INTRODUCTION

The Michigan Constitution empowers the Michigan legislature to "enact laws to preserve the purity of elections . . . [and] guard against abuses of the elective franchise." The Michigan legislature has exercised this power since 1913 when it enacted the Corrupt Practices Act which prohibited corporate contributions and expenditures in connection with political elections. The Act was passed to remedy what the Michigan legislature had found to be an abuse of Michigan's electoral process — the corruptive influence of "large aggregations of capital" controlled by corporations upon the nomination or election of political candidates. Michigan continues to preserve the purity of its elections by way of section 54(1) of the Michigan Campaign Finance Act ("Act") which prohibits corporations from using corporate treasury funds to make independent expenditures in support of or in opposition to the election of a candidate for Michigan office.

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   No officer, director, stockholder, attorney, agent or any other person, acting for any corporation or joint stock company, whether incorporated under the laws of this or any other state or any foreign country, except corporations formed for political purposes, shall pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation to any candidate or to any political committee whatever for the payment of any election expenses.
   Id. See also People v. Gansley, 191 Mich. 357, 363-65, 158 N.W. 195, 197 (1916) (holding that Corrupt Practices Act applies to local referenda as well as candidate elections because the "supposed abuse to be corrected is as apparent in one case as the other.").


   Except with respect to the exceptions and conditions in subsection (2) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal
In *Austin v. Michigan Chamber of Commerce*, the United States Supreme Court addressed first and fourteenth amendment attacks on section 54(1) of the Michigan Campaign Finance Act. As applied to the Michigan Chamber of Commerce, a nonprofit corporation comprised of a membership including profit-making business corporations, the Court held that section 54(1) was constitutional because it is narrowly tailored to serve a compelling state interest. The Court found that the purpose of the Michigan legislature in enacting section 54(1) was to prevent corporate wealth from distorting the marketplace of political ideas. The Supreme Court's holding in *Austin* is significant because it sheds light on the constitutional parameters of corporate political speech. The holding is also important because it demonstrates that the Supreme Court is now clearly willing to defer to the legislative judgment that unrestricted corporate spending in the electoral process is a danger to the democratic process that must be remedied even though corporate first amendment expressive rights are thereby implicated.

This Note discusses the history of the federal campaign finance laws and examines the United States Supreme Court decisions which adjudicated the constitutionality of the Federal Campaign Finance Act and similar state legislation. This Note asserts that by upholding the Act, the Supreme Court in *Austin* adhered to precedent and properly deferred to legislative judgment justifying the infringement by the Act upon corporate political speech. This Note further asserts that the Court should continue to sustain, as against facial attack, legislation regulating corporate speech in the electoral process and continue to judge such legislation on a case by case basis.

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7. The first amendment to the United States Constitution provides in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. Const.* amend. I.
8. The fourteenth amendment to the United States Constitution provides in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, § 1.
10. *Id.*
11. *Id.* at 1397.
12. See *infra* notes 289-317 and accompanying text.
13. See *Austin*, 110 S. Ct. at 1397-98.
15. See *infra* notes 77-101, 102-219 and accompanying text.
16. See *infra* notes 220-60, 269-88 and accompanying text.
17. See Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 377
nally, this Note considers what Austin portends for governmental regulation of corporations in the election and referendum processes.\textsuperscript{18}

**FACTS AND HOLDING**

The Michigan State Chamber of Commerce ("Chamber") is a multi-purpose, nonprofit, membership corporation which was formed pursuant to the laws of Michigan in 1959 to promote the interests of the business community.\textsuperscript{19} Of the 8000 members of the Chamber approximately seventy-five percent are for-profit business corporations.\textsuperscript{20}

A special election was held on Monday, June 10, 1985, to fill a seat in the Michigan House of Representatives.\textsuperscript{21} The Chamber sought to make a public statement in support of one of the candidates in the special election through a one-quarter page paid advertisement in the June 9, 1985, Grand Rapids Press.\textsuperscript{22} Although the Chamber could have paid for the advertisement through a segregated fund, the Michigan State Chamber Political Action Committee ("Chamber PAC"),\textsuperscript{23} it sought to pay for the advertisement out of its general

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\textsuperscript{18} See infra notes 289-317 and accompanying text.


\textsuperscript{20} Id. Of the 8000 Chamber members, approximately 15% employ 10 individuals or less; 57% employ 50 individuals or less; 80% employ 100 individuals or less; and 20% employ 100 individuals or more. Brief of Appellee Michigan State Chamber of Commerce at 5, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569) (LEXIS, Genfed library, Briefs file) (pagination in accordance with LEXIS Screens). In Michigan, there are approximately 250 local chambers of commerce, each a separate and independent legal entity. However, there is a "working relationship" between the state and local chambers on legislative, regulatory and other issues. Joint Appendix at 124a, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (No. 88-1569) (trial testimony of E. James Barrett, President of the Michigan State Chamber of Commerce and Treasurer of its Political Action Committee).

\textsuperscript{21} Brief for Appellants at 7.

\textsuperscript{22} Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 398 (W.D. Mich. 1986). The Grand Rapids Press, the sole daily newspaper in the area, has a circulation of 140,000. Id. at n.1. The candidate the Chamber wished to support was Richard Bandstra; his opponent was Robert Kolt. Joint Appendix at 57a (Plaintiff’s Exhibit 13).

\textsuperscript{23} Brief for Appellants at 7, n.12. The Michigan Campaign Finance Act ("Act")
treasury funds. The payment thus qualified as an independent expenditure and was prohibited under the Michigan Campaign Finance Act.

Because a violation of the ban on corporate independent expenditures in a candidate election constitutes a felony, before publishing the advertisement the Chamber brought an action in the United States District Court for the Western District of Michigan seeking declaratory and injunctive relief. The Chamber challenged the constitutionality of the section 54(1) prohibition on corporate independent expenditures as violative of its equal protection and free expression rights under the United States and Michigan constitu-

allows corporations to make expenditures from a separate segregated fund, commonly known as a political action committee ("PAC"). Section 169.255(1) provides:

A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.

MICH. COMP. LAWS ANN. § 169.255(1) (West 1989). Under the Act, for a fund established by a nonprofit corporation, only the following persons may be solicited to make contributions to the fund:
(a) Members of the corporation who are individuals.
(b) Stockholders of members of the corporation.
(c) Officers or directors of members of the corporation.
(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

MICH. COMP. LAWS ANN. § 169.155(3) (West 1989).

25. Brief for Appellee at 5. The Act defines "expenditure" as follows:
(1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question.
(2) Expenditure includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage, or defeat of a ballot question.

MICH. COMP. LAWS ANN. §§ 169.206(1) to (2) (West 1989). An expenditure is considered independent if it "is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." MICH. COMP. LAWS ANN. § 169.209(1) (West 1989). A committee is defined as a group that "receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate." MICH. COMP. LAWS ANN. § 169.203(4) (West 1989).

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

MICH. COMP. LAWS ANN. § 169.254(4) (West 1989).
On June 24, 1985, the district court entered an order denying the motion of the Chamber for a preliminary injunction. On September 3, 1986, the district court issued an opinion upholding the constitutionality of the section 54(1) ban on corporate independent expenditures. The district court held that section 54(1) was narrowly tailored to serve the compelling state interest of "preventing corruption or the appearance of corruption in the electoral process," the so called quid pro quo. Quid pro quo corruption refers to the giving of campaign contributions directly to a candidate in exchange for political favors.

27. Brief of Appellee at 5-6. Article I, section 5 of the Michigan Constitution provides, "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." MICH. CONST. art. I, § 5.


29. Michigan Chamber of Commerce, 643 F. Supp. at 402, 404-05. The court, noting that the regulations placed on corporate independent expenditures are more restrictive than those placed on individuals, stated that the difference reflected the judgment of the Michigan legislature that the "particular legal and economic attributes of corporations [call for more restrictive regulation which] ... warrants considerable deference ... [and] ... courts should not second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." Id. at 403-04 (quoting Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 209-10 (1982)). Furthermore, the court stated that the "complaint of financial restrictions and limitations placed upon ... [the Chamber] by this legislation should more properly be addressed to the state legislature." Michigan Chamber of Commerce, 643 F. Supp. at 404.

30. See supra notes 7-8. Because Article I, §§ 2, 3, and 5 of the Michigan Constitution have been construed identically with the first and fourteenth amendments to the United States Constitution, the District Court, Court of Appeals for the Sixth Circuit, and United States Supreme Court applied only first and fourteenth amendment analysis in Austin. See Austin, 110 S. Ct. at 1395; Michigan State Chamber of Commerce v. Austin, 856 F.2d 783, 786 (6th Cir. 1988); Michigan State Chamber of Commerce, 643 F. Supp. at 401; Advisory Opinion on Constitutionality of 1975 P.A. 227, 396 Mich. at —, 242 N.W.2d at 9-10, 14 (1976).

31. Id. at 402-03.

32. See Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 207 (1982). In addition to preventing corruption or the appearance of corruption, the State of Michigan suggested two additional state interests:

(1) protecting the interests of those shareholders who may oppose the use of general treasury funds (of which they have some ownership) to support or oppose a particular candidate; and
On September 15, 1988, the United States Court of Appeals for the Sixth Circuit reversed the district court decision. The court of appeals found that section 54(1) violated the first amendment because the independent expenditures did not "pose the threat or appearance of corruption." In light of an intervening decision by the United States Supreme Court, the Sixth Circuit stated that the district court had defined the issue too broadly. The court of appeals reasoned that because nonprofit corporations do not amass great amounts of capital in the economic marketplace which can yield an unfair advantage in the political marketplace, there existed an insufficient "threat or appearance of corruption" to qualify as a compelling state interest.

On March 27, 1990, the United States Supreme Court reversed the Sixth Circuit. Justice Marshall, writing for the majority, acknowledged that corporate expressive rights were implicated in the case. However, the Court held that section 54(1) was constitutional as applied to the Chamber because the provision was a narrowly tai-
lored means to achieve a compelling state interest.39

The Court, having found that an independent expenditure in support of a political candidate is political speech "at the core of our electoral process and of the First Amendment freedoms," determined that section 54(1) must be analyzed under strict judicial scrutiny.40 Even though the Chamber was allowed to make independent expenditures through a separate segregated fund, the Court found that this alternative burdened freedom of expression because the Chamber was not free to spend its general treasury funds in support of a political candidate.41 Moreover, the attendant costs involved in administering the segregated fund also burdened freedom of expression because the general treasury funds the Chamber had used to administer the segregated fund could otherwise have been used to directly engage in political speech.42

The Chamber had argued that state concern about "corporate domination" of the electoral process was insufficiently compelling to justify the prohibition on corporate independent expenditures.43 The Chamber had asserted that the risk of the fact or appearance of corruption is not present in the context of independent expenditures to the extent that they are present when a corporation makes a direct contribution to a candidate.44 The Court, however, found it unnecessary to address whether the prevention of quid pro quo corruption was a compelling state interest.45 The Court stated that the section 54(1) prohibition on corporate independent expenditures was aimed at preventing a different type of corruption in the electoral process: "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."46 The Court found this to be a "sufficiently compelling rationale" to support the ban on corporate independent expenditures.47

The Court dismissed the contribution/expenditure distinction by stating that just as direct corporate contributions to a candidate can

39. Id.
40. Id. at 1396 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).
41. Austin, 110 S. Ct. at 1396.
42. Id. at 1396-97. See Brief of Appellee at 22. The Michigan State Chamber Political Action Committee is the largest state chamber of commerce PAC in states which forbid direct corporate contributions to political candidates. Joint Appendix at 161a.
43. Id.
45. Austin, 110 S. Ct. at 1397.
46. Id.
47. Id. at 1398.
unfairly skew an election, so too can corporate independent expenditures.\textsuperscript{48} The Court emphasized that the mere fact that corporations may amass large aggregations of wealth was not the sole justification for section 54(1).\textsuperscript{49} Rather, the Court noted that the ban on independent expenditures is warranted because corporations are able to accumulate large treasuries due to the state-conferred benefits that are attendant to the corporate form.\textsuperscript{50}

The Court found the Act to be “precisely targeted” to prevent the “distortion” caused by corporate independent expenditures while allowing corporations to engage in political speech through separate segregated funds.\textsuperscript{51} The Court rejected an argument that section 54(1) was overinclusive, stating that the applicability of section 54(1) to all corporations is justified because all corporations have the potential to distort the electoral process.\textsuperscript{52}

The Court similarly rejected an argument that section 54(1) was underinclusive.\textsuperscript{53} The Court reasoned that because the compelling interest embodied in section 54(1) is to “counterbalance those advantages unique to the corporate form,” the mere fact that unincorporated associations are not prohibited from making independent expenditures does not diminish the legislative interest in regulating corporations.\textsuperscript{54}

\textsuperscript{48} Id. A “contribution” is a payment made directly to a person to influence the election of a political candidate. \textit{See} \textsc{Mich. Comp. Laws Ann.} \textsection 169.204(1) (West 1989). An “independent expenditure” is a payment made which is not influenced by, or made at the request of another person. \textit{See} \textsc{Mich. Comp. Laws Ann.} \textsection 169.209(1) (West 1989). \textit{In Buckley} the Court struck down restrictions on individuals’ expenditures and upheld restrictions on individuals’ contributions in connection with federal elections. \textit{Buckley}, 424 U.S. 1, 29, 51 (1976) (per curiam). \textit{See also infra} notes 127-44 and accompanying text.

\textsuperscript{49} \textit{Austin}, 110 S. Ct. at 1398.

\textsuperscript{50} Id. The Court listed “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets, as state-conferred benefits that allow corporations to utilize resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.” Id. at 1397.

\textsuperscript{51} Id. at 1398.

\textsuperscript{52} Id. The Chamber had argued that section 54(1) was overinclusive because closely held corporations and some publicly held corporations do not accumulate vast treasuries. Id.

\textsuperscript{53} Id. at 1400. The Chamber had argued that section 54(1) was underinclusive because it did not restrict the independent expenditures of unincorporated labor unions, some of which have large treasuries. Id.

\textsuperscript{54} Id. The Court also distinguished labor unions from corporations because union members are not compelled to pay dues for union political speech with which they disagree. Even if union members do not wish to support political speech, they continue to benefit from the duties of the union as their representative in collective bargaining situations. Thus, the voluntary contributions paid by union members into a political fund accurately reflect the members’ support for the political statements made by the union. On the other hand, if corporations were not required to make expenditures through a segregated fund, political speech of the corporation would not ac-
Justice Brennan concurred, expressing the view that the Court’s opinion was consistent with precedent.55 Justice Brennan stated that the Court had previously acknowledged the “legitimacy of [legislative] concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.”56 Moreover, he noted that the Court was especially wary of direct corporate spending because the funds in the general treasury of a corporation are not indicative of the “popular” support for the its political speech.57

Justice Brennan was concerned about Chamber members and corporate shareholders whose money was being drawn from general treasury funds to pay for political speech which they might oppose.58 Justice Brennan asserted that the “[s]tate surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber’s political

accurately reflect shareholder support because the general treasury funds would be spent for political speech without the shareholders’ consent. Id. at 1400-01.

The Chamber had argued alternatively that even if the Act was constitutional, it could not be applied to the Chamber, a nonprofit, ideological corporation. The Court rejected the this argument, holding that the Chamber did not qualify as a nonprofit-ideological corporation. Id. at 1398-99.

The Chamber had also advanced two fourteenth amendment equal protection arguments. The Court rejected both arguments, holding that the classifications drawn by the Act were constitutionally sound even under strict scrutiny. The Chamber had first argued that the statute unfairly discriminated against similar entities, that is, corporations and unincorporated associations with large treasuries. The Court summarily dismissed the argument on the same grounds that it had rejected the overinclusiveness and underinclusiveness arguments. The Court stated that the Michigan decision to restrict only corporate independent expenditures was “precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effects of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.” Austin, 110 S. Ct. at 1401-1402.

The second equal protection argument of the Chamber was that the Act unfairly discriminated against non-media corporations because media corporations were exempted from the prohibition on independent expenditures. See Mich. Comp. Laws Ann. § 169.206(3)(d) (West 1989). The Court disagreed, stating that the unique role of the media in American life warranted the exemption. The Court found that the media exemption furthered the compelling state interest of ensuring that the press not be hindered from reporting and commenting on political campaigns. Austin, 110 S. Ct. at 1401-02. But see id. at 1414 (Scalia, J., dissenting). Justice Scalia argued that the “unique role” of the press provided a compelling reason to include them in the prohibition on independent expenditures. Id.

55. Id. at 1402-03 (Brennan, J., concurring). See supra notes 220-60 and accompanying text.


57. Austin, 110 S. Ct. at 1403 (Brennan, J., concurring). The “popular” support Justice Brennan referred to is both the popular support of shareholders within a particular corporation as well as the public at large. Id.

58. Id. at 1403 (Brennan, J., concurring).
Finally, Justice Brennan conceded that the Michigan law is underinclusive insofar as it does not restrict all political expenditures a corporation could make, for example independent expenditures in a state ballot question, or indirect independent expenditures through a segregated fund. However, Justice Brennan went on to state that section 54(1) was not underinclusive when considering that the compelling state interest in enacting the provision was the regulation of independent expenditures in candidate elections.

Justice Scalia vigorously dissented, stating that the Court had wrongly embraced the principle that too much speech is an evil. Justice Scalia declared that the Court's opinion conflicted with the "absolutely central truth of the first amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." Justice Scalia stated that the fact that state law confers special advantages upon corporations which allow them to accumulate large treasuries, does not lead to the conclusion that the state may categorically deny corporate first amendment rights. In the first place, Justice Scalia argued, all corporate assets are banned from being used to make political expenditures, not just that particular percentage accumulated by virtue of the state-conferred benefits. Second, he argued that the Court had previously drawn a distinction between political contributions and political expenditures, allowing a ban on the former but invalidating a ban on the latter because independent expenditures did not pose a sufficient danger of corruption to warrant the ban. Furthermore, Justice Scalia as-

59. Id. at 1406 (Brennan, J., concurring). Justice Brennan presented the following example: "A's right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication." Id. (citing Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 YALE L.J. 235, 247 (1981)).
60. Austin, 110 S. Ct. at 1406 (Brennan, J., concurring). Section 169.254(3) provides in pertinent part, "Nothing in this section shall preclude a corporation . . . from making an independent expenditure in any amount for the qualification, passage, or defeat of a ballot question." MICH. COMP. LAWS ANN. § 169.254(3) (West 1989).
61. Austin, 110 S. Ct. at 1406 (Brennan, J., concurring).
62. Id. at 1406-07 (Brennan, J., concurring).
63. Austin, 110 S. Ct. at 1408 (Scalia, J., dissenting). Justice Scalia began his dissent deriding the Court's opinion with the following quote:
Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: —"
   Id.
64. Id. (Scalia, J., dissenting).
65. Id. at 1408-09 (Scalia, J., dissenting).
66. Id. at 1409 (Scalia, J., dissenting).
67. Id. at 1409-10 (Scalia, J., dissenting). The distinction Justice Scalia was ref-
sserted that corporate independent expenditures in support of a candidate would probably do the candidate more harm than good in the public eye.68

Justice Scalia also accused the Court of discovering a new type of corruption to justify the prohibition on corporate independent expenditures — what he called the “New Corruption.”69 He stated that under the Court’s reasoning, anything it considers “politically undesirable” can be transformed into political corruption “by simply describing its effects as politically ‘corrosive,’ which is close enough to ‘corruptive’ to qualify for government regulation.”70 Justice Scalia asserted that the Court’s opinion was based on the flawed proposition that corporate expenditures must be calibrated to “reflect actual public support for the political ideas espoused.”71

Justice Scalia next addressed the Court’s justification for prohibiting all corporations from making independent expenditures, which was that all corporations present the potential for distortion.72 Justice Scalia admonished that “for the first time since Justice Holmes left the bench,” the Court had held that a ban on speech is “narrowly enough tailored if it extends to speech that has the mere potential for producing social harm.”73 Justice Scalia, acknowledging that the Michigan legislature may have had good intentions, submitted that the “premise of our Bill of Rights . . . is that there are some things — even some seemingly desirable things — that government cannot be trusted to do.”74 The very first of these, he stated, is restricting speech in order to establish a “fair political debate.”75 Justice Scalia concluded by asserting that the phrase “too much speech” is foreign to the first amendment, and that the American people can “separate the wheat from the chaff” without the aid of paternalistic legislation.76

68. Id. (Scalia, J., dissenting). Justice Scalia quipped that he “could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT&T or General Motors.” Id.
69. Id. at 1411 (Scalia, J., dissenting). See supra note 46 and accompanying text.
70. Austin, 110 S. Ct. at 1411 (Scalia, J., dissenting).
71. Id. (Scalia, J., dissenting).
72. Id. at 1398 (Scalia, J., dissenting).
73. Id. at 1413 (Scalia, J., dissenting).
74. Id. at 1415 (Scalia, J., dissenting) (emphasis omitted).
75. Id. (Scalia, J., dissenting).
76. Id. at 1416 (Scalia, J., dissenting). Justice Kennedy also dissented, finding the Act to be constitutionally suspect in two respects. First, he stated that the Act impermissibly restricts speech based on its content. Second, Justice Kennedy stated that the Act discriminates “on the basis of the speaker’s identity.” Justice Kennedy asserted
BACKGROUND

HISTORY OF THE FEDERAL CAMPAIGN FINANCE LAWS

There is now little question that spending money to engage in political speech commands first amendment protection. Nonetheless, the government may regulate political expression upon the showing of a compelling state interest.

Such a state interest arose during the industrial revolution when corporations began to amass huge amounts of capital, and with these "war chests" corporations "unduly influenced politics, an influence that the identity of the speaker, in this case a nonprofit corporation, does nothing to lessen the degree of protection that "core political speech" deserves. Id. at 1418-19 (Kennedy, J., dissenting).

Justice Kennedy understood the Court's opinion to mean that because some corporations can afford to publicly express their political views, government may prohibit all corporate speech to prevent it from "dominating political debate." Justice Kennedy found this reasoning unsound for two reasons. First, he asserted that section 54(1) is overinclusive because it covers all corporations. Second, he asserted that the Court wrongly assumed that Michigan has a compelling state interest in "equalizing" political speech. Id. at 1421 (Kennedy, J., dissenting).

77. See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam). The First Amendment to the United States Constitution provides in part:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

U.S. CONST. amend. I. But see Wright, Politics and the Constitution: Is Money Speech? 85 YALE L.J. 1001 (1976). Judge J. Skelly Wright argues that the Supreme Court wrongly jumped to the conclusion that money is speech deserving of core first amendment protection. In Judge Wright's view, equating money with speech is a misconception of the first amendment. "[N]othing in the First Amendment," wrote Judge Wright, "commits us to the dogma that money is speech." Id. at 1005. Judge Wright asserts that the use of money in politics should be viewed as a "mere vehicle" for expressing political speech much like the burning of a draft card to express one's political views. Id. at 1007 (citing United States v. O'Brien, 391 U.S. 367, 382 (1968)). In O'Brien, the Court deemed the burning of a draft card not to be pure speech, but merely "speech-related" conduct. O'Brien, 391 U.S. at 382. From this, Judge Wright concluded that the expenditure of money to express a political view is deserving of less than "pure speech" first amendment protection. Wright, 85 YALE L.J. at 1007. Judge Wright was a member of the United States Court of Appeals for the District of Columbia panel that had found the contribution and expenditure limits in the Federal Election Campaign Act constitutional. See Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), aff'd in part and rev'd in part, 424 U.S. 1 (1976) (per curiam) (interpreting the Federal Election Campaign Act codified as amended at 2 U.S.C. §§ 431-55 (1988)). See also, Buckley, 424 U.S. at 263 (White, J., dissenting) (remarking, "[A]s it should be unnecessary to point out, money is not always equivalent to or used for speech, even in the context of political campaigns.").

78. See Ex parte Yarbrough, 110 U.S. 651 (1884). In Yarbrough, the Supreme Court found authority in the Constitution to prevent "corruption and fraud" in the congressional electoral process in article I, section 4, the necessary and proper clause, and in the implied powers of Congress to preserve the republican form of government. Id. at 660, 666. See also Burroughs v. United States, 290 U.S. 534, 545 (1934) (extending congressional authority to monitor presidential and vice-presidential elections by enacting corrupt practices legislation). See generally, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 627-73 (1970) (examining the role of government in promoting the freedom of expression).
not stopping short of corruption."39 Responding to this concern, in 1905 President Theodore Roosevelt remarked in his annual message to Congress that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law."40 Shortly thereafter Congress passed the Tillman Act of 1907 which barred national banks and other federally-chartered corporations from making contributions in any political election and prohibited all corporations from making contributions to any candidate for federal office.41 The Tillman Act was designed to (1) prevent quid pro quo arrangements between corporations and federal office holders,42 (2) "prevent the subversion of the integrity of the electoral process, . . . [and] (3) sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government."43

In 1910, Congress enacted a law requiring the disclosure of corporate independent expenditures made in connection with congressional elections.44 In 1911, Congress placed overall expenditure ceilings on congressional elections and prohibited candidates from promising employment in exchange for political support.45 Congress acted again in 1918, creating criminal penalties for offering or soliciting inducements to influence voting.46

In 1925, Congress enacted the Federal Corrupt Practices Act,


80. UAW, 352 U.S. at 572 (quoting 40 Cong. Rec. 96 (1905) (statement of President Theodore Roosevelt)). President Roosevelt said further that corporate "directors should not be permitted to use stockholders' money for such [political] purposes." UAW, 352 U.S. at 572.


[...that it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.]

Id. (now codified in amended form at 2 U.S.C. § 441b (1988)).

82. See LAW OF POLITICS, supra note 79, at § 1.1.

83. UAW, 352 U.S. at 575. The Tillman Act was upheld in United States v. Brewers Association, 239 F. 163 (W.D. Pa. 1916). The court held that Congress had authority to enact the statute and that the statute was not in violation of the first amendment. Id. at 167-69.


85. UAW, 352 U.S. at 576 (citing 37 Stat. 25).

which revised then existing campaign finance legislation. The Corrupt Practices Act broadened the Tillman Act prohibition on corporate contributions in connection with federal elections by defining a contribution as "anything of value."

The Hatch Act was the next major piece of reform legislation. The Hatch Act restricted the political activity of persons having a connection to the federal government. In 1943, Congress passed the War Labor Disputes Act which prohibited labor unions from contributing to a federal election campaign.

However, the Corrupt Practices Act remained the primary federal campaign finance law until Congress passed the Federal Election Campaign Finance Act in 1971 ("1971 Act"). The 1971 Act had three principal effects. First, it required federal candidates and their political committees to make detailed disclosures of expenditures made in connection with their campaigns as well as contributions received. Second, it established ceilings on campaign expenditures. Finally, it allowed labor unions and corporations to

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It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political office, or for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or for any candidate, political committees, or other person to accept or receive any contribution prohibited by this section. Every corporation which makes any contribution in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation who consents to any contribution by the corporation in violation of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

88. Murphy, supra note 79, at 43. See Act of 1925, ch. 368, 43 Stat. 1070, 1071, §§ 302(d), 302(e) (current version codified at 2 U.S.C. § 441b (1988)).


92. See UAW, 352 U.S. at 578.


94. See LAW OF POLITICS, supra note 79, at § 1.1. See also Murphy, supra note 79, at 44.

95. LAW OF POLITICS, supra note 79, at § 1.1.

96. See Note, Federal Election Commission v. National Conservative Political Ac-
participate in politics by making expenditures from their general treasuries to establish, administer, and solicit contributions for a separate segregated fund, or political action committee. 97

In response to the public outcry stemming from Watergate, Congress passed the Federal Election Campaign Act Amendments of 1974. 98 The 1974 Amendments put strict limits on contributions and expenditures in connection with federal elections, created the Federal Election Commission which was empowered to monitor and enforce the Federal election laws, and provided for optional public financing of presidential general election campaigns. 99 The Federal Election Campaign Act was subsequently amended in 1976 100 after the Supreme Court found that key provisions of the Act were unconstitutional. 101

SUPREME COURT DECISIONS ON CAMPAIGN FINANCE LAWS

The Labor Union Cases

United States v. Congress of Industrial Organizations

In United States v. Congress of Industrial Organizations, 102 the Congress of Industrial Organizations ("CIO") and its President, Mr. Philip Murray, had been indicted for violating section 313 of the Federal Corrupt Practices Act. 103 The defendants had been indicted for publishing a weekly periodical containing an advertisement which urged the members of the CIO to vote for a certain congressional candidate. 104 The periodical and advertisement were paid for by CIO funds. 105 The United States District Court for the District of Columbia dismissed the indictment, holding that "no clear and present danger to the public interest" could be found to justify the infringement on the defendants' first amendment rights. 106
Upon receiving the case on direct appeal from the district court, the United States Supreme Court affirmed the dismissal of the indictment. The Court, however, avoided the constitutional issues, holding that Congress had not intended to prohibit internal union communications such as the one contained in the periodical the defendants circulated to the members of the CIO. However, the Court suggested that it would have found section 313 unconstitutional if the publication in question had been held to be within the prohibition of the statute. Furthermore, the four Justices who concurred in the judgment suggested that had they reached the constitutional issues they would have held section 313 overbroad and in violation of the first amendment.

United States v. UAW

The Court had an opportunity to address the constitutionality of section 610 of the Labor Management Relations Act in United States v. UAW. In that case, the government had indicted a labor union for making expenditures out of its general treasury funds to pay for television broadcasts which endorsed certain congressional candidates. The United States District Court for the Eastern District of Michigan dismissed the indictment and the government filed a direct appeal to the United States Supreme Court.

The Supreme Court reversed the dismissal of the indictment and remanded the case to the District Court without addressing the con-

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107. Id. at 124.
108. Id. at 116. The Court discussed the history of the federal campaign finance laws and noted that those laws were motivated by a congressional desire to destroy corporate influence over elections and prevent corporate officials who had no "moral right" to use corporate funds from making political contributions without stockholder approval. Id. at 113.
109. Id. at 121.
110. Id. at 150, 155. Justice Rutledge wrote the concurring opinion in which Justices Black, Douglas and Murphy joined.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress . . . or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative . . . are to be voted for.

18 U.S.C. § 610 (current version at 2 U.S.C. § 441b (1988)). A labor organization and officer of an organization found in violation of § 610 were subject to fines of not more than $5,000 and $1,000 respectively. Id.
112. UAW, 352 U.S. at 584.
stitutionality of section 610. Justice Frankfurter’s majority opinion ostensibly demonstrated that the Court was sympathetic to congressional concern for the need to regulate corporate and union political expenditures. The dissent, however, expressed the view that “[m]aking a speech endorsing a candidate for office does not . . . deserve to be identified with anti-social conduct.” The dissent argued that first amendment rights cannot be abridged “merely because [the Court] or the Congress thinks the person or group is worthy or unworthy.”

Pipefitters Local Union No. 562 v. United States

In *Pipefitters Local Union No. 562 v. United States*, the pipefitters union had maintained a fund which received payments from union members and in turn made contributions and expenditures in connection with federal elections. The union and three of its officers were convicted in the United States District Court for the Eastern District of Missouri for conspiring to violate section 610. The United States Court of Appeals for the Eighth Circuit affirmed the district court decision, expressing the view that the union fund was merely a subterfuge which allowed the union to make political contributions of union funds in contravention of section 610.

In light of the intervening enactment of the Federal Campaign Finance Act of 1971, the United States Supreme Court reversed the lower court rulings. The Court held that section 610 did not apply to union contributions and expenditures made from segregated political funds which were contributed to voluntarily by the union members. The Court held that the segregated political fund must be separate from union dues and assessments and that solicitation by

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114. *UAW*, 352 U.S. at 592-93. The Supreme Court directed the lower court to consider the source of the funds for the broadcast, the audience the broadcast reached, the content of the broadcast, and the intent with which the broadcast was made. *Id.* at 592.

115. *See*, *e.g.*, *id.* at 570. The Court stated:

> Appreciation of the circumstances that begot . . . [the campaign finance laws] is necessary for its understanding. . . . Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society.

*Id.*


117. *Id.* at 597 (Douglas, J., dissenting).


119. *Id.* at 388.

120. *Id.* at 387.


123. *Id.*
union officials for union member donations to the fund must be made in such a way as to clearly indicate that the donations are for political purposes, and that union members may decline without fear of management reprisal. Once again, the Court failed to elaborate on the constitutional bounds of labor union speech. In his dissent, however, Justice Powell admonished that the Court's holding reversed the trend established in 1907 with the passage of the Tillman Act, "open[ing] the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations."

The Landmark: Buckley v. Valeo

Not long after the 1974 Amendments to the Federal Election Campaign Act went into effect, major provisions of the amendments came under constitutional attack in Buckley v. Valeo. Before considering the specific constitutional challenges, the Court found it necessary to determine, as Justice Stewart asked during oral arguments: "Is money speech and speech money? Or, stated differently, is an expenditure for speech substantially the same thing as speech itself, because the expenditure is necessary to reach large audiences by purchase of airtime or space in print media?" The Court answered the question with a qualified "yes," determining that campaign contributions and expenditures are so related to speech as to "operate in an area of the most fundamental First Amendment activities."

The Buckley decision is significant in part because of the distinction the Supreme Court found between campaign contributions made

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124. Id. at 414.
125. See Murphy, supra note 79, at 46.
127. 424 U.S. 1 (1976) (per curiam). The plaintiffs included Senator James L. Buckley of New York, a U.S. presidential candidate, a potential contributor, a political committee for a presidential candidate, the Mississippi Republican Party, the New York State Conservative Party, the New York Civil Liberties Union, Inc., the Libertarian Party, the Conservative Victory Fund, the American Conservative Union, and Human Events, Inc. Id. at 7-8. The defendants included Secretary of the Senate, Francis R. Valeo, the Federal Election Commission, and other government officials. Id. at 8.
129. Buckley, 424 U.S. at 14. See generally, 3 R. ROTUNDA, J. NOWAK, J. YOUNG, TREATISE ON CONSTITUTIONAL LAW, § 20.51 at 279-80 (1986) [hereinafter ROTUNDA]. See also, Buckley, 424 U.S. at 262 (White, J., concurring in part and dissenting in part) (observing that the Court had wrongly proceeded from the maxim "money talks").
directly to a candidate or directly within a candidate's control, and campaign expenditures made independently in an effort to endorse or oppose a candidate.\textsuperscript{130} The Court upheld the limitations imposed on individual contributions, but struck down the expenditure limitations placed on individuals and groups, and on expenditures by candidates from their personal funds.\textsuperscript{131}

In upholding the contribution limitations,\textsuperscript{132} the Court acknowledged that restricting the amount of money a group or person can spend for political speech purposes "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\textsuperscript{133} However, the Court found that in contrast to limitations on expenditures, the contribution limitations entailed "only a marginal restriction upon the contributor's ability to engage in free communication."\textsuperscript{134} The Court reasoned that a contribution merely "serves as a general expression of support" for a particular candidate but does not "communicate the underlying basis for the support."\textsuperscript{135} Moreover, the Court stated that the "quantity of communication" does not increase with the amount of the contribution, and first amendment expressive rights are not unduly implicated because "the contributor's freedom to discuss candidates and issues" is in no way restricted.\textsuperscript{136} In up-


\textsuperscript{131} Buckley, 424 U.S. at 143. The Court also sustained the public financing provisions and disclosure and reporting requirements of the Act. Id. However, the Court held that the method of appointment of the Federal Election Commission was unconstitutional because it violated separation of powers principles emanating from the Appointments Clause. Id. at 140-41 (citing U.S. Const. art. II, § 2, cl. 2). These aspects of the Buckley decision are beyond the scope of this Note.

\textsuperscript{132} Buckley, 424 U.S. at 29. The contribution limitations upheld by the Court included an individual contribution cap of $1000 made to a single candidate, a political committee contribution cap of $5000 made to a single candidate, and a $25,000 limit on individual contributions made to all candidates within one year. 18 U.S.C. § 608b (Supp. V 1970) (current version at 2 U.S.C. § 441a (1988)). The contribution limitations applied to "persons" which is defined as including "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 18 U.S.C. 591g (Supp. V 1970) (current version at 2 U.S.C. § 431 (1988)).

\textsuperscript{133} Buckley, 424 U.S. at 19.

\textsuperscript{134} Id. at 19-20. The Court stated that "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." Id. at 23. Cf. Coppel v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting) (stating that even though some freedoms may be infringed, the state may prohibit employers from extracting yellow dog contracts from workers); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding fairness doctrine despite implication of licensees' first amendment rights in order to "preserve an uninhibited marketplace of ideas").

\textsuperscript{135} Id. at 21.

\textsuperscript{136} Id.
holding the contribution limitations the Court inquired no further than the primary purpose of the limitations which was "to limit the actuality and appearance of corruption resulting from large individual financial contributions."\textsuperscript{137}

The Court determined that limitations on political expenditures "impose direct and substantial restraints on the quantity of political speech."\textsuperscript{138} Holding that the expenditure limitations burdened expressive rights at the core of the first amendment, the Court applied "exacting scrutiny" and held that the governmental interest of preventing the fact or appearance of corruption was insufficient to justify the expenditure limitations.\textsuperscript{139} The Court emphatically rejected the proposed governmental interest of "equalizing" the ability of groups and individuals to influence the results of candidate elections.\textsuperscript{140}

Justice White dissented, arguing strongly that the Court should have deferred to the congressional judgment that both contributions and expenditures "have corruptive potential."\textsuperscript{141} Justice White found it nonsensical to limit contributions but allow unlimited expenditures to be made on a candidate's behalf, noting that the candidate for whom the expenditure was made "could scarcely help knowing about and appreciating the expensive favor."\textsuperscript{142} Justice White also found it important to maintain public confidence in the electoral process and make it clear that federal elections are not "purely and simply a function of money."\textsuperscript{143} Justice White maintained that the limitation on expenditures was simply a content-neutral, constitutionally permissible regulation of the use of money in the context of federal elections.\textsuperscript{144}

\textsuperscript{137} Id. at 26.
\textsuperscript{138} Id. at 39. Individuals and groups were limited to an expenditure of $1000 "relative to a clearly identified candidate during a calendar year." Id. (quoting 18 U.S.C. § 608(e)(1) (Supp. V 1970) (repealed)). The expenditure limits also applied to candidates, campaigns, and political parties involved in election campaigns. Buckley, 424 U.S. at 39 (citing 18 U.S.C. §§ 608(a), 608(c), and 608(f) (Supp. V 1970) respectively).

\textsuperscript{139} Buckley, 424 U.S. at 44-45. The Court stated that the restriction on independent expenditures did "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." Id. at 46. The United States Court of Appeals for the District of Columbia Circuit upheld the expenditure limitations on the grounds that they were "loophold-closing" provisions necessary to prevent circumvention of the contribution limitations. Buckley v. Valeo, 519 F.2d 821, 853 (D.C. Cir. 1975).

\textsuperscript{140} Buckley, 424 U.S. at 48. The Court declared that such an interest was "wholly foreign to the First Amendment." Id. at 49.

\textsuperscript{141} Id. at 260-61 (White, J., dissenting).

\textsuperscript{142} Id. at 261.

\textsuperscript{143} Id. at 265.

\textsuperscript{144} Id. at 259-60.
Post-Buckley Decisions

Citizens Against Rent Control v. City of Berkeley

In *Citizens Against Rent Control v. City of Berkeley*, a city campaign ordinance had established a $250 limitation on contributions made to committees formed to endorse or oppose ballot measures. Citizens Against Rent Control, an unincorporated association formed to oppose a certain ballot measure, had accepted contributions exceeding the ordinance-imposed limit and was ordered by the city of Berkeley to pay into the city treasury the amount the group had collected over the ordinance limit. The Supreme Court of California upheld the ordinance as a narrowly tailored means serving the compelling state interest of preventing special interest groups from corrupting the initiative process by spending large sums of money to influence the outcome of ballot measures.

The United States Supreme Court reversed the California Supreme Court decision and remanded the case, holding that the ordinance violated first amendment principles of free expression and association. The Court stated that *Buckley* had created only "a single narrow exception" to the rule that restrictions on political speech are violative of the first amendment. The *Buckley* exception permitted the government to prevent the "perception of undue influence of large contribut[ions] to a candidate in spite of the infringement on first amendment rights." The Court found no evidence in the record that the ordinance was necessary to preserve voter confidence in the initiative process and held that it could not pass the exacting scrutiny that the first amendment required.

California Medical Association v. Federal Election Commission

In *California Medical Association v. Federal Election Commission*, the Supreme Court upheld a provision of the Federal Election Campaign Act which prohibited individuals and unincorporated associations from contributing in excess of $5000 to multi-candidate political committees. The Court distinguished *Buckley* by stating...
that the expenditures to which the Court had given constitutional protection in *Buckley* were those made independently "in order to engage directly in political speech."155 In contrast, the Court found that the contributions to the multi-candidate committee in *California Medical Association* were nothing more than "speech by proxy" and therefore entitled to less than full first amendment protection.156

*Federal Election Commission v. National Conservative Political Action Committee*

In 1985, the Supreme Court decided the case of *Federal Election Commission v. National Conservative Political Action Committee*,157 in which the Court held unconstitutional a provision of the Presidential Election Campaign Fund Act.158 This act prohibited independent political committees from expending more than $1000 in support of a presidential candidate who had received public financing pursuant to the Act.159 The Court, relying on *Buckley*, found the expenditures of the National Conservative Political Action Committee ("committee") to be "at the core of the First Amendment."160 The Court acknowledged that the committee was not an individual "pamphleteer," but nevertheless held that the restriction on the amount of money the committee could spend on political speech reduced the quantity of the group's expression.161 The Court determined that the committee expenditures were not "speech by proxy" because at issue were expenditures by PACs, not contributions which they had received.162 The Court stated that the only "legitimate and compelling" state interest was the prevention of the fact or appearance of corruption.163 The Court concluded that the committee expenditures did not pose a...
threat of corruption.\textsuperscript{164}

\textit{Post-Buckley Corporations Decisions}

\textit{First National Bank v. Bellotti}

In \textit{First National Bank v. Bellotti},\textsuperscript{165} the United States Supreme Court considered a constitutional challenge to a Massachusetts statute which prohibited certain banks and business corporations from making expenditures for the purpose of "influencing or affecting the vote" on referendum proposals "other than [a proposal] materially affecting any of the property, business or assets of the corporation."\textsuperscript{166} The appellant national banks and business corporations had sought to make expenditures to influence the vote on a proposed constitutional amendment which would have allowed the Massachusetts legislature to impose a graduated income tax on individuals.\textsuperscript{167} Under threat of enforcement of criminal sanctions, the appellants brought an action to the Supreme Judicial Court of Massachusetts upon stipulated facts challenging the constitutionality of the statute on first and fourteenth amendment grounds.\textsuperscript{168} In upholding the statute, the

\textsuperscript{164} Id. at 497. The Court cited \textit{Buckley}, 424 U.S. 1 (1976) and \textit{Citizens Against Rent Control}, 454 U.S. 290 (1981) in support of the proposition that independent expenditures do not tend to corrupt or create an appearance of corruption. \textit{National Conservative PAC}, 470 U.S. at 496-97. The Court found only a "hypothetical" threat of corruption which was not enough to sustain the provision. Id. at 498.

Justice White dissented, noting his continuing belief that \textit{Buckley} had been wrongly decided. Id. at 502, 507 (White, J., dissenting). In addition, he stated that \textit{Buckley} left the door open for upholding expenditure limitations to the extent that "unforeseen developments in the financing of campaigns might make the need for restrictions on 'independent' expenditures more compelling." Id. at 510 n.7 (White, J., dissenting).

\textsuperscript{165} 435 U.S. 765 (1978).

\textsuperscript{166} \textit{Bellotti}, 435 U.S. at 767-68 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). A corporation found to be in violation of section 8 was subject to a maximum fine of $50,000; a corporate officer, director, or agent who violated the section was subject to a maximum fine of $10,000 or imprisonment for up to one year, or both. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

\textsuperscript{167} Id. at 765 (West Supp. 1977).

\textsuperscript{168} \textit{Bellotti}, 435 U.S. at 769. The appellant banks and business corporations had argued that the tax would have materially affected their businesses by discouraging executives and other personnel from working in Massachusetts, by discouraging business corporations from incorporating in Massachusetts resulting in lost business to the banks, and by lessening the disposable income of individuals who would otherwise have spent the lost money buying consumer goods resulting in profits to business corporations. Id. at 771 n.4 (quoting 371 Mass. 773, —, 359 N.E.2d 1262, 1266 (1977)). The referendum was defeated before the case reached the Supreme Court but the Court held that the issue was "capable of repetition, yet evading review," and thus was not moot. Id. at 774 (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)). The statute expressly provided that income tax issues were not "deemed materially to affect the property, business or assets of the corporation." MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

\textsuperscript{169} Id. at 769-70 (1978). Corporations are considered to be "persons" for constitutional purposes. \textit{See generally}, H. HENN & J. ALEXANDER, LAWS OF CORPO-
Supreme Judicial Court of Massachusetts determined that the central issue was whether corporations "have First Amendment rights coextensive with those of natural persons or associations of natural persons."169 The Court answered in the negative, holding that corporations have first amendment rights only when their speech is directed at an issue which materially affects corporate business or assets.170

The United States Supreme Court reversed the Massachusetts Supreme Judicial Court, stating that the lower court had asked the wrong question.171 The correct issue, the Court stated, was whether the statute "abridges expression that the First Amendment was meant to protect."172 In striking down the statute, the Court focused on the speech itself and listeners' rights to receive it, not on the speaker.173 The Court asserted that "[i]f the speakers here were not corporations, no one would suggest that the state could silence their proposed speech."174

The State of Massachusetts had offered two justifications for the
restriction on corporate speech. The first justification was “sustaining the active role of the individual citizen in the electoral process,” thereby maintaining citizen confidence in government. The second justification was “protecting the rights of shareholders whose views differ from those expressed” by the corporation. The Court, acknowledging that the two interests may be “weighty” in candidate elections, found them to be insufficient to justify a restriction on political speech in a referendum context.

In addressing the state interest of preserving active citizen involvement in government, the Court asserted that had the state interest been buttressed by proof in the record or by legislative findings it would have merited consideration, provided that the state aptly demonstrated that “corporate advocacy . . . denigrat[ed] rather than serv[ed] First Amendment interests.” The Court held that the appellants had failed to make such a showing.

The Court found that the state shareholder protection justification insufficient as well, asserting that shareholders are capable of protecting their own interests through the “procedures of corporate democracy.” The Court ultimately held that the statute was hopelessly overinclusive and underinclusive and was thus not narrowly tailored as required by strict scrutiny.

175. Id. at 787.
176. Id.
177. Id.
178. Id. at 787-88.
179. Id. at 789.
180. Id. at 789-90. The Court asserted further that unlike in candidate elections, the risk of the fact or appearance of corruption “simply is not present” in referenda proposals. Id. at 790. But see, id. at 811 (White, J., dissenting). As an example of corporate domination of the Massachusetts referenda process, Justice White cited a 1972 proposed amendment to the Massachusetts Constitution which would have imposed a graduated income tax on individuals and corporations. A political committee opposed to the amendment, funded mostly by large corporate contributions, spent approximately $120,000 in opposition to the amendment. The one political committee which had advocated the amendment was able to raise and spend only $7000. Id. (White, J., dissenting). Justice White cited a similar experience in California as well. See id. at 812 n.11. (White, J., dissenting).
181. Id. at 794. The Court stated that a shareholder may protect himself from being implicated in speech he disagrees with by exercising his right to vote for the corporate board of directors, by insisting that protective provisions be placed in the corporate charter, or by bringing a derivative suit to challenge the corporate expenditure. Id. at 794-95.
182. Id. at 793-94. The statute was overinclusive because it would have prohibited a corporate expenditure in a referendum proposal even if the shareholders had given unanimous consent. Id. at 794. The statute was found to be underinclusive because corporations would have been permitted to endorse or oppose the passage of legislation through lobbying; they may have made expenditures to endorse or oppose a public is-
In dissent, Justice White advocated a view of the first amendment which focused on the "self-expression, self-realization, and self-fulfillment" of the individual. Justice White used this first amendment rationale and the Buckley contribution/expenditure distinction to demonstrate that corporate political speech is deserving of less first amendment protection than speech by individuals. In Buckley, the Court had upheld the individual contribution limitations in part because they entailed "only a marginal restriction" upon the individual contributor's ability to engage in free speech. Conversely, the Court had invalidated the restrictions on individual expenditures because they "impermissibly restricted the right of individuals to speak their minds and make their views known." Justice White asserted that corporate political speech lacks the self-expression component of the first amendment. He therefore concluded that corporations are on a lower first amendment plane than individuals, thus corporations were rendered susceptible to greater governmental regulation.

Federal Election Commission v. National Right to Work Committee

A unanimous Court in Federal Election Commission v. National Right to Work Committee upheld a provision of the Federal Election Campaign Act which restricted the solicitation of political contributions for the non-stock segregated political fund of a corporation. The Court rejected the first amendment associational arguments of the National Right to Work Committee holding that they were "overborne" by the interests Congress was attempting to protect. The Court stated that Congress intended to prevent the huge aggregations of capital accumulated with the aid of the corporate form from being turned into political "war chests" which present the danger of quid pro quo corruption. The Court found that Congress also sought to protect the individual shareholders and union members who pay money into their corporations or unions...
from having that money spent in support of political candidates they may oppose. After tracing the history of the federal election laws, the Court declared that continual legislative adjustment of those laws "warrants considerable deference." More specifically, the Court found embodied in the Federal Election Campaign Act a legislative judgment that the unique characteristics of corporations require "particularly careful regulation." The Court stated that it was not willing to "second-guess" a legislative judgment that the potential for corruption or the appearance of corruption demands regulation.


In 1986, the Supreme Court decided Federal Election Commission v. Massachusetts Citizens for Life, Inc. which presented a constitutional challenge to a provision of the Federal Election Campaign Act which was similar to the Michigan statute involved in Austin. Section 441b of the Federal Election Campaign Act prohibits corporations from making expenditures in connection with any elections to federal office.

Massachusetts Citizens for Life ("MCFL") was a non-profit, non-stock, ideological corporation formed to advocate pro-life views. MCFL did not accept contributions from labor unions or business corporations. MCFL published a newsletter several times a year.

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193. Id. at 208.
194. Id. at 209. See also, Leventhal, Courts and Political Thickets, 77 COLUM. L. REV. 345, 375-87 (1977) (arguing for judicial deference in the complex area of campaign finance laws).
196. Id. at 210. The Court distinguished Bellotti as involving corporate expenditures in state referenda, not candidate elections. Id.
198. Id. at 241. See MICH. COMP. LAWS ANN. § 169.254(1) (West 1989). See supra note 5 (setting forth text of § 169.254(1)).
199. 2 U.S.C. § 441b (1988). Section 441b provides in part:
   It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .
201. Id. MCFL's fund raising endeavors were very modest, including such things as "garage sales, bake sales, dances, raffles, and picnics." Id. at 242.
and distributed it to contributors, as well as to other supporters when funds permitted.\textsuperscript{202} In 1978, prior to the primary elections, MCFL published a special edition of their newsletter which was distributed to a much larger audience than usual.\textsuperscript{203} This special edition listed all of the candidates running for state and federal office in Massachusetts and indicated which candidates, in MCFL's view, held acceptable views on abortion.\textsuperscript{204}

The United States District Court for the District of Massachusetts held that the special edition newsletter was not an expenditure within section 441b.\textsuperscript{205} The Court noted that even if the newsletter had been classified as an expenditure, the provision was invalid under the first amendment.\textsuperscript{206} On appeal, the United States Court of Appeals for the First Circuit held that the statute did apply to MCFL but affirmed the district court's holding that the statute was unconstitutional.\textsuperscript{207} Finally, the United States Supreme Court affirmed the First Circuit decision, holding that the restriction on independent expenditures as applied to MCFL violated the first amendment absent a compelling state justification.\textsuperscript{208}

Because MCFL was incorporated, it was required to establish a segregated fund as the only means by which it could engage in political spending.\textsuperscript{209} Noting the administrative burdens involved in operating the fund, the Court held that the option of establishing a segregated fund was not sufficient to prevent the prohibition on independent expenditures from being an unconstitutional "infringement on First Amendment freedom."\textsuperscript{210} The Court recognized the legitimate government interest of ensuring "that competition among ideas in the political arena is truly competition among ideas," not among dollars.\textsuperscript{211} The Court, however, determined that MCFL was not a traditional for-profit business corporation which was the historical focus of corrupt practices legislation, and therefore MCFL was not the type of corporation at which the statute was aimed.\textsuperscript{212}

The Court outlined three characteristics which were "essential" to the Court's holding that the prohibition on expenditures was un-

\begin{itemize}
  \item \textsuperscript{202} Id. at 242-43.
  \item \textsuperscript{203} Id. at 243.
  \item \textsuperscript{204} Id. at 243-44.
  \item \textsuperscript{206} Id. at 651.
  \item \textsuperscript{207} Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 23 (1st Cir. 1985).
  \item \textsuperscript{208} Massachusetts Citizens, 479 U.S. at 263.
  \item \textsuperscript{209} Id. at 253.
  \item \textsuperscript{210} Id. at 255.
  \item \textsuperscript{211} Id. at 259.
  \item \textsuperscript{212} Id.
\end{itemize}
First, the Court noted that MCFL was an ideological corporation prohibited by its charter from engaging in business activities, which ensured that its “political resources reflect[ed] political support.” Second, the Court stated that MCFL “ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings,” which ensured that the members had no “economic disincentive” for disassociating with the group if they disagreed with its political message. Finally, the Court noted that MCFL had not been established by a corporation, nor did it accept contributions from corporations; thus MCFL did not serve as a “conduit” through which business corporations could freely spend to the detriment of “the political marketplace.”

Four Justices concurred in part and dissented in part, declaring that the Court should have deferred to the congressional judgment that corporations require “particularly careful regulation.” The dissent argued that distinctions among corporations “are more properly drawn by the legislature than by the judiciary.” The dissent further argued that the Court should have deferred to legislative regulation of all corporate political expenditures regardless of the type or financial strength of a given corporation.

ANALYSIS

Despite Justice Scalia’s assertion to the contrary, Austin v. Michigan Chamber of Commerce is wholly in accord with prior United States Supreme Court corporate political speech decisions. In Austin, the Court upheld section 54(1) of the Michigan Campaign Finance Act which prohibits corporations from making independent expenditures from their general treasury funds to political candidates. Thus, for the first time, the Supreme Court in Austin

213. Id. at 263-64.
214. Id. at 264.
215. Id.
216. Id.
218. Id. at 268 (Rehnquist, J., dissenting).
219. Id. at 271.
222. See supra notes 102-219 and accompanying text.
granted the government carte blanche to regulate the political speech of business corporations in candidate elections.\textsuperscript{224}

The Court in \textit{Austin} employed a more sweeping rationale than the justification of preventing real or apparent corruption.\textsuperscript{225} However, the Court had previously acknowledged the general importance of maintaining “the active, alert responsibility of the individual” in the electoral process.\textsuperscript{226} In addition, the Court had expressed that “the special characteristics of the corporate structure require particularly careful regulation.”\textsuperscript{227} In effect, the \textit{Austin} holding embraced each of these judicial concerns.\textsuperscript{228} The Court deferred to the compelling state interest of eliminating “the corrosive and distorting effects” of corporate wealth which give corporations “an unfair advantage in the political marketplace.”\textsuperscript{229}

\textbf{The Precedents}

The case of \textit{First National Bank v. Bellotti}\textsuperscript{230} stands for the proposition that government may not prohibit corporations from making expenditures to influence the vote on referenda proposals.\textsuperscript{231} The Court’s holding was explicitly limited to corporate expenditures made in the context of referenda.\textsuperscript{232} The Court, however, acknowledged the problem of \textit{quid pro quo} corruption arising when contributions and expenditures are made in the context of candidate elections, stating that the governmental interest of preventing such corruption has never been questioned.\textsuperscript{233} The Court further stated that the granting of first amendment protection to corporate speech in referenda “implies no comparable right in the quite different context of participation in a political campaign for election to public of-

\begin{footnotesize}
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\item[224.] \textit{Austin}, 110 S. Ct. at 1395.
\item[225.] \textit{See Austin}, 110 S. Ct. at 1397-98, 1400; Buckley v. Valeo, 424 U.S. 1, 46 (1976) (per curiam) (stating government interest in preventing the fact or appearance of corruption).
\item[228.] \textit{See supra} notes 46-57 and accompanying text.
\item[229.] \textit{Austin}, 110 S. Ct. at 1397 (quoting Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).
\item[230.] 435 U.S. 765 (1978).
\item[231.] \textit{Id.} at 795. The Court held that the prohibition did not satisfy the required compelling state interest because there was no proof offered “that the relative voice of corporations has been overwhelming or even significant in influencing referenda.” \textit{Id.} at 789.
\item[232.] \textit{Id.} at 787 n.26. The Massachusetts statute involved in \textit{Bellotti} also proscribed corporate contributions and expenditures in connection with state candidate elections but the appellants had not challenged the law in that context. \textit{Id.}
\item[233.] \textit{Id.}
\end{itemize}
\end{footnotesize}
Furthermore, the Court stated that a legislature "might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." In Austin, the Court determined that the Michigan legislature had demonstrated a different type of corruption resulting from corporate independent expenditures. The Court accordingly upheld the ban on independent expenditures which was enacted to serve the compelling state interest of preventing corporate wealth from unfairly influencing elections.

In Federal Election Commission v. National Conservative Political Action Committee, the Court invalidated a provision of the Presidential Election Campaign Fund Act which had prohibited independent political committees from making expenditures in excess of $1000 to presidential candidates who opted to receive public financing for their general election campaigns. Despite the fact that the National Conservative Political Action Committee was incorporated, the Court explicitly avoided determining whether a corporation could be constitutionally prohibited from making independent expenditures to support or oppose a candidate for political office. The Court reasoned that National Conservative Political Action Committee was not a "corporations case" because the statute at issue applied to any organization making expenditures in connection with election campaigns. Therefore, the Court determined that it did not "need to reach . . . the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office."

In Federal Election Commission v. Massachusetts Citizens For

234. Id. See also 3 R. ROTUNDA, J. NOWAK AND J. YOUNG, TREATISE ON CONSTITUTIONAL LAW § 20.51 at 283 (1986) [hereinafter ROTUNDA]. The Court in Austin validated a broader rationale than preventing the fact or appearance of quid pro quo corruption. The Court permitted governmental regulation of the effects of corporate wealth on the electoral process which "have little or no correlation to the public's support for the corporation's political ideas." Austin, 110 S. Ct. at 1397.

235. Id. at 1398.

236. Austin, 110 S. Ct. at 1397.

237. Id. at 1398.


239. National Conservative Political Action Committee, 470 U.S. at 482.


241. Id. National Conservative Political Action Committee, 470 U.S. at 496.

242. Id. In dissent, Justice White stated that the Buckley Court had left open the possibility, "that unforeseen developments in the financing of campaigns might make the need for restrictions on independent expenditures more compelling." Id. at 510 n.7 (White, J., dissenting). In this regard, Justice White declared, with an apparent touch of sarcasm, that "[t]he time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court as well." Id.
Life, Inc., the Court gave a qualified answer to the question, holding that a nonprofit, nonstock, ideological corporation could not be constitutionally prohibited from making expenditures in candidate elections. In lieu of holding the statute in question facially unconstitutional, the Court held it unconstitutional only as applied to MCFL, acknowledging that the number of organizations affected by the holding may be small.

While noting the importance of the congressional interest in preventing "organizations that amass great wealth in the economic marketplace" from gaining an "unfair advantage in the political marketplace," the Court stated that this justification could not constitutionally support the application of the statute to all corporations. Once again, the Court had explicitly declined to consider whether "commercial enterprises" could be prohibited from making independent expenditures in candidate elections.

AUSTIN

In Austin, the Michigan State Chamber of Commerce ("Chamber"), another nonprofit corporation, challenged a Michigan statute similar to the federal statute involved in Massachusetts Citizens. The statute in question prohibited corporate independent expenditures for the purpose of assisting or opposing the nomination or election of a candidate for Michigan office. The Court held that the Michigan statute was constitutional as applied to the Chamber because it was "narrowly tailored to serve a compelling state interest."

The Court reasoned that because all corporations have the "special benefits" attendant to the state-conferring corporate form, all corporations "present the potential for distorting the political process." Therefore, the Court stated that the "potential for distortion" requires the "general applicability of the Act to all corporations."

The Chamber argued that even if the Act were facially constitut-

244. Massachusetts Citizens, 479 U.S. at 241.
245. Id. at 264.
246. Id. at 263. The Court stated that "Congress has chosen too blunt an instrument for such a delicate task." Id. at 265.
247. Id. at 263.
249. Id. at 1395. See MICH. COMP. LAWS ANN. § 169.254(1) (West 1989). See supra note 5 (setting forth text of statute).
250. Austin, 110 S. Ct. at 1395.
251. Id. at 1396.
252. Id. at 1398.
Corporation, the status of the Chamber as a nonprofit corporation, like MCFL, should render it constitutionally exempt from the prohibition on independent expenditures.\textsuperscript{253} The Court properly refused to invalidate the Act as applied to the Chamber because the Chamber was unable to pigeonhole itself within the three nonprofit corporation characteristics which were "essential" to the holding which had exempted MCFL.\textsuperscript{254}

First, unlike MCFL, the Chamber "was not formed for the express purpose of promoting political ideas;" to the contrary, it was formed to further the interests of the Michigan business community.\textsuperscript{255} Second, although the Chamber has no shareholders, its members similarly face an "economic disincentive for disassociating with it if they disagree with its political activity" because they benefit from the nonpolitical Chamber services and the business contacts made through the various Chamber functions.\textsuperscript{256} Moreover, many of the corporate members of the Chamber have shareholders who have a claim on member corporation assets or earnings and who may be opposed to their corporation spending those assets for political pur-

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\textsuperscript{253} Id.  \\
\textsuperscript{254} Id.  \\
\textsuperscript{255} Id. at 1399 (citing Massachusetts Citizens, 479 U.S. at 264). According to its by-laws, the Chamber was organized to:  

promote conditions favorable to the economic development of the State of Michigan . . . analyze compile and disseminate information on laws and regulations of interest to the members . . . further the training and education of the membership . . . collect data and make investigations and surveys relative to matters of social, civic, and economic importance to the State of Michigan . . . receive expenditures and make contributions for political purposes . . . establish administer and solicit contributions to a political action committee . . . and perform any other acts of a political nature permitted by the laws of the State of Michigan.  


\textsuperscript{256} Austin, 110 S. Ct. at 1399 (citing Massachusetts Citizens, 479 U.S. at 264. The general treasury of the State Chamber is funded through annual dues required of all its members. The dues are set at the discretion of the board of directors. Joint Appendix at 45a (Plaintiff's Trial Exhibit 9 — State Chamber by-laws). The representation for voting purposes is determined as follows:  

Each individual and firm member shall have one vote on any matter voted on by the members. . . . Each member whose dues shall exceed $100 per year shall have one vote for each $100 of its annual dues not to exceed ten votes in number. An organization member shall have one vote for its first 100 members or less and one additional vote for an additional 200 members or fractions thereof but in no event shall any organization member have more than five votes for its organization.  

\textit{Id.} at 46a.
\end{flushleft}
Thus, the Court held that Chamber members were more akin to shareholders of a business corporation than to members of a voluntary political association. Finally, the Court found that the Chamber most drastically differed from MCFL in that the Chamber accepted contributions from its 6000 corporate members, thus rendering the Chamber a conduit for prohibited direct spending which threatens the political marketplace. Accordingly, the Court properly concluded that the Chamber could not avail itself of the Massachusetts Citizens exemption from the prohibition of the Michigan Act on independent political expenditures.

Narrowly Tailored

Despite the prohibition of the Michigan Act on corporate independent expenditures, the Chamber is left with ample opportunity to engage in independent political activity. The political action committee of the Chamber has been highly successful in Michigan politics. For example, the Chamber PAC expected to have over $140,000 to spend in the 1986 primary general elections, which was

257. Brief for Appellants at 15. During the Austin trial, Judge Hillman interrupted counsel for the Chamber and posed the following question to the witness, Mr. E. James Barrett, the President of the Chamber and treasurer of its PAC:

Excuse me. A thought just comes to mind. You think of a corporation as manufacturing mobile homes here in Michigan, and my broker talks me into investing $5,000 because it is a good investment and I want to make some money on it. Now Mr. Boyden [(Chamber’s counsel)] is going to run for ... the State Senate ... I may never have heard of him ..., don’t know anything about his views. Is there any real reason you can think of why corporations should be spending my money that I’m anxious ... [to have] invested in the mobile home business to help elect Mr. Boyden to the State Senate? If the board of directors is interested in Mr. Boyden’s views on economic issues and thinks he would make a good senator, is there any reason why they can’t, as a stockholder, send me a letter and ask me to make a contribution rather than spending corporate funds for that purpose? ... [Y]ou make the point here that the corporations are being treated so unfairly. Is the corporation really set up in our society for getting into ... [political activities]?

Joint Appendix at 130a. Mr. Barrett answered that corporate participation in the political process is in the long term interest of the corporation, its shareholders and its employees. Id. at 130a-131a.

258. Austin, 110 S. Ct. at 1399. See Massachusetts Citizens, 479 U.S. at 263-64.

259. Austin, 110 S. Ct. at 1400. Under the Michigan Act, corporate contributions to the general treasury of the Chamber would not qualify as contributions or expenditures because they would not be made “in assistance of, or in opposition to, the nomination or election of a candidate.” Mich. Comp. Laws Ann. § 169.206(1) (West 1989). Therefore, business corporations could circumvent the restrictions of the Act and effectively make “political contributions and expenditures [which] can constitutionally be regulated by the state.” 110 S. Ct. at 1400 (citing Buckley, 424 U.S. at 29 (upholding contribution limitations) and Austin, 110 S. Ct. at 1397-98 (upholding expenditure limitations)).

260. Austin, 110 S. Ct. at 1400.

261. See Brief for Appellants at 16.

262. Id.
forty percent more than the Chamber had raised in 1984.263 In November 1984, the Chamber PAC had backed sixty-seven Michigan House of Representatives candidates, sixty-four of whom were victorious.264 Similarly in November 1980, the Chamber PAC had endorsed sixty-six House candidates, sixty-three of whom were victorious.265

Additionally, the Chamber has expended treasury funds to lobby the legislative and executive branches of Michigan government, to make contributions to ballot question committees, to donate to a state official's office expense fund, to fund advertisements to the electorate on public policy issues, to fund a reapportionment lawsuit, and to communicate its political views to member corporations.266 Furthermore, the Act itself allows the Chamber to make expenditures to conduct registration and get-out-the-vote drives and to make contributions for political party activities.267 As an expert witness had testified at trial, "[a]s a practical matter, . . . those corporations that wish to be involved in the political process can be and are involved in the political process."268

Compelling State Interest

In Austin, the Court held that the Michigan legislature had demonstrated a compelling interest in preventing the "corrosive and distorting" effects of corporate wealth from unfairly skewing elections.269 The Court had thus determined that the Act was intended to address a type of corruption different from the quid pro quo corruption which the Court had previously said was "the only legitimate and compelling government interest thus far identified for restricting campaign finances."270 Although first articulated in Massachusetts Citizens, the Court in Austin for the first time gave constitutional credence to an "equality of voices" rationale in upholding the Michigan ban on corporate independent expenditures.271

263. Joint Appendix at 143a.
264. Id. at 162a.
265. Id. at 163a.
266. Brief for Appellants at 16 (citing Joint Appendix at 138a, 144a-147a, 163a-168a).
268. Joint Appendix at 62a.
269. Austin, 110 S. Ct. at 1397.
271. See Austin, 110 S. Ct. at 1411 (Scalia, J., dissenting). See also Buckley, 424 U.S. at 48-49. The Court in Buckley stated that limiting the speech of some to equalize voices in the political marketplace "is wholly foreign to the First Amendment." Id. See also Bellotti, 435 U.S. at 809 (White, J., dissenting). Justice White stated that
The Court in *Buckley* had maintained that a laissez-faire approach to regulating spending in the political marketplace was necessary because "expensive modes of communication" such as television and radio have become "indispensable instruments of effective political speech." However, this very point presents a sound justification for increased regulation of corporate political spending in order to liberate the stifled speech of the individual.

Instead of viewing the first amendment as only a negative prohibition, the Court in *Austin* properly viewed the first amendment affirmatively in an effort to enhance equality and open up the political marketplace.

Generations ago, a laissez-faire approach to regulating corporate spending in referenda, government was not trying to "equalize" voices, rather it was attempting to "prevent institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . . The State need not permit its own creation to consume it." *Id.*

272. *Buckley*, 424 U.S. at 19. From early on, however, the Court had acknowledged the legitimate congressional interest of "eliminating the effect of aggregated wealth on federal elections." Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 416 (1972); United States v. UAW, 352 U.S. 567, 585 (1957). *See also Massachusetts Citizens*, 479 U.S. 238, 257 (1986) (citing cases acknowledging legitimacy of controlling the influence of aggregated wealth in the electoral process). *See supra* notes 118-26, 111-17, and 197-219 and accompanying text.

273. *See* J. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 610 (1982). Judge Wright argues that the problem of money in the electoral process has "taken on a new urgency," stating that:

> The development of communications technology and campaign techniques has made the political impact of money even more potent and the political consequences of meager financial resources even more devastating. Financial inequalities pose a pervasive and growing threat to the principle of "one person, one vote," and undermine the political proposition to which this nation is dedicated — that all men are created equal.

*Id.* The plight of the individual in modern politics has been aptly described:

> The system is choked with communications . . . and becomes incapable of performing its basic function. Search for the truth is handicapped because much of the argument is never heard or heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble. The possibility of orderly social change is greatly diminished because those persons with the most urgent grievances come to believe the system is unworkable and merely shields the existing order. Under these circumstances it becomes essential, if the system is to survive, that a search be made for ways to use the law and legal institutions in an affirmative program to restore the system to effective working order.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 628-29 (1970). The "system" Professor Emerson refers to is the "system of freedom of expression." *Id.* at 3. *See generally*, *Id.* at 6-9. *See also UAW*, 352 U.S. at 570 (declaring that what is underlying corrupt practices legislation is the integrity of the electoral process and the "responsibility of the individual citizen for the successful functioning of that process").

274. Wright, 82 COLUM. L. REV. at 642. The effect of allowing corporations to freely spend money in referenda and elections has been described:

> If liberty means the opportunity of the individual man or woman to express
ing political speech may have best served the “town hall” political marketplace of ideas. However, today’s society of mass media and sophisticated corporations requires governmental regulation of money in politics so that all voices may be heard, “so that the wealthiest voices may not dominate the debate by the strength of their dollars rather than their ideas.” Just as it is generally recognized that an efficient economic market requires the enforcement of antitrust laws against monopolists, so too is it necessary to enforce campaign finance laws against monopolists in the political marketplace in order to enhance the freedom of all voices trying to compete and to maintain a market diverse in ideas. Not regulating spending in the electoral process, “no less than crass regulation of ideas, may drown opposing beliefs, vitiate the principle of political equality, and place some citizens under the damaging and arbitrary control of others.”

Moreover, corporate first amendment rights are on a lower constitutional plane than are those of natural persons. In Buckley, the Court upheld the limitations on contributions made by individuals because they “[did] not in any way infringe the contributor’s freedom to discuss candidates and issues.” Thus, the Court focused on the speaker’s first amendment right to participate in the political marketplace. Just as the upholding of the contribution limitations in Buckley did not materially infringe on individual first amendment rights, neither will the upholding of corporate expenditure limitations in Austin significantly burden individual rights.

himself or herself in a society in which ideas are judged principally by their merit, increasing the relative influence of organizations with large financial resources and shrinking the attention paid to truly individual voices means a net loss of human freedom.


275. See Wright, 82 Colum. L. Rev. at 638.
276. Id. See also Massachusetts Citizens, 479 U.S. at 258 (“the power of the corporation may be no reflection of the power of its ideas”).
277. See Wright, 82 Colum. L. Rev. at 638; Leventhal, Courts and Political Tickets Colum. L. Rev. 345 at 373-74. See also, c.f. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding fairness doctrine governing broadcast licensees as exemplary of affirmative use of the first amendment despite implication of licensees’ expressive rights); Coppage v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting) (stating that even though some freedoms are implicated, government may prohibit employers from extracting yellow dog contracts” in order to establish the equality of position between the parties in which liberty of contract begins.”).
278. Wright, 82 Colum. L. Rev. at 637.
281. See id. See also, T. Emerson, supra note 272, at 6 (stating that “freedom of expression is essential as a means of assuring individual self-fulfillment.”).
282. See Bellotti, 435 U.S. at 906 (White, J., dissenting).
ual members of the Chamber and the shareholders of the Chamber member corporations remain free to discuss any issues; these individuals could form associations, or even corporations such as MCFL, in order to speak about political or ideological issues. Essentially, the self-expression component of the first amendment is absent in the context of corporate speech. For example, the Court in Bellotti focused on the listeners' first amendment rights to receive information, rather than the speakers' rights to engage in speech.

However, in Austin, the first amendment rights of listeners were not burdened because the Chamber remained free to, and did, disseminate information through its segregated fund, the Chamber PAC. Nor were individual first amendment expressive rights infringed, because the individuals remained free to engage in political speech. Therefore, in Austin, because the Act did not place significant burdens on individual self-expressive rights or on individual listeners' rights, the lesser first amendment rights of the corporate Chamber properly yielded to the compelling state interest of Michigan which was aimed at furthering the first amendment rights of individuals.

**RAMIFICATIONS OF AUSTIN**

**Corporate Political Speech in Candidate Elections**

Before Austin, the Supreme Court had not given a definitive indication of the extent to which government may regulate corporate political speech in the context of candidate elections. Although the Court in Massachusetts Citizens had declined to determine

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283. *Id.* at 807 (White, J., dissenting). See also *Massachusetts Citizens*, 479 U.S. at 242-43 (describing an example of the type of corporate association individuals may form to constitutionally express political views by making independent expenditures).

284. *See Bellotti*, 435 U.S. at 807 (White, J., dissenting).

285. *Id.* at 776.

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

287. *See Bellotti*, 435 U.S. at 807 (White, J., dissenting).

288. *See Austin*, 110 S. Ct. at 1397-98. *See Baldwin & Karpay, 14 PAC L.J. at 211, 215; Wright, 82 COLUM. L. REV. at 641-42. See also, *Bellotti*, 435 U.S. at 809 (White, J., dissenting). While arguing that governmental regulation of corporate political speech involves considerations different from regulations on individual speech, Justice White elaborated:

> [c]orporations are artificial entities created by law for the purpose of furthering certain economic goals ... It has long been recognized ... that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.

*Id.* The Court in Austin properly upheld the ban on corporate expenditures, however, without specifically discussing the first amendment rights of corporations. *See Austin*, 110 S. Ct. at 1402.

289. *See supra* notes 165-219 and accompanying text.
whether business corporations could be constitutionally prohibited from making independent expenditures in candidate elections, the scope of the Court's holding tentatively indicated that the Court would defer to such regulation.  

In Massachusetts Citizens, the Court held unconstitutional a section of the Federal Election Campaign Act which had prohibited corporate election expenditures as applied to a nonprofit, nonstock, ideological corporation. Conceivably the Court could have decided Massachusetts Citizens by relying on the principle set forth in Buckley that independent expenditures, whether made by individuals or corporations, simply do not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." The Court in Massachusetts Citizens could have, therefore, held that the ban on corporate expenditures was in violation of the first amendment for lack of a compelling state interest. An even more plausible approach would have been for the Court to recite the narrow state interest of preventing the fact or appearance of corruption and hold that because the newsletter involved in Massachusetts Citizens did not pose the risk of corruption, the infringement on first amendment rights was unjustified.

The Court in Massachusetts Citizens instead articulated a much broader rationale which reached even further than the election context. The Court held that speech by business corporations, unlike that of more financially modest groups, creates a "concern over the corrosive influence of concentrated corporate wealth [which] reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." The Court in effect had planted the seeds of an equality of voices rationale which ostensibly granted government the authority to regulate the political speech of business

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290. See Massachusetts Citizens, 479 U.S. at 263.
291. Id. at 479 U.S. at 263.
292. Massachusetts Citizens, 424 U.S. at 46. But see National Conservative PAC, 470 U.S. at 518-20 (Marshall, J., dissenting) (stating that contribution/expenditure distinction articulated in Buckley has no constitutional significance); Bellotti, 435 U.S. at 261-62 (White, J., dissenting) (stating that contributions and expenditures are nearly identical for constitutional purposes and that the regulation of the latter is essential to prevent the evasion of limits on the former).
293. See, e.g., Austin, 110 S. Ct. at 1419 (Kennedy, J., dissenting); Id. at 1410 (Scalia, J., dissenting).
294. See, e.g., National Conservative PAC, 470 U.S. at 496-97. The Court identified as the "hallmark of corruption" the "financial quid pro quo: dollars for political favors," and stated that its prevention is "the only legitimate and compelling government interest thus far identified for restricting campaign finances." The Court struck down a $1000 limit on PAC expenditures because they did not pose the threat of such corruption. Id. at 496.
296. Id.
corporations without the difficult task of proving that such corporate speech threatens the fact or appearance of corruption. The Court in *Austin* affirmed the broad *Massachusetts Citizens* rationale, holding that the government has a legitimate interest in regulating "the corrosive and distorting effects" of corporate wealth accumulated "with the help of the corporate form." Three general points regarding corporate speech in candidate elections may be gleaned from *Austin*. First, the government may totally restrict contributions and expenditures made by business corporations. Second, the three-part test set forth in *Massachusetts Citizens* will continue to be controlling for determining whether a nonprofit corporation may be constitutionally exempt from governmental restrictions on expenditures. Finally, the class of corporations eligible for the *Massachusetts Citizens* exemption indeed "will be small."

**Corporate Political Speech in Referenda**

In 1978, the Supreme Court in *First National Bank v. Bellotti*, held that "the relative voice of corporations" did not significantly influence the outcome of referenda or pose "any threat to the confidence of the citizenry in government." The Court further held that "[t]he risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue." The government had argued that the State had an "especially great" interest in restricting corporate speech in order to maintain "the active role of the individual citizen" in referenda because of the direct citizen involvement in the legislative process. The Court wholly disagreed and held that the public's right to hear information from "diverse and antagonistic sources" was paramount in referenda precisely because of direct citizen participation in the
CORPORATE POLITICAL FREE SPEECH

Although Massachusetts Citizens did not seriously question the validity of Bellotti, Austin puts Bellotti in jeopardy. The broad rationale laid down in Massachusetts Citizens demonstrated that governmental efforts to regulate corporate speech are legislative judgments to which the Court owes considerable deference. In Austin, the Court again exercised judicial deference and held that the State has a legitimate interest in regulating the distorting effects of corporate spending in the electoral process.

The Court in Austin could have decided the case on narrower grounds by holding that corporate expenditures in candidate elections, like direct contributions, pose a threat of corruption and therefore may constitutionally be regulated. The Court, however, did not explicitly confine its rationale to candidate elections, and the rationale appears to be at least as compelling in the context of referenda. Approximately half of the states utilize the referendum in order to allow citizens to participate directly in the law-making process and "to lessen the influence of special interests and corrupt maneuvering upon major public decisions." The powerful impact of corporate wealth is most evident in referendum contests, where "big-spending media campaigns" win much more often than not because of the "sheer inequality of financial resources and the avalanche of campaign messages." The effects of unrestricted corporate spending in referenda have been aptly described as follows: "As individuals are squeezed out, as the behemoths of concentrated wealth dwarf the individual and bid fair to dominate the political field, the very purpose of direct democracy is defeated, and voters are bound to be-

305. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)). In Bellotti, the Court conceded that corporate speech "may influence the outcome of the vote . . . . But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." Bellotti, 435 U.S. at 790.

306. See, e.g., Austin, 110 S. Ct. at 1397. See also, Wright, 82 COLUM. L. REV. at 622-23 (discussing unfair influence of concentrated wealth in referenda).


308. Austin, 110 S. Ct. at 1397. The Court insisted that it was not attempting to equalize the strength of speakers, but rather to ensure "that expenditures reflect actual public support for the political ideas espoused by corporations." Id. at 1398.

309. See e.g., Austin, 110 S. Ct. at 1410-11 (Scalia, J., dissenting); Id. at 1420 (Kennedy, J., dissenting).

310. See id. at 1397. See supra note 305.

311. See Wright, 82 COLUM. L. REV. at 622.

312. See id. at 622, 624-25. Judge Wright remarked that the big spenders "simply drown out their opponents when they have the wherewithal to outspend them by margins of up to fifty to one." Id. at 625. See id. at 624-25 (describing case studies demonstrating extent of influence of corporate spending in referenda). See also Citizens Against Rent Control v. Berkeley, 454 U.S. at 306-09 (describing similar case studies).
come disillusioned and apathetic."\footnote{\textit{Bellotti}, 435 U.S. at 789 (emphasis added).}

In \textit{Bellotti}, the Court stated that "arguments . . . supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests," would merit the Court's consideration.\footnote{\textit{Austin}, 110 S. Ct. at 1397. See supra note 306.} This pronouncement, read together with the deference in \textit{Austin} to the sweeping legislative interest of regulating corporate wealth "having little or no correlation to the public's support for the corporation's political ideas," strongly suggests that the Court will now allow government to wholly restrict corporate spending in referenda, thus effectually overruling \textit{Bellotti}.\footnote{\textit{Id.} at 1398. See supra note 306.} Just as "[c]orporate wealth can unfairly influence [candidate] elections," so too can it unfairly influence referendum contests.\footnote{\textit{Id. at 1397} (quoting \textit{Massachusetts Citizens}, 479 U.S. at 257). See also Wright, 82 \textsc{Colum. L. Rev.} at 622 (examining purpose and goal of the referendum).} Moreover, the \textit{Austin} rationale of preventing the "unfair advantage" of corporate spending in candidate elections is even more pertinent in referendum contests because that is the very rationale behind the referendum itself.\footnote{\textit{See supra} note 5 (setting forth text of statute).} The United States Supreme Court has declared that the aim of this regulation is to "prevent the subversion of the integrity of the electoral process" and "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government."\footnote{\textit{United States v. UAW}, 352 U.S. 567, 575 (1957). See supra note 79-101 and accompanying text.}

In \textit{Austin v. Michigan Chamber of Commerce},\footnote{\textit{Id. at 1395}. See also \textsc{Mich. Comp. Laws Ann.} § 169.254(1) (West 1989). See supra note 5 (setting forth text of statute).} the United States Supreme Court upheld section 54(1) of the Michigan Campaign Finance Act which prohibits corporations from spending general treasury funds to assist or oppose the nomination or election of political candidates.\footnote{\textit{Id. at 1391} (1990).} The Supreme Court held that the statute was narrowly tailored to serve the compelling state interest of preventing corporate wealth from unfairly influencing the results of candidate elections.\footnote{\textit{Austin}, 110 S. Ct. at 1397.}
Austin stands for the proposition that business corporations may be totally restricted from making independent expenditures in candidate elections without violating corporate first and fourteenth amendment rights. In addition, the broad rationale in Austin ostensibly indicates that corporations may constitutionally be prohibited from making independent expenditures to influence the results in referenda contests, thus signaling the future demise of First National Bank v. Bellotti.

The Supreme Court in Austin properly exercised judicial deference in sustaining section 54(1) which was enacted to enhance the diversity of the political marketplace by preventing the voice of the individual citizen from being inundated by corporate dollars. The Supreme Court thus affirmed the superior first amendment rights of natural persons over artificial corporate persons. Most importantly, the Supreme Court in Austin validated an affirmative use of the first amendment by people seeking to restore the waning principles of equality and self-government — principles upon which all first amendment rights are founded.

Michael J. Merrick—'92

323. Id. at 1401-02. See supra notes 289-301 and accompanying text.