bellotti* majority. It is conceivable that no matter what evidence Massachusetts had compiled in legislative findings or in the trial court record, the Court would have reached the same result for other reasons, such as the Justices' view of "hearers' rights" necessitating unfettered corporate political speech.[184] Under this theory, the Court pointed to the lack of evidence as a cover. Even with record evidence of corporate influence in ballot campaigns, the Court would have still invalidated the ban. Support for this theory can be found in the language of *Bellotti*. "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'"[185] If the Justices firmly subscribed to this belief, then record evidence of a dominating corporate voice would probably not have mattered.

Nevertheless, there are good reasons to take the Court at its word when it states that record evidence of corporate dominance would merit the Court's attention. *Bellotti* was written by Justice Powell, who was known for including in opinions instructions for future litigants and policy makers as to how they might shape their laws or lawsuits to protect them from broad court rulings. For example, Justice Powell wrote the lead opinion in the seminal affirmative action case of *Regents of the University of California v. Bakke,*[186] striking down a U.C. Davis medical school admissions quota for racial and ethnic minorities. Scholars have recognized that his opinion was not a condemnation of race-based affirmative action policies, but a subtle

184. *See id.* at 788-92.

185. *Id.* at 790 (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).

186. 438 U.S. 265 (1978).

guide setting forth how an affirmative action program can be structured to pass constitutional muster.[187] Justice Powell described in detail what was wrong with the University of California at Davis Medical School's quota and also suggested that an affirmative action program that gave preferential treatment to minorities as plus factors to their application would be appropriate.[188] Ever since, affirmative action programs in many public institutions have been structured along the lines suggested by Justice Powell.

If we also understand Justice Powell's *Bellotti* opinion as a "how-to-do-it" guide, then any state looking to regulate corporate initiative speech would have to support its regulatory laws with hard evidence of corporate dominance in the initiative process.

But what evidence would satisfy the Court? The language of the opinion suggests that the Court was looking for evidence that corporations exerted "undue influence on the outcome of a referendum vote,"[189] enjoyed a "relative voice"[190] that was "overwhelming,"[191] or at least "significant in influencing referenda."[192] The operative words of these phrases—"undue" or "significant" influence and "overwhelming" voice—are ambiguous and the opinion does not sort them out with any clarity. Yet the language appears to require the state to show that corporate speech can dictate the outcome of initiative votes.

Presumably any test of corporate dominance must separate out initiative campaigns in which business corporations make a concerted effort to sway the voters from those in which corporate participation is absent or minor. It would not make sense for judges to

187. *See* Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 *passim* (1979) (explaining Justice Powell's *Bakke* decision as a "how-to-do-it" handbook for professional schools).

188. *See Bakke*, 438 U.S. at 315-18. I have elsewhere described how Justice Powell's vision of affirmative action was colored by strong understandings of institutional rules and structures, abstracted from the social environment in which those institutions actually operate. *See* Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 933-43 (1995).

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

190. *Id.*

191. *Id.*

192. *Id.*

look at the extent of the corporate speech in *all* the initiative campaigns in a given state if corporations only involve themselves in *some* campaigns. Such an approach would render an inaccurate picture of corporate influence. Corporate involvement varies depending on the specifics of the initiative; indeed, many hotly-debated ballot measures, such as those on affirmative action and immigration, are often devoid of any substantial corporate speech. If one's goal is to measure the strength of the corporate voice, it is essential that one focus only on those ballot campaigns in which corporations have made an effort to speak.

If states only had to show that corporate participation in initiative campaigns can sway the electoral results, the evidentiary burden would be easy to meet. One might start with rather simplistic comparisons of numbers: look at levels of voter support for an initiative measure prior to the campaign season and compare those numbers with the actual vote count. This method presumes that corporate speech was prevalent in the campaign and that it supported the side that was losing prior to the start of the campaign. Several commentators have made such comparisons. As an example of corporate influence in referenda, Professor Allen Easley cites the 1976 Colorado initiative to impose mandatory deposits on bottled and canned beverages:

> [I]nitial popular opinion polls taken six months before the election showed proponents of mandatory deposits leading by a better than three-to-one margin. . . . On the eve of election the lead in opinion polls had shifted dramatically to roughly two to one against the proponents . . . . By and large, opposition financing was corporate generated.[193]

Other commentators offer similar assessments, citing for example corporate political speech on the 1988 Massachusetts nuclear power plant closing initiative, the 1990 California "Big Green" initiative designed to curtail the use of pesticides and chlorofluorcarbons, the 1990 Oregon recycling measure, the 1992 Massachusetts recycling initiative, the 1992 Ohio toxic-labeling initiative, and the

193. Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675, 675 (1983).

1994 Massachusetts initiative to curtail corporate spending in ballot campaigns.[194] "Each of these ballot initiatives enjoyed wide popular support early in the campaigns .... For example, the California Big Green initiative had 'overwhelming' support two months before the election. On election day, however, each initiative succumbed to devastating defeats. None ... earned much more than forty percent of the popular vote ...."[195]

Similar analyses are common in the scholarly literature.[196] Yet, showing corporate influence on initiatives through simple comparisons of support levels before the campaign and on election day tells us little. The problem is that voter support levels several months before an election are not necessarily deep or stable.[197] Generally, there has been little or no public debate by either side of an initiative campaign so long before the election. Thus respondents to survey polls may be reacting primarily to the title of the initiative or the phrasing of the surveyor. In a complex issue dealing with the environment and/or nuclear power, respondents may have no sense of the impact or cost of a particular initiative. Several months prior to an election, their favorite newspaper has not taken a stand nor have they seen any advertisements concerning the issues involved. Moreover, we do not know if voters changed their minds because of corporate spending as such, or if the corporate funded speech was substantively persuasive arguing against the initiatives.

Another proposed method of showing corporate dominance is illustrated by the Montana case. Although as of this writing the case has not yet come to trial, leaving uncertain whether District Judge Lovell will require the state to prove corporate dominance, a hint is found in the district judge's opinion and order on the Montana Chamber of Commerce's motion for summary judgment.[198] District

194. *See* David R. Lagasee, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347, 1347 (1995).

195. *Id.* at 1348.

196. *See., e.g.*, Fletcher N. Baldwin, Jr. & Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209, 226-31 (1983).

197. *See id.* at 228.

198. *See* Montana Chamber of Commerce v. Argenbright, CV 97-6-H-CCL (D. Mont. Feb. 18, 1998) (order granting Part IV and denying counts I-V of plaintiff's motion for summary judgment).

Judge Lovell examined the evidence Montana offered to support its claim to have a compelling interest in preserving the integrity of the initiative process, and he emphasized the evidence of corporate dominance in his ruling.

The evidence Montana relied upon, and District Judge Lovell accepted for purposes of summary judgment, was spending ratios in four Montana initiative campaigns.[199] In each of those campaigns, corporate entities vastly outspent their opponents. Illustrative of this phenomenon was the relative spending on a 1990 Montana initiative which would have imposed a tax on the sale of tobacco. According to the court, the citizen's group promoting the initiative was able to raise approximately $40,000, while the opposition raised $1.5 million from sixteen large corporations including tobacco companies R.J. Reynolds and Philip Morris. While the largest single donation to the proponents campaign was approximately $12,000, the opposition had a $600,000 contribution from Philip Morris, a $300,000 contribution from R.J. Reynolds, and other six figure corporate contributions. All told, the corporate opposition to the tobacco tax initiative spent 97% of the total money expended by both sides on the measure.[200] District Judge Lovell also took note of several other Montana initiatives in which corporations funded upwards of 90% of all expenditures.[201]

Similar evidence of profound disparities in spending ratios can be found in other initiatives around the country. In the 1990 "Big Green" initiative campaign in California, a corporate-organized coalition spent over $16 million to defeat the measure, while proponents could muster only a little more than one-third of that amount.[202] In a Massachusetts initiative campaign on mandatory bottle deposits, corporate-financed opponents outspent proponents by a ratio of nearly thirty-five to one.[203] In various state-wide initiatives concerning

199. *See id.* at 30-42. *See also* Raskin, *supra* note 80, at 397-98 (using spending ratios to argue corporate dominance of the initiative process).

200. District Judge Lovell stated that "99.7% of all funds expended" on the tobacco tax initiative were corporate generated. *Id.* at 32. In light of the numbers he himself alluded to, this appears to be a typographical or computational error.

201. *See id.* at 33-35.

202. *See* Lagasse, *supra* note 194, at 1386-87.

203. *See* Easley, *supra* note 193, at 687.

nuclear energy, the spending ratio between mainly corporate opposition and proponents ranged from two hundred to one in Montana, to five to one in Colorado and to three to one in California.[204] Business interests in Missouri outspent proponents of a minimum wage increase by an eight to one margin.[205] Opponents of California's Proposition 211, an initiative making it easier for shareholders to sue companies whose stock fluctuates excessively, spent over $26 million, compared with just over $6.5 million by the measure's backers.[206] When it comes down to money in initiative campaigns, corporate-funded speech far outpaces non-corporate speech time and time again.

But does outspending opponents necessarily mean that corporations dominate the initiative process? In one sense, the answer depends on whether the money is successfully spent. If the money is wasted on poor advertisements or direct mail campaigns that send literature to the wrong people, then the money will not translate into electoral victory. Indeed, there is evidence to suggest that disproportional corporate spending does not guarantee success in initiative campaigns. Perhaps the most nuanced study of the impact of big money on ballot measures, by Professor Dan Lowenstein, found that disproportionate spending can exert a dominating influence on ballot measures, but only in some circumstances.[207] Professor Lowenstein discovered that one-sided spending has little impact when attempting to persuade people to vote in favor of an initiative.[208] But when spent to convince people to reject an initiative, disproportionate money "has been almost invariably successful."[209] Professor John

204. *See id.* at 691-93.

205. *See* Stuart Silverstein, *Tough Sell for Minimum Wage*, L.A. TIMES, Nov. 7, 1996, at D4.

206. *See* Carl Ingram, *Campaign Fight Nears Spending Record*, L.A. TIMES, Oct. 10, 1996, at A3.

207. *See* Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 511 (1982).

208. *See id.*

209. *Id.* For criticism of Lowenstein's methodology, see John R. Owens & Larry L. Wade, *Campaign Spending on California Ballot Propositions, 1924-1984: Trends and Voting Effects*, 39 WEST. POL. Q. 675, 682-87 (1986). For different views of the impact of money on ballot propositions, compare CRONIN, *supra* note 2 at 111 ("When corporations spend vast sums of money

Schockley surveyed the available social scientific studies on the influence of money on initiatives and reached similar conclusions to Professor Lowenstein.[210]

Even in the sophisticated studies, such as Professor Lowenstein's, it is hard to separate out the power of money from the substance of what is said in the speech funded by that money. Nevertheless, these studies suggest a disturbing trend of corporate veto power in the initiative process. Such "dominance" fundamentally undermines the people-enhancing purposes of direct democracy.

To fully comprehend the potential for corporate dominance, it is worthwhile to look beyond the mere fact of corporate spending. By looking to the broader social, political, and economic context of the initiative process and its link to the mass media, we can see other threats to the initiative process posed by corporations—from manipulating voters to censoring political debate.

2. The environment of initiatives

The evidentiary question posed by *Bellotti* inquired into the ability of corporations to dominate initiatives by overwhelming the public discourse. For both Justice Powell and the scholarly commentators who have researched corporate spending on initiatives, the animating metaphor of corporate power was "drowning out" other voices. Corporations might exert dominance over public debate by flooding the airwaves with their speech and, like a loudspeaker blaring in a room, preventing opposing voices from being heard.

But "drowning out" has never been a particularly apt metaphor for corporate involvement in initiative speech. After all, unlike the loudspeaker, corporate speech does not *prevent* other voices from being heard. Opposing groups can take out mass media advertisements and send out direct-mail literature. Even if they lack the funds to finance expensive mass media campaigns, they can make information available through less expensive means, such as internet

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to dominate discussion . . . the voting public often hears only one side of an issue. The advantages that opposition money in large quantities can buy can rarely be overcome."), and CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 26 at 290-91, with Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1028 (1979) (contending that one-sided spending has little impact).

210. *See* Schockley, *supra* note 81, at 393-94.

postings, political brochures, and public speaking. Their voice is out there and can be heard, no matter how much corporate-funded speech there is. A voter just has to be willing to search it out.

In place of the drowning out metaphor, we might more closely analogize corporate initiative speech to the books prominently displayed in the front section of a Barnes & Noble bookstore. While the company carries many books, it sells this frontal display space to publishers at premium rates. Publishers value this space because they know that the books displayed here catch the shopper's eye and, of course, are more likely to sell. The diligent reader looking for a particular book may be able to find it back on the shelves—so long as his tastes are mainstream—but those without the previous commitment may not make it that far back into the store. As with prime time television, the larger corporate players can afford the expense of gaining privileged access to the public's attention.

Corporate initiative speech occupies a privileged position in the sense that it can afford the prime display space of public political discourse. Most information received by the voter comes from mass media advertising—via television, radio, and the print media—direct-mail marketing, newspapers and billboards. Each of these methods of communication is expensive to utilize, and thus better suited for those with large amounts of money. Corporations that can use general treasury funds avoid the collective action problem of political fund-raising faced by other participants in the initiative process. Thus, corporations can afford to advertise in prime time or during high-profile television events when the audience is largest. Noncorporate advertising makes its way onto the small screen, but often during the off hours when the prices, and viewership, is lower. Without reaching the same audience with the same repetition—marketing research shows that swaying viewers depends on well-timed repetition, not simply exposure[211]—poorly-funded groups are less capable of getting their message across and responding to the opposition's claims. Corporations do not force anyone out of the political debate, but they do take on a prominent voice because the system of mass political communication favors those with the most cash.

211. *See* JOHN PHILIP JONES, HOW MUCH IS ENOUGH? GETTING THE MOST FROM YOUR ADVERTISING DOLLAR 248 (1992).

Voters, like shoppers, often only see what is in the prime display space. They confront many initiative campaigns without the traditional safeguards of party cues. As political science research has long shown, the lack of voter knowledge in candidate elections is often overcome by party cues.[212] When I enter the voting booth, I may know nothing about the stated political positions of the candidates for Lieutenant Governor. I will see, however, that candidate *x* is a Democrat while candidate *y* is a Republican and I will be instantly familiar with the general political attitudes and positions of the candidates. The science is hardly exact, but nevertheless I can place the candidates on a rough political spectrum and vote accordingly. With ballot measures, however, at least those unaffiliated with any candidates, there are few party cues to help the voter. Consequently, pre-election efforts to educate voters on initiatives are all the more significant.[213] And it is here that the side which can outspend its opponents by fifty to one, thirty to one, or ten to one ratios can take its greatest advantage.

The willingness of voters to base their electoral opinions on perceptions and imagery[214] exacerbates the problem. Mass media advertisements tend to encapsulate issues into often deceptive slogans and catch-phrases, eschewing substantive examination.[215] Viewers in California have become accustomed to advertisements related to litigation reform that picture packs of hungry, salivating wolves roaming the woods while a voice-over ominously warns of the impending attack by lawyers on innocent elderly victims. Such advertisements make good theater and may even persuade many voters, but they do not give the viewers much substantive political knowledge.[216]

212. The classic political science analysis of the importance of party identification in shaping voting behavior is ANGUS CAMPELL ET AL., THE AMERICAN VOTER (1960).

213. *See* Shockley, *supra* note 81, at 393-94.

214. On the apathy and lack of political sophistication of voters, see W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS (1986).

215. There is no better example of this phenomenon than the Arthur Samish "Drive the Hog from the Road" ballot campaign described in Lowenstein, *supra* note 2, at 559.

216. This fits the pattern of the "commercialization of politics" described in RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 94-

There is good reason for campaign strategists to favor simplistic television advertisements that focus on viewer perception instead of viewer knowledge. It may be easier to convince voters to adopt a particular image of a ballot measure than to change their substantive political ideologies.[217] Richard Woodward, the political consultant who orchestrated the opposition's campaign against California's "Big Green" initiative, credited much of his success in defeating the measure to merely changing its public name.[218] In a heavy mass media drive, Woodward's team relabeled the measure the "Hayden Initiative" after the famous, but widely disliked 60s radical-turned-politician Tom Hayden.[219] In a media environment favorable to brief commercials and sloganeering over political substance, we are left with a democracy of images.

One of the more remarkable illustrations of form over substance in ballot measure campaigns is provided by the anti-affirmative action initiatives of the past few years. In 1996, California voters passed Proposition 209, the "Civil Rights Initiative," by a substantial margin.[220] The measure's language was worded as a ban against state-sponsored discrimination and "preferential treatment." Although the objective of the measure was to outlaw race- and gender-based affirmative action in state hiring, contracting and education, the language evoked more abstract notions of civil rights reminiscent of the 1960s. In 1997, Houston voters rejected an anti-affirmative action initiative by a fifty-five to forty-five margin.[221] In contrast to the abstract language of the California initiative, the Houston measure was worded straight-forwardly as a ban on affirmative action in municipal contracting and hiring. Analysts of the contrasting results have concluded that "of all the factors, none was more important than the wording change in the ballot."[222] In ballot campaigns, perception can overshadow substance merely by a turn of a phrase.

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95 (1996).

217. *See* Lowenstein, *supra* note 207, at 569.

218. *See* Tom Furlong, *Expensive Victory for Business*, L.A. TIMES, Nov. 8, 1990, at D1.

219. *See id.*

220. *See* Bill Stall, *Outcomes on State Propositions Yield Paradoxes and Contradictions*, L.A. TIMES, Nov. 7, 1996, at A3.

221. *See* Verhovek, *supra* note 79, at A1.

222. *Id.*

The susceptibility of voters to images in deciding how to vote helps to create the environment in which corporate initiative speech can be particularly effective. Corporations have the upper hand in reaching potential voters due to their ability to fund expensive advertising campaigns through their general treasury funds. Of course, corporations are not alone in being able to finance such campaigns. Wealthy individuals and unions have also been known to fund big money efforts to pass or defeat ballot propositions, often overwhelming their opponents.[223] Organizations with large sums of money, gained through means other than persuading potential donors of the value of their political agenda, have a decided advantage in mounting the expensive campaigns capable of swaying the electorate.

Concentration of ownership in the predominant mediums of mass communication threatens another type of corporate danger in public discourse: censorship. As a result of mergers, mass media forums are increasingly owned by a handful of large corporate conglomerates. Seven corporate giants control eighty-four percent of the most-subscribed-to cable channels and all six of the broadcast networks.[224] The Walt Disney Company owns Capital Cities/ABC, which comprises the national television network, nearly a dozen local affiliates, eleven major cable outlets such as ESPN and Lifetime Television, and several publications.[225] General Electric owns NBC, which operates including major-market affiliates and eight cable stations, including two cable news channels (CNBC and MSNBC).[226] CBS owns not only a network, it also owns over a dozen local affiliates in major cities, 175 radio stations, and a handful of cable outlets.[227] Time Warner owns a handful of the largest magazine publications in the country (Time, People, and Life among them) in

223. California's Proposition 226 is a recent example of unions vastly outspending their opponents to defeat a ballot initiative. Proposition 226 would have required unions to obtain annual approval from union members to use their dues to support political activities, and unions outspent proponents of the measure by as much as ten to one. *See* Eric Bailey, *Labor Upset Prop. 226 by Focusing on Backers*, L.A. TIMES, June 8, 1998, at A1.

224. *See The Media Nation* (Chart), THE NATION, June 8, 1998 at 23 [hereinafter *Media Nation*].

225. *See id.*

226. *See id.*

227. *See id.*

addition to the WB television network, CNN, Headline News Network, WTBS, and several other major cable stations.[228] Rupert Murdoch's News Corporation is a global media powerhouse with local affiliates reaching over 40 percent of U.S. households and additional major holdings in newspapers, magazines, book publishing, and cable and satellite broadcasting.[229] T.C.I. is perhaps the biggest corporation in the mass media industry with interests in over ninety cable networks and the largest cable franchise in America.[230] Americans' primary sources of political information—both news and advertising—are controlled by just a handful of corporate entities. If the managers of these companies believe that certain initiatives will hurt business, they could close their outlets to supporters.

While there have been no published reports of corporate censorship of ballot measure advertisements, political speech is increasingly at risk when communicated through corporate media conglomerates. CNN, owned originally by Ted Turner and presently by Time Warner, is one of the most respected sources for news and information throughout the world. It is also one of the prime offenders in censoring advertisements that support political positions on proposed laws that might injure the business corporation's bottom line. In 1995, CNN refused to air an advertisement opposing a telecommunications bill because the bill would help CNN's business.[231] The telecommunications bill, which eventually passed,[232] made it easier for corporate media mergers by allowing a single company to own the major newspaper, television station, radio station, and cable company in a given city.[233] At the time Mr. Turner was negotiating the merger with Time Warner, which would lead to sole ownership of mass media outlets in several cities. CNN justified the refusal to run the advertisement by contending it posed a "conflict of interest."[234] In 1997, CNN dropped advertisements opposing a United Nation's

228. *See id.*

229. *See id.*

230. *See id.*

231. *See CNN Rejects an Ad*, N.Y. TIMES, Oct. 24, 1995, at A26 [hereinafter *CNN Rejects an Ad*].

232. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

233. *See CNN Rejects an Ad*, *supra* note 231, at A26.

234. *Id.*

treaty on global warming which had run previously on the cable network.[235] Mr. Turner is a well-known environmentalist, causing some to wonder if his personal political beliefs dictated the content of political advertising on CNN.[236] When political speech depends on media conglomerates for dissemination, it better correspond to the personal politics of corporate management, in addition to the corporation's bottom line.

CNN's refusal to run advertisements on global warming and on the telecommunications bill represents some of the most brazen illustrations of corporate censorship of oppositional political views. Yet, there is no shortage of examples from other corporate conglomerates. In the spring of 1998, publisher HarperCollins, owned by Murdoch's News Corporation, canceled publication of former Hong Kong mayor Chris Patten's memoirs at the last minute.[237] Patten's book made critical comments about Chinese leaders in Beijing, prompting the News Corporation to drop the book out of fear of hurting its business relationship with China.[238] Out of similar concerns for corporate business, Murdoch dropped the BBC television station from his Asia satellite services because Chinese officials disliked the political content of its programming.[239]

While CNN and the News Corporation have censored political speech that threatened the corporate bottom line or offended the boss, at least they allow political speech to air on their national television networks. In contrast to CNN and Fox (owned by the News Corporation), the three major national networks currently refuse to run *any* advertisements in support or opposition of political issues,[240] such as those involved in an initiative campaign. Each of the "big three" have established policies against issue advertising,[241] although local

235. *See* Debbie Seaman, *Hot Potatoes: It's a Safe Bet that any TV Station Will Air Your Fab New Detergent Spot—But What if Your Client is Planned Parenthood or a Gay Action Group?*, CREATIVITY, Dec. 1, 1997, at 32, 32.

236. *See id.*

237. *See* Johnnie L. Roberts, *Rupert's Black Eye*, NEWSWEEK, Mar. 16, 1998, at 44, 44.

238. *See id.*

239. *See id.*

240. *See* Seaman, *supra* note 235, at 32. The networks do accept advertising for candidates. *See id.*

241. *See id.*

affiliates can (and do) sell airtime to ballot campaigns.[242] An ABC spokesperson stated, "We do not accept advocacy ads because we believe that it is subject matter best handled by our news division, which can provide a balanced look at the topic . . . ."[243]

If, however, Americans must depend on network news divisions for their political information, we have reason to fear corporate interference here, too. In October, 1998, ABC News controversially decided not to air a report produced by two of its top, award-winning investigative journalists that raised questions about the hiring and safety policies at parent Disney's Orlando theme parks.[244] NBC has been criticized on several occasions for allowing larger corporate interests to dictate news programming. In one instance, an NBC news story on defective bolts used in nuclear power plants, bridges, and airplanes failed to mention that its parent General Electric used some of those bolts in its own nuclear facilities.[245] Even PBS is victim to the corporate interests that provide it financial support. In 1995, the *Newshour* paid scant attention to a price-fixing scandal involving Archer Daniels Midland, which underwrites funding for the show.[246] So much for relying on the news divisions.

The diversity of business interests within a modern media conglomerate only increases the number of opportunities for "conflicts of interest" censorship. If the decreasing diversity of ownership of

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242. The networks allow local affiliates to run issue advertisements, but this is hardly a reliable alternative. Just recently, for example, the Chicago affiliate of ABC refused to broadcast a family planning commercial for Planned Parenthood even though the affiliate had earlier run pro-life political advertisements. *See id.*

243. *Id.* One basis for the network's policy, according to the ABC spokesperson, is that they do not open the airways for "companies that can afford to spend money advertising their points of view." *Id.* Yet, lest we conclude that the networks are following the reasoning of *MCFL*, it should be noted that they do not accept issue advertisements no matter what the source of funding, be it a PAC or a non-profit advocacy group. *See* Karla Peterson, *Merger, They Wrote*, S.D. UNION-TRIBUNE, Sept. 7, 1997, at E3.

244. *See* Bill Carter, *ABC Shelves Report on Parent Disney*, N.Y. TIMES, Oct. 15, 1998. The report was shelved despite ABC having earlier signed an exclusive rights agreement with the authors of the book in which the charges originated. *Id.*

245. *See id.*

246. *See* Jeff Cohen, *Stories TV Doesn't Tell*, THE NATION, June 8, 1998, at 7.

the main channels of public information were not worrisome enough, each of these conglomerates is much more than a media empire. They have significant holdings in real estate, utilities,[247] advertising companies,[248] manufacturing,[249] telecommunications,[250] financing,[251] transportation,[252] sports franchises,[253] retail enterprises,[254] and a host of other industries and businesses.[255] The larger and more diversified the conglomerate, the more likely any given initiative will impact it and its business operations. This dilemma is exacerbated by strategic corporate partnerships that join media conglomerates with other large corporations. The Walt Disney Company, for example, has "corporate alliances"—joint marketing and exclusivity deals—with, among others, McDonalds, General Motors, Coca-Cola, Kodak, and

247. *See Media Nation*, *supra* note 224, at 23.

248. *See id.*

249. G.E., for example, manufactures aircraft engines, appliances, light bulbs and fixtures, industrial motors, medical equipment, electrical equipment, and plastics. *See id.*

250. T.C.I. has substantial interests in telephone carriers and cellular and paging services, while Time Warner has a stake in PageNet, the nation's largest wireless paging and messaging provider. *See id.*; *see also* Elizabeth Douglass & Anne Colby, *Satellite Problem Cuts Service to 90% of Pagers*, L.A. TIMES, May 20, 1998, at A1 (noting that PageNet is the largest paging service in the United States).

251. Through subsidiaries, including the GNA Group, G.E. provides car financing, mortgage lending, and consumer and commercial financing. *See Media Nation*, *supra* note 224, at 23.

252. Among its many products, G.E. counts both diesel and electric trains. *See id.*

253. Disney owns the Anaheim Mighty Ducks, a National Hockey League (NHL) franchise, and the Anaheim Angels, a Major League Baseball (MLB) team. Time Warner owns MLB's Atlanta Braves and the Atlanta Hawks, a National Basketball Association (NBA) team. News Corp. and T.C.I. are both major owners of the NBA's New York Knicks, the NHL's New York Rangers, and the NHL's Los Angeles Kings. News Corp. also owns MLB's Los Angeles Dodgers. *See id.*

254. Combined, Disney and Time Warner own over 800 retail stores. *See id.* As of publication, Viacom owns Blockbuster Video, the nation's largest video rental chain. *See id*; *see also* Chris Woodyard & Dottie Enrico, *Taco Bell CEO Fast Forwards to Blockbuster, Video Chain Seeks Revival*, USA TODAY, June 4, 1997, at 3B.

255. *See Media Nation*, *supra* note 224, at 23.

Ever-Ready.[256] As the network of corporate connections grows, there are even more "conflicts" to impinge on the news media.

Even in the absence of corporate chieftains issuing censorship orders, relying on media conglomerates to provide diverse political coverage remains a concern. Media independence within a corporate conglomerate can still be undermined by subtle and indirect attitudes of employees seeking to please their bosses and enhance the bottom line. As media analyst Leo Bogart has remarked in the context of news programming:

> Few media overlords are so crude as to give direct orders to kill or slant stories. They do not have to do that in order to let it be known what their views are and where their interests lie. Almost imperceptible Pavlovian cues reinforce desired behavior and inhibit what is unwelcome.[257]

According to another media critic, the tendency exists "to avoid getting yourself or your boss in trouble. So an adjective gets dropped, a story skipped, a punch pulled."[258] When you have a corporate conglomerate as a boss, there may be a wide variety of political perspectives to which you might seek to avoid giving voice. Moreover, media outlets must take care "not to offend other large financial interests, especially those of big corporate advertisers" who might "cancel ads when they feel the reporting reflects unfavorably on their product or industry."[259] The effect of this self-censorship can be significant. "Concentration in other industries may lead to market power, oligopolistic pricing and restrictive trade practices. In the media business, it can change the country's values, ideas and politics, perhaps even the national character."[260]

The development of mass media conglomerates poses new types of threats to political debate. The *Bellotti* Court looked for evidence

256. These deals are not secret, but I am happy to admit I found out about them from an "inside" source. My wife, Melissa Bomes, works in Disney's Corporate Alliances Division.

257. Leo Bogart, *What Does It All Mean?*, MEDIA STUD. J., Spring-Summer 1996, at 15, 22.

258. Jonathan Alter, *A Call for Chinese Walls: Why We Should Keep Journalists Out of the Magic Kingdom*, NEWSWEEK, Aug. 14, 1995, at 31.

259. *See* Joseph Turow, *Hidden Conflicts and Journalistic Norms: The Case of Self Coverage*, J. COMM., Spring 1994.

260. Bogart, *supra* note 257, at 15.

of corporate domination in terms of an overwhelming voice that drowns out its opposition. While large business corporations may have the resources (and occasional willingness) to flood the airwaves with political speech, the modern mass media conglomerate suggests other ways in which they might overwhelm the initiative process. Media corporations have proven capable of censoring political views hostile to the corporate bottom line—"conflicts of interest"—both through executive decision and the more subtle corporate environment. Whether this phenomenon leads to censorship in initiative campaigns remains to be seen. But it is clear that the social and economic environment of the modern mass media conglomerate creates new ways for business corporations to exert a forceful influence on public political debate.

3. Corporate dominance: an irrelevant question?

Many have tried to compile evidence that might satisfy courts that corporations are capable of dominating the initiative process. To the extent those efforts were based on Justice Powell's "drowning out" metaphor, they were bound to fail. But if corporations cannot "drown out" other voices, they can take advantage of the system of mass communication to assume a privileged position in public discourse. This broader, contextual understanding of the electoral communication environment suggests the ways in which corporations can threaten political debate.

Is it possible however that the evidentiary question posed by *Bellotti* is no longer even necessary? One reason we might conclude that proof of corporate dominance in the initiative process is unnecessary is that the *Austin* Court did not look to evidence of corporate dominance in candidate-oriented expenditures.[261] Presumably, if states could not regulate the voice of business corporations in the initiative process absent evidentiary proof of corporate dominance, then they could not regulate the corporate voice in other areas of electoral politics without similar proof of corporate dominance there. Nevertheless, the *Austin* Court upheld the Michigan limits on

261. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990).

general treasury financing of corporate electoral speech without ever asking the evidentiary question.[262]

It was not oversight by the *Austin* majority; instead, it was the result of the Court's conceptualization of corruption. Due to the Court's reasoning that corporate corruption can arise from the inappropriate use of other people's money, the evidentiary issue of corporate dominance on the process as a whole is no longer essential. Corruption is viewed as the political conversion of shareholder money by corporate managers, whether or not that speech drowns out other voices. Thus, *Austin* not only shifted the conceptualization of corruption, it also eliminated *Bellotti*'s evidentiary question.

Does this mean that there is no remaining evidentiary question to ask in corporate initiative speech cases? If one follows the *Austin* Court, the answer might be yes; like the Court, we can presume that general treasury funds used for electoral purposes have been converted. However, if one takes *Austin*'s view of corruption seriously, we may want to pose a question the Court did not: Can the corporation show that it has unanimous support from shareholders for its electoral speech? If it can, and corruption stems from the misuse of shareholders' money, it would be appropriate to allow an evidence-based exemption from the general prohibition on general treasury funding.[263] A law narrowly tailored to meet the state's interest in curbing other people's money corruption would seem to need an allowance for shareholder consent.[264]

Such a requirement might also turn on the nature of the relevant corporation. A closely-held corporation may be able to surmount the difficulty associated with unanimous shareholder consent with ease; a large publicly held corporation will have considerably more trouble gaining unanimity. In practice, a consent-based exemption would stop almost all large public corporations from using general treasury funds to finance initiative speech. It is inconceivable that the Walt Disney Company or General Motors would succeed in obtaining the consent of each of their hundreds of thousands of shareholders to support a ballot initiative campaign. Yet despite this practical

262. *See id.*

263. On the constitutionality of state laws requiring unanimous shareholder consent for corporate political speech, see Brudney, *supra* note 154, at 255-64.

264. *See Bellotti*, 435 U.S. at 792-95.

difficulty facing the large public corporation, the exemption remains necessary for the majority of business corporations, which are privately or closely held operations. This does not mean that laws regulating the funding sources of the corporate voice should not apply at all to private or closely-held business corporations. It means that all business corporations, large and small, should be given an opportunity to provide evidence of unanimous shareholder consent.

C. *Pillar Three: Corporate Speech in First Amendment Theory*

The third pillar of *Bellotti*'s reasoning was its theoretical understanding of corporate speech under the First Amendment. While overturning the Massachusetts law, the Court purposely avoided grounding its decision on any general free speech right belonging to corporations, stating:

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. . . . The proper question . . . is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect.[265]

Perhaps the Court avoided ruling on the question of corporate speech rights because it was an unusually thorny one. Corporations are entities with no obvious standing to participate in a democratic polity. Corporations cannot vote, and no court has ever questioned long-standing laws prohibiting corporations from making direct contributions to candidates, such as the Tillman Act of 1907[266] and the Federal Corrupt Practices Act of 1925,[267] despite *Buckley*'s holding that candidate contributions are protected speech. Political philosophy has traditionally understood democratic self-governance to be a right attaching to individuals or to the corporate entity of the

265. *Id.* at 775-76.
266. Tillman-Gillespie Resolution of 1907, Pub. Res. No. 8, 34 Stat. 823 (1906).
267. Federal Corrupt Practices Act of 1925, 2 U.S.C. § 441b (1994).

"People," but not to business corporations. Yet corporations, like individuals, have an interest in the product of government. In some forms of political participation, such as lobbying, corporations are the most active democrats.[268] But whether or not corporations should have particular constitutional rights has been an elusive question throughout American history.[269]

In this section, I examine the competing First Amendment theories that might justify corporate electoral speech rights or, conversely, their regulation. I question whether the theoretical undergirding of *Bellotti* makes sense and expose some of its weaknesses. I then assess the main theoretical competitor to *Bellotti*, the self-realization theory of the First Amendment, concluding that this theory is also flawed as an approach to corporate initiative speech. However, the constitutive approach does appropriately refocus the First Amendment inquiry towards the rights of the owners of the corporation, the shareholders. Finally, borrowing principles supplied by organizational dues cases, I propose to view *MCFL* and *Austin* as reflective of a theoretical framework with different, yet established roots in First Amendment jurisprudence. Viewing corporate electoral speech from this theoretical angle captures the association and speech interests of shareholders and reveals the First Amendment values served by the Court's reasoning in *MCFL* and *Austin.*

1. *Bellotti,* hearers' rights, and constitutive speech theory

The *Bellotti* Court was cognizant of the individual basis of self-government and, indeed, attempted to translate it into constitutional protection for corporate initiative speech. The Court hinged its reasoning on the desirability and importance of the speech to

268. *See* WILLIAM GREIDER, WHO WILL TELL THE PEOPLE? 44 (1992).

269. One might trace the origin of corporate constitutional rights to *Dartmouth College v. Woodward,* 17 U.S. 518 (1815), where the Court, led by Chief Justice John Marshall, held a corporate charter was protected from state revision by the Contracts Clause of Article I, § 10. Since then, application of individual rights to corporate entities has been inconsistent. *Compare, e.g.,* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886) (corporations are "persons" for purposes of Equal Protection Clause), *and* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (corporations have substantive due process right of contract), *with* Hale v. Henkel, 201 U.S. 43 (1906) (corporations lack Fifth Amendment right against self-incrimination).

self-governing individuals, regardless of its source. The substance of the regulated corporate speech "is the type of speech indispensable to decisionmaking in a democracy . . . . The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source."[270] Commentators have thus appropriately remarked that *Bellotti* rests on a First Amendment theory of hearers' rights, rather than speakers' rights.[271] Corporate initiative speech is protected because it serves the listeners' ability to govern themselves.

If the Justices believed that corporate speech rights should turn on the rights of hearers, one might expect to find some consistent application of the principle. In fact, the Court has invoked hearers' rights in some corporate speech cases, while completely ignoring the principle in others. In commercial speech cases such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[272] and *44 Liquormart, Inc. v. Rhode Island*,[273] the Court struck down advertising restrictions on the grounds that consumers benefited from the businesses' speech. But the Court paid scant attention to hearers' rights in *Pacific Gas & Electric Co. v. Public Utilities Commission*[274] and *Miami Herald Publishing Co. v. Tornillo*,[275] where it invalidated laws requiring private corporations to give access to third parties to their modes of communication—i.e., bills and newspapers.

The Court's finding that unlimited *corporate* initiative speech served hearers' rights rested on no articulated understanding of corporations as institutions. Nevertheless, it made some sense as a response to the over-broad Massachusetts law at issue in *Bellotti.* That law amounted to a complete ban on corporate initiative speech, thus one could reasonably conclude that it effectively silenced corporations' voices. But hearers' rights are not substantially diminished by *Austin*-style regulations on corporate financing of electoral speech, which give ample room for corporations to participate in public

270. *Bellotti*, 435 U.S. at 777.
271. *See* Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on* First National Bank of Boston v. Bellotti, 1227, 1234-35 (1986).
272. 425 U.S. 748, 757, 763 (1976).
273. 517 U.S. 484, 495-500 (1996).
274. 475 U.S. 1 (1986).
275. 418 U.S. 241 (1974).

debate. In his *Austin* concurrence, Justice Brennan explains that, despite the PAC/segregated fund requirement, the Michigan Chamber of Commerce had remained an active participant in electoral politics.[276] In the ten years during which the law challenged in *Austin* was in effect, the Michigan Chamber of Commerce had established a PAC, raised hundreds of thousands of dollars, and contributed to candidates with those funds in every election cycle.[277] Quoting from the district court's finding below, Justice Brennan noted that "'the record in this case amply demonstrates that the Chamber PAC frequently makes independent expenditures to influence political elections, and those efforts have been tremendously successful in electing Chamber PAC endorsed candidates.'"[278]

Even under *Austin* limits, political speech and influence will continue to be skewed decidedly in favor of corporations and their interests. Corporate officers and managers are among the wealthiest groups in society, and there is no reason to believe they are going to cease their efforts to influence politics (nor should they). To the extent they believe in a corporation's political agenda, they will contribute to segregated corporate speech funds or PACs which finance electoral speech without limit.

Regulated corporate electoral speech does not offend the instrumentalist values of free expression; yet, there are other theoretical frameworks for understanding the First Amendment's guarantee. It has often been argued that the freedom of speech is necessary because speech has a constitutive function, helping individuals to develop character and hone their faculties for critical thought.[279] Constitutive conceptions of free speech have been articulated by renowned lawyers such as Justice Louis Brandeis (in his famous concurrence in *Whitney v. California*[280]), Professor C. Edwin Baker,[281]

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276. *Austin*, 494 U.S. at 676 n.7 (Brennan, J., concurring).

277. *See id.* (Brennan, J., concurring).

278. *Id.* (Brennan, J., concurring).

279. *See* Winkler, *supra* note 162, at 339-40 (describing the constitutive theory of free speech).

280. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he final end of the State [is] to make men free to develop their faculties.").

281. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 (1989); C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1009 (1978).

Professor Martin Redish,[282] and other notable legal scholars.[283] According to this view, free speech is essential not merely for helping sustain democratic self-governance, but because of the intrinsic value of speech to the individual. Violating the First Amendment's guarantee of freedom of expression adversely affects the dignity interests of individuals; it silences them and hinders their ability to develop fully as human beings.

It is not at all obvious how a constitutive conception of free speech can justify unrestrained corporate electoral speech.[284] Corporations have no dignity interest to preserve and no character to develop. Nor do corporations participate in political debate to sharpen their "faculties for critical thought." Indeed, the constitutive conception seems to be particularly dependent upon the human characteristics of speakers: their dignity and rational faculties. This conclusion is given some additional weight by the fact that constitutive theorist C. Edwin Baker has strongly criticized the Supreme Court's *Bellotti* decision and inveighed against extending free speech rights to corporate entities.[285]

Baker and others have made their cases capably and there is no need to repeat that effort here. Nonetheless, Professor Redish and Howard Wasserman have recently published an important article arguing in favor of corporate political speech rights on constitutive free speech grounds that warrants discussion.[286]

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282. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

283. *See, e.g.*, Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 43-47 (1990); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1975).

284. Justice Powell has been criticized for failing to consider whether a constitutive understanding of free speech could justify corporate initiative spending protection. *See* Nicholson, *supra* note 44 at 606; Schneider, *supra* note 271, at 1235, 1257-61.

285. *See* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646, 646 (1982).

286. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

Redish and Wasserman do not argue that business corporations have faculties and characters in need of development, nor claim that corporate enterprises have dignity rights to preserve. Rather, they contend that corporate speech serves to further the constitutive interests of its founders and its shareholders.[287] "[T]he corporate form performs an important democratic function in facilitating the personal self-realization of the individuals who have made the voluntary choice to make use of it. One should view corporate speech, then, as a form of indirect or catalytic self-realization . . . fully consistent with the purposes served by the constitutional protection of speech."[288] Due to this "catalytic self-realization" value, corporate political speech warrants full First Amendment protection, without any limitation on funding sources.

There are four flaws in this argument. First, it is hardly clear that corporate political speech serves any self-realization goals of the individuals who have chosen to associate with the corporate entity. Shareholders invest in business corporations to garner a profit and grow their portfolio. The investment is a gamble, with more risk than an investment in bonds or treasury bills and, the shareholder hopes, more return. It is a commercial transaction at its core: the shareholder gives up something of value (his dollar) in exchange for something of value (a share of stock), with the traditional commercial mindset that the trade will leave the shareholder better off than before. For most if not all shareholders, business corporations are not catalysts for self-realization, they are vehicles for profit-maximization.

Second, even assuming that business associations "serve as catalysts in enabling people to use and develop their human faculties and control their own destinies by pursuing their chosen purposes,"[289] corporate speech does not necessarily achieve those ends. It is essential to remember what Redish and Wasserman forget: shareholders have little control over the use of their money once it is invested. Corporate managers make the decisions on what political issues to support, functionally immunized from shareholder scrutiny

287. *See id.* at 237.
288. *Id.*
289. *Id.* at 252.

by the business judgment rule and the structure of corporate democracy.[290] The consequence is that corporate political speech reflects the judgments of corporate officers, and not necessarily the people whose money funds the speech. If a business corporation's political speech helps a shareholder to realize his sense of self, it is by chance not design.

Third, even if some shareholders use the corporate form for self-realization, allowing corporate political speech may have the effect of diminishing or harming the character development of other shareholders. To the extent the corporation uses a shareholder's money to support political causes he disagrees with, the shareholder may end up feeling abused and powerless. His own money has fought against him in the electoral arena. Yet, helplessness and being taken advantage of are hardly the character traits the Constitution was designed to encourage through its First Amendment guarantee.

Fourth, it does not follow inexorably from the possibility of catalytic self-realization that corporate speech should receive broad constitutional protection. The law has never offered constitutional support to any and all forms of speech within associations that might conceivably further the self-realization of their members. Rather, it has distinguished between associations based on their purpose and context. A political advocacy association, such as a political party, the NAACP, or the Christian Coalition, designed especially for the expression of ideas and the influencing of public policy, receives the constitutional freedoms of speech and association. Yet, an association of people formed to commit crimes, as in a conspiracy or the Mafia, cannot claim speech rights protection for their criminal statements. Despite the fact that Mafia membership and criminal speech might help constitute the members' personalities—they may feel a sense of belonging, a place of power over others, and rebelliousness—speech in furtherance of the associations' unlawful goals is not constitutionally protected.[291] Indeed, it can be deemed an "overt act" of their conspiracy and subject them to prison terms. The

290. *See supra* notes 151-52 and accompanying text.
291. Hence, the speech aspects of perjury, fraud, conspiracy, and bribery are outlawed.

law properly distinguishes among different sorts of associations depending on their purposes and their context.

This last point indicates a larger problem associated with protecting speech on the basis of self-realization. Virtually any speech can be conceived of as promoting the development of the speaker's self, even speech that virtually all agree lacks First Amendment protection. Perjury, child pornography, deliberately false publication, defamation, and the disclosure of military secrets to foreign spies may all serve to enhance the speaker's personality or character. They might do so in ways that we find objectionable and even disgusting, but they still serve constitutive ends. Although I have elsewhere recognized the importance of constitutive theory, in particular with regard to the right to vote,[292] in the speech context constitutivity takes us only so far. It does not adequately capture why we protect some types of speech while limiting others.

Nevertheless, if we were determined to set up a system in which corporate electoral speech would further the self-realization of those who provide financial support for the speech, then *Austin*'s rule makes more sense than *Bellotti*'s. If business corporations are limited to speaking on electoral issues through segregated funds or PACs, then only those who agree with the content of the speech will fund it. *Austin*'s rule simply allows people who have invested in the business corporation for purely economic reasons—and who might feel mistreated by electoral speech supported by their money with no beneficial constitutive or developmental effects—to avoid being taken advantage of, without sacrificing their economic objectives. Those who might wish to realize their selves through the business corporation's speech have ways to do so through the corporate PAC. That seems like a system designed to enhance people's ability to "control their own destinies by pursuing their chosen purposes."[293]

Redish and Wasserman are critical of *Austin* because, in their view, it relies on hopelessly circular reasoning in requiring that business corporations speak through segregated funds and PACs that reflect genuine political support. "[I]f such calibration were necessary, [how could] the idea's popularity . . . be measured if the idea's

292. *See* Winkler, *supra* note 162, at 367-78.
293. Redish & Wasserman, *supra* note 286, at 252.

expression were restricted beforehand[?] How, one might reasonably ask, can an idea get itself accepted in the competition of the market if the state can restrict the idea at the source . . . ?"[294]

Whatever one might think of *Austin*, it does not restrict any idea's expression "beforehand" or "at [its] source." Any perspective the corporation wishes to espouse—or, to be clear, the corporation's managers wish to espouse—can be expressed and given the opportunity to gain political support. Funding of that speech must simply be through segregated funds or PACs, from which it can gain unlimited support. Any interested corporation burdened by a law similar to the Michigan law upheld in *Austin* would set up a permanent segregated fund or PAC for electoral expression, enabling it to further corporate views in the political marketplace. Indeed, corporations we might expect to be politically active already have well-established PACs to support candidates. Even with limits on corporate electoral speech, business corporations will remain a vibrant source of information. For those who might realize themselves through corporate electoral speech, contributing to PACs or segregated funds fully enables them to accomplish that goal.

2. Free speech rights of corporate shareholders

One of the primary insights of First Amendment theories that rest on self-realization is that the focus of First Amendment protection is on the shareholders, not the corporate entity as such. Shareholders "own" the business corporation as well as the money in the corporation's general treasury. Any First Amendment theory that protects unlimited corporate electoral speech, no matter what its source of funds, must justify why corporate *managers* can spend *shareholders'* money to fund political speech in elections those shareholders may not support.

By reference to long-standing principles of associational freedom and organizational speech, in particular those developed in union dues, state bar dues, and student fee cases, we can see the outlines of a First Amendment approach that refocuses *Bellotti*'s understanding of hearers' rights to *Austin*'s view of shareholder rights. It is not that organizational dues cases provide an exact or

294. *Id.* at 266 (internal quotations and citations omitted).

precise analogy to corporate electoral speech (they do not); it is that these cases suggest a First Amendment view of organizational politics that balances the rights of the organization against the rights of its members.

In the context of the First Amendment, it has been held that individuals should not be forced to support political ideas they do not believe. Although the relevant cases have arisen out of legal controversies involving state action, judges and Justices have based their reasoning on the maxim that coerced political speech, by its very nature, offends First Amendment values. In *West Virginia Board of Education v. Barnette*,[295] the Supreme Court overturned a state law requiring public school students to recite the pledge of allegiance on this basis. "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger . . . . It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds. . . ."[296] Forced political speech is not protected speech.

While *Barnette* affirms the general principle that individuals should not be made to support causes involuntarily, organizational dues cases provide further insight into how First Amendment values work in associational settings.[297] In a series of cases, the courts have held that political speech of organizations representing associations of members joined for nonpolitical purposes (such as unions and state bar associations) may offend the association and speech rights of dissenting members. In each of these organizational settings, members may decline to provide financial support for political speech sponsored by the organization.[298] Although the organizations may have speech rights themselves, they can be required to respect the associational choices of their dissenting members by exempting

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295. 319 U.S. 624 (1943).

296. *Id.* at 633.

297. For an early, pre-*Austin* argument that corporate speech cases raise similar issues as union dues cases, see Brudney, *supra* note 154, at 268-71.

298. Associational dues cases stand for the First Amendment tenet, aptly articulated by Thomas Jefferson, that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948).

them from financing the organizations' political speech.[299] Under the First Amendment, dissenting members ought not be forced to resign their membership, and forsake the nonpolitical benefits of it, if they disapprove of the organization's political speech. Instead, associational organizations such as unions, bar associations, universities and now corporations, can be required to fund political speech in ways designed to allow dissenting members to abstain from providing financial backing.

The Court began to develop this line of reasoning in union dues cases. In *Abood v. Detroit Board of Education,*[300] a group of teachers required by state law to join the teachers' union or pay fees to support the union's collective bargaining efforts challenged the union's use of member and employee dues to support political causes.[301] While upholding the state law requiring the payment of dues in a union shop, even by non-union members, the Court held that the union violated the employees' First Amendment rights by spending such payments to "contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[302] Writing for the Court, Justice Potter Stewart looked specifically to campaign finance case law for appropriate First Amendment principles. "One of the principles underlying the Court's decision in *Buckley v. Valeo* was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. . . . The fact that the [teachers] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."[303]

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299. Where an association's speech is not political, but consists of generic commercial advertising, the court has refused to allow dissenting members to cease providing financial support for the speech. *See* Glickman v. Wileman Bros., 117 S. Ct. 2130, 2138 (1997).

300. 431 U.S. 209 (1977). Prior to *Abood*, the Court held that, as a matter of statutory construction, the Railway Labor Act did not allow unions to spend compulsory dues intended for collective bargaining for political causes against the will of employees. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 770 (1961).

301. *See Abood*, 431 U.S. at 209.

302. *Id.* at 234.

303. *Id.* Another factor in the Court's analysis was that public employees

In his *Austin* dissent, Justice Kennedy recognized that union dues cases might be seen as somewhat analogous to corporate political speech controversies and suggested that there was a "crucial distinction"[304] between shareholders and union members. That distinction was found in the fact that a shareholder can easily divest in a corporation, but a union member cannot leave a union without incurring significant costs. Unlike union members, shareholders who disagree with the political views espoused by a corporation "can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own."[305]

Of course, dissenting union members can also "seek change from within" or "form a rival group of their own"[306] within the union to dissuade the union's political pursuits. Nevertheless, Justice Kennedy is right that the burden imposed on a shareholder to divest from a corporate stock holding is considerably less than that faced by a union member who might be forced to choose between supporting the union's political causes or leave his job.

Yet Justice Kennedy's argument obscures important difficulties faced by a shareholder who disagrees with a corporation's electoral speech. When these are accounted for, the "crucial distinction" between union dues and shareholder money dissolves. First, explicit in Justice Kennedy's argument is the belief that shareholders can easily withdraw their money from the corporation in which they have invested. As discussed earlier, most stock-holding individuals have considerably less control over where their money is invested than Justice Kennedy presumes.[307] Investors in pension funds, in mutual funds and in other intermediaries often lack knowledge of where their money is on a given day. Even if they knew, they might be unable to exercise effective control over their investments. More

should not be compelled to forsake their First Amendment rights as a condition of public employment. *See id.* at 234-36. In subsequent cases, however, the Court made clear that the *Abood* principle applied with equal force to private sector employees. *See* Ellis v. Railway Clerks, 466 U.S. 435, 455-57 (1984).

304. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 709-10 (1990) (Kennedy, J., dissenting) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (1978)).

305. *Id.* at 710 (Kennedy, J., dissenting).

306. *Id.* (Kennedy, J., dissenting).

307. *See supra* notes 153-54 and accompanying text.

importantly, a shareholder who sells her shares after discovering that her corporation has funded political speech acts too late; she has already financed the speech. The damage has been done.

A union member may actually be better able to discover the use of his dues than a shareholder because he works with other dues-paying members in a union shop where information may spread easily. While no one would deny that the penalty to a union member who must quit his job to avoid the unwanted political use of his dues is greater than any faced by a dissenting shareholder, the latter faces problems associated with limited control and limited knowledge that make divestment an utterly ineffective remedy for unwanted corporate electoral spending. If the main difference, for purposes of the First Amendment, between union dues and shareholder investments is ease of divestment or the potential of corporate democratic control—as Justice Kennedy argues—then there is little to distinguish them in practice.

Another objection to limiting the power of business corporations to spend general treasury funds on electoral speech comes from those who view any act of the corporation as a necessary part of profit-making.[308] Under this view, corporate electoral speech is like corporate commercial advertising: each involves expenditures designed to protect or increase the corporation's business. Corporate speech on ballot initiatives is thus an essential aspect of the corporation's pursuit of profit and, so long as the expenditures can reasonably be characterized as in the shareholders' best interests, such expenditures are protected from judicial oversight by the business judgment rule.

First Amendment case law on union dues, however, suggests the limits of such an argument within the framework of free speech. The political speech funded by union dues is often, if not always, designed to advance union objectives. Consequently, unions could contend that political expenditures further the broad interests of union members, much the same as corporate electoral speech furthers the economic interests of shareholders. Nevertheless, the Supreme Court has held that political expenditures by unions, no matter how much they further union objectives, can be regulated consistently

308. *See generally* Baker, *supra* note 285, at 652-55 (discussing the market-based justification for corporate speech and arguing against it).

with the First Amendment.[309] According to the Court, unions have the ability to spend members' dues on "necessarily or reasonably incurred" expenses.[310] Yet, those expenditures are defined narrowly to include only those used for collective bargaining, dispute resolution, and activities to implement the duties of the union as the employees' exclusive representative.[311] Thus, to the extent the union spends money to support pro-union political candidates or pro-union legislation, the members must be afforded the opportunity to withhold their monetary support.[312] Even where union dues will be used to further union members' interests, the members have a First Amendment right to refuse to contribute financially to the political expenditures.

The Court has extended this reasoning to non-union organizations such as state bar associations. *Keller v. State Bar of California* is an illustration. In *Keller*, the Court held that the California State Bar's use of attorney dues to finance political or ideological activities with which some members disagreed violated the First Amendment rights of dissenting attorney members. In pursuit of its broadly-phrased, general mission of "promot[ing] 'the improvement of the administration of justice,'"[313] the State Bar had made political expenditures in diverse areas. The Bar made expenditures lobbying for and against legislation, including a law which would prohibit state employers from requiring employees to take polygraph tests, a law creating an unlimited right of action to sue air polluters, a law creating criminal sanctions for selling drug paraphernalia to minors, and a law providing for life imprisonment for some minors tried as adults for murder.[314] The Bar also made expenditures for adopting political resolutions which, among other things, disapproved of statements of a candidate for public office regarding a victim's bill of rights and denounced federal legislation designed to limit federal court

309. *See* Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 446 U.S. 435, 457 (1984).
310. *See id.* at 448.
311. *See id.*
312. *See id.* at 447.
313. Keller v. State Bar, 47 Cal. 3d 1152, 1156, 767 P.2d 1020, 1021, 255 Cal. Rptr. 542, 543 (1989) [hereinafter ("Keller I")] (quoting CAL. BUS. & PROF. CODE § 6031(a) (West Supp. 1990)).
314. *See* Keller v. State Bar, 496 U.S. 1, 5-6 & n.2. (1990) ("Keller II").

jurisdiction over specific social controversies.[315] Finally, the Bar made expenditures for filing amicus briefs in cases involving: the power of a workers' compensation board to discipline lawyers; the mandatory client-list disclosure for attorneys who serve as public officials; and the disqualification of a law firm.[316]

Borrowing from the union dues cases, Chief Justice William Rehnquist reasoned that the constitutionality of the State Bar's expenditures must turn on whether they were "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"[317] While recognizing that the difference between expenditures made in pursuit of those objectives and illegitimate expenditures "will not always be easy to discern,"[318] the Court noted that the extreme ends of the spectrum are identifiable[319] and that reasonable procedures could be adopted by the State Bar to insure that dissenting attorneys were not compelled to support ideological causes with which they disagreed.[320]

The Court's analysis in *Keller* reflects a fundamentally different approach to the First Amendment than *Bellotti*. In the latter, the Court conceives of the relevant First Amendment interests as belonging to the recipients of corporate political speech. If the *Keller* Court had taken a similar tact, the result in that case would have been different. The State Bar would offer the public perspectives and information they might not otherwise receive or would benefit from hearing. From the standpoint of recipient interests, the freedom of speech would best be preserved by allowing unfettered political speech by the State Bar, no matter how it is funded.

In contrast, the First Amendment approach taken in *Keller* emphasized the free speech and association interests of the members of the Bar. Rather than looking merely at the speech recipients' interests, the *Keller* Court looked to the State Bar members' right to

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315. *See id.* at 6 n.2.

316. *See id.*

317. *Id.* at 14 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (plurality opinion)).

318. *Id.* at 15.

319. *See id.*

320. *See id.* at 16-17.

refuse to finance political speech with which they disagreed.[321] In the context of corporate electoral speech, it seems appropriate to recognize that the free speech rights at issue are not merely those of the public at large. Shareholders also have free speech and association interests affected by corporate electoral speech.

The protection of dissenting members who financially contribute to an organization for non-political purposes dictated the outcome of a recent case involving student fees. Students at the University of Wisconsin successfully challenged the school's use of their mandatory student fees to support ideological student groups.[322] The Court of Appeals for the Seventh Circuit recognized the First Amendment rights of the contributing students, rejecting altogether the University's claim that the organizations' free speech rights would be sacrificed.

> The Regents argue that the First Amendment protects the rights of these organizations to engage in such speech. Of course it does. But the students do not ask that we restrict the speech of any student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree.[323]

Perhaps the student fees, union dues, and state bar fees should be treated differently form corporate investments on the grounds that the former are compelled by the state and the latter are not. Certainly, the former were analyzed as forms of state action, while the latter are not. In practice, the role of the state in each of these circumstances is similar: state law grants an organization the right to charge members for joining and the organization in turn attempts to spend that money on political speech. In the union dues cases, state law allows the union to set dues; in state bar fees cases, state law allows the bar to charge membership fees; in student fees cases, state law allows the university to charge student activity fees; in corporate speech cases, state law allows the corporation to charge individuals for the privilege of investing. The state law does not require any of the organizations to charge a set amount. The organizations themselves decide

321. *See id.* at 9-10.
322. *See* Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998).
323. *Id.* at 721.

whether to charge and how much—although corporate equities, once issued at the corporation's set price, are then sold on the open market.

In none of these scenarios does the state force anyone to join. It is up to the individual to make the free choice whether to go to work at a union shop, practice law as a profession, attend this particular university, or invest in a corporation. Simply because joining is voluntary is no reason to limit the members' First Amendment right not to financially support political speech.

Indeed, there are situations in which a dissenting shareholder has even less choice in joining than the union member, lawyer, or university student. Each of the last three know in advance the nature of the organization they are joining. An employee who has a pension fund, however, does not know in advance where her money will be invested. She invests in her pension fund blindly. And once she has invested, she does not know where her money will be invested later—that is, which corporations she will become a "member" of. Thus, some corporate investors have less freedom of choice to join than other individuals who have found protection in organizational dues cases.

The lesson of the organizational dues cases is that the financial supporters of an association do not give up their own First Amendment rights of freedom of association and speech simply because they supply money to the group. When we add to that lesson the dilemmas facing shareholders who dissent from corporate electoral speech—from lacking control over their investments to discovering political speech to selling shares after the damage has been done[324]—an associational approach to corporate electoral speech furnishes *Austin*'s "other people's money" corruption with a First Amendment framework. Moreover, we can also see the limitations of *Bellotti*'s theory of the First Amendment, which failed to extend past the rights of listeners to include the rights of those paying for expenditures.

324. *See supra* notes 153-55 and accompanying text.

IV. EVEN FURTHER BEYOND *BELLOTTI*: SOME REFLECTIONS ON *ARGENBRIGHT*, CORPORATE PACS, AND SOFT MONEY

Since *Bellotti*, both judicial doctrine and electoral politics have changed considerably, and the three pillars of Justice Powell's opinion have been modified and supplemented. To the extent the pillars still stand, they provide only weak support for the rule of law built upon them.[325] The Court has gone beyond *Bellotti*, and we know the direction it took. Several questions remain, however, and this section addresses three of them. First, is the Montana law constitutional? Second, does the Court's post-*Bellotti* approach mandate changes in the organization and maintenance of corporate PACs? Finally, does the First Amendment allow regulation of soft money contributions to parties by business corporations?

A. Judging Montana Chamber of Commerce v. Argenbright

Current litigation over Montana's corporate electoral speech regulation provides an opportunity to assess the viability of *Bellotti*. In deciding the Montana case, the courts will first have to determine whether *Bellotti* has any continuing precedential force and, if so, how much. They will then have to determine whether the particulars of the Montana law render it constitutionally infirm.

What then of *Bellotti*? It seems that its three pillars have been rendered too weak to support unlimited First Amendment protection for corporate initiative speech. If it is construed to mean that states cannot regulate the electoral speech of business corporations in any way, *Bellotti* is no longer good law. We know that under *Austin* states can regulate the funding of corporate electoral speech for candidates.[326] Nevertheless, *Bellotti* cannot be entirely discarded; *Austin* did not explicitly overrule *Bellotti* and even cited it for precedential authority.

Instead, District Judge Lovell and the appellate courts can make the best sense of *Austin* by reading *Bellotti* narrowly. The precedential value of *Bellotti* could be limited to its precise holding that a *complete ban* on corporate political speech in the context of ballot

325. *See supra* Part III.
326. *See supra* Part II.B.

campaigns is unconstitutional. The Court itself has distinguished *Bellotti* from source-of-funding restrictions on this ground.[327]

Unlike Massachusetts, Montana has not enacted a complete ban on corporate initiative speech. Like Michigan, it has adopted a source-of-funding rule for the speech.[328] Under Montana's law, corporations can still sponsor initiative speech, but it must be paid for by separate funds designated for political purposes. Thus, the law seems to fit more comfortably with *Austin* than with *Bellotti*. And if, as discussed earlier, other people's money corruption occasions no reason to distinguish candidate-centered independent expenditures from initiative-centered expenditures,[329] the Montana law should be judged primarily by reference to *Austin*.

Yet, this does not avoid the constitutional troubles for the Montana law; indeed, *Austin* reveals precisely why the Montana law is constitutionally infirm. Its major defect is that it applies equally to all corporations, with no exception for corporations designed for purposes of advocacy.[330] Both *MCFL* and *Austin* require that advocacy groups organized through the corporate form be allowed to use general treasury funds to finance electoral speech.[331] By failing to distinguish among corporations, the Montana law unnecessarily reaches protected speech where other people's money corruption is not threatened. As a result, it violates the First Amendment overbreadth doctrine.

Under the First Amendment, a law is facially invalid if it "does not aim specifically at evils within the allowable area of state control" and "sweeps within its ambit other activities that . . . constitute an exercise" of free speech.[332] Although the Montana legislature was within its regulatory authority in imposing source-of-funding limits on business corporations, it exceeds its boundaries by reaching the speech of non-profit advocacy groups. (Some observers

327. *See* Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 259 n.12 (1986).

328. *See supra* note 33 and accompanying text.

329. *See supra* notes 174-81 and accompanying text.

330. MONT. CODE ANN. § 13-35-236(1) (1997).

331. *See supra* notes 51-73 and accompanying text; *see also* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 651-65 (1990).

332. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (invalidating anti-picketing law because it did not exempt peaceful picketing).

of Montana politics have alleged that the legislature, forced to enact a law regulating corporate initiative speech by a ballot measure, crafted the law broadly to apply to non-profit advocacy groups in a purposeful effort to make it constitutionally untenable.[333])

The Montana plaintiffs do not count among them any non-profit advocacy groups, but the party business corporations can litigate the rights of non-parties since their claims involve a First Amendment overbreadth challenge.[334] Due to the chilling effect of overbroad laws on protected speech caused by a fear of prosecution, third parties are allowed to challenge an overbroad statute for facial unconstitutionality.[335]

Montana may contend that any overbreadth in the language of the statute can be remedied in application. Either the state will not prosecute the initiative speech of non-profit advocacy groups financed with general treasury funds, or the courts can preserve such groups' speech rights by determining, on a case-by-case basis, whether the relevant group is appropriately covered by the law. Yet, this defense is not enough to salvage the statute. Non-profit advocacy groups cannot depend on the vague promise of non-prosecution, and "gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications . . . does not respond sufficiently to the peculiarly vulnerable character of activities protected by the First Amendment."[336] In both cases, the chilling effect on non-profit advocacy groups remains.

To salvage the Montana law, the courts can sever and declare unconstitutional the law's facial application to advocacy corporations. The law's application to business corporations however is appropriately in pursuit of preventing other people's money corruption. Nevertheless, the law remains too broad because it does not provide an exemption for business corporations that can show unanimous shareholder approval for their initiative speech. Recall that *Austin*'s version of corruption, if taken to its logical extension,

333. *See* Peter Callaghan, *Limits Simply Will Not Work on Ballot Propositions*, NEWS TRIBUNE (Tacoma, WA), Nov. 2, 1997, at C12.

334. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

335. *See id.*

336. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27, at 1023 (2d ed. 1988).

invites an evidentiary inquiry into the existence of shareholder support. If all the shareholders approve of the speech—and in close corporations covered by the Montana regulation such approval may be obtained relatively easily—the corporation should be allowed to make its initiative expenditures. The courts should either practice the art of the judicial craft by creating a corporate defense to prosecution, or hold the law to be insufficiently tailored to meet other people's money corruption.

B. Corporate PACs: Fund-Raising and Administration

The post-*Bellotti* developments do not only require a rethinking of corporate initiative speech regulation. They may also require reassessment of the design and administration of corporate PACs. If *Austin*'s conceptualization of corruption and the First Amendment analogy to organizational dues cases are valid, two questions arise. First, do the organizational dues cases suggest constitutional ways in which a corporation can raise PAC money? Second, can corporations continue to pay the administration fees of their PACs through general treasury funds?

If laws regulating the source of funding for corporate electoral speech are constitutional, it is possible that more states will follow Michigan and Montana in adopting regulation. In turn, corporations will increasingly rely on PACs to finance speech. Currently, PACs solicit money from officers, employees, and shareholders[337] and they can be quite successful at raising substantial sums. Figures compiled a decade ago—and which have certainly been far surpassed since—show that corporate PACs raised over $50 million for congressional candidates alone in 1988.[338] In his concurrence in *Austin*, Justice Brennan noted that "the segregated fund requirement [in Michigan] had not burdened significantly the [Chamber of Commerce's] speech with respect to candidate-oriented expenditures."[339]

Business corporations, like unions, can compile the funds necessary to advance political causes, such as ballot initiatives, by any

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337. *See* 2 U.S.C. § 441(b)(4) (1994) (detailing from whom corporations can solicit PAC money). In practice, shareholders are rarely solicited.

338. *See* LOWENSTEIN, *supra* note 2, at 591.

339. *Austin*, 494 U.S. at 676 n.7 (Brennan, J., concurring).

number of means. For example, they can send direct solicitations to employees, officers, and shareholders.[340] Assuming business corporations need to raise even more money under a system of increasing regulation of corporate electoral speech funding, they have several additional options. One possibility is to deduct small amounts from dividend payments to stockholders.[341] Another is to deduct from the employee payroll, with the informed consent of the employee. Like unions,[342] business corporations who raise money by these alternative methods should be required to offer stockholders and employees the ability to opt out of supporting the PAC. To avoid the corruption of converting other people's money, business corporations must afford stockholders and employees the right to abstain.

In a major corporation, such as the Walt Disney Company, even a small deduction from shareholder dividends could raise a substantial amount of money. Disney has approximately two billion shares in circulation.[343] Thus, a fraction of a cent deduction from each dividend payment would enable the corporation to fund a considerable amount of electoral speech. Dividend withholdings will be reflected in the stock price, of course, and potentially diminish shareholder value. Good corporate management will take market considerations into account when financing corporate electoral speech. And corporations remain able to raise money through ordinary voluntary contributions solicited from employees, officers, and shareholders.

Nevertheless, recognition of *Austin* corruption may mean further limits ought to be imposed on the administration of corporate PACs. Under federal law, corporations can use general treasury funds to sponsor corporate PACs and pay for their administrative expenses.[344] In the words of Professor Lowenstein, "[t]his is no trivial advantage,

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340. *See* 2 U.S.C. § 441b(b)(4)(C).

341. Granted, corporations may be hesitant to directly charge shareholders for electoral speech expenditures. But this does not speak to the constitutionality of doing so.

342. *See supra* Part III.C.3.

343. THE WALT DISNEY COMPANY, 1997 ANNUAL REPORT 61 (as of Sept. 30, 1997, 683,000,000 shares issued; as of publication, stock had since split three for one; *see Disney's 3-for-1 Split Approved*, WALL ST. J., June 10, 1998, at B5).

344. *See* 2 U.S.C. § 441b(b)(2)(C); *see also* LOWENSTEIN, *supra* note 2, at 591.

as the administrative expenses often exceed the money received from contributors and donated [by the PAC] to candidates."[345]

If we accept the proposition that corruption arises from the conversion of shareholder's money when general treasury funds of a business corporation are used for electoral speech,[346] it would seem to cast a long shadow on corporate funding of PACs. After all, both the administration of a PAC and independent spending on politics accomplish the same goal: furthering political speech in elections. If they are both financed by general treasury funds, they work the same evil of corruption.[347] For stockholders, there is little difference between seeing their money support a PAC that distributes money to electoral causes they object to, and seeing their money go directly towards electoral expenditures. Corporations could still establish PACs in their name, but shareholders would not be required to pay for them.

It is a reasonable extension of the notion of corruption by conversion to require corporate PACs to finance their operations in the same way unaffiliated PACs do, through the raising of money from voluntary contributors. Corporate PACs, however, face limitations that outside groups do not. Corporate PACs have a limited scope of people they can solicit money from, whereas an unaffiliated PAC can solicit virtually anyone.[348] It may be that this discrimination is also subject to revision in light of *Austin*'s corruption standard; soliciting money from outsiders poses no threat of corruption by conversion (although it may pose other dangers). In any case, shareholders should not be required to support the administration of a corporate PAC without the opportunity to abstain.

C. Soft Money

Post-*Bellotti* developments also invite campaign finance reforms on corporate soft money contributions. "Soft money" refers to the

345. LOWENSTEIN, *supra* note 2, at 591.
346. Writing before *Austin*, but after *MCFL*, Professor Nicholson also suggested that limits on corporations using general treasury funds to pay PAC administrative expenses "should be found constitutional on the authority of *Massachusetts Citizens for Life*." *See* Nicholson, *supra* note 44, at 603.
347. *See* Brudney, *supra* note 154, at 272 n.133.
348. *Compare* 2 U.S.C § 441a, *with* 2 U.S.C. § 441b(b)(4).

contributions corporations, individuals, and others give to the political parities, ostensibly for party-building activities. It is distinct from "hard money": direct contributions to candidates. Soft money given for the party's use (not the candidates'), has no limits under federal law, and is generally unregulated.[349] Soft money has only recently become the subject of campaign finance reform debate, due mainly to the watershed election of 1996.[350]

Two features of the 1996 election brought the issue of soft money to the fore. First, the election season witnessed an unprecedented amount of soft money donations to the parties. During the race, the Democratic Party raised and spent approximately $120 million in soft money and the Republican Party raised and spent nearly $150 million.[351] Much of this spending was on issue advertisements specifically designed to help the presidential candidates. Second, the presidential candidates themselves organized massive soft money fund-raising efforts to finance the party advertisements. The candidates admitted to donors that their soft money contributions were essential to furthering the candidates' electoral chances—indeed, that was their main selling point.[352] Not only did the candidates actively raise soft money, they and their campaigns conceived of the ads and managed their production and distribution. President Clinton, for example, was called "the day-to-day operational director of our TV-ad campaign" by his campaign advisor, Dick Morris.[353]

The party issue advertisement campaigns enabled the candidates to circumvent the public financing bargain each had agreed to. Both candidates agreed to voluntary spending limits in exchange for public funds. These thinly-veiled endorsements were essential parts of the

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349. *See* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324-25 (1998) [hereinafter *Soft Money*].

350. *See generally id.* at 1332-36.

351. *See* David Schultz, *Revisiting* Buckley v. Valeo: *Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 92-93 (1998); *see also Soft Money*, *supra* note 349, at 1333.

352. *See* Jill Abramson, *Tape Shows Clinton Involvement in Party-Paid Ads*, N.Y. TIMES, Oct. 21, 1997, at A20 (detailing President Clinton's soft money fund-raising pitch to potential contributors). *See also*, *Soft Money*, *supra* note 349, at 1334.

353. RICHARD S. MORRIS, BEHIND THE OVAL OFFICE: WINNING THE PRESIDENCY IN THE NINETIES 144 (1997).

campaigns but did not count against the spending limits. The candidates' efforts appear to reflect a conspiracy by each to evade the voluntary spending limits.

The coordination of soft money-financed issue advertisements with presidential candidates raises numerous issues, most notably a potential for the type of *quid pro quo* corruption the Court referred to in *Buckley* as a justification for contribution limits. If candidates make direct appeals for huge, six-figure soft money donations that go to support their campaigns, they can become beholden to larger contributors in precisely the same way as if the money was contributed as hard money. But whether or not campaign reformers ban soft money contributions outright, *Austin*'s notion of corruption would justify efforts to regulate such contributions from corporations.

The current lack of regulation means that business corporations can—and do—contribute large sums to the major political parties in the form of soft money. Corporate soft money can be used by the parties to pay for up to thirty-five percent of their administrative expenses in presidential election years,[354] and no doubt corporate soft money was used in 1996 to finance party issue advertisements.

Under *Austin*, a reasonable source-of-financing rule regarding corporate soft money contributions to parties could survive constitutional scrutiny. Prohibiting general treasury funds from being contributed to the parties as soft money would meet the state's goal of preventing corruption by conversion. Indeed, current rules allow such corruption by enabling corporations to use general treasury funds for soft money contributions.

V. CONCLUSION

In looking back to *Bellotti*, we can see that the basic holding of the Court—that complete bans on corporate initiative speech are unconstitutional—remains intact. The structure of the Court's reasoning, however, has been substantially weakened. Of the three main pillars relied upon by the Court, each has been significantly modified or weakened by post-*Bellotti* developments. Conceptually, corruption has been redefined, or rather a new layer added to the old. The notion that corruption can be caused by the wrongful political use of

354. *See* 11 C.F.R. § 106.5(b)(2)(i) (1998).

other people's money slowly developed, from a mention in *Buckley* to extended discussions in *Massachusetts Citizens for Life* and *Austin*. Adding to the traditional conception of corruption as financial *quid pro quo* between contributor and candidate, *MCFL* and *Austin* recognized the danger of a different type of corruption posed by the separation of ownership and control in the modern corporation. Although *Austin*'s language is susceptible to varying interpretation, I have argued here that the core evil that the holding is designed to combat is corruption by conversion of shareholder money.

Bellotti's evidence-of-corporate-dominance pillar is perhaps the weakest of any remaining part of the Court's reasoning. Subsequent cases have avoided looking at such evidence perhaps because of the inability of empirical research to answer the question definitively. Several scholarly attempts have been made, but it remains difficult to isolate the effect of corporations as corporations rather than as persuasive, reason-giving participants in public debate. The potential for corporate domination over the initiative process may perhaps only be understood by reference to the larger context of voter attributes and the mass media environment. In the wake of *Austin*, with its emphasis on shareholders' rights, it appears however that *Bellotti* and its academic respondents were asking the wrong question.

If the evidentiary pillar of *Bellotti* has crumbled, the theoretical pillar is in need of modification to reflect *Austin*'s concern with shareholder rights. In terms of First Amendment theory, the Court should no longer emphasize the controversial notion of hearers' rights in the marketplace of ideas. The most notable contender to the hearers' rights theory, constitutive theory, supports regulation of the corporate voice along *Austin* lines, despite the defense offered by Professor Redish and Mr. Wasserman. We may be able to make the best sense of *MCFL* and *Austin*, however, by crafting a First Amendment theory of shareholder rights by analogy to organizational dues cases. Here the focus is shifted from the rights of the corporation to the rights of the corporation's owners.

For the courts to adequately assess the constitutionality of Montana's regulation of the corporate voice in the initiative process, they must take into account the Court's moves beyond *Bellotti*. The state will attempt to use those moves to buttress its case, but those same moves lead to the conclusion that Montana's law on its face violates the First Amendment due to overbreadth. It is also conceivable that those moves will enable further regulation of corporate PAC funding and administration expenses, and can also justify limits on corporate soft money contributions to parties. These potential reforms suggest that while the Court has moved beyond *Bellotti* in allowing regulation of the corporate voice in politics, there may still be far to go.