

Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of *Austin v. Michigan Chamber of Commerce*

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In 1990, the U.S. Supreme Court in *Austin v. Michigan Chamber of Commerce* adopted a new theory that allowed states to regulate independent expenditures by corporations in connection with candidate campaigns.¹ This new theory held that corporations by definition have the potential to corrupt the political process, because special state-conferred advantages allow them to accumulate massive economic resources which can then be used in the political marketplace without correlation to public support for the corporation's political position. Therefore, according to the Supreme Court, it is constitutional under the First Amendment to prohibit corporations from using their general treasury funds expressly to advocate support for, or opposition to, a candidate for political office. Corporations may, however, establish and administer separate segregated funds, also called political action committees, the purpose of which is to engage in such political speech, as long as contributions to the segregated fund are solicited only from shareholders, employees and members of the corporation. In other words, a corporation may not contribute money from its general treasury to the segregated fund, although the corporation may spend such monies on the establishment and administration of the fund.

The State of Montana recently tried, through a popular initiative ("I-125"), to extend the *Austin* approach to corporate spending on

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1. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668-69 (1990). Limitations on contributions to candidates, as opposed to independent expenditures on behalf of candidates, have been constitutional since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). See *infra* Part I.A, for a discussion of *Buckley* and the distinction between expenditures and contributions.

ballot measure campaigns.² Although the initiative was approved by the voters of Montana in 1996, it was declared unconstitutional by a federal district court two years later on the grounds that the Supreme Court has not permitted such regulation of speech on ballot measure campaigns.³ The case has been appealed to the Ninth Circuit,⁴ and is likely to be appealed to the Supreme Court regardless of the Ninth Circuit's decision. In the meantime, the U.S. Public Interest Research Group and citizen groups around the country are hoping to use Montana's law as a model for similar laws in other states.⁵

Although the Supreme Court's opinion in *Austin* applied only to corporate spending in connection with candidate campaigns, and although the Court has never approved any government-imposed restrictions on expenditures in connection with ballot measure campaigns, *Austin's* theory is so broad that it must necessarily reach corporate spending on ballot issues. The extension of *Austin* to ballot issues could have a significant impact on states' initiative and referendum processes. As of 1999, 27 states provided for some form of initiative or popular referendum process and 49 permitted legislative referenda.⁶ In the November 1998 elections, voters in 44 states were asked to decide on a total of 235 statewide ballot questions.⁷ Because of the frequent state use of ballot measures, the opportunity for corporate participation in law-making is enormous, as is the potential for distortion of the democratic process.⁸ Therefore, the question of

2. The terms "ballot measure," "ballot issue," "ballot question," and "initiative and referendum" are used interchangeably in this article to refer to any type of proposed law that is placed on a state ballot and requires a public vote. Generally speaking, an initiative is a proposed law placed on the ballot by citizens, whereas a referendum is placed on the ballot by state legislatures. See *Initiative & Referendum Institute Factsheet #1* (visited Mar. 12, 2000) <<http://www.iandrinstitute.org/factsheets/fs1content.htm>>.

3. See *Montana Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593, 600 (D. Mont. 1998).

4. See *Montana Chamber of Commerce v. Argenbright*, C.A. No. 98-36256 (9th Cir.).

5. See Telephone Interview with Jonathan Motl, attorney for I-125 Proponents' Committee (July 23, 1999). A petition for an initiative similar to I-125 has been certified for circulation in Oregon, (visited Mar. 12, 2000) <http://www.ballotwatch.org/asp/full_description.asp?id=253>, and citizen groups in approximately 15 other states, including California, have also expressed interest in placing initiatives like I-125 on their state ballots. See *id.*

6. See *Initiative & Referendum Institute Factsheet #1* (visited Mar. 12, 2000) <<http://www.iandrinstitute.org/factsheets/fs1content.htm>>.

7. See *Initiative and Referendum Institute, Initiatives, and Referendum on the 1998 Ballot Report Summary* (visited Mar. 12, 2000) <<http://www.iandrinstitute.org/98post.htm>>. Of the 235 questions, there were 55 initiatives, 6 popular referenda and 174 legislative referenda. See *id.*

8. See generally, David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995).

whether states can constitutionally regulate corporate political spending on ballot issues is becoming increasingly significant.

This article argues that although the *Austin* theory should logically extend to ballot measure campaigns, the theory is ill-considered and cannot constitutionally support the segregated fund requirement for corporate political spending. Government regulation of political speech⁹ is constitutional only if the regulation serves a compelling or sufficiently important¹⁰ state interest and is narrowly tailored to protect that interest. *Austin*, however, fails clearly to define the state interest involved in the regulation of corporate political spending. Moreover, the segregated fund requirement permitted by *Austin* is not sufficiently narrowly tailored to protect the state's asserted interest. Perhaps huge corporate expenditures on candidate elections and bal-

9. The U.S. Supreme Court has equated spending with speech. *See, e.g., Austin*, 494 U.S. at 657 (1990) ("Certainly, the use of funds to support a political candidate is 'speech'"). Nevertheless, there is some disagreement among the current justices over whether money equals speech. *See, e.g., Nixon v. Shrink Missouri Gov't PAC*, ___ U.S. ___, 120 S.Ct. 897, 910 (2000), Stevens, J., concurring (stating that "[m]oney is property; it is not speech," but going on to state that use of money to fund speech by others merits significant constitutional protection); *id.* at 911, Breyer, J., concurring ("a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech"); *but see id.* at n.4, Thomas, J., dissenting (Justice Stevens' propositions "are directly contradicted by many of our precedents"). There is also debate among commentators over whether spending equals speech for purposes of the First Amendment. *See, e.g., Bradley A. Smith, Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 52 (1997) (money is speech); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005, 1009-10 (1976) (money does not necessarily equal speech, although the two are closely related); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1290 (1994) (spending money on political speech should be protected by First Amendment). This article follows the U.S. Supreme Court's lead in assuming that political spending equals political speech.

10. Until recently, it seemed clear that a compelling state interest is required to justify government regulation of political speech. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[w]hen a law burdens core political speech, we apply 'exacting scrutiny'"); Smith, *supra* note 9, at 52 ("strict scrutiny is the appropriate level of judicial review for campaign finance regulation"). The Supreme Court recently drew a distinction, however, between the standard of review for limitations on contributions to candidates and expenditures on behalf of candidates. While expenditures are still subject to strict scrutiny, limitations on contributions must merely be "closely drawn" to match a "sufficiently important interest." *Nixon*, 120 S.Ct. at 899. Justices Thomas and Scalia criticized this standard, arguing that "[t]he Court in *Buckley* at least purported to employ a test of 'closest scrutiny.' . . . The Court today abandons even that pretense and reviews contributions under the sui generis '*Buckley's* standard of scrutiny'. . . . Apart from its endorsement of *Buckley's* rejection of the intermediate standards of review . . . the Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases." *Id.* at 922, Thomas, J., dissenting.

lot issue campaigns are corrupting the political process and undermining public confidence in democracy,¹¹ but the *Austin* theory is neither constitutional nor is it good policy. Therefore, this article argues that the Supreme Court should reconsider *Austin* and develop a different theory for determining whether corporate political speech corrupts the democratic process and undermines public confidence in the political system.

Part I of this article reviews Supreme Court jurisprudence on corporate political speech cases, culminating in *Austin v. Michigan Chamber of Commerce*. Part II describes the Montana initiative that sought to extend *Austin* to ballot measure campaigns, and discusses the resulting law suits and their current status. Part III shows that the *Austin* theory of corruption must also logically be extended to ballot issue campaigns, but Part IV argues that *Austin's* theory is unconstitutional with respect to both candidate and ballot question campaigns because (a) the segregated fund requirement is a significant burden on constitutionally protected speech, (b) the alleged state interest is poorly defined, and (c) the segregated fund law is not sufficiently narrowly tailored. Specifically, Part IV shows that although the *Austin* Court attempts to justify the segregated fund requirement on grounds that corporations receive special state-conferred advantages that allow them to amass "war-chests" that can then be spent on political speech, in fact these alleged advantages are also available to non-corporate entities and therefore can not support *Austin's* or Montana's attempt to regulate corporate political spending. Finally, the article concludes that the Court should abandon *Austin* and instead create a new theory for determining whether well-funded political speech, corporate or otherwise, can constitutionally be regulated in the context of both candidate elections and ballot measure campaigns.

I. Supreme Court Jurisprudence on Corporate Political Speech

Although attempts to regulate corporate spending on political campaigns in the United States date back at least 100 years,¹² it was not until after the passage of the Federal Election Campaign Act of

11. See, e.g., Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 29 UNIV. MIAMI L. REV. 377 (1985).

12. For a detailed history of the regulation of corporate spending on political campaigns, see *United States v. United Auto Workers*, 352 U.S. 567 (1957).

1971 ("FECA")¹³ that the Supreme Court began seriously to consider the constitutional issues associated with such regulation. In the 1957 case *United States v. United Auto Workers*, the Court declined to consider the constitutional issues raised by a prohibition on labor union contributions or expenditures in connection with a candidate election, focusing instead on statutory interpretation of the prohibition.¹⁴ Similarly, in the 1972 case *Pipefitters v. United States*, the Court again avoided the constitutional question in favor of statutory interpretation when it found that the same statute it had considered in *Auto Workers* allowed a union to create a political action committee controlled by the union, as long as union members' contributions to the committee were truly voluntary.¹⁵

However, starting in 1976 the Court began to consider the constitutionality of regulations on political spending on numerous occasions. This series of decisions began with *Buckley v. Valeo*,¹⁶ which considered the constitutionality of limits on contributions and expenditures in connection with federal candidate campaigns. For purposes of this article, the next two important cases were *First National Bank of Boston v. Bellotti*¹⁷ and *Citizens Against Rent Control v. Berkeley*,¹⁸ both of which addressed expenditure limits on ballot issue campaigns. Subsequently came a series of cases involving the constitutionality of prohibiting corporations and unions from spending money out of their general treasuries on candidate campaigns.¹⁹ These cases together form the context for an analysis of Montana's attempt through I-125 to push the bounds of current Supreme Court jurisprudence to permit state regulation of corporate spending on ballot issue campaigns.

A. *Buckley v. Valeo*

The key case on which all subsequent political campaign spending cases rest is *Buckley v. Valeo*.²⁰ *Buckley* considered the constitutionality of the FECA,²¹ which, among other provisions, "includes restric-

13. See Pub. L. No. 92-2252, 86 Stat. 11 (codified as amended at 2 U.S.C. § 431 et seq. (1997 & 1999 Supp.)).

14. See *United States v. United Auto Workers*, 352 U.S. 567, 591 (1957).

15. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 401 (1972).

16. 424 U.S. 1 (1976).

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

18. 454 U.S. 290 (1981).

19. See *Federal Election Comm'n v. National Right to Work Comm'n.*, 459 U.S. 197 (1982); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Austin*, 494 U.S. at 652.

20. 424 U.S. 1 (1976).

21. 2 U.S.C. § 431 et seq. (1997 & Supp. 1999).

tions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process.”²² Although the case focused exclusively on campaign funding issues for federal candidates, and did not address funding of ballot issues, *Buckley* established the parameters of the debate on political funding questions.

Buckley began with the premise that “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest possible protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”²³ Despite the importance of the First Amendment to the political process, however, *Buckley* held that the State may burden free speech rights if the State does so to protect a “sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of” First Amendment rights.²⁴

The Court then went on to distinguish, in its constitutional analysis, between limitations on *contributions* to candidates and limitations on *expenditures* made on behalf of candidates, finding that limitations on contributions constituted much smaller restrictions on political expression than did limitations on expenditures.²⁵ The Court held that the government has a compelling state interest in limiting contributions to candidates in order to prevent corruption, or the appearance of corruption, in the political process:

To the extent that large contributions are given to secure political *quid pro quo*'s from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence “is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”²⁶

22. *Buckley*, 424 U.S. at 12-13.

23. *Id.* at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). *See also id.* at 49, n.55 (“Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.”).

24. *Id.* at 25.

25. *See id.* at 19-20.

26. *Id.* at 26-27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

Accordingly, the Court concluded that FECA's limitations on *contributions* to candidates for federal office were constitutional because they were narrowly drawn to address a compelling state interest.

The Court was less comfortable with FECA's limitations on *expenditures* on behalf of candidates. The Court found that the government's interest in preventing corruption and the appearance of corruption was inadequate to justify FECA's limitations on expenditures because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."²⁷ The Court expressly rejected the government's argument that the expenditure limitations were necessary to equalize the political influence of individuals and groups:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.²⁸

Buckley's distinction between contributions and expenditures, its characterization of the type of corruption that justifies regulation of political speech, and its refusal to find a compelling state interest in equalizing political influence have formed the foundation of all subsequent attempts to regulate political speech.²⁹

B. Ballot Measure Cases

The Supreme Court has only twice considered the constitutionality of limitations on expenditures in connection with ballot measure campaigns, and in both cases has found such regulations to be unconstitutional. However, because both cases were decided before *Austin*

27. *Id.* at 46. The Court also found that the limitations on expenditures did not sufficiently address the state's interest because the limitations applied only to expenditures that explicitly advocate the election or defeat of a particular candidate, but not to expenditures that simply promote a candidate. *See id.* at 45. The Court itself had made this distinction in order to avoid problems of constitutional vagueness. *See id.* at 44.

28. *Id.* at 48-49 (citations omitted).

29. Several Supreme Court justices have recently questioned the continuing validity of *Buckley*. *See Nixon*, 120 S.Ct. 897, (Kennedy, J., dissenting, Part. II) (Thomas, J. & Scalia, J., dissenting).

v. Michigan Chamber of Commerce, they many no longer represent the Court's final position on ballot-issue campaign funding.

In *First National Bank of Boston v. Bellotti*,³⁰ the Supreme Court found unconstitutional a Massachusetts statute that prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."³¹ The statute further provided that any ballot issue concerning income tax was by definition not an issue that materially affected the property, business or assets of a corporation.³² The plaintiffs in *Bellotti* were two banking associations and three business corporations that wanted to publicize their views on a proposed constitutional amendment that would have allowed the Massachusetts legislature to impose an income tax on individuals, and which was to be submitted to the voters as a ballot question at a general election.³³ The plaintiffs sued to have the Massachusetts statute prohibiting expenditures for such a purpose declared unconstitutional.³⁴

The Court framed the issue as whether the Massachusetts statute "abridges expression that the First Amendment was meant to protect."³⁵ Put another way, the Court stated that the question in the case, "simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear [First Amendment] entitlement to protection."³⁶ The Court held that it did, and thus found the statute to be unconstitutional.³⁷

The Court began its analysis by pointing out that the kind of speech in which the plaintiff corporations sought to engage is "at the heart of the First Amendment's protection."³⁸ Furthermore,

[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the

30. 435 U.S. 765 (1978).

31. *Id.* at 768.

32. *See id.*

33. *See id.* at 767-69.

34. *See id.* at 769.

35. *Id.* at 776. The Court explicitly refused to consider the separate question of whether corporations have First Amendment rights. *See id.*

36. *Id.* at 778.

37. *See id.* at 795.

38. *Id.* at 776.

speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.³⁹

Thus, the role of the First Amendment is not only to foster individual self-expression, but also to afford “the public access to discussion, debate, and the dissemination of information and ideas.”⁴⁰

Having decided that corporate speech on ballot issues is protected by the First Amendment, the Court proceeded to determine whether the Massachusetts statute was nevertheless constitutional because it served a compelling state interest and was sufficiently narrowly drawn to avoid unnecessary abridgment of the First Amendment.⁴¹ Massachusetts asserted two compelling state interests. First was “the State’s interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing the diminution of the citizen’s confidence in government.”⁴² Second was “the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation.”⁴³ The Court rejected both asserted interests as not being served by the statute.

Addressing Massachusetts’ first argument, the Court acknowledged that in the context of campaigns by candidates for elected office, there is a threat of real or apparent corruption because of the possibility of a political *quid pro quo*, and agreed with Massachusetts that preventing corruption and preserving individual citizens’ confidence in government are interests “of the highest importance.”⁴⁴ However, the Court found that

[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving elections, simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it⁴⁵

The Court also rejected Massachusetts’ argument that “corporations are wealthy and powerful and their views may drown out other points of view,”⁴⁶ because, according to the Court, there was “no

39. *Id.* at 777 (footnotes omitted).

40. *Id.* at 783.

41. *See id.* at 786.

42. *Id.* at 787.

43. *Id.*

44. *Id.* at 788-89, n. 26.

45. *Id.* at 790 (citations omitted).

46. *Id.* at 789.

showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.”⁴⁷ Importantly, the Court left the door ajar on this point stating that if Massachusetts’ “argument were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.”⁴⁸ The Court did not indicate what kind of evidence would be sufficient to make the required showing.⁴⁹

The Court also rejected as sufficient grounds for the statute Massachusetts’ asserted government interest in protecting corporate shareholders from having their money used by the corporation to express views on ballot issues with which the shareholders might disagree. Although the Court agreed that this interest is “both legitimate and traditionally within the province of state law,”⁵⁰ the Court found that the Massachusetts statute did not sufficiently address this concern because the statute was both under and overinclusive. The statute was underinclusive because it prohibited corporations from making expenditures in connection with ballot measures, but not with respect to the support or defeat of other legislation. In addition, the statute prohibited only banks and corporations from engaging in the proscribed speech, but not other kinds of organizations that “have resources com-

47. *Id.* at 789-90 (footnote omitted).

48. *Id.* at 789.

49. It is still not clear what kind of evidence is needed to prove corruption of the political process, although the Court recently opined that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Nixon*, 120 S.Ct. at 900. Justice White, in his *Bellotti* dissent, pointed out that there was significant evidence in the record indicating the effect of corporate spending on ballot issues. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 810-11 (1978). He noted that in 1972, an “organized political committee” raised and expended approximately \$120,000 to defeat a proposed amendment to the Massachusetts constitution, while the only political committee organized to support the amendment raised only \$7,000. *See id.* at 811. In a 1976 California referendum campaign, 203 corporations contributed \$2,530,000 in opposition to the referendum, while supporters raised only \$1,600,000. *See id.* at 811 n.11. Justice White also noted that in Montana in 1976, corporate opponents of a referendum raised \$144,000, while supporters raised only \$451. In each case, the corporate interests won. *See id.* at 811 & n.11.

50. *Bellotti*, 435 U.S. at 792.

parable to those of large corporations” and whose members have interests similar to shareholders.⁵¹

The Court also deemed the Massachusetts statute to be overinclusive because it would prohibit corporate political speech on ballot questions even when the shareholders unanimously supported the corporation’s position.⁵² Without deciding whether the protection of shareholders is a “compelling” state interest, the Court noted that shareholders can protect their own interests either by electing a board that represents their views, or by bringing derivative suits to challenge allegedly improper expenditures by management.⁵³

The only other Supreme Court case on ballot issues is *Citizens Against Rent Control v. Berkeley*.⁵⁴ In that case, a Berkeley, California city ordinance limited contributions by a person to committees formed to support or oppose local ballot measures to \$250. The Supreme Court found the limitation to be unconstitutional, emphasizing, as it did in *Bellotti*, that contributions to ballot issue campaigns do not have the same potential to corrupt as do contributions to individual candidates.⁵⁵

It is thus clear from *Bellotti* that an outright prohibition on corporate contributions and expenditures in connection with a ballot issue is unconstitutional unless the “argument[] were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests”⁵⁶ It is also clear from *Berke-*

51. *Id.* at 793. The Court apparently believed that Massachusetts’ proffered interest in protecting shareholders was merely a pretext for “silencing corporations on a particular subject.” *Id.*

52. *See id.* at 794.

53. *Id.* at 795.

54. 454 U.S. 290 (1981).

55. *See id.* at 297-98. *See also* concurrence by Justices Blackmun and O’Connor, *id.* at 302. Justice White dissented from the Court’s decision in *Berkeley*, and, as in *Bellotti*, he included in his dissent figures that he argued may show that “the relative voice of corporations ha[d] been overwhelming [and] . . . significant in influencing referenda.” 454 U.S. at 306, quoting *Bellotti*, 435 U.S. at 789-90. According to Justice White, “[s]taggering disparities have developed between spending for and against various ballot measures.” [footnote omitted]. *Id.* at 307-08. While it is not possible to prove that heavy spending ‘bought’ a victory on any particular ballot proposition, there is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process [footnote omitted].” *Id.* at 307-08. Justice White included evidence showing corporate spending for and against ballot issues far exceeding spending by those on the opposite side of the measure, and showing that when corporations oppose a ballot measure, they far outspend those supporting the measure and successfully defeat such measures in almost all cases. *See id.* at 307-08 nn.2-4.

56. *Bellotti*, 435 U.S. 789.

ley that a *quid pro quo* corruption theory is unlikely to satisfy the evidentiary standard set by the Court for ballot measures and therefore can not sustain regulation of political spending on ballot measure campaigns.

These cases are not dispositive of the constitutionality of Montana's I-125, however, for two reasons. First, because Montana's I-125 arguably does not constitute an outright prohibition on corporate political spending, but merely requires a corporation to use a separate, segregated fund for such spending, it is distinguishable from the Massachusetts statute at issue in *Bellotti*. Second, the Supreme Court in *Austin v. Michigan Chamber of Commerce* moved away from *Bellotti*'s and *Berkeley*'s focus on *quid pro quo* corruption as the basis for regulation of corporate political spending and has opened the door for regulation of corporate spending on ballot measure campaigns regardless of whether *quid pro quo* corruption has been shown. The following two sections explain these issues further.

C. Segregated Fund Cases

The only Supreme Court cases to address the constitutionality of requiring separate, segregated funds for corporate political activity, as is required by Montana's I-125, have occurred in the context of contributions or expenditures on behalf of candidates for political office, not for or against ballot measures. The *Austin* theory of corruption that ultimately came out of these cases, however, is equally applicable to ballot question campaigns. The cases are therefore highly relevant to the constitutional analysis of attempts to regulate corporate spending in connection with such campaigns.

The first important precursor to *Austin v. Michigan Chamber of Commerce* is the Court's discussion in *Federal Election Commission v. National Right to Work Committee* (hereinafter "NRWC")⁵⁷ of the regulation of corporate and union contributions to political campaigns. The issue in *NRWC* was whether the National Right to Work Committee (hereinafter "NRWC") had violated Section 441(b) of FECA,⁵⁸ which requires corporations and unions that wish to make contributions or expenditures in connection with federal elections to do so only through separate, segregated funds solicited from stockholders and members. The NRWC had solicited over 250,000 persons for contributions to a separate segregated fund the purpose of which was to support certain federal candidates for office. The FEC chal-

57. 459 U.S. 197 (1982).

58. 2 U.S.C. § 441(b) (1997 & Supp. 1999).

lenged the NRWC's solicitation of so many people, arguing that not all were actually "members" of the NRWC.⁵⁹

While refusing to "attempt an exegesis of the statutory meaning of the word "members" beyond that necessary to decide this case,"⁶⁰ the Court concluded that the word "member" suggests "some relatively enduring and independently significant financial or organizational attachment"⁶¹ Although NRWC called anyone who had responded to the NRWC's past mass mailings a "member," neither the NRWC's articles of incorporation nor its bylaws made any mention of members, and the alleged "members" played no part in the administration of the NRWC.⁶² Under such circumstances, the Court concluded that to define as a member anyone who had ever responded to an NRWC mailing would "open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to 'members.'"⁶³

The Court defended its definition of "members" against the lower court's concern that such a narrow definition would infringe upon the constitutional right to free association.⁶⁴ The Court found that one of the state interests justifying the segregated fund requirement for corporations and unions was "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions."⁶⁵ Apparently the Court felt that if corporations and unions could solicit funds from anyone who had ever expressed an interest in the organization, they would be able to use their special attributes to accumulate funds that could then

59. See *NRWC*, 459 U.S. at 200-01.

60. *Id.* at 203.

61. *Id.* at 204; cf. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 242 n.1 (stating that *NRWC* held that a "member" of a nonstock corporation must have "some relatively enduring and independently significant financial or organizational attachment" to the corporation).

62. See *id.* at 206.

63. *Id.* at 204.

64. See *id.* at 206-07.

65. *Id.* at 207. A second alleged state interest was "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed [citation omitted]." *Id.* at 208. The Court was not entirely clear on its attitude toward this alleged state interest. Although the Court said that the prevention of corporate war-chests creating *quid pro quo* debts and the protection of shareholders and members "are sufficient to justify the regulation at issue," the Court's subsequent discussion focuses entirely on *quid pro quo* corruption without further mention of the protection of shareholders. *Id.*

be used (or could appear to be used) to corrupt public officials through the creation of *quid pro quo* relationships.

Although the Court's discussion in *NRWC* focused on the *Buckley* notion of *quid pro quo* corruption,⁶⁶ it clearly anticipated the "corporate corruption of the political marketplace" theory introduced four years later in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,⁶⁷ (hereinafter "MCFL") and subsequently applied in *Austin v. Michigan Chamber of Commerce*.⁶⁸

MCFL involved the constitutionality of requiring a non-profit corporation to use a segregated fund to make an expenditure on behalf of political candidates.⁶⁹ The Court decided that a non-profit corporation may not constitutionally be required to use a segregated fund for its expenditures on behalf of political candidates if the non-profit corporation meets certain criteria established by the Court.⁷⁰ More important for purposes of the present discussion, however, is the Court's analysis of the threat of corruption potentially posed by corporate political expenditures.

Massachusetts Citizens for Life, Inc. (hereinafter "MCFL") was a non-profit, non-stock corporation incorporated in Massachusetts.⁷¹ In September 1978, MCFL had published a special newsletter in which it exhorted readers to "vote pro-life" and identified the pro-life candidates in the upcoming election.⁷² The newsletter was printed with MCFL's general treasury funds, not with segregated funds.⁷³ The Court unanimously decided that MCFL had violated FECA's requirement that it use segregated funds for such activity.⁷⁴ The Court then proceeded to the issue of the constitutionality of the FECA segregated fund requirement as it applied to non-profits.

A plurality of the Court (Justices Brennan, Marshall, Powell, and Scalia), joined in a concurrence by Justice O'Connor, concluded that FECA was a burden on MCFL's First Amendment rights because "the corporation is not free to use its general funds for campaign advocacy purposes. While that is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated

66. See *supra* text accompanying note 65.

67. 479 U.S. 238 (1986).

68. 494 U.S. 652 (1990); see *infra* Part I.D.

69. See *Federal Election Comm'n*, 479 U.S. at 241.

70. See *id.*

71. See *id.*

72. See *id.* at 243.

73. See *id.* at 244.

74. See *id.* at 250-51.

fund, MCFL must make very significant efforts.”⁷⁵ The Court went on to note that because a segregated fund is considered under FECA to be a “political committee,” MCFL’s segregated fund must comply with all the regulations imposed by FECA on political committees.⁷⁶ If, on the other hand, MCFL were not incorporated, it would not have to use a segregated fund and would not have to comply with the “political committee” regulations.⁷⁷ The plurality noted that it is not an unconstitutional burden on free speech to require non-profit corporations to conduct their political activity through a separate segregated fund in order to receive Section 501(c) tax-exempt status because “there is no right to have speech subsidized by the Government.”⁷⁸

Having determined that FECA burdened MCFL’s First Amendment rights, a majority of the Court⁷⁹ next considered whether the burden was justified by a compelling state interest. The FEC asserted three such interests, each of which the majority rejected as not applicable to non-profit corporations like MCFL: (1) “the special charac-

75. *Id.* at 252.

76. *Id.* at 253.

77. *Id.* at 252. The plurality stated that

[i]t is evident . . . that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear [footnote omitted]. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to “members” vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech. . . . Thus, while [FECA] does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute’s practical effect may be to discourage protected speech is sufficient to characterize [FECA] as an infringement on First Amendment activities.

Id. at 254-55. Justice O’Connor in her concurrence emphasized that it is the organizational restraints imposed by FECA on such groups as MCFL, rather than the disclosure requirements discussed by the majority, that constitute a significant burden on First Amendment rights of non-profits. *Id.* at 266 (O’Connor, J. concurring).

78. *Id.* at 256, n.9.

79. The majority consisted of Justices Brennan, Marshall, Powell, Scalia, and O’Connor. Chief Justice Rehnquist and Justices White, Blackmun, and Stevens concurred in the judgment that MCFL had violated FECA, but dissented from the majority’s decision that FECA’s segregated fund requirement was unconstitutional as applied to non-profit corporations like MCFL, on the grounds that the Court should defer to Congress’ judgment that political spending by non-profit corporations poses a threat of corruption. *Id.* at 266-71. White, while joining the Chief Justice’s dissent, also stated that he continued to adhere to his dissenting views in *Buckley*, 424 U.S. at 257, *Bellotti*, 435 U.S. 789, and *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985).

teristics of the corporate structure require particularly careful regulation;”⁸⁰ (2) preventing “an organization from using an individual’s money for purposes that the individual may not support;”⁸¹ and (3) the prevention of “massive undisclosed political spending.”⁸²

With respect to the FEC’s first argument, a majority of the Court agreed that corporate spending by business has the potential for corruption of the political marketplace through “unfair deployment of wealth for political purposes,”⁸³ but concluded that groups such as MCFL do not pose such a danger of corruption.⁸⁴ Building on the Court’s previous statements about the rationale for restricting the influence of corporations on the political process,⁸⁵ however, the Court in dicta restated its theory of why corporate political speech may be regulated, this time without reference to *quid pro quo* corruption.

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

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, [FECA] seeks to prevent this threat to the po-

80. *Id.* at 256 (footnote omitted).

81. *Id.* at 260.

82. *Id.* at 262.

83. *Id.* at 259.

84. The Court specifically stated that it was not deciding the constitutionality of FECA’s segregated fund requirement as applied to commercial enterprises. *Id.* at 263. That issue was later addressed in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60, *see infra* Part I.D.

85. According to the MCFL majority, the rationale for regulating corporate political activity has been described “as the need to restrict ‘the influence of political war chests funneled through the corporate form;’ to ‘eliminate the effect of aggregated wealth on federal elections;’ to curb the political influence of ‘those who exercise control over large aggregations of capital;’ and to regulate the ‘substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.’” 479 U.S. at 257 (citations omitted).

litical marketplace. The resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.⁸⁶

The Court also noted, however, that MCFL, as a non-profit entity, did not have the potential to disrupt the political marketplace through use of resources amassed in the economic marketplace.⁸⁷ On the contrary, the resources MCFL had available “are not a function of its success in the economic marketplace, but its popularity in the political marketplace.”⁸⁸ Therefore, the Court concluded, “MCFL is not the type of [corporation] that has been the focus of regulation of corporate political activity.”⁸⁹

With respect to the FEC’s argument that the state has a compelling state interest in protecting stockholders and members from their money being used for purposes they do not support, the Court again made a distinction between business corporations and labor unions on the one hand, and non-profit corporations like MCFL on the other. The Court stated that while stockholders of corporations and members of unions contribute their funds for economic gain rather than political purposes, contributors to organizations like MCFL *expect* their money to be used for political purposes.⁹⁰ Therefore, the state does not have a compelling interest in protecting contributors to non-profit political organizations such as MCFL from political use of their money.

86. 479 U.S. at 257-58 (citations omitted). The *MCFL* Court’s explanation of its theory sounds a lot like Justice White’s dissent in *Bellotti*. Justice White in *Bellotti* had argued that the State’s interest in regulating corporate political activity was not based on equalizing voices,

but rather o[n] preventing 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 Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas Corporate political expression . . . is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.

Bellotti, 435 U.S. at 809-10 (White, J., dissenting).

87. See *MCFL*, 479 U.S. at 259.

88. *Id.*

89. 479 U.S. at 259. The Court distinguished *NRWC* by observing that *MCFL* concerned expenditures, whereas *NRWC* concerned contributions. Thus, the Court returned to the distinction made in *Buckley* between expenditures and contributions. See *supra* Part I.A. “We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.” *MCFL*, 479 U.S. at 259-60.

90. See 479 U.S. at 260-61.

The Court quickly dispensed with the FEC's third argument in favor of the FECA regulation by stating that the inapplicability of FECA's segregated fund requirement to MCFL would not "open the door to massive undisclosed political spending" because "an independent expenditure of as little as \$250 by MCFL will trigger the disclosure provisions of [FECA]."⁹¹ "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under [FECA]."⁹²

Finally, the Court set forth the three "essential features" of MCFL that justified its conclusion that FECA's segregated fund requirement may not constitutionally apply to MCFL.

First, [MCFL] was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . This ensures that political resources reflect political support.

Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.

Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.⁹³

91. *Id.* at 262.

92. *Id.*

93. *Id.* at 263-64. A disagreement has developed over how narrowly to interpret this third MCFL factor. According to the FEC, a non-profit must either not accept any donations from business corporations or must have an actual policy against accepting contributions from business corporations and labor unions in order to qualify for an exemption from FECA's segregated fund requirement pursuant to MCFL. 11 C.F.R. § 114.10(c)(4)(iii) (1999); *see also* Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 130 (8th Cir. 1997) (FEC follows narrow interpretation); FEC v. Survival Education Fund, Inc., 65 F.3d 285, 292 (2d Cir. 1995) (the FEC argues that "only an absolute policy against accepting contributions from business corporations and labor unions would guarantee that a non-profit . . . would not abuse its corporate form"). The FEC's narrow interpretation has been accepted in two cases. *See* FEC v. NRA Political Victory Fund, 778 F. Supp. 62, 64 (D.D.C. 1991), *rev'd on other grounds*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed* 513 U.S. 88 (1994) and Faucher v. FEC, 743 F. Supp. 64, 69-70 (D. Me. 1990), *aff'd* 928 F.2d 468 (1st Cir.), *cert. denied* 502 U.S. 820 (1991). Several other courts, however, have adopted a more flexible approach, finding that a non-profit entity does not have to have an actual policy in place as long as the non-profit is in fact independent of business interests. *See* North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999); Community Advocate Inc. v. Ohio Elections Comm., 705 N.E.2d 414 (Ohio App. 1997), *appeal dismissed* 692 N.E.2d 211 (Ohio 1998); FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied* 115 S. Ct. 936 (1995). Montana's I-125 followed the more flexible approach, requiring that non-

Thus, the Court established these three features as criteria an organization must meet in order to be constitutionally exempt from FECA's segregated fund requirement. Even after *MCFL*, however, the constitutionality of a segregated fund requirement for corporations that do not meet the three *MCFL* criteria remained unresolved. That question was answered a few years later in *Austin v. Michigan Chamber of Commerce*, when the Court fully adopted its "corporate corruption of the political marketplace" theory in upholding as constitutional a Michigan law requiring corporations to make expenditures on behalf of political candidates only out of segregated funds.⁹⁴

D. *Austin v. Michigan Chamber of Commerce*

*Austin v. Michigan Chamber of Commerce*⁹⁵ involved a suit by the Michigan Chamber of Commerce ("the Chamber") to have declared unconstitutional a Michigan statute that required corporations to make expenditures on behalf of political candidates only out of segregated funds.⁹⁶ The Chamber was a non-profit corporation comprising more than 8,000 members, three-quarters of whom were for-profit corporations. The Chamber sought to use its general treasury, funded by annual dues paid by its members, to pay for an advertisement in a newspaper supporting a specific candidate. The Chamber sued to have declared unconstitutional the Michigan statute prohibiting such use of its general funds. The Supreme Court first briefly discussed why the segregated fund requirement was a burden on corporations' free speech rights, quoting its previous discussion in *MCFL*. It then went on to conclude that the state has a compelling interest in preventing corruption in the political arena.

profit corporations must accept no more than 5% of their total revenue from for-profit corporations. See *infra* Part II.

94. 494 U.S. 652 (1990).

95. 494 U.S. 652 (1990).

96. The Michigan Campaign Finance Act prohibited direct corporate contributions or expenditures. See Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, MICH. COMP. LAWS §§ 169.254, 169.206 (1979) quoted in *Austin*, 494 U.S. at 697-98 n.1 (Kennedy, J., dissenting). Expenditure was defined as anything of value for purposes of influencing a candidate, but did not include a communication on a subject or issue that did not support or oppose a candidate by name or clear inference. Thus, the law did not prohibit corporations from spending their general treasury funds on issue advocacy. The Michigan law also explicitly stated that "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." § 169.254.

In upholding the constitutionality of the Michigan statute, a 6-3 majority of the Court⁹⁷ finally acknowledged what it had hinted at in *NRWC* and implied in *MCFL*: that the corruption threatened by corporate political expenditures was not necessarily political *quid pro quo*,⁹⁸ but a “different type of corruption in the political arena.”⁹⁹ This “New Corruption,” as Justice Scalia calls it in his *Austin* dissent,¹⁰⁰ is “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.”¹⁰¹

The *Austin* majority held that preventing such distorting (*i.e.* corrupting) effects was a sufficiently compelling rationale to justify Michigan’s restriction on independent expenditures by corporations on behalf of political candidates. The Court emphasized that “the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the regulation]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”¹⁰² The Court explained that

[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.”¹⁰³

The Court rejected the argument that Michigan’s statute was underinclusive because of its failure to regulate expenditures by unincorporated labor unions. Rather, the court emphasized that the state’s compelling interest in regulating such expenditures by corporations was the “desire to counterbalance those advantages unique to the cor-

97. The majority consisted of Chief Justice Rehnquist and Justices Marshall, Brennan, White, Blackmun, and Stevens, with Justice Marshall authoring the opinion. The dissenters were Justices Scalia, Kennedy, and O’Connor.

98. Presumably the Court could not apply the *quid pro quo* rationale in *Austin* because *Buckley* had held that the rationale was inapplicable to independent expenditures. See *supra* Part I.A.

99. 494 U.S. at 660.

100. 494 U.S. at 684 (Scalia, J., dissenting).

101. 494 U.S. at 660.

102. 494 U.S. at 660.

103. 494 U.S. at 658-59 (quoting *MCFL*, 479 U.S. at 257).

porate form”¹⁰⁴ Excluding unincorporated unions, which do not receive such advantages, therefore “does not undermine [the state’s] justification for regulating corporations.”¹⁰⁵

Having found that the state’s interest in preventing the “new corruption” was compelling, the Court concluded that Michigan’s statute was sufficiently narrowly tailored to pass constitutional muster. The Court upheld the Michigan statute against challenges that it was over-inclusive because it included closely held corporations that were not wealthy within its scope, stating that the special benefits received by such corporations from the state, and the *potential* of such corporations to distort the political marketplace, justified the general applicability of Michigan’s law to all corporations.¹⁰⁶

The Court concluded that because the Chamber did not meet any of the three criteria established in *MCFL*, the Michigan statute was constitutional as applied to the Chamber.¹⁰⁷ The Chamber failed the first *MCFL* criterion because its bylaws set forth several purposes that were not inherently political, such as to disseminate information, to train its members, and to promote ethical business practices. The Chamber failed the second criterion because many of its members might be reluctant to withdraw from the Chamber over political differences because of the business benefits obtainable through the Chamber. Finally, the Chamber failed the third *MCFL* criterion because the Chamber’s close connection to businesses created the potential for those businesses to funnel their political payments through the Chamber in a bid to circumvent the Michigan statute.¹⁰⁸

The Court summarily rejected the Chamber’s Fourteenth Amendment equal protection argument that “unincorporated associations with the ability to accumulate large treasuries” should be regulated along with corporations.¹⁰⁹ The Court reiterated that the state’s compelling interest is in eliminating the corruption made possible by special benefits granted by the state to corporations.¹¹⁰ Unincorporated entities do not receive such benefits. Therefore, corporations and unincorporated entities are not similarly situated, and there is no violation of the right to equal protection.

104. 494 U.S. at 665.

105. *Id.*, quoting *MCFL*, 479 U.S. at 258, n.11.

106. *See* 494 U.S. at 661.

107. *See id.* at 662-65.

108. *See id.*

109. *See id.* at 665.

110. *See id.*

The Supreme Court has thus moved from a focus on *quid pro quo* corruption as the justification for regulation of political contributions to a far more tenuous conception of corruption that justifies the comprehensive regulation of essentially all corporate political contributions and expenditures. *Austin* thus represents a dramatic change in the Court's thinking since *Buckley* and *Bellotti* and opens the door to new state regulations like Montana's I-125 which was based, nearly word for word, on the Court's opinions in *MCFL* and *Austin*.

II. Montana's Initiative 125

In November of 1996, Montana voters approved I-125, prohibiting corporations in Montana from making contributions or expenditures in connection with ballot measure campaigns out of the corporation's general treasury.¹¹¹ As in the Michigan law that was the subject of *Austin*, corporations were permitted to establish a separate, segregated fund for making contributions or expenditures as long as that fund consisted only of voluntary contributions from individuals who are shareholders, employees, or members of the organization.¹¹² Although the prohibition extended to non-profit corporations, the law did exempt from the prohibition those non-profit corporations that met the *MCFL* criteria.¹¹³

111. Expenditures "in connection with" means only express advocacy using such words as "vote for," or "support." *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52. Montana law already prohibited such contributions or expenditures in connection with a candidate. MONT. CODE ANN. §13-35-227 (1997).

112. Thus, after passage of I-125, Montana law (MONT. CODE ANN. §13-35-227 (1997)) stated:

(1)(a) Except as provided in subsection (4), a corporation may not make a contribution or expenditure in connection with a candidate, a ballot issue, or a political committee which supports or opposes a candidate, a ballot issue, or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and non-profit corporations.

....

(3) This section does not prohibit the establishment or administration of a separate segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or a member of the corporation. . . .

113. Section 13-35-227(4) stated that the prohibitions on using general treasury funds in connection with a ballot issue do not apply to a non-profit corporation formed for the purpose, among others, of promoting political ideas, and that:

(a) does not engaged [sic] in business activities;

(b) has no shareholders or other affiliated person who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic forprofit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic forprofit corporations.

The impetus behind I-125 was a concern that wealthy corporations were subverting the democratic process in Montana. Thus, the preamble to I-125 stated that the processes of initiative and referendum are a vital part of the political process in Montana; and . . . corporations are now making direct corporate expenditures of overwhelming amounts of money in Montana initiatives; and . . . participation in the political system needs to be kept fair to citizens of normal financial means; and . . . limitations on direct corporate contributions work toward that fairness.

Jonathan Motl, a representative of Montana Common Cause and a chief proponent of the Initiative, explained that

I-125 was written because there is too much money in Montana politics and nowhere is so much spent by so few than on ballot campaigns. . . . Large out-of-state corporations now routinely dump hundreds of thousands of dollars into ballot issue campaigns I-125 continues a 90-year history of reform aimed at preserving Montana's initiative process for its citizens.¹¹⁴

C.B. Pearson, the executive director of Montana Common Cause, stated that reform of ballot issue campaign funding was needed "to prevent a total corruption of the [initiative] process. Without reform we can expect to see Montana voters move away from this democratic tool with cynicism and disgust."¹¹⁵ According to Pearson, "corporations shouldn't be able to buy votes like they buy wood. It's just not fair."¹¹⁶

I-125 was carefully drafted by its proponents both to reflect and extend the U.S. Supreme Court's jurisprudence on the constitutionality of state regulation of corporate political spending. Shortly after I-125's passage, however, the Montana Chamber of Commerce and several other for-profit and non-profit corporations sued in federal district court to have I-125 declared unconstitutional.¹¹⁷ While that suit was pending, the Montana legislature approved House Bill 575, which extended I-125's coverage to include essentially *all* organizations, not

114. Jonathan Motl, Letter to the Editor, Great Falls Tribune, Oct. 29, 1996, at 7A, col 1.

115. Steve Shirley, *Ballot-Issue Financing Is at Issue in I-125*, Great Falls Tribune, Oct. 2, 1996, at 7A, col. 2.

116. Jason Kozleski, *I-125 Would Ban Corporate Giving to Campaigns, a First for Nation*, Great Falls Tribune, Oct. 26, 1996, at 1B, col. 1, 2B.

117. See *Montana Chamber of Commerce v. Argenbright*, Cause No. CV-97-6-H-CCL (D. Mont. 1997).

just corporations.¹¹⁸ In February 1998, the Federal District Court for the District of Montana declared House Bill 575 to be unconstitutional,¹¹⁹ but permitted the suit seeking to have I-125 declared unconstitutional to proceed to trial. The complaint against I-125 argued several constitutional infirmities with the initiative, all but one of which were rejected by the court on motion for summary judgment.¹²⁰ The remaining issue that finally went to trial in October 1998 was a challenge to I-125 on First Amendment grounds.

The federal district court found that I-125 violated the First Amendment, and so declared I-125 to be unconstitutional.¹²¹ The court determined that I-125 was a significant infringement of core First Amendment speech,¹²² and that therefore the State must show a compelling interest to justify such an infringement. "Leveling the playing field by equalizing the strength of citizen speech relative to corporate speech" was found by the court not to be consistent with the First Amendment,¹²³ which left only the argument that the State has a compelling interest in preventing the existence or appearance of corruption, defined by the court as "real harm to the integrity of Montana's ballot initiative process."¹²⁴ The court found that although such harm is conceivable, the

118. H.B. 575, 55th Leg. (1997), codified at MONT. CODE ANN. § 13-35-236 (1997). The proponents of H.B. 575 claimed that "the purpose of the bill is to level the playing field for all organizations in Montana to make sure all groups are treated equally by campaign law regardless of how they are organized." SENATE COMM. ON STATE ADMIN., *Minutes, Hearing on H.B. 575*, Opening Statement by Sponsor at 11 (Mar. 12, 1997). Opponents of H.B. 575, however, argued that the bill's intent was unconstitutionally to expand the coverage of I-125 in to order effectively repeal I-125. *See id.* at 14 (testimony of Tara Mele), 15 (testimony of Beverly Fox).

119. *See Montana Chamber of Commerce v. Argenbright*, Opinion and Order on Plaintiffs' Motion for Summary Judgment, CV 97-6-H-CCL, Feb. 18, 1998 (D. Mont.). *See also Montana Right to Life Association v. Eddleman*, 999 F. Supp. 1380 (D. Mont. 1998) (H.B. 575 unconstitutional as applied).

120. *See Argenbright*, Opinion and Order on Plaintiffs' Motion for Summary Judgment, CV 97-6-H-CCL, Feb. 18, 1998 (D. Mont.). The court rejected arguments contending that I-125 was unconstitutionally vague because it did not define "business activities," "corporations," "for-profit corporations," or "non-profit corporations," and that it violated Fifth and Fourteenth Amendment due process and equal protection rights.

121. *See Montana Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593, 600 (D. Mont. 1998).

122. According to the court, I-125 infringed core political speech because it "deprives corporations of the ability to communicate political ideas directly to the electorate[,] . . . chills impermissibly the speech and association rights of corporations, their officers and employees[,] . . . precludes corporations from directly resisting potential laws that could put them out of business[,] . . . [and] prevents the electorate from being exposed to diverse viewpoints on public policy issues." *Argenbright*, 28 F. Supp. 2d at 599.

123. *Id.*

124. *Id.*

meager anecdotal evidence presented by the Defendants wholly fails to prove that . . . corporate contributions or expenditures in ballot initiative campaigns have had any adverse effect on the integrity of Montana's political process. Specifically, the State has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process.¹²⁵

The proponents of I-125 have appealed the district court's decision to the Ninth Circuit,¹²⁶ which held arguments on November 3, 1999.

In requiring the proponents of I-125 to prove that corporate political spending in Montana has undermined public confidence in the ballot initiative process, the court relied entirely on *Bellotti's* statement that, although there can be no *quid pro quo* corruption in connection with ballot measure campaigns, it is conceivable that the Supreme Court might find such corruption to exist if the state could prove that "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests."¹²⁷ And, as the Supreme Court had in *Bellotti*, the federal district court rejected as sufficient the evidence offered by the proponents of the law that corporate spending is indeed undermining public confidence in the political system.¹²⁸ Curiously, the court virtually ig-

125. *Argenbright*, 28 F. Supp. 2d at 600. See Lopach, *Montana's Role in the Free Speech vs. Equal Speech Debate*, 60 MONT. L. REV. 475, 486-96 (1999) for a more detailed discussion of *Montana Chamber of Commerce v. Argenbright*.

126. See *Montana Chamber of Commerce v. Argenbright*, C.A. No. 98-36256 (9th Cir.). The case has been combined with *Montana Mining Ass'n v. Argenbright*, C.A. No. 98-36257, which appeals the district court's refusal to grant a preliminary injunction against Initiative 137, prohibiting the use of cyanide at new open-pit gold and silver mines and mine expansions, on grounds that I-125 unconstitutionally prevented corporations from participating in the debate on I-137. The case was tried by the district court immediately after *Montana Chamber of Commerce v. Argenbright*. The district court denied the motion for preliminary injunction on October 22, 1998, because "the relief sought was premature" since the election had not yet been held and so I-137 was not yet law. *Argenbright*, 28 F. Supp. 2d at 601. I-137 was approved by the voters of Montana on November 3, 1998, and the Montana Mining Association, Majesty Mining of Butte and Yellow Band Gold of Missoula filed a new suit on November 4, 1998 seeking to have I-137 invalidated on several theories, including that the plaintiffs were illegally prohibited by I-125 from engaging in political speech during the I-137 campaign. *Montana Mining Ass'n v. State of Montana*, CV-98-48-8-CCL (D. Mont. 1998), Complaint for Declaratory Relief, Count II at 6-8. The District Court dismissed the suit on October 26, 1999, *Montana Mining Ass'n v. Simonich*, Case No. CV-98-48-H-CCL (D. Mont. 1999) upon the motion of the plaintiffs, who apparently did not have sufficient funds to continue. *Mining Group Ends I-137 Challenge*, Bozeman Daily Chronicle, Oct. 23, 1999, at 4.

127. *Bellotti*, 435 U.S. at 789; see *supra* text accompanying notes 35-56.

128. See *Argenbright*, 28 F. Supp. 2d at 600.

nored *Austin*,¹²⁹ which goes well beyond *Bellotti* and, as argued in the next section, should have served as the basis for upholding the constitutionality of I-125.¹³⁰

The attempt in Montana to extend *Austin*'s political marketplace theory to ballot measure campaigns highlights the substantial problems with the *Austin* theory. Because the logic of the *Austin* theory is as applicable to ballot measure campaigns as it is to candidate elections, *Montana Chamber of Commerce v. Argenbright* will require the Ninth Circuit, and perhaps the Supreme Court, to decide whether *Austin* is still good law and thus to allow significant regulation of corporate speech on ballot issues, or whether *Austin*'s theory is misguided and should be abandoned. This article argues that the second course of action is the better one.

III. *Austin*'s Logical Applicability to State Ballot Measure Campaigns

The proponents of I-125 in Montana carefully drafted the initiative to both reflect the theories of *MCFL* and *Austin*, and to test whether, despite *Bellotti*, the courts would be willing to extend the *Austin* "corporate corruption of the political marketplace" theory beyond candidate elections to state ballot measure campaigns.¹³¹ Although several courts have refused to allow limits on independent corporate expenditures on ballot measure campaigns even after *Austin*,¹³² in fact there is no principled reason for not extending *Austin* to

129. 494 U.S. 652 (1990).

130. See discussion in next section.

131. Because there are no federal ballot measure campaigns, *Austin* could be extended only to state ballot measure campaigns.

132. The cases addressing regulation of corporate spending on ballot measure campaigns have generally done so in the context of a complete prohibition on such corporate spending, rather than in the context of a segregated fund requirement. See, e.g., *Greater Austin Chamber of Commerce v. City of Austin*, No. A 98 CA 597 SS, at 6 n.3 (W.D. Texas 1998) (granting injunction against city law prohibiting corporate expenditures on ballot measure campaigns, distinguishing *Austin* as not applicable to ballot items); *Brown v. State*, 680 So. 2d 1179, *reh'g denied*. LEXIS 3727 (La. 1996) (striking down as unconstitutional a prohibition on contribution to or expenditure on behalf of a political committee organized to support or oppose a ballot proposition by a licensee of the Louisiana Gaming Control Board, no reference to *Austin*); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195 (D.R.I. 1993), *aff'd* 4 F.3d 26 (1st Cir. 1993) (granting permanent injunction against enforcing state law prohibiting corporations from making independent expenditures with respect to ballot questions, citing *Bellotti* but not *Austin*). Two federal judges in Montana have found I-125's segregated fund requirement for corporate spending on ballot measure campaigns to be unconstitutional. See *Argenbright*, 28 F. Supp. 2d 593, see also discussion *supra* Part II; *Montana Right to Life Association v. Eddleman*, 999 F. Supp. 1380 (D. Mont. 1998) (I-125 unconstitutional as applied to Montana Right to Life Association; distinguishing *Austin* as

ballot issues. If one accepts *Austin's* "corporate corruption of the political marketplace" theory, as a matter of basic logic one must also accept its applicability to referendum and initiative campaigns.

The old *Buckley* theory of corruption stated that large contributions to candidate campaigns can, or in the eyes of the voting public can appear to, result in *quid pro quo* arrangements whereby a person contributes to a candidate running for office and the candidate, once elected, returns the favor by acting in the contributor's interest rather than in the public interest.¹³³ Because this theory of corruption is based on elected officials acting in the interests of contributors, the Court in *Bellotti* rejected the theory as a constitutional basis for regulating corporate spending on ballot issue campaigns, since in the case of a ballot measure there is no elected official who can do favors for a contributor. Instead, *Bellotti* required a state seeking to regulate corporate speech on ballot measure campaigns to prove that "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests" ¹³⁴ So far, this standard has proven to be impossible to meet.¹³⁵

Austin's "political marketplace" theory of corporate corruption, however, has opened up a whole new avenue by which to evaluate corporate political spending, one that no longer requires any proof of actual or imminent corruption. *Austin* essentially concludes that cor-

not applicable to ballot measure campaigns). Another case, *Brower v. State of Washington*, 969 P.2d 42 (Wash. 1998), cert. denied 526 U.S. 1088, (1999), addressed the issue indirectly. In *Brower*, Football Northwest had agreed to fund a referendum submitted by the Washington legislature to the people of Washington asking whether a new football stadium should be built. The referendum was scheduled for 60 days after the legislature authorized the referendum. Plaintiff *Brower* argued that his First Amendment and equal protection rights were violated by such a short time-frame in which to raise money in opposition to the stadium. Citing *Buckley*, *Berkeley*, and *Bellotti*, but not *Austin*, the Washington Supreme Court found that the contributions to ballot question campaigns do not pose the same threat of *quid pro quo* corruption as contributions to candidate campaigns, and that the First Amendment does not require an equalization of voices or spending.

133. Cf. *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

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

135. The Court rejected offers of proof of such undermining of democratic processes in both *Bellotti*, 435 U.S. at 789-90 & 811 (White, J., dissenting), and *MCFL*, 454 U.S. at 307 (White, J., dissenting), as did the Federal District Court in *Montana Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593 (D. Mont. 1998).

porate political spending *by definition* corrupts the political process.¹³⁶ There is nothing left to prove: corporations by definition receive special state-granted advantages, and these advantages enable corporations to amass wealth in the economic marketplace which can then corrupt the political marketplace. After *Austin*, the corrupting influence of corporate political speech is a conclusive presumption.¹³⁷

Because the *Austin* “political marketplace” theory of corruption focuses on the corporate characteristics of the speaker rather than on the speaker’s potential relationship with an individual candidate, there is no reason to limit the theory’s applicability only to candidate campaigns. The existence of a candidate simply is no longer relevant. If money amassed in the economic marketplace by definition corrupts candidate campaigns, it must also by definition corrupt ballot measure campaigns. As one commentator has noted, “[t]he persuasive power of corporate resources is equally effective in” candidate elections and referenda.¹³⁸ Perhaps one basis upon which potentially to distinguish candidate from ballot-measure campaigns for purposes of *Austin*’s corporate corruption theory is to define the political marketplace differently for the two types of campaign. Nothing the Supreme Court has said provides the basis for such a distinction, however. In *MCFL*, the Court based its political marketplace conception on Justice Holmes’ statement that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the

136. The Court stated in *Austin* that “the unique state-conferred corporate structure that facilitates the accumulation of large treasuries warrants the limit on independent expenditures.” 494 U.S. at 660. Because all corporations by definition have this state-conferred corporate structure, and because it is this structure that threatens corruption of the political marketplace, corporations by definition are corruptive of the political process.

137. Cf. Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 193 (1998) (*Austin* dispenses with need to show evidence of corporate dominance in political process).

138. Charles D. Watts, *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. MIAMI L. REV. 317, 340 n.89 (1991). See also Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENTARY 91, 102 (1997) (“*Austin*’s expansion of ‘corruption’ to include ‘undue influence’ over election outcomes eliminates the significance of” the distinction between referenda elections and candidate elections); Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 174 (1998) (no reason not to extend *Austin*-type corruption to ballot measure campaigns); Gerald D. Ashdown, *Controlling Campaign Spending and the “New Corruption”: Waiting for the Court*, 44 VAND. L. REV. 767, 780 (1991) (“legislatures are now free to restrict corporations to spend only from separate segregated funds in ballot measures as well as candidate elections”); David Cole, *First Amendment Antitrust*, 9 YALE L. & POL’Y REV. 236, 252 (1991) (“corruption is no less troubling in referenda than in candidate elections”).

thought to get itself accepted in the competition of the market”¹³⁹ The Court then stated that “[p]olitical ‘free trade’ does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. . . . The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas.”¹⁴⁰ Thus, the Court’s conception of the political marketplace seems to be founded on the “free trade” of political ideas. If the marketplace is a marketplace of ideas, then surely there is no difference between the political ideas espoused by a candidate and those raised in the context of a ballot measure campaign.

The Court and individual justices have tried to draw a distinction between the applicability of the *Austin* theory to candidate as opposed to ballot measure campaigns. These efforts, however, are unconvincing. In *MCFL*, for example, the Court specifically distinguished the applicability of the corporate corruption of the political marketplace theory in the context of candidate campaigns from “the complete foreclosure of any opportunity for political speech” in the context of a state referendum that was the subject of *Bellotti*.¹⁴¹ That is an easy distinction to make, of course: it is rare that political speech can constitutionally be silenced totally. The harder case, which the Court did not address in either *MCFL* or *Austin*, is whether the corporate corruption of the political marketplace theory can justify the application of a segregated fund requirement, which significantly burdens but arguably does not totally foreclose corporate speech, to ballot measures.

Justice Brennan in his *Austin* concurrence explicitly stated that, after *Austin*, corporations remain “free . . . to use general treasury funds to support an initiative proposal in a state referendum.”¹⁴² However, Brennan’s statement arose in the context of defending *Austin* against the argument that the Michigan segregated fund law was underinclusive because it regulated only expenditures in connection with candidate campaigns, not referenda or other corporate expression. Justice Brennan explained that “to the extent that the Michigan statute is ‘underinclusive,’ . . . this reflects the *requirements of our decisions* rather than the lack of an important state interest on the part of Michigan in regulating expenditures in candidate elections.”¹⁴³ He

139. *MCFL*, 479 U.S. at 257 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

140. 479 U.S. at 257, 258.

141. *MCFL*, 479 U.S. at 259 n.12.

142. 494 U.S. at 676 (citing *Bellotti*).

143. *Id.* at 678 (emphasis added).

thus implied that Michigan applied its segregated fund requirement only to candidate campaigns because *Bellotti* had been interpreted not to permit regulation of corporate speech on ballot measure campaigns. The Court has now adopted a new theory of corruption different from the *quid pro quo* theory used in *Bellotti* to strike down state regulation of corporate speech on ballot measures; therefore, it remains an open question whether a segregated fund requirement may constitutionally be applied to corporate speech on ballot issues. That is in fact what Montana attempted to do through I-125.

Justice Stevens concurred in *Austin* because he believed that the danger of *quid pro quo* corruption in the context of corporate participation in candidate elections justified state regulation of both corporate contributions and expenditures.¹⁴⁴ Citing *Bellotti*, he added that “there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.”¹⁴⁵ Thus, Justice Stevens seems unwilling to extend *Austin*’s theory to ballot measure campaigns. On what basis he would decline to do so, however, is not clear, since *Austin* has moved the Court’s jurisprudence on the regulation of corporate speech on ballot issues beyond *Bellotti*.

Thus, despite some attempts to limit *Austin* to candidate elections, there is no principled way to avoid extending the corporate corruption of the political marketplace theory to corporate expenditures on ballot measure campaigns.¹⁴⁶ If corporate wealth amassed in the economic marketplace corrupts the political process with respect to candidate elections, then it also must do so with respect to state initiative and referendum campaigns.¹⁴⁷ That is not to say, however, that such extension is a good outcome. In fact, the *Austin* corporate cor-

144. *See id.* at 678.

145. *Id.*

146. In Montana’s I-125 case, the court simply ignored the possibility that *Austin* could be applied in the context of ballot measure campaigns. *See Argenbright*, 28 F. Supp.2d 593. The judge did so despite the fact that a year earlier he had discussed *Austin* at some length and seemed willing to at least entertain the argument that *Austin* could apply to ballot measure campaigns. *See Argenbright*, Opinion and Order on Plaintiffs’ Motion for Summary Judgment, CV 97-6-H-CCL, Feb. 18, 1998, at 20-29.

147. The *Austin* theory has ramifications far beyond the scope of this article. For example, it also threatens *Buckley*’s distinction between contributions and expenditures. *See Austin*, 494 U.S. at 702-03 (Kennedy, J., dissenting); *see also* Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENTARY 91, 101 (1997) (“If undue influence on the electoral process—and not just undue influence over elected officials, which is the sole focus of the *quid pro quo* model—could become a basis for campaign finance restrictions, then both the practical ability and the normative rationale for

ruption theory is badly flawed, and rather than extending it to ballot issue campaigns, the Court should simply abandon it altogether.

IV. The Segregated Fund Requirement and *Austin's* Corporate Corruption of the Political Marketplace Theory Are Unconstitutional and Bad Policy.

In evaluating the constitutionality of a regulation which is alleged to infringe on the First Amendment's protection of political speech, one must analyze three key issues: First, is the regulation a substantial burden on core First Amendment rights? If so, does the regulation serve a compelling (or, in the case of political contributions, a sufficiently important) state interest? If the answer is yes again, is the regulation narrowly drawn to accomplish its purpose? Only if the answer is "yes" to all three questions does the regulation pass constitutional muster. The following analysis uses this framework to conclude that the *Austin* theory of corporate corruption of the political marketplace is untenable in the context of both candidate and ballot issue campaigns.

A. The Segregated Fund Requirement is a Substantial Burden on Core First Amendment Speech.

Corporate political speech is protected by the First Amendment because it is the type of speech that is essential to an educated electorate. The segregated fund requirement is a burden on such free speech. Therefore, the first prong of the strict scrutiny analysis is satisfied.

1. Corporate Speech is Protected by the First Amendment Right to Free Speech.

The value assigned to corporate political speech, as opposed to speech by a natural person, depends on a large extent upon which theory of free speech is applied. For example, the "self-realization" theory that the First Amendment's purpose is to enhance an individual's ability to develop her own personal powers and abilities,¹⁴⁸ tends

distinguishing between contributions and expenditures for First Amendment purposes would be substantially eroded.") (emphasis added).

148. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 244-45 (1998).

not to value corporate speech highly because the corporation does not exist as an entity that can be “self-realized.”¹⁴⁹

By contrast, another theory of free speech dictates that corporate speech is as essential to public discourse as is individual speech. This theory states that the public must be able not only to speak, but also to hear other points of view in order to be able to participate in the democratic process. Accordingly, “there is practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.”¹⁵⁰ The First Amendment affords the broadest possible protection to political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁵¹ “Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.”¹⁵²

The Supreme Court in *Bellotti* relied heavily on this theory in determining that corporate speech on a ballot initiative is protected by the First Amendment. As the Court said, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”¹⁵³ Corporate speech on ballot measures and candidate campaigns serves to inform the public about the importance and ramifications of the measures just as individual speech does. In order for the electorate to make informed decisions in the voting booth, it must be exposed to all sides of an issue, including the corporate side. Corporations are simply one voice in the sea of voices of

149. See, e.g., *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting) (“[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”); Adam Winkler, *Beyond Bellotti*, 32 *LOY. L.A. L. REV.* 133, 198-200 (1998). But see Redish & Wasserman, *supra* note 148 (arguing that the corporate form facilitates personal self-realization).

150. *Bellotti*, 435 U.S. at 776-77 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

151. *Buckley*, 424 U.S. at 14 (citation omitted).

152. *Id.* at 49 n.55. Cf. *United States v. International Union United Auto, Aircraft & Agric. Implement Workers of America*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (“The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.”).

153. 435 U.S. at 777.

political discourse, all of which voices are essential to a functioning democratic process.¹⁵⁴

The state's limiting of corporate voices in political debates severely restricts the quality and quantity of the very information that is essential to the maintenance of an informed electorate. Contrary to those who argue that a reduced corporate voice would increase confidence in the democratic system, such reduction in fact severely undermines the robustness of the political debate. Consequently, restrictions on corporate political speech fundamentally undermine the vitality of the democratic system.¹⁵⁵

Other theories of free speech that demand corporate participation in political discourse are the so-called "negative" theories that "derive from the skeptical, mistrustful strain underlying American democratic theory, manifested more generally in the theory of separation of powers."¹⁵⁶ These theories hold that free speech is necessary for ensuring that government does not accumulate too much power and that it does not control individual voices.¹⁵⁷ In order to serve these functions, public speech must arise from diverse sources and must represent diverse interests, corporate interests among them.¹⁵⁸ Negative theories posit that limiting or silencing corporate speech will undermine democracy by removing from public discourse some of the voices that are likely to be most effective at countering governmental propaganda.¹⁵⁹ As Justice Scalia said in his *Austin* dissent, "[t]o elimi-

154. Cf. *Austin*, 494 U.S. at 706 (Kennedy, J., dissenting) (fact that political speech comes from corporation "detracts not a scintilla from its validity, its persuasiveness, or its contribution to the political dialogue"); see also, Redish & Wasserman, *supra* note 148, at 248.

155. See Redish & Wasserman, *supra* note 148, at 258 ("Ironically, although it is the corporation's wealth and power that often causes opponents of corporate speech to call for its restriction, that very power is what makes corporate speech most valuable to the facilitation of both the democratic process and the listener's self-realization. The result of restricting the corporate voice, then, is that debate on a political issue is considerably less 'uninhibited, robust, and wide-open' than the First Amendment commands.") (footnotes omitted).

156. *Id.* at 243-44.

157. See *id.* at 262-66.

158. See *id.* at 263-64.

159. See *id.* at 262 ("The checking value demands protection for speech by 'institutions outside of government with the resources, energy, and expertise to counter the government's messages' and actions. The countervailing voices, according to Professor Blasi, should be 'well-organized, well-financed,' and 'capable of disseminating their information and judgments to the general public.' Of many organized constituencies that fit this description, one of the potentially most effective is the profitmaking corporation." (quoting MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* at 161 (1983); Vincent Blasi, *The Pathological Perspectives of the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985)). See also Redish & Wasserman, *supra* note 148, at 263 ("In the context of the checking function,

nate voluntary associations—not only including powerful ones, but especially powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate.”¹⁶⁰

These theories do not assume that the corporate point of view will always be well-informed, unbiased and informative. In fact, much of the time it will not be so. However, much of the time speech by individuals, public interest groups, non-profits and government also do not meet these standards. The point is that the entire mix of all voices together will provide the electorate with information that will enable voters to make more informed decisions than if one or more of these voices were not a part of the political discourse.¹⁶¹ Because corporate speech is protected under the First Amendment as essential to the functioning of the democratic process, the first prong of the strict scrutiny analysis next requires an examination of whether a segregated fund requirement for corporate political speech is a substantial burden upon such speech.

2. *The Segregated Fund Requirement is a Substantial Burden on Free Speech*

The segregated fund requirement is a substantial burden on corporate political speech for several reasons. First, the segregated fund requirement burdens corporate speech because it prohibits corporations themselves from speaking. While corporations are permitted to establish and administer segregated funds,¹⁶² contributions to the funds may be solicited only from shareholders, employees and mem-

the greater the number of motivated and powerful private speakers, the smaller the danger of undue power centralization and unchecked governmental excess.”).

160. *Austin*, 494 U.S. at 651 (Scalia, J., dissenting).

161. Some have also argued that regulation of corporate speech may in fact be a little more than disguised regulation based on content. See Redish & Wasserman, *supra* note 148, at 238 (regulation of corporate speech may be “an indirect but nonetheless invidious form of viewpoint regulation”); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 54 (1997) (easy to target content-neutral legislation so as to limit speech of others). Content-based regulation is subject to the strictest scrutiny because it poses “the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994); see also *Bellotti*, 435 U.S. at 784-85 (“the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”); *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting) (“Content-based restrictions are the essence of censorial power.”).

162. See *Buckley*, 424 U.S. at 28 n.31. In Montana, see MONT. CODE ANN. § 13-35-227(3) (1997).

bers, not from the corporation's general treasury. Therefore, the corporation itself is prohibited from speaking.¹⁶³

Second, the segregated fund requirement imposes significant organizational and disclosure burdens on corporations because the law regulates a segregated fund as a political action committee.¹⁶⁴ Typical requirements include the appointment of a treasurer, who must record almost all contributions received along with the names and addresses of the contributors; the filing of organizational and financial information with the government; and the frequent and detailed reporting to the government of information on receipts, contributions, and expenditures, as well as on the fund's financial condition.¹⁶⁵ According to the *MCFL* plurality, such requirements "may create a disincentive for [organizations subject to the segregated fund requirement] to engage in political speech."¹⁶⁶ Small entities in particular are likely to be discouraged by the administrative costs associated with the detailed record-keeping and disclosure obligations, the requirement to appoint a treasurer, and the more formalized organizational structure required to comply with the law.¹⁶⁷ It is therefore likely that at least some organizations subject to a segregated fund requirement have chosen, or will in the future choose not to participate in political discourse.¹⁶⁸

Third, restricting solicitations for segregated funds to shareholders, employees and members seriously limits the amount of money small corporations are able to raise to promote their viewpoints. Most companies in the U.S. have fewer than ten employees.¹⁶⁹ Therefore,

163. *See Austin*, 494 U.S. at 681 (Scalia, J., dissenting).

164. 2 U.S.C. § 431(4)(B) (1997); MONT. CODE ANN. § 13-1-101(18) (1997) (definition of political committee).

165. *See MCFL*, 479 U.S. 238, 251-56 (plurality opinion); *see id.* at 266 (O'Connor, J., concurring); *see, e.g.*, 2 U.S.C. § 432-34; MONT. CODE ANN. § 13-37-201 et seq.; MICH. COMP. LAWS § 169.201 et seq. (1989 & 1999 Supp.).

166. *MCFL*, 479 U.S. at 254 (plurality opinion); *see id.* at 266 (O'Connor, J., concurring) ("The significant burden on *MCFL* in this case comes . . . from the additional organizational restraints imposed upon it by [FECA].").

167. *See id.* at 254-55 (plurality opinion).

168. *Cf.* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1082-83 (1996) ("Typically, regulation favors those already familiar with the regulatory machinery and those with the money and sophistication to hire the lawyers, accountants, and lobbyists needed to comply with complex filing requirements. Such regulation will naturally disadvantage newcomers to the political arena, especially those who are themselves less educated or less able to pay for professional services. Efforts to regulate campaigns in favor of small contributors thus have the perverse effect of professionalizing politics and distancing the system from 'ordinary' citizens." (speaking of candidates, not ballot measures) (footnotes omitted)).

169. According to Bank One, "[s]mall businesses with fewer than 10 employees account for nearly 80 percent of all U.S. companies." *For Small Business Owners, Exposure is a*

these companies probably cannot raise significant amounts for their segregated funds.

Extension of the segregated fund requirement to corporate spending on ballot measure campaigns will be particularly burdensome on the large group of non-profit corporations that do not meet all of the *MCFL* criteria, but on occasion may want to participate in the political discourse on initiatives and referenda.¹⁷⁰ Not only are there significant administrative costs associated with creating segregated funds, but for those non-profit corporations which do not currently have members¹⁷¹ but which desire to participate in ballot measure debates will probably need to reorganize as membership organizations in order to be able to solicit contributions to their segregated funds from members.¹⁷² Membership organizations must follow myriad regulations, including for example membership votes and annual meetings, that can impose significant additional costs on the organization.¹⁷³ Rather than choosing to establish segregated funds, some organizations may even elect to disincorporate in order to avoid the restrictions of the segregated fund requirement as applied to ballot measure campaigns.¹⁷⁴ Because of the costs associated with all of these options, the segregated fund requirement will cause many non-profit corporations simply to sit out the political debate, thus depriving voters of important perspectives and information.

At least one commentator contends that the segregated fund requirement does not substantially burden free speech because it does not stop corporations from speaking and does not inhibit the public's right to hear speech, but merely requires that such speech be con-

Goal; Time is Precious; Internet Increasingly the Office Tool of Choice, Bank One Press Release (July 28, 1999), available online at <<http://www.shareholder.com/fcn/news/19990728-9863.htm>>.

170. In Montana, for example, the list of non-profit corporations affected by I-125 included the Montana Stockgrowers Association, the Montana Wool Growers Association, the Montana Chamber of Commerce, the Montana Farm Bureau, the Montana Hospital Association, the Montana Medical Association, and the Montana Taxpayers' Association. See *Argenbright*, 28 F. Supp.2d at 599 Other affected non-profits include most charitable and social welfare organizations.

171. Non-profits can choose whether to incorporate as member or non-member organizations. REVISED MODEL NONPROFIT CORPORATION ACT § 6.03 (1988).

172. Cf. *MCFL*, 479 U.S. 238, 255 (plurality opinion) (“[r]estriction of solicitation of contributions to “members” vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech.”).

173. REVISED MODEL NONPROFIT CORPORATION ACT § 7.01 et seq. (1988).

174. The Montana Education Association disincorporated in order to avoid the requirements of I-125. See *Argenbright*, 28 F. Supp. 2d at 594.

ducted through a separate entity.¹⁷⁵ The plurality in *MCFL* rejected this position, however:

[W]hile [FECA's segregated fund requirement] does not remove all opportunities for independent spending by organizations such as *MCFL*, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [the segregated fund requirement] as an infringement on First Amendment activities.¹⁷⁶

Some might argue that a segregated fund requirement is not a substantial burden on free speech because it merely regulates express advocacy, leaving corporations free to engage in issue advocacy as long as the corporations do not overtly urge votes in support of or in opposition to a candidate or ballot issue.¹⁷⁷

Issue advocacy is permitted for non-profit 501(c)(3) organizations without a segregated fund as long as the advocacy falls under the definition of "educational activity," which requires that the activity indeed be educational, Rev. Proc. 86-43, 1986-2 C.B. 729, and that the purpose of the activity is educational, I.R.C. 501(c)(3).¹⁷⁸ Issue advocacy, however, is not an adequate substitute for express advocacy because the corporation may not urge a vote for or against an initiative or referendum. Therefore, the corporation's choice of what to say is limited, as is the public's ability to learn from the corporation's clearly stated position. Moreover, according to some commentators, issue advocacy is abused in the context of candidate campaigns,¹⁷⁹ and

175. Adam Winkler, *Beyond Bellotti*, 32 *LOY. L.A. L. REV.* 133, 156, 196-97 (1998).

176. *MCFL*, 479 U.S. at 255.

177. Only expenditures that expressly advocate the election or defeat of a candidate may constitutionally be regulated. *See id.* at 248-50 (citing *Buckley*, 424 U.S. at 42, 80). *Buckley* had held that "expenditures in connection with" an election must be interpreted to cover only express advocacy in order to avoid unconstitutional vagueness. 424 U.S. at 44. The Court stated that express advocacy requires such words as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44 n.52. If the segregated fund requirement is extended to ballot issue campaigns, it too must be limited by this express advocacy interpretation in order to avoid unconstitutional vagueness.

178. *See* Frances R. Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 *N.Y.L. SCH. L. REV.* 881, 928 (1997).

179. *See, e.g.*, Lisa Rosenberg, *A Bag of Tricks: Loopholes in the Campaign Finance System*, part 2 (1996), Center for Responsive Politics, available online at <http://www.opensecrets.org/pubs/law_bagtricks/loop3.html>; Comments of Common Cause and Democracy 21 in response to FEC Notice of Proposed Rulemaking regarding Public Financing of Presidential Primary and General Election Candidates (Feb. 1, 1999), available online at <http://www.commoncause.org/publications/020199_letter.htm>; *Nixon*, 120 S.Ct. at 914 (Kennedy, J., dissenting) (issue advocacy means "advertisements that promote or attack a candidate's positions without specifically urging his or her election or defeat");

there is no reason to think it will not be similarly abused in the context of ballot-issue campaigns.¹⁸⁰ Thus, corporations will do everything they can to convince voters to support or oppose an initiative without using the magic express advocacy words.¹⁸¹ The result is a limitation on useful political speech without achieving the asserted purpose of preventing corporate resources earned in the economic marketplace from distorting the political marketplace.

For all of the foregoing reasons, it is beyond serious dispute that the segregated fund requirement is in fact a significant burden on free speech. Accordingly, strict scrutiny requires an analysis of whether, despite this significant burden, the regulation promotes a compelling state interest.

B. *Austin's* Alleged State Interest Is Unconstitutional and Ill-Defined.

Several state interests have been asserted by litigants, courts, and commentators as sufficient to justify regulation of corporate political speech. Because the Supreme Court has so far accepted only two state interests as sufficiently important to sustain such regulation, this

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 708 (4th Cir. 1999) (“issue advocacy may influence an election even though it does not expressly advocate the election or defeat of a particular candidate or party.”); *See also* Mariani v. United States, No. 3:CV-98-1701 (M.D. Pa. Oct. 27, 1999) (mem.) (visited Jan. 20, 2000) <<http://www.pamd.uscourts.gov/docs/maria.htm>> (soft money, which is used in part for issue advocacy, presents the same threat or appearance of corruption as does money contributed directly to a candidate). *Mariani* certified to the Third Circuit the question of whether FECA’s prohibition on corporate contributions to federal candidates violates the First Amendment in light of “the presently existing law that otherwise permits corporations to expend unlimited amounts of corporate treasury funds that influence the outcome of federal elections,” *id.* at 139, and whether FECA is unconstitutional because of overbreadth, *Id.* at 140.

180. *See, e.g.,* Peter Schrag, *California, Here We Come*, ATLANTIC MONTHLY, March 1998, 20, 29-30 (“California shows that the process of bedazzling voters with sound bites, slogans, and nuanced bias works as effectively in the initiative process as it does in electoral politics.”).

181. *See Buckley*, 424 U.S. at 44 n.52 (express advocacy requires such words as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject”). *But see* 11 C.F.R. §100.22(b) (1999), in which the FEC defines “express advocacy” to include communications which, “when taken as a whole. . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat” of a candidate because the electoral portion of the communication “is unmistakable, and suggestive of only one meaning” and “reasonable minds could not differ” with respect to the real nature of the communication’s message. There is a split among the Circuits on the constitutionality of this definition, with the Ninth Circuit supporting it, and the First and Fourth Circuits holding it to be unconstitutional. *See FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987); *Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied* 522 U.S. 810 (1997); *FEC v. Christian Action Network*, 92 F.3d 1049 (4th Cir. 1997).

article discusses only these two interests.¹⁸² Critics of the “share-

182. Other state interests that have been asserted include preventing the “drowning out” of certain viewpoints and equalizing access to political speech; preventing “information overload” of the electorate; and the protection of shareholders against unwilling participation in the political speech of the corporation.

Appellee in *Bellotti* posited a state interest in preventing the drowning out of other points of view by wealthy and powerful corporations, which “threatens imminently to undermine democratic processes.” 435 U.S. at 789. Although *Bellotti* rejected this theory of political corruption on grounds that it had not been proven to exist in that case, the Court did suggest that the theory might be compelling enough to justify regulation if proven. *See id.* Because wealthy corporations are able to pay more for more advertising, the theory is that voters will be unfairly swayed by the corporate point of view simply because they hear that view expressed more often than other views. This theory leads quite naturally to the argument that democracy does not work unless all people have equal, or at least more equal, financial ability to engage in and disseminate political speech. Although the Court has never actually used this theory of corruption to sustain a political spending regulation, many commentators have argued vigorously for its adoption. *See, e.g.,* Edward B. Foley, *Equal Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994) (the “achievement of political equality is an important constitutional goal”); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982). *But see* Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 268 (1998) (it is a “paternalistic assumption” that “massive amounts of corporate speech are likely to persuade listeners, regardless of the merits of the ideas presented.”).

Another alleged compelling state interest is the prevention of information overload of the electorate. *See, e.g.,* Redish & Wasserman, *supra* note 148, at 268. With the advent of cable television and the Internet, no one can possibly hear or read, let alone absorb and understand all information available. Therefore, the overload theory argues, the more a voter is bombarded with information, the less rational that voter’s political choices will be. Information overload therefore threatens to corrupt and undermine democratic processes. Critics of both the “drowning out” and “information overload” theories assert that there is no such thing as too much information, and that voters can intelligently “separate the wheat from the chaff,” as Justice Scalia has put it. *Austin*, 494 U.S. at 652 (Scalia, J., dissenting); *see id.* at 705 (Kennedy, J., dissenting). Others, however, have argued that more information is not necessarily better because people cannot gather all relevant information themselves and must rely on others’ opinions as a guide for their own decisions. Thus, a little bit of information early can result in a “cascade, in which a small change in the initial starting points results in a huge change in the end point.” Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 996, 1019 n.68 (1998).

The last alleged compelling state interest in regulating corporate political speech is the protection of shareholders whose money is used by the corporation to engage in speech with which a shareholder may disagree. Although the Court in *Bellotti* agreed that this is a legitimate state interest, it is not settled that it is sufficiently compelling to sustain a substantial burden on constitutionally protected free speech. *See* 435 U.S. at 792. *Austin* did address members’ interests in the speech of organizations to which they belong, 494 U.S. at 662-66, but the Court did not hold that the protection of shareholders or members is a compelling state interest. *See id.* at 660 (after discussion of corporate corruption theory, without reference to protection of shareholders, Court holds that Michigan “has articu-

holder protection” rationale for regulation of corporate political speech, however, have challenged the notion that the state interest in protecting shareholders is really important. They generally argue that if a shareholder does not agree with the political speech of the corporation, the shareholder can either try to get a majority of the other shareholders to object to the speech, or simply sell his or her shares.¹⁸³ Furthermore, attempts to regulate corporate political speech based on shareholder protection generally are underinclusive because they still allow corporations to engage in non-political speech with which individual shareholders may disagree.¹⁸⁴ Moreover, non-corporate organizations also often have members that may disagree in whole or in part with the organization’s speech, so that protection only of corporate shareholders is underinclusive.

lated a sufficiently compelling rationale”), *id.* at 665 (“the desire to counterbalance [state-conferred] advantages is the State’s compelling interest in this case”). Some commentators have assumed that protection of shareholders was deemed in *Austin* to be a compelling state interest, *see, e.g.*, Charles D. Watts, Jr., *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. MIAMI L. REV. 317, 333 (1991); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 163-64 (1998). The Court, however, never explicitly endorses this theory, but rather merely cites *MCFL* in its discussion in *Austin* of the responsibilities of the Michigan Chamber of Commerce to its members. Justice Brennan in his *Austin* concurrence does seem to argue that Michigan’s segregated fund requirement is intended to protect shareholders, 494 U.S. at 670-71 (Brennan, J., concurring), but this is not specifically stated in the *Austin* majority opinion and Justice Scalia assigns the argument only to Justice Brennan, not to the majority. *See id.* at 685-86 (Scalia, J., dissenting); *but see id.* at 709 (Kennedy, J., dissenting) (“[t]he majority relies on the state interest in protecting members from the use of nonprofit corporate funds to support candidates whom they may oppose.”).

Proponents of the “protection of shareholders” theory assert that shareholders’ investments in the corporation should not be used by the corporation for political speech because: (1) shareholders invest for economic gain, not in order to engage in political speech (*See MCFL*, 479 U.S. at 260; *see Winkler* at 165, 170-71); (2) shareholders depend on their investment for income, so they have a financial disincentive to sell their shares in the corporation if they do not agree with the corporation’s political position (*See MCFL*, 479 U.S. at 260; *see Austin*, 494 U.S. at 674 (Brennan, J., concurring)); (3) it is costly for shareholders to monitor corporate political communications (*See id.*; *see Winkler* at 167-68); (4) it is not really practical for shareholders simply to sell their shares if they disagree with corporate speech, since many shareholders invest through mutual funds or institutional investors (*See Winkler* at 166-67); (5) it is usually very difficult for dissenting shareholders to convince other shareholders to support shareholder proposals opposed by management (*See id.* at 166); (6) selling one’s shares after the corporation has already engaged in objectionable political speech is pointless (*See id.* at 168); and (7) shareholders’ First Amendment rights should protect them against having their money used to engage in political speech with which they disagree (*See Bellotti*, 435 U.S. at 812-13 (White, J., dissenting); *see Winkler* at 170-71 & 202 et seq.).

183. *See, e.g., Austin*, 494 U.S. at 686 (Scalia, J., dissenting).

184. *See id.*

The first state interest accepted by the Supreme Court is *Buckley's* interest in preventing *quid pro quo* corruption involving the trading of campaign contributions for political favors. Because such conduct threatens the ability or willingness of publicly elected officials to act in the best interest of the public that elected them, such corruption undeniably threatens the entire democratic system and the state's interest in preventing such conduct is certainly compelling. As noted by the Court in *Bellotti*, however, this type of corruption is possible only in the context of candidate elections; it cannot justify regulation of contributions and expenditures in connection with ballot measure campaigns because such campaigns do not result in the election of a person who can do favors for a contributor.¹⁸⁵

The second state interest that has been found by the Supreme Court to be sufficiently compelling to justify the regulation of political speech is the interest asserted in *Austin*. Rather than the prevention of *quid pro quo* corruption as described in *Buckley*, the *Austin* state interest is the prevention of "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."¹⁸⁶ There are two parts to this new theory of corruption, one of which is a substantive concern with corruption, while the second is designed narrowly to tailor the theory in order to allow it to pass constitutional muster. Despite the Court's best efforts, however, the state's asserted interest is not constitutionally sufficient.

1. Immense Aggregation of Wealth Is Insufficient Basis for a Sufficient State Interest.

The first component of *Austin's* alleged state interest theory is the notion that it is "unfair," and therefore corrupting of the democratic process, to allow money to be spent on political speech in amounts that are out of proportion with public support for that speech.¹⁸⁷ Although the Court phrased this concern as arising out of the ability of corporations to amass great resources with the help of state-conferred

185. *But see* John S. Shockley, *Direct Democracy, Campaign Finance and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 29 U. MIAMI L. REV. 377, 385 (1985) (ballot propositions "have involved the reality or appearance of bribes, extortion, and personal gain").

186. 494 U.S. at 660.

187. *See id.* at 659 (quoting *MCFL*, 479 U.S. at 257); *see also* 494 U.S. at 693 (Scalia, J., dissenting) ("The fundamental approach of the First Amendment, I had always thought, was . . . to rule the regulation of political speech 'for fairness' sake' simply out of bounds.").

advantages, in fact the concern is much broader than just corporate speech. The clear implication is that any money spent on political speech that is out of proportion to the public's support for that speech is in some way "corrosive and distorting," and therefore corruptive of the political process. If corporate money spent in the political arena is corruptive of the political process because the amount of money spent does not necessarily reflect popular support for the corporate political position asserted, then the same money spent by a non-corporate entity or an individual also creates that corruptive influence.¹⁸⁸ No rational justification exists for limiting "disproportionate" political spending by corporations while leaving unregulated similarly "disproportionate" spending by non-corporate entities,¹⁸⁹ whether in the context of candidate or ballot measure campaigns.¹⁹⁰

Some people may argue, of course, that limiting everyone's ability to expend funds in the political marketplace is exactly what is needed, and that money spent on everyone's political speech should in fact represent at least approximately the level of public support for that speech. Such an argument does admittedly hold some initial visceral appeal because it would prevent a wealthy organization or individual from dominating the mass media with minority¹⁹¹ political views and thus drowning out more popular views.¹⁹² However, a rule which stifles expression of unpopular or offensive speech is, in fact, highly threatening to a democracy designed in part to avoid the tyranny of the majority.¹⁹³

While some political positions are deservedly unpopular, it is a fundamental tenet of our society that speech may not be regulated

188. Cf. Redish & Wasserman, *supra* note 148, at 267 ("One could just as easily reason that an individual's actual amount of advocacy should not be disproportionate to the level of actual public support that currently exists for his position.").

189. Cf. Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 781 (1991) ("If the focus of the new corruption rationale is the correlation between money spent in political campaigns and public support for the views on which the funds are expended, it becomes difficult to confine the majority's analysis to corporations.").

190. The Court tried to establish such rational justification by focusing on the special advantages received by corporations from the state that individuals and non-corporate entities do not receive. See *infra* notes 201-05 and accompanying text for discussion of why this justification is inadequate.

191. "Minority" is used here to denote views held by less than a majority of the citizens, not to indicate a racial minority.

192. See *supra* note 182 for brief discussion of "equalization," "drowning out" and "overload" theories advanced to justify regulation of political speech.

193. See THE FEDERALIST No. 10 (James Madison).

based on content, except in very rare circumstances.¹⁹⁴ If money spent on political speech must be calibrated to reflect public support, however, then only speech supported by the majority, or at least a substantial minority, is likely to be heard because, as the Court recognized almost 25 years ago, “virtually every means of communicating ideas in today’s mass society requires . . . money.”¹⁹⁵ As a result, the democratic process established by the Constitution will stagnate as the “interchange of ideas for the bringing about of political and social changes”¹⁹⁶ is no longer unfettered, but instead dictated by whose speech is most popular.¹⁹⁷ Thus, the *Austin* Court’s new political corruption theory is ultimately a content-based restriction on political speech because the theory rests on the fundamental assumption that the electorate must be protected from corporate political speech that may not represent the views of the majority.

The content-based nature of the *Austin* theory becomes particularly problematic when applied to ballot measure campaigns. At least with candidate campaigns, a candidate’s political speech cannot be limited except to the extent campaign contributions are restricted by law. Candidates themselves remain free to spend as much as they want and say anything they wish regardless of popular support.¹⁹⁸ When the theory is applied to ballot-issue campaigns, however, it quickly becomes apparent that the theory has the potential to severely curtail discussion about proposed ballot measures. Because a ballot measure obviously cannot speak for itself by making expenditures out of its own personal funds due to the fact that it is not a person, the only speech that can be made in favor of or in opposition to the measure must occur by means either of contributions to a ballot campaign organization from individuals or organizations, including corporations, or through independent expenditures by such entities. If the

194. See *Consolidated. Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 537 (1980) (“[T]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”); see also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

195. *Buckley*, 424 U.S. at 19.

196. *Id.* at 14.

197. *Cf. Austin*, 494 U.S. at 693 (Scalia, J., dissenting) (the less popular the speech, the more important it is that it be aired); see also Redish & Wasserman, *supra* note 148, at 266 (“How . . . can an idea ‘get itself accepted in the competition of the market’ if the state can restrict the idea at the source because of its presumed lack of support?”).

198. See *Buckley*, 424 U.S. at 58-59 (holding FECA’s limitations on a candidate’s expenditures from personal funds and on overall campaign expenditures to be unconstitutional).

amount spent on such contributions and expenditures must be proportional to the amount of public support for the speech, the minority position on the ballot issue may well be overwhelmed by the initially more popular position, even if the more popular position is based on misinformation and bad policy. The less-popular position may never gain a fair hearing or an opportunity to sway public opinion because it is disadvantaged from the start by spending restrictions on its proponents.

Application to ballot measure campaigns of the state's alleged interest in ensuring that there is a correlation between money spent and public support highlights another problem with the theory. Although it seems intuitively obvious that the more people who support an initiative, the more money will be donated in support of the initiative, this proposition may not always be true. For example, imagine an initiative that requires the state to spend 5% of its budget on developing affordable housing. The initiative may be supported by 60% of the state's citizens, but because these supporters are likely to come primarily from the lower-income sector, they are unlikely to have much money to contribute to the initiative campaign.¹⁹⁹ Thus, the funds available to the proponents of the initiative may in fact not actually reflect the level of public support for the initiative.²⁰⁰ Of course, the funding available to the opponents of the initiative also will not accurately reflect the level of public opposition to the initiative.

2. *State-Conferred Advantages Are Not Unique to Corporations.*

In order to avoid the above-mentioned problems, the *Austin* Court insisted that its theory was not that all wealth is corruptive on the democratic process, but only that wealth accumulated by corporations with the aid of state benefits is sufficiently corrosive to warrant regulation.²⁰¹ In fact, it appears that the Court focused on state-con-

199. For example, in 1997 Montana ranked 47th in the U.S. with a per capita personal income of \$19,704, compared to the national average of \$25,298. U.S. Department of Commerce, Economics and Statistics Administration, Bureau of Economic Analysis, BEA Regional Facts <<http://www.bea.doc.gov/bea/regional/bearfacts/stbf9697/30000.htm>>. A person making less than \$20,000 per year is unlikely to have any discretionary income to devote to political activity.

200. Cf. Sunstein, *supra* note 182, at 1393-94 ("The correlation between public enthusiasm and the capacity to attract money is crude. . . . Candidate A might . . . attract large sums of money from wealthy people; but A's supporters may be less interested in her success than Candidate B's poorer supporters are interested in B's success, even though B's supporters donate less money.").

201. *Austin*, 494 U.S. at 660 ("the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the regulation]; rather, the unique state-

ferred advantages because it was only by limiting the state's alleged interest to *corporate* wealth that the Court could justify Michigan's segregated fund requirement. The Court followed Justice Rehnquist's lead in his *Bellotti* dissent²⁰² and concluded that since the state confers benefits on corporations, the state may also regulate corporations in ways that would not be permitted were non-corporate entities or individuals involved.²⁰³ In other words, although it is not acceptable to limit all wealthy speech, according to *Austin* it is acceptable to limit corporate speech because corporations receive advantages from the state that no other entity or individual does.

The Court's distinction between corporations and non-corporations based on state-conferred benefits is untenable. The alleged special benefits that corporations receive from the state are in fact available to other entities as well.²⁰⁴ Moreover, every organization and individual receives state benefits of one kind or another that help the organization and individual accumulate wealth. Regardless of how one may feel about the amount of money spent on political campaigns, the Court's attempt to distinguish corporate political spending from all other types of political spending based on state-conferred advantages is not supported by reality.²⁰⁵

conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”).

202. 435 U.S. at 822-28 (Rehnquist, J., dissenting).

203. See *Watts*, *supra* note 182, for an interesting discussion of corporate theories as applied in the Supreme Court's First Amendment cases.

204. Some would argue the focus on state-conferred benefits as the basis for permitting state regulation of corporations is wrong not only because non-corporate entities also receive benefits, but also because it reflects an incorrect theory of the corporation. Thus, contractarians view the corporation not as a fictional entity created by the state, and not as a natural entity separate from its shareholders, but rather as a “nexus of contracts” among the shareholders, managers, directors, and customers designed to achieve efficiency. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819); *Watts*, *supra* note 182, at 329-30. According to this theory of the corporation, benefits are not conferred by the state but are rather contract terms negotiated by the parties to the corporate contract. See Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 85-86 (1991). Therefore, “regulation of corporations cannot be justified under the Constitution on the ground that corporations receive ‘privileges’ from the state.” *Id.* at 86 n.20. See *Watts*, *supra* note 182, and Ribstein, *supra*, for fuller discussions of corporate theory.

205. There may be other more legitimate grounds on which to distinguish corporations from non-corporations for purposes of the First Amendment. See, e.g., *Greenwood*, *supra* note 182, at 1003 (arguing that corporations act on behalf of a fictional shareholder and so are “inappropriate participants in the political debate”). *Austin* was not based upon other theories, however, and so those arguments are beyond the scope of this article.

a. Which State-Conferred Advantages Matter?

The *Austin* theory depends on the state's conferral of special advantages on corporations that allow corporations to accumulate massive treasuries and that are not available to other entities.²⁰⁶ Surprisingly, however, *Austin* says no more than a few words about exactly what state-conferred advantages are relevant, and even those few words are vague and imprecise. In fact, not only are the three advantages mentioned by the Court available to non-corporate interests, but corporations and other entities receive far more state-conferred advantages than are listed by the Court.²⁰⁷ As a result, the entire *Austin* theory rests on a very shaky foundation of ill-defined and perhaps misunderstood benefits allegedly received from the state only by corporations.²⁰⁸

According to *Austin*, corporations receive advantages from the state, "such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."²⁰⁹ This reference is the only mention in the opinion of exactly which state-conferred advantages are relevant to the *Austin* theory. Because the state-conferred advantages given to corporations form the foundation of *Austin's* corporate corruption of the political marketplace theory, it is necessary to examine the advantages specifically listed by the Court, as well as those not listed, to determine whether those advantages do in fact distinguish corporations from other entities and individuals, and whether therefore such advantages justify separate regulation of corporate speech.

The first advantage listed by the Court is limited liability.²¹⁰ This advantage, of course, refers to the fact that by law, shareholders of a corporation are not personally liable for the debts of the corporation; they might lose their investment in the corporation, but they are not

206. Note that *Austin* rejected the Fourteenth Amendment equal protection argument that the Michigan segregated fund requirement treated similarly situated entities unequally, stating that unincorporated organizations do not receive the same benefits from the state as do corporations, and that therefore corporations and unincorporated entities are not similarly situated. 494 U.S. at 666.

207. See *infra* notes 234-41 and accompanying text.

208. In fairness to the Court, limited liability companies were only just beginning to be accepted by state legislatures at the time *Austin* was decided, and limited liability partnerships did not even exist yet. These recent developments in the law, however, simply serve to emphasize the flaws with the *Austin* theory. With new business entities now easy to form and widely used, the Court's limitation of corporate speech rights, based on state-conferred privileges, is simply unjustifiable.

209. 494 U.S. at 658-59.

210. See *id.* at 658.

liable beyond that investment.²¹¹ Limited liability helps corporations raise funds because it reduces the risk to which the investing shareholders are exposed.²¹² Traditionally, no entity other than a corporation could offer its investors such legal limited liability. The owners of sole proprietorships, general partnerships and joint ventures all have unlimited personal liability for the debts of their businesses. Limited partners in limited partnerships do have limited liability, but general partners continue to have unlimited liability. Because of this distinction between corporations and other business forms, corporations arguably used to have an advantage over other entities in raising funds.

Today, however, limited liability is no longer only available to corporate shareholders. Members²¹³ of limited liability companies ("LLCs") have limited liability,²¹⁴ as do, to some extent, partners in limited liability partnerships ("LLPs").²¹⁵ Therefore, limited liability is not unique to the corporate form, and cannot be one of the state-conferred benefits that distinguishes corporations from all other entities, unless LLCs and LLPs are deemed to fall under the *Austin* Court's definition of "corporation." Because LLCs and LLPs have quite different characteristics than corporations,²¹⁶ however, they should not be considered corporations for purposes of the *Austin* theory.²¹⁷

211. See MODEL BUSINESS CORPORATION ACT § 6.22 (1997); 1 JAMES D. COX, ET AL., CORPORATIONS § 1.15 (1998-2 Supp).

212. See 1 JAMES D. COX, ET AL., CORPORATIONS § 1.5 (1998-2 Supp) (limited liability "is frequently said to be the most important corporate privilege, one that enables a corporation to attract investors and assemble large amounts of capital.").

213. "Members" are what one might think of as shareholders.

214. See UNIFORM LIMITED LIABILITY COMPANY ACT § 303 (1996); see also 1 JAMES D. COX, ET AL., CORPORATIONS § 1.5 (1998-2 Supp) ("limited liability may be less of a factor today than it once was in light of the growing number of alternative business forms which grant limited liability to its owners," such as limited partnerships and limited liability companies).

215. See BROMBERG & RIBSTEIN, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT § 1.01(c) (1998) (approximately half the states have LLP statutes that create limited liability for partners in LLPs that "is substantially indistinguishable from that of corporate shareholders or members of LLCs.").

216. See BROMBERG & RIBSTEIN, *supra* note 215, § 1.04(d) (1998); Barbara C. Spudis, *Limited Liability Companies: An Introduction*, in LIMITED LIABILITY COMPANIES: FORMATION, OPERATION AND CONVERSION §1.4 (Robert W. Wood ed., 1993).

217. See *Montana Chamber of Commerce v. Argenbrigh*, where the plaintiffs argued in their motion for summary judgment that I-125 was unconstitutionally vague because it did not define "corporation." The court rejected the argument without discussion. *Montana Chamber of Commerce v. Argenbrigh*, Opinion and Order on Plaintiffs' Motion for Summary Judgment, CV 97-6-H-CCL, Feb. 18, 1998, at 29-30 (D. Mont.).

The next purported advantage mentioned by the Court is perpetual life.²¹⁸ “Perpetual life” means that the existence of a corporation does not depend on the identities of its shareholders.²¹⁹ In other words, individual shareholders can buy and sell shares as often as they like without in any way affecting the legal existence of a corporation. In contrast, traditional general partnerships effectively ended their existence when a partner withdrew.²²⁰ Perpetual existence is a benefit to corporations’ ability to raise funds because shareholders have greater certainty that they will not lose their investments due to the dissolution of the corporation. Partners in a traditional partnership have no such certainty because such partnerships are dissolved upon the departure of one of the partners.

Today, however, entities besides corporations also have perpetual existence. Many state statutes now allow partnerships to continue their existence even after a partner dissociates from the partnership,²²¹ and the organizers of LLCs can choose to have perpetual existence.²²² Perpetual existence also no longer is an advantage reserved exclusively for corporations. Contrary to *Austin*, therefore, corporations’ perpetual existence does not form a sound basis for distinguishing between corporations and other types of entities for purposes of regulating corporate political speech.

The third advantage of the corporate form enumerated in *Austin* is “favorable treatment of the accumulation and distribution of assets.”²²³ The meaning of this alleged advantage is not explained by the Court and is not typically recognized as a unique attribute of corporations. Therefore, one can only speculate about the Court’s intention in citing this purported “advantage” conferred by the state upon corporations. Perhaps the reference is to the tax treatment of corporations, although it is by no means clear that corporations always re-

218. See *Austin*, 494 U.S. at 658.

219. 1 COX, ET AL., *supra* note 212, § 1.5 (1998-2 Supp).

220. A “dissolution” is caused by several events, one of which is the ceasing of a partner’s association with the partnership. See UNIFORM PARTNERSHIP ACT § 29, 31 (1914). Unless otherwise provided by the partnership agreement, a dissolution triggers the winding up of the partnership, which ultimately results in the partnership’s termination. See UNIFORM PARTNERSHIP ACT § 38 (1914). Because a dissolution forces the partnership to wind up, the dissociation of a partner in effect results in the eventual termination of the partnership.

221. See REVISED UNIFORM PARTNERSHIP ACT § 603 & Official Comment 1 (1997) (remaining partners can choose whether to buy out the departing partner and continue the partnership, or to dissolve, wind up and terminate the partnership).

222. A member can dissociate from an LLC without causing the dissolution of the company. See UNIFORM LIMITED LIABILITY COMPANY ACT § 601 Official Comment (1996).

223. 494 U.S. at 658-59.

ceive more favorable tax treatment than do other types of organizations.²²⁴ Moreover, although the Court's list of advantages sounds a lot like Justice White's list of such advantages in his *Bellotti* dissent,²²⁵ Justice White actually distinguished among "accumulation, distribution, and taxation of assets," which suggests that since the *Austin* Court did not mention taxation as a corporate advantage, that is not what it meant.

Perhaps the "favorable treatment of the accumulation and distribution of assets" is a reference to the ownership of corporations by their shareholders, which structure allows a corporation potentially to raise a great deal of money through public offerings of stock and to distribute a portion of its earnings to shareholders in the form of dividends. This interpretation of the Court's phrase is supported by the *Austin* Court's references to "the unique state-conferred corporate structure that facilitates the amassing of large treasuries,"²²⁶ and to "those advantages unique to the corporate form."²²⁷ These references seem to point toward a focus on the structure of the corporation, and specifically, the fact that corporations are owned by their shareholders but managed by their officers and boards of directors. The interpretation is also somewhat supported by the Court's assertion that the three listed advantages "enhance [corporations'] ability to *attract capital* and to deploy their resources in ways that *maximize the return on their shareholders' investments*,"²²⁸ although in that phrase the Court is referring to all three advantages, not just the favorable treatment of the accumulation and distribution of assets.

If the Court did in fact intend to refer to the ownership of corporations by their shareholders, there are at least two problems with the Court's presumption that shareholder-ownership constitutes a state-conferred advantage which distinguishes corporations from other entities. First, although large corporations undeniably raise significant resources through public offerings of stock, for most corporations this is not the primary source of funds. As one commentator has noted, "most of the assets of any successful business corporation . . . are likely to have been generated by corporate activities rather than con-

224. Except, of course, tax-exempt organizations under 26 U.S.C. § 501(c) (1988).

225. See *Bellotti*, 435 U.S. at 809 (White, J., dissenting) ("special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets" allow corporations to "increase their economic viability" which in turn can be used to disrupt democracy).

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

227. *Id.* at 665.

228. *Id.* at 659 (emphasis added).

tributed by shareholders or their equivalents.”²²⁹ Second, LLC interests and limited partnership shares can also be offered to the public for sale if permitted by the operating agreement,²³⁰ and, because LLC members and limited partners have limited liability just as do corporate shareholders, the potential for LLCs and limited partnerships to accumulate and distribute assets may be just as great as for corporations. Thus, the allegedly unique corporate advantage of the existence of shareholders is illusory.

Yet another possible interpretation of the “favorable treatment of the accumulation and distribution of assets” is the existence of a market for the shares of corporations. In other words, perhaps the phrase is a reference to the former IRS definition of a corporation, which included the free transferability of ownership interests.²³¹ However, the shares of close corporations typically are not freely transferable,²³² and despite this non-transferability, the Court refused to exempt such corporations from the *Austin* rule. Moreover, interests in non-corporate entities such as LLCs may be freely transferable if permitted by the operating agreement.²³³ Therefore, free transferability of ownership interests does not necessarily distinguish corporations from other entities.

The Court’s third alleged special advantage is so poorly defined, it is not possible to define what exactly the Court meant. Perhaps corporations do receive from the state favorable treatment of the accumulation and distribution of assets, but the Court must define and explain that favorable treatment before it rests a First Amendment theory upon it.

The *Austin* Court apparently enumerated the three advantages discussed above merely as examples of the kind of benefits corporations receive from the state, rather than as an exhaustive list. After all, the Court did refer only to advantages “such as” limited liability,

229. Greenwood, *supra* note 182, at 1010 n.40.

230. See UNIFORM LIMITED LIABILITY COMPANY ACT § 503 (1996); UNIFORM LIMITED PARTNERSHIP ACT § 704 (1976).

231. Before the advent of the “check-the-box” regulations, 26 U.S.C. § 301.7701-3 (1999), the IRS determined whether to tax an entity as a corporation or a partnership based on several enumerated factors, one of which was the free transferability of interests. See 26 U.S.C. § 301.7701-2(a) (1990). An organization had free transferability of interests if each of its members had the power without the consent of the other members to substitute for themselves a person who is not a member of the organization. See 26 U.S.C. § 301.7701-2(e)(1).

232. Shares in a close corporation are not transferable except to the extent permitted by the articles of incorporation. See MODEL STATUTORY CLOSE CORPORATION ACT § 11.

233. See UNIFORM LIMITED LIABILITY COMPANY ACT § 503 (1996).

perpetual life, and favorable treatment of the accumulation and distribution of assets.²³⁴ Therefore, it is important to consider what other advantages, if any, are conferred by the state exclusively on corporations that aid corporations in amassing wealth in the economic marketplace.

For purposes of taxation, the four traditional indicia of “corporateness” used to be limited liability, perpetual life, free transferability of interests, and centralization of management.²³⁵ The first three have already been discussed above, leaving just centralization of management as a state-conferred advantage not specifically mentioned in *Austin*. Centralization of management means that management decisions are made by a defined group of people—in the case of a corporation the officers and the board of directors.²³⁶ This contrasts with decision-making authority in partnerships, in which all partners have management rights.²³⁷ Centralization of management tends to make decision-making more informed and efficient and therefore often is a benefit to an organization.²³⁸ Once again, however, centralization of management is no longer unique to corporations. Members of an LLC may elect to have the company managed by one or more managers, none of whom must be members of the LLC.²³⁹ Thus, LLCs have the right to centralized management just like corporations.²⁴⁰

It is thus apparent that none of the state-conferred advantages traditionally associated only with corporations is sufficient to support the Court’s assertion that only corporations receive the kind of advantages that enable them to accumulate wealth in the economic market-

234. *Austin*, 494 U.S. at 658-59.

235. 26 U.S.C. § 301.7701-2(a) (1990). These indicia are no longer used now that the IRS has adopted the “check-the-box” regulations for choice of entity. 26 U.S.C. § 301.7701-3 (1999).

236. The old Treasury regulations stated that an organization had centralized management if “any person (or any group of persons which does not include all the members) has continuing, exclusive authority to make decisions necessary to the conduct of the business for which the organization was formed.” 26 U.S.C. § 301.7701-2(c)(1) (1990).

237. See UNIFORM PARTNERSHIP ACT § 18(e); REVISED UNIFORM PARTNERSHIP ACT § 401(f).

238. See 1 JAMES D. COX, ET AL., *supra* note 212, § 1.5 (1998-2 Supp).

239. See UNIFORM LIMITED LIABILITY COMPANY ACT § 301 (Agency of Members and Managers), 404 (Management of Limited Liability Company).

240. See Frances T. Wirtz & Kenneth L. Harris, *Tax Classification of the Limited Liability Company*, in LIMITED LIABILITY COMPANIES: FORMATION, OPERATION AND CONVERSION §4.9 (Robert W. Wood ed., 1993).

place.²⁴¹ Therefore, the *Austin* Court's use of these state-conferred advantages to justify separate regulation of corporate, as opposed to non-corporate, political speech is insupportable.

b. All Entities and Individuals Receive State-Conferred Advantages.

Further undercutting the *Austin* reasoning, corporations are not the only participants in the political process that receive advantages from the state which enable them to accumulate resources more easily than they might otherwise be able to do. As Justice Scalia noted in his dissent, "other associations and private individuals [are] given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies."²⁴²

Tax rules are only one example of the state-conferred advantages received every day by entities and individuals. LLCs, LLPs and partnerships receive the benefit of pass-through tax treatment despite the fact that their members also receive limited liability and management flexibility which is not available to traditional for-profit corporations. Non-profit corporations receive preferential tax treatment, or even tax-exempt status,²⁴³ which allows them to accumulate greater resources than if they were subject to the same taxation rules as other corporations. Informed individuals can take advantage of various tax-shelters to protect their income. Other benefits conferred by the state on organizations and individuals run the gamut from lucrative government contracts to protection of private property rights.

c. State-Conferred Advantages Cannot Justify Curtailment of Corporate Political Speech

Ultimately, the Court's attempt to limit the definition of the state's interest to corporate spending fails because the Court focuses on the *source* of corporate money rather than on its use. If, as is asserted by the *Austin* Court, the problem is too much non-representative money being spent on political speech, the state's interest must be

241. The IRS recognized in 1995 that many state statutes now "provide that partnerships and other unincorporated organizations may possess characteristics that have traditionally been associated with corporations, thereby narrowing considerably the traditional distinctions between corporations and partnerships." I.R.S. Notice 95-14, 1995-14 I.R.B. (seeking comments on proposed "check-the-box" regulations).

242. 494 U.S. at 680; see also David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 267 (1991) (wealthy individuals, like corporations, owe wealth to benefits received from state).

243. See 26 U.S.C. § 501(c) (1988).

in preventing overwhelming amounts of money being spent on political speech, regardless of whether the money comes from economic or other activity. The Court, however, focuses on corporate money being corruptive of the political process because it is accumulated in the economic marketplace with the help of state-conferred advantages.²⁴⁴ In order to apply the *Austin* theory consistently, the Court would have to permit regulation of all political spending, not just corporate political spending, because all entities and individuals derive their resources in some way from the economic marketplace, whether in the form of sales, donations, salaries, dividends or capital gains, and all do so to some extent with the help of state-conferred advantages.²⁴⁵ Millionaires should then not be allowed to spend \$1 million on promoting their own political ideas because their money was earned in the economic marketplace and may not represent \$1 million worth of public support.²⁴⁶ This is true regardless of whether a millionaire spends his or her money in support of a candidate for office or a ballot initiative.

C. The Segregated Fund Requirement is Not Narrowly Tailored.

Even if one accepts the *Austin* theory that the state has a sufficiently important interest in regulating corporate political speech because such speech is financed by resources accumulated with the help of state-conferred advantages, a problem still remains. The segregated fund requirement is simply not sufficiently narrowly tailored to achieve the state's interest.

244. 494 U.S. at 660.

245. See, e.g., Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 783 (1991) (referring to *MCFL*, "[i]f an organization that receives corporate contributions potentially can distort the political process, it is difficult to see why an individual who receives corporate dividends, interest, or income is not also a source of corruption").

246. Cf. Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENTARY 91, 102 (1997) (corporations are not unique "in their capacity to divert wealth obtained in the economic marketplace to political purposes. Other business associations—as well as billionaire individuals who benefit from inheritance laws or obtain their wealth from investments in corporations—may build up campaign war chests 'that have little or no correlation to the public's support for their . . . political ideas.'" (quoting *Austin*, 494 U.S. at 652)). How one would even begin to calibrate money with public support is an interesting puzzle. The challenge posed by this endeavor does not necessarily mean it is not a good idea—after all, most people would probably agree that the hundreds of millions of dollars that are spent on campaigns in each election cycle could be better used in other quarters, such as improving education. The problem is how to do so constitutionally, particularly as long as *Buckley*'s prohibition on limitations on expenditures stands as good law.

“Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.”²⁴⁷ According to *Austin*, the “particular problem at hand” is “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public’s support for the corporation’s political ideas.”²⁴⁸ Assuming for the sake of argument this is in fact a compelling state interest, the segregated fund requirement for corporations is not sufficiently narrowly tailored to meet this particular problem because it is overinclusive.

The segregated fund requirement for corporations sweeps into its ambit all corporations that do not meet the *MCFL* criteria, regardless of whether those corporations actually present a real risk of corrupting the political marketplace by spending money in amounts that are out of proportion to the public support for the corporate speech. For example, a two-shareholder close corporation that is barely breaking even is deemed under *Austin* to pose just as great a threat to the political marketplace as General Motors. The *Austin* Court dismissed this concern by stating that all corporations receive state advantages, and therefore all corporations “present the *potential* for distorting the political process.”²⁴⁹ Although Justice Brennan admitted the overinclusiveness of the rule, he argued that the *MCFL* criteria sufficiently address that small class of non-profit corporations to whom application of the segregated fund requirement would be unconstitutional.²⁵⁰

247. *MCFL*, 479 U.S. at 265.

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

249. *Id.* at 661 (emphasis added). To back up its argument, the Court cited its statement in *FEC v. National Right to Work Committee*, 459 U.S. 197, 209-10 (1982), that the Court accepts Congress’s legislative judgment that it is necessary to guard against corporations’ potential for corruptive influence. As one commentator has noted, however, the Court has been inconsistent in its respect for legislative judgments:

In the corporations cases, the Court’s vacillation has been acute. In different cases, it has dismissed out of hand the argument that corporations present any danger of undue influence [*Bellotti*]; deferred to a Congressional or state legislative judgment that corporations in general present unique dangers, without requiring that regulation be limited to corporations that actually amass the wealth necessary to fund a war chest that poses a danger of undue influence [*FEC v. National Right to Work Committee*]; and upheld regulation in principle but required Congress to target only those corporations whose war chests are divorced from public support [*MCFL*]. Briffault, *supra* note 246, at 104.

The Court’s most recent pronouncement on legislative judgments has come in *Nixon*, 120 S.Ct. at 906, in which the Court states that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”

250. See *Austin*, 494 U.S. at 672 (Brennan, J., dissenting).

Justice Brennan said nothing about all the small, for-profit corporations that have not amassed enormous treasuries or about those non-profits that do not meet the *MCFL* criteria because they were not formed for the express purpose of promoting political ideas.

The *MCFL* majority also acknowledged the overinclusiveness of the segregated fund requirement as applied to corporations that do not meet the *MCFL* criteria, but said that business corporations “are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth,”²⁵¹ and that Congress’s failure “at present” to

seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress’s decision represents the “careful legislative adjustment of the federal electoral laws, in a ‘cautious advance, step by step,’” to which we have said we owe considerable deference.²⁵²

Such a cautious approach to regulation is unnecessary. If the problem is some corporations amass overwhelming resources in the economic marketplace that can then be used to distort the political marketplace, it should be relatively easy for Congress and state legislatures to decide how much money is “overwhelming” and then simply to limit independent expenditures accordingly. In other words, simply limit expenditures in the same way contributions are limited.²⁵³ It is completely unnecessary to paint with as broad a brush as *Austin* permits.

Some may argue that small corporations with only a few shareholders are not really affected by the segregated fund requirement because the individual shareholders can simply make contributions or expenditures in their own names and do not need to speak through their corporations. This contention misses the point by arguing that the segregated fund requirement is not a significant burden on speech, rather that the segregated fund requirement for corporations is sufficiently narrowly tailored. As discussed above, because the segregated fund requirement imposes detailed organizational and disclosure de-

251. *MCFL*, 479 U.S. at 258, n.11.

252. *Id.* (quoting *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982)).

253. *See Austin*, 494 U.S. at 688 (Scalia, J., dissenting) (“If narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed ‘war chests’ must be targeted, if possible, at amassed ‘war chests.’ And surely such targeting is possible—either in the manner accomplished by the provision that we invalidated in *Buckley*, i.e. by limiting the prohibition to independent expenditures above a certain amount, or . . . by limiting the expenditures of only those corporations with more than a certain amount of net worth or annual profit.”).

mands, it may be prohibitively expensive for small corporations, or even large but unprofitable ones, to create a segregated fund, leaving the shareholders no choice but to speak as individuals, thereby losing the unique message that may more effectively be communicated by a corporation than by an individual shareholder. The point therefore is not whether shareholders in a small corporation have an alternative way to speak; rather, the issue is whether a constitutional manner of speaking is foreclosed by an insufficiently narrowly tailored regulation.²⁵⁴

The segregated fund requirement is also overinclusive because it includes non-profit corporations that do not meet the *MCFL* criteria but also do not pose any threat of distorting the political marketplace.²⁵⁵ Such non-profits might include all of those organizations formed not with the express purpose of promoting political ideas, as required by *MCFL*, but rather with charitable or social welfare purposes, including, for example, parent-teacher associations, environmental groups, museums and symphonies. Many such organizations may occasionally wish to participate in public debate on political issues, including ballot questions, but most are unlikely to accumulate war-chests large enough to “corrupt” the political process.²⁵⁶ Nonetheless, if the state’s concern is about such non-profits using excessive amounts of money to distort the political process, it should be a relatively simple matter just to place a limit on amounts that may be expended.²⁵⁷ If, on the other hand, the concern is about organizations using members’ money to engage in political speech with which the members disagree, the state can simply require such non-profits to in-

254. The Court has “consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.” *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 541 n.10 (1980); *see also Nixon*, 120 S.Ct. at 921, n.6 (“[W]e have rejected the notion that a law will pass First Amendment muster simply because it leaves open other opportunities.”).

255. Justice Kennedy was particularly concerned about the different classes of non-profits created by *MCFL* and *Austin*. *See Austin*, 494 U.S. at 700 (Kennedy, J., dissenting) (as a result of *MCFL* and *Austin*, First Amendment protection “is given only to a preferred class of non profit corporate speakers: small, single issue non profit corporations that pass the Court’s own vague test for determining who are the favored participants in the electoral process.”).

256. There are, of course, tax-exempt organizations with huge resources, such as the American Association of Retired Persons, The Nature Conservancy, the American Medical Association and, of course, the American Bar Association.

257. *Cf.* 26 U.S.C. § 501(h) (1988 & 1999 Supp), creating a sliding scale of permissible lobbying expenditures by certain tax-exempt organizations based on an organization’s expenditures for its tax-exempt purpose.

form members that their money may be used for political purposes.²⁵⁸ There is no reason to include in the *Austin* theory any non-profit organizations.

Some may argue that including non-profit corporations within the *Austin* theory is not significant because most tax-exempt corporations are already effectively precluded from spending money on political speech by the Internal Revenue Code restrictions on the political activities of charitable and social welfare organizations.²⁵⁹ However, there is a huge difference between the Congress's refusal to pay for political speech through tax-exemptions and the state's attempt in *Austin* to regulate such speech. The limitations imposed on tax-exempt organizations by Congress are not subject to constitutional analysis because "there is no right to have speech subsidized by the Government."²⁶⁰ Unlike in *Austin*, tax law organizations remain free to engage in as much political speech as they wish as long as they pay taxes. Moreover, the Internal Revenue Code restriction on charitable organizations participating in ballot measure campaigns provides only that such organizations may not devote a "substantial part" of their activities to attempts to influence legislation,²⁶¹ leaving charities the ability to engage in some speech on ballot measures. *Austin*, on the other hand, allows no such speech by non-profit organizations failing to meet the *MCFL* test except to the extent such non-profits can raise additional money from their members for a segregated fund.

Even if one accepts that the state has a compelling interest in preventing corporate corruption of the political marketplace as defined in *Austin*, the segregated fund requirement for corporations is

258. *Cf. MCFL*, 479 U.S. at 261 ("persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than [FECA's] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose."). This is probably equally true for corporations generally, demonstrating further why the segregated fund requirement is not sufficiently narrowly tailored.

259. In order to retain their tax-exempt status, charitable and social welfare organizations may not participate or intervene in any campaign of a candidate for public office, *see* 26 U.S.C. § 501(c)(3) & (c)(4) (1988 & 1999 Supp.), and tax-exempt charitable organizations may not spend a "substantial part" of their activities on attempts to influence legislation, which includes ballot measures. Bruce R. Hopkins, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 20.1 (1998). Social welfare organizations may engage in campaigning for or against ballot issues. *See id.* at § 17.4. Most organizations can probably legally, if not realistically, create separate segregated funds or political action committees to engage in political activity. *See id.*

260. *MCFL*, 479 U.S. at 256 n.9.

261. 26 U.S.C. § 501(c)(3).

not sufficiently narrowly tailored to prevent such corruption because it curtails political speech by corporations that do not present a threat to the political process. Thus, the *Austin* theory cannot stand up to strict scrutiny and does not pass constitutional muster.

D. The *Austin* Theory of Corruption Should Not Be Extended to Ballot Measure Campaigns

A segregated fund requirement for corporations justified by the new political corruption theory espoused in *Austin* should not be extended to ballot measure campaigns. Not only is the *Austin* theory of corporate corruption of the political marketplace unsound as demonstrated above, but the segregated fund requirement is not sufficiently narrowly tailored to be constitutional. Ballot initiatives and referenda are increasingly used as essential tools of democracy within the states.²⁶² For the reasons stated above, restriction of for-profit and non-profit corporate speech on ballot issues through a segregated fund requirement will unconstitutionally undermine the very democratic process the state seeks to protect.

V. Conclusion

Austin found constitutional a prohibition on corporations' independent expenditures in connection with a political candidate campaign, as long as the corporation is permitted to establish and administer a segregated fund whose purpose is to engage in such political speech. A corporation may not contribute its own general treasury funds to the segregated fund, but may solicit contributions to the fund from shareholders, employees and members. Montana voters approved an initiative that attempted to extend the *Austin* holding to corporate expenditures in connection with ballot measure campaigns in Montana. Although a federal district court found the Montana initiative to be unconstitutional because the Supreme Court has not yet permitted such regulation of speech on ballot measure campaigns, the *Austin* theory of corporate corruption of the political marketplace logically applies just as readily to ballot measure campaigns as it does to candidate campaigns.

Montana's attempt to broaden *Austin* to include ballot measure campaigns emphasizes the urgency of the need to reconsider *Austin*. The Supreme Court should not extend *Austin* to ballot issue campaigns because it is bad law and bad policy. As demonstrated above,

262. See *supra* notes 6-8 and accompanying text.

the segregated fund requirement for corporations is in fact unconstitutional because the alleged state interest is poorly defined, and the segregated fund requirement is not sufficiently narrowly tailored to achieve that interest. An extension of *Austin* to ballot issue campaigns would seriously undermine the democratic process by firmly and unconstitutionally reinforcing *Austin*'s flaws in First Amendment jurisprudence.

The best course for the Court, therefore, is to reconsider the *Austin* theory of corporate corruption of the political marketplace with respect to both candidate and ballot issue campaigns. The Court should return to *Bellotti*'s framing of the issue, and develop a test for corruption based on convincing evidence that well-financed voices are "overwhelming or even significant in influencing" political discourse and that this threatens "the confidence of the citizenry in government."²⁶³ The test established by the Court must make clear that it is not just corporate voices that can dominate political discourse to the detriment of other points of view, but any voice, individual or organizational, that can spend practically unlimited funds to promote its political position. The Court must also give some guidance on how such corruption can be proved. This approach may well require the Court to reject its holding in *Buckley* that independent expenditures may not be regulated,²⁶⁴ but there are worse things than recognizing and correcting past mistakes, especially when such mistakes perpetuate and extend precedents that unconstitutionally curtail First Amendment rights.

263. 435 U.S. at 789-90.

264. See *Nixon*, 120 S.Ct. at 916 (arguing that Congress should be allowed to regulate both expenditures and contributions, but recognizing that because of *Buckley*, "there are serious constitutional questions to be confronted in enacting any such scheme.").

