

# First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance

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Judging from the rhetoric of the dissenting Justices, the Supreme Court's decision in *Austin v. Michigan Chamber of Commerce*,<sup>1</sup> which upheld limits on corporate campaign speech, marked a revolution in First Amendment jurisprudence. Justice Kennedy branded the majority a "censor," and characterized the result as "the most severe restriction on political speech ever sanctioned by this Court."<sup>2</sup> Justice Scalia warned that by accepting the majority's rationale, "the First Amendment will ultimately be brought down."<sup>3</sup> But dissenters' rhetoric, like campaign speech itself, must be taken with a grain of salt.

One might ask Justice Kennedy, for example, how a rule requiring corporations to establish a segregated fund of monies voluntarily donated for campaign expenditures is a more "severe restriction on political speech" than the ten-year prison sentence imposed on Socialist Party leader Eugene Debs for an anti-war speech, upheld by the Supreme Court in *Debs v. United States*.<sup>4</sup> And Justice Scalia's apocalyptic pronouncement comes at least four years too late, as *Austin* did no more than apply the rationale set forth in *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*,<sup>5</sup> a decision which Justice Scalia himself joined. Moreover, in holding that corporations' campaign expenditures can be restricted, the *Austin* decision essentially ratified what Congress has been doing since 1947, when it amended the Federal Corrupt Practices Act to prohibit corporate expenditures in connection with federal electoral campaigns.

In fact, *Austin* was a remarkable decision, but not for the reasons stated by the dissent. Far from marking the beginning of the end of the First Amend-

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1. 110 S. Ct. 1391 (1990).

2. *Id.* at 1425-26.

3. *Id.* at 1411.

4. 249 U.S. 211 (1919).

5. 107 S. Ct. 616, 630-31 (1986). *MCFL* involved a constitutional challenge by an ideological nonprofit corporation to a law requiring corporations to establish a separate segregated fund comprised of voluntarily donated money if they sought to make expenditures in federal campaigns. The Supreme Court struck down the restriction as applied to *MCFL*, but in dicta it essentially approved of the application of the restriction to for-profit corporations. *See infra* part II.B.3.

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ment, *Austin*, and *MCFL* before it, reflect the Court's first serious acknowledgments of the structural problem underlying the campaign spending issue: capitalism and democracy are an uneasy mix. Free market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities. Because even "free speech" costs money, those who succeed in the economic marketplace are able to purchase far more speech opportunities than those who do not. Absent government intervention of some kind, the marketplace of ideas, and in turn the election of our representatives, threatens to go to the highest bidder. The threat posed by concentrated wealth is not merely the aberration of a bribed official, but the structural threat of a monopolized marketplace of ideas.

This fact, long recognized by politicians and those who study them,<sup>6</sup> has generally been ignored by the Court. Until *MCFL* and *Austin*, the Court treated the distorting effects of wealth on electoral debate as a phenomenon beyond legitimate government control. As the Court stated in *Buckley v. Valeo*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>7</sup> From this perspective, the only legitimate interest served by campaign finance regulation was avoidance of the most mundane form of corruption, namely, direct exchange of money for votes. In *Austin*, the Court for the first time upheld campaign finance regulations as a justified response to a far more problematic and systemic form of corruption: "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."<sup>8</sup> With these words, the Court has begun to acknowledge the problem that capitalism poses for democracy. It has also potentially begun a new era of campaign finance jurisprudence, for the Court's recognition of systemic corruption collapses all the distinctions that guided its prior jurisprudence in this area.

Whether *Austin* gets us much closer to solving the problem it recognizes

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6. David Magleby and Candice Nelson, in a recent overview of the literature on the effects of money on electoral success, concluded that "while disagreement continues about the relative importance of money to challengers and incumbents, the conclusion of all is that money matters in congressional elections." DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 69-70* (1990); see also ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 77-98* (1983) (arguing that money can make a difference in who wins elections, and in who has access to politicians); cf. GARY C. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* (1980) (maintaining that money is more important for challengers than incumbents); Charles R. Beitz, *Political Finance in the United States: A Survey of Research*, 95 *ETHICS* 129, 138-41 (1984) (finding that money matters, but is only one of several important campaign resources).

7. 424 U.S. 1, 48-49 (1976) (per curiam).

8. 110 S. Ct. at 1397.

is another matter. The *Austin* dissents unwittingly demonstrate the intractability of the problem. If government may limit corporate political speech because of its inordinate power, the dissenters ask, why could it not also restrict the speech of the media, certainly the most influential corporations in the marketplace of ideas today? Moreover, capitalism does not make only businesses inordinately wealthy. The individuals who own, manage, or invest in corporations (or whose parents, grandparents, or great-grandparents did so) gain similar advantages, which are equally unrelated to "the public's support for the [individuals'] political ideas."<sup>9</sup> And the state's legal protection of private property maintains and reinforces such inequalities. Thus, the problem of inequitable wealth distribution and its effect on the electoral marketplace extends far beyond corporations. The *Austin* dissenters are correct that the line drawn at corporations is artificial, but that observation does not tell us whether we should be less or more concerned with redressing the distorting effects of wealth.

Aggregations of wealth, corporate or otherwise, pose a direct threat to the principles of representative democracy. Non-media corporate wealth, the specific focus of the law upheld in *Austin*, is merely the easiest form of wealth distortion to address. With a corporation, it is possible to create an admittedly rough distinction between the influence derived from an idea and the influence derived from a speaker's wealth. But the problems that the Court recognized in *Austin* go much deeper, and pose a fundamental value choice for the Court, Congress, and the American people: how are we to reconcile the egalitarian aspiration reflected in the First Amendment, in the right to vote, and in the democratic ideal, with the anti-egalitarian foundation of capitalism? This article will trace the Supreme Court's ambivalent approach to this question, and will argue that while *Austin* does not answer the question, it takes an important first step simply by recognizing that the problem exists.

Part I will sketch the general jurisprudential outlines of the Court's approach to campaign finance regulation prior to *Austin*. The Court's pre-*Austin* approach was premised on two metaphors that obfuscated the structural threat posed by the use of concentrated wealth: a laissez-faire model of "free trade in ideas" and "quid pro quo" corruption. As a result, most of the Court's campaign spending decisions have an air of unreality and are founded on distinctions—between contributions and expenditures, referenda and candidate elections—that cannot be sustained in light of *Austin*.

Part II will focus specifically on the Court's treatment of campaign spending by *corporations*. In this line of cases, culminating in *Austin*, the Court ultimately moved beyond the metaphors that plagued its general approach, and effectively adopted a new metaphor: First Amendment antitrust. In *Austin*, the

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9. *Id.*

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Court recognized the *structural* nature of the problem that concentrated wealth poses for freedom of speech, and properly upheld limited government intervention designed to correct the distorting effects of corporate wealth. While this development was easiest in the corporate context, dissenting Justices Scalia and Kennedy are correct that it cannot be analytically confined to that context, and accordingly it may presage a new approach to campaign finance generally.

Finally, inspired by the *Austin* dissenters' insight, part III will argue that the wealth distortion problem is not only not unique to corporations, but is also not unique to campaign spending. In fact, it is endemic to democratic capitalism, which at once guarantees rights of equality and rights of inequality. The conflict between a norm of equality, reflected in the campaign finance context in the right to vote and the right to free speech, and the reality of inequality, is one the Court has repeatedly confronted in other constitutional areas. What is most striking about *Austin* is that its approach goes against the grain of much of the Court's constitutional jurisprudence concerning this fundamental conflict. The *Austin* Court recognizes what most of the Court's previous decisions pointedly ignored: the threat economic inequality poses for realizing individuals' constitutional rights.

### I. CAMPAIGN FINANCE JURISPRUDENCE: CAPTURED BY METAPHOR

#### A. *The Metaphor of the Political Marketplace*

At one point in his *Austin* dissent, an extended lament to what he apparently sees as a fast-disappearing First Amendment, Justice Scalia remarked, “[i]t is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.”<sup>10</sup> The “poetic metaphor” to which Justice Scalia refers is “corruption.” While corruption seems at first glance neither poetic nor metaphorical, Justice Scalia suggested that the *Austin* majority had made it so by extending it well beyond its original meaning. Where “corruption” in previous cases referred only to direct, quid pro quo exchanges of money for votes, the majority in *Austin* used it to describe the systemic distorting effects of wealth on the public dialogue. Adopting a somewhat poetic technique himself, Justice Scalia labeled the majority's view of corruption the “New Corruption.”<sup>11</sup>

Justice Scalia's poetic critique is curious, for no constitutional doctrine is more centrally founded on poetic metaphor than First Amendment doctrine. The “free marketplace of ideas,” the governing principle of First Amendment jurisprudence, is nothing more than a metaphor. There is no New York Stock

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10. 110 S. Ct. at 1411.

11. *Id.* at 1414.

Exchange for speech, yet the notion of “free trade” in ideas has nonetheless guided the Court’s First Amendment jurisprudence since Justice Holmes first used the image in his 1919 dissent in *Abrams v. United States*.<sup>12</sup> In fact, Justice Scalia’s dissent in *Austin* itself draws on one version of this metaphor—the laissez-faire model, in which government regulation is inherently suspect, and a “free market” is defined by the absence of government intervention. I will argue that it is precisely the Court’s pure laissez-faire approach to First Amendment issues, an approach abandoned long ago in the economic marketplace, that has so stymied judicial response to the campaign finance issue.<sup>13</sup>

Laissez-faire, however, is not the only lens through which to view the “marketplace of ideas.” The *Austin* majority also hews to the marketplace metaphor, but its model envisions a more interventionist role for government. In its view, a wholly unregulated marketplace of ideas does not necessarily produce the most “uninhibited, robust, and wide-open”<sup>14</sup> debate, just as an unregulated economic marketplace does not necessarily result in the most competitive free trade. The *Austin* majority recognizes that concentrations of wealth can distort the speech market, and that government regulation may be needed to offset the distorting effects of that inequality. Thus, far from rejecting the “marketplace” metaphor, the *Austin* Court adapts it to take into account the reality of unequal wealth.

The “marketplace” metaphor can be traced back well before Holmes to John Milton (when it was more truly poetic) and John Stuart Mill, both of whom maintained that “Truth” was best approached by the free struggle of ideas.<sup>15</sup> That notion has been sharply criticized on both theoretical and practical grounds.<sup>16</sup> As a matter of theory, critics argue, there appears to be no reason why “truth” should win in a hypothetical free market. In free competition,

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12. 250 U.S. 616, 630 (1919). Elsewhere I have traced the poetic/juridical development of this metaphor. See David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986).

13. This laissez-faire approach is not limited to the First Amendment. Constitutional jurisprudence is generally far more concerned with government intervention than with the effects of nonintervention. The Constitution is understood to provide negative rights against government interference, not affirmative entitlements to government assistance for those whose means foreclose them from exercising their constitutional rights. The effect of the Court’s libertarian, negative view of rights is that only those wealthy enough to exercise their rights are in fact “free” to do so. See, e.g., *Maier v. Roe*, 432 U.S. 464, 474 (1977) (state may choose to fund childbirth and not abortion, notwithstanding pressure this policy exerts on indigent women not to have abortion); see also *Harris v. McRae*, 448 U.S. 297 (1980) (same); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal protection not violated by state’s district-based public school funding system that results in substantial disparities in resources for rich and poor school districts).

14. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

15. See John Milton, *Areopagitica*, reprinted in *THE TRADITION OF FREEDOM 28* (Milton Mayer ed., 1957) (“Let [Truth] and Falshood [sic] grapple; who ever knew Truth put to the wors, in a free and open encounter”); JOHN STUART MILL, *ON LIBERTY 38* (R. B. McCallum ed., 1949). See generally Cole, *supra* note 12, at 875-78.

16. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH 6-24* (1989).

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people might well be persuaded by falsehood.<sup>17</sup> If we could accurately define truth, therefore, there would be little point in allowing falsehoods free rein. Thus, the argument for “free trade” necessarily turns on human uncertainty—it is because we cannot know truth that we must allow a free exchange of ideas. But if we cannot know what is true, then how can we know whether it is true that “free trade” will get us there? As Justice Holmes himself acknowledged, belief in “free trade” ultimately requires a leap of faith: the Constitution “is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”<sup>18</sup>

The “marketplace of ideas” is by no means the only rationale for the First Amendment. Some scholars have suggested that the First Amendment should be viewed in more individualistic terms, as a means of protecting liberty,<sup>19</sup> self-realization,<sup>20</sup> or autonomy.<sup>21</sup> Still others have argued that the value of speech lies not in its discovery of truth but in its integral role in self-government.<sup>22</sup> But as Justices Brandeis and Brennan’s best opinions have demonstrated, these values are not inconsistent with the “marketplace of ideas.”<sup>23</sup> It is in part by protecting the liberty and autonomy of speakers that we encourage the free exchange of ideas necessary to informed collective decisions about what course is best for our society. Similarly, we further liberty and autonomy values by promoting the free exchange of ideas.

The particular value of the marketplace metaphor is that it depicts free speech as both an individual and a collective right. Its emphasis on the collective or structural perspective can be found in its goal of an “uninhibited, robust and wide-open” debate on public issues.<sup>24</sup> The First Amendment’s vision of a robust marketplace of ideas dovetails with the republican conception of the town meeting, and implies not merely an abstract or formal “right” to speak, but a more substantive guarantee that ordinary people will in fact have a real opportunity to participate in the exchange.<sup>25</sup> If a laissez-faire approach does not produce such a debate, the “marketplace” approach may justify affirmative

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17. *Id.* at 12-16.

18. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

19. *BAKER*, *supra* note 16, at 5.

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

21. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

22. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Greenwood Press 1979) (1948).

23. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 170-204 (1973) (Brennan, J., dissenting). For a discussion of the relationship of these opinions to the “marketplace of ideas” metaphor, *see* Cole, *supra* note 12, at 887-92, 897-902.

24. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

25. *See, e.g.*, *CBS v. DNC*, 412 U.S. at 183-204 (Brennan, J. dissenting) (relying on “marketplace of ideas” metaphor to find First Amendment right of access for editorial advertisers to television stations); *see also* Cole, *supra* note 12, at 894, 897-900 (discussing implications of Justice Brennan’s “marketplace” metaphor).

government intervention.

Moreover, the "marketplace" model, while widely criticized in the academic community, remains a dominant point of reference in First Amendment jurisprudence and ideology.<sup>26</sup> This may be because the leap of faith it requires is precisely the same leap of faith that liberalism itself makes: a belief in reason. It is reason that does the work in the marketplace of ideas, distilling good from bad, truth from error, and the just from the unjust. Stanley Fish has persuasively argued that while liberalism often sees faith and reason as polar opposites, reason is ultimately liberalism's faith; reason is the standard by which outcomes are judged in a liberal system, and as such, reason itself cannot be questioned within the domain of liberalism.<sup>27</sup> Like liberalism, the marketplace of ideas also rests on faith in the capacity for reason. The marketplace's strength as a metaphor, then, is that it captures a central tenet of our political faith.

### B. *The Economics of the Political Marketplace*

The weakness of the "marketplace" story is its susceptibility to laissez-faire interpretation, which is in turn subject to a devastating practical critique. As Owen Fiss has cogently argued, the "marketplace" image of streetcorner speakers competing for audience approval in the town square, whether or not it was ever accurate, simply does not reflect the reality of speech in the era of mass communications.<sup>28</sup> Today's streetcorner is a television set,<sup>29</sup> and a handful of speakers control access to the podium. Access is theoretically available, but only at a prohibitive price,<sup>30</sup> and certainly not for all.<sup>31</sup> In today's marketplace, therefore, the most effective opportunities to address the public are limited to those with substantial economic resources. That these developments have affected political campaigns is indisputable; the press regularly reports on the long hours politicians feel compelled to devote to raising money for their campaigns, the costs of which skyrocket further every

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26. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 418-420 (1989); *New York Times Co. v. Sullivan*, 376 U.S. at 270.

27. Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997; see also Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

28. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-25 (1986).

29. See e.g., *CBS v. DNC*, 412 U.S. at 195 (Brennan, J., dissenting).

30. The amount of money spent on all political television advertising during election years increased, in constant 1988 dollars, from under \$50 million in 1970 to over \$225 million in 1988. *American Politics Loses Way as Polls Displace Leadership*, N.Y. TIMES, Mar. 18, 1990, at A22. Advertising and media costs make up between 15% and 70% of federal electoral candidates' spending. MAGLEBY & NELSON, *supra* note 6, at 61-62. In the 1986 campaign, congressional candidates spent more than \$97 million on broadcasting alone. *Id.*

31. With few exceptions, broadcasters have no obligation to accept paid political advertisements. See *CBS v. DNC*, 412 U.S. 94 (1973) (upholding against a First Amendment challenge broadcasters' refusal to accept paid political advertisements). *But cf.* *CBS v. FCC*, 453 U.S. 367 (1981) (upholding FCC requirement that broadcasters accept political advertisements from candidates during federal campaigns).

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year.<sup>32</sup>

These economic barriers to the marketplace of ideas threaten the norm of equality implicit in the marketplace metaphor and the First Amendment itself. The metaphor is premised on the notion that individuals and ideas will have equal access to the market, so that the exchange will be robust and wide-open, and so the audience can choose the best ideas. The First Amendment therefore prohibits the government from picking and choosing among ideas or speakers based on the content of their speech or their identity.<sup>33</sup> By forbidding such discrimination, the First Amendment creates a kind of equal protection guarantee for speakers and ideas. As the Supreme Court has stated, “[t]here is an ‘equality of status in the field of ideas,’ and government must afford all points of view an opportunity to be heard.”<sup>34</sup> That “equality of status” is threatened if vast concentrations of wealth can effectively dominate the “marketplace.”<sup>35</sup>

These problems are especially grave in the campaign context for a number of reasons. First, the stakes are arguably higher here than in other realms of speech. Elections are the backbone of our democratic system, so threats to their integrity strike directly at the legitimacy of the whole system. And speech plays perhaps its most crucial societal role in the electoral process by informing citizens of candidates’ views, and by defining the issues that determine how we vote. For this reason, the Court has long maintained that political speech, and especially speech during political campaigns, is at the apex of First Amendment protection.<sup>36</sup>

Second, the norm of equality implicit in the First Amendment’s mandate is heightened in the electoral context by the guarantee of “one person, one

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32. *An Edge for Incumbents: Loopholes That Pay Off*, N.Y. TIMES, Mar. 20, 1990, at A16; *Study Links Contributions to How Lawmakers Vote*, N.Y. TIMES, Dec. 30, 1987, at A10; DREW, *supra* note 6, at 1; MAGLEBY & NELSON, *supra* note 6, at 43-44.

33. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”).

34. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)); *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

35. *See* Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983) (arguing that Court should respond to this threat by according absolute protection only to those forms of speech to which all citizens have access, while balancing the effects on collective rights when treating regulation of speech activities not accessible to all).

36. *Bellotti*, 435 U.S. at 776-77 (speech during political campaigns is “at the heart of the First Amendment’s protection” because “it is indispensable to decisionmaking in a democracy”); *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (campaign expenditures constitute “political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)); *see also* *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times v. Sullivan*, 376 U.S. at 270. Indeed, one of the principal rationales for protecting speech in the first place is its integral relationship to the means by which a polity decides how to govern itself. *See generally*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).



vote."<sup>37</sup> When unequal monetary resources translate into unequal influence in electoral campaigns, the democratic function of the "one person, one vote" guarantee is undermined. That guarantee is designed to ensure that we all have an equal say in the composition of our government, but the mere fact that we all have one vote at the end of the campaign does not negate the substantial effects of widespread spending differentials during the campaign.

Political participation in the form of expenditures or donations is apparently for most citizens a luxury, to be engaged in only after the necessities of life—food, housing, clothing—are obtained. Campaign expenditures are made by a small minority of the population—approximately fourteen percent, excluding the one dollar check-off on federal income tax returns.<sup>38</sup> Not surprisingly, that small minority is concentrated in the upper- and middle-income brackets.<sup>39</sup> Thus, unless political participation is in some measure equalized, the "one person, one vote" guarantee is in danger of being reduced to a formalistic symbol.

Finally, electoral campaigns are of finite duration. The marketplace model is premised on the ongoing exchange of ideas, and cannot guarantee that the best result will prevail at any particular moment. Because the campaign exchange is cut short on election day, there may be a greater danger of distortion from well-timed infusions of wealth that produce effectively unanswerable speech.<sup>40</sup>

On the one hand, these concerns might support an argument that the First Amendment should *require* government regulation of campaign finance. After all, where wealth directly threatens to undermine the representative process, such as where votes are bought and sold, we criminalize the activity, reflecting a strong social consensus that such distortions of democracy cannot be countenanced. It does not require a great leap, then, to maintain that First Amendment and democratic values similarly require the government to take some responsibility for counteracting distortions of wealth in the electoral speech marketplace.

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37. Reynolds v. Sims, 377 U.S. 533, 558 (1964). As Alexander Heard wrote:

A deeply cherished slogan of American democracy is "one man—one vote." . . . Concern over the private financing of political campaigns stems in significant measure from the belief that a gift is an especially important kind of vote. It is grounded in the thought that persons who give in larger sums or to more candidates than their fellow citizens are in effect voting more than once.

ALEXANDER HEARD, THE COSTS OF DEMOCRACY 48-49 (1960).

38. Beitz, *supra* note 6, at 132-33.

39. *Id.*

40. Paul G. Chevigny, *The Paradox of Campaign Finance*, 56 N.Y.U. L. REV. 206, 214 (1981) (book review) (citing INSTITUTE OF POLITICS, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARV. U., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78, at 3-37 (1979)). DREW, *supra* note 6, at 80 (organizations prefer to contribute and spend in the last few days of campaigns).

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On the other hand, the campaign context also presents special reasons for fearing government regulation of speech. The Court's recognition of the importance of protecting political speech stems at least in part from a sense that public officials will be most tempted to censor political speech precisely because it hits closest to home.<sup>41</sup> Where speech directly involves a political campaign that will determine whether those in power remain there, the temptation to suppress is likely to be even greater. A frequent criticism of campaign spending ceilings, moreover, is that they favor incumbents, because challengers generally need more money to overcome the advantages of incumbency. These concerns, considered on their own, might lead one to conclude that the First Amendment should *forbid* government regulation of campaign finance.

The threats to free and equitable participation in campaign debate are thus bipolar: one pole appears to demand government intervention and the other appears to prohibit intervention. Both private concentrations of wealth and government authority can be abused to undermine free and equitable access to the political process. For this reason, campaign finance issues present a classic Scylla and Charybdis scenario: in order to respond to the danger of private monopolization, we must empower government, the other pole of the peril.

### *C. The Jurisprudence of the Political Marketplace*

The Supreme Court has not navigated this course particularly well in the twenty or so years that it has been actively reviewing campaign finance laws. Until *MCFL* and *Austin*, the Court was hampered by metaphorical blinders. Captured by the laissez-faire model of the marketplace and a quid pro quo vision of corruption, the Court could not see the structural basis of the problem—the systemic distortion created by an inequitable distribution of wealth. As a result, its campaign finance jurisprudence was constructed on a series of distinctions that made little or no sense, and were doomed to collapse.

1. *The vision of quid pro quo corruption: Legitimizing laissez-faire.* The Supreme Court's modern-day approach to campaign finance was forged in *Buckley v. Valeo*,<sup>42</sup> which presented a facial challenge to the Federal Election Campaign Act of 1971 (FECA).<sup>43</sup> FECA established ceilings on contributions

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41. "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting THOMAS IRWIN EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 9 (1966)).

42. 424 U.S. 1 (1976).

43. Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

to political candidates,<sup>44</sup> independent expenditures related to candidates,<sup>45</sup> and expenditures by the candidates themselves.<sup>46</sup> The Court first held that any restriction on campaign spending must be subjected to strict scrutiny, because a limitation on the amount of money one can spend or contribute for a political cause is essentially a restriction on political speech.<sup>47</sup> This equation of money with speech has been much criticized,<sup>48</sup> but it cannot be denied that a restriction on the amount of money one can spend in furtherance of a particular idea, cause, or candidate is a restriction on one's freedom of speech. Restrictions on campaign spending cannot be treated as mere limits on conduct, as Judge Skelly Wright proposed,<sup>49</sup> because the government's purpose in setting such constraints is to limit the amount of political speech that those with substantial resources can purchase.<sup>50</sup> Moreover, Sanford Levinson has argued that campaign spending limits cannot be characterized as content-neutral, because if political ideas and causes were randomly distributed across the economic spectrum, we would not be concerned about regulating campaign finance in the first place.<sup>51</sup>

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44. The Act limited contributions made by individuals and groups to \$1,000 to any candidate per election, with an overall annual limit on individual contributions of \$25,000. 18 U.S.C. §§ 608(b)(1), (3) (1970 ed. Supp. IV). It also limited contributions by political action committees to \$5,000 to any candidate per election. 18 U.S.C. § 608(b)(2).

45. The Act limited independent expenditures to a candidate to \$1,000 per election. 18 U.S.C. § 608(e).

46. The Act set different limits for expenditures by the candidates and their families, depending on the office for which they were running. A candidate for President or Vice-President could spend up to \$50,000 of his or her own money, a Senatorial candidate could spend up to \$35,000, and a candidate for the House of Representatives was limited to \$25,000. 18 U.S.C. § 608(a).

47. 424 U.S. at 14-15, 25, 44-45.

48. See, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); see also Blum, *supra* note 35, at 1369-82 (arguing that campaign expenditures do not deserve absolute First Amendment protection, because they have the effect of perpetuating political domination by economic elites).

49. Wright, *supra* note 48, at 1006.

50. Where the government's purpose in proscribing expressive conduct is related to expression, the proscription must be treated as if it were a prohibition on speech itself, and subjected to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (citing *Boos v. Barry*, 485 U.S. 312, 315 (1988), where the Court held that any act proscribing expressive conduct must be subjected to "the most exacting scrutiny."); see also *United States v. Eichman*, 110 S. Ct. 2404, 2409 (1990) (also citing *Boos*).

51. Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939 (1985) (reviewing ELIZABETH DREW, *POLITICS AND MONEY* (1983)). Levinson notes that we are not concerned with regulating celebrities' use of their fame to support political candidates, or students' use of volunteer time, presumably because we believe that celebrities' and students' views are randomly distributed politically. *Id.* at 949. By contrast, he suggests, our interest in restricting the rights of the rich to use their advantages implies that we believe the rich are identifiably different from the rest of us in their political ideology. *Id.* at 945.

But arguably our special concern about wealth distortion reflects not a desire to suppress the point of view of the wealthy, but an attempt to counteract systemic distortion of the political process, whatever views the wealthy may have. In this respect, campaign finance restrictions might be analogous to time, place, and manner restrictions on the quantity or volume of speech, as in *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding power to regulate use of amplifiers) or *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (same). Campaign spending regulations are like a rule forbidding participants in a town meeting from bringing individual amplifiers to drown out their fellow citizens. Such a rule seems both wise and fair, whether or not those who could afford the amplifiers share a particular political ideology.

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The Court's recognition that regulation of spending in political campaigns directly implicates speech concerns is therefore not the *Buckley* decision's weak link. Its mistake, rather, was to proceed from the conclusion that spending limits restrict the speech of the spender to the assumption that the spender's speech rights are the *only* rights at stake. In weighing the intrusion on spender's speech rights against the asserted state interests, the Court rejected out-of-hand the statute's most important justification: the need to limit distortions in the marketplace caused by concentrations of wealth.

Even assuming that our concern with vast expenditures in political campaigns arises from a sense that the wealthy hold a particular point of view, one can still maintain that regulation is justified as an attempt to offset distortion in the political process. Wealth poses a unique threat of systemic distortion in part because one of the most important issues the state addresses is the distribution of wealth itself. If those who hold favored positions in the existing distribution of wealth are allowed to use their inequitable distributions to maintain the status quo against majority desires, the legitimacy of the democratic process is directly undermined.<sup>52</sup>

The Court flatly refuted such redistributive rationales, stating, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."<sup>53</sup> But this concept is by no means "wholly foreign" to the First Amendment. In fact, seven years earlier in *Red Lion Broadcasting Co. v. FCC*,<sup>54</sup> the Court upheld the fairness doctrine on the ground that the government could restrict the speech of some elements of our society—broadcasters—in order to enhance the relative voice of others—viewers and listeners. It would later uphold an FCC regulation requiring broadcasters to provide reasonable access to such candidates during electoral campaigns, again permitting the government to restrict the speech rights of broadcasters in the interest of enhancing the relative voice of others, candidates for federal of-

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52. This concern is strengthened by the fact that even without the influence that unregulated campaign spending would provide, the business community holds a privileged position vis-à-vis the state that already affords it a disproportionate say over political decisions. As Charles Lindblom has detailed in *Politics and Markets*, in a capitalist system the state, by and large, lets private business decide many important social policy decisions: wage scales, production schedules, plant location, and the quality and quantity of goods and services. CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 170-72 (1977). The government has a strong interest in appeasing business because it depends on business to make and implement these important decisions, and accordingly the government involves business very closely in its decision making processes. *Id.* at 172-79. Thus, business already has a tremendous ability, even outside the electoral channels, to make demands on the state independent of, and often contrary to, democratic controls. *Id.* at 190. Lindblom accordingly sees the corporation as the primary impediment to a truly democratic state. *Id.* at 356. Given these concerns, there is every reason to believe both that the wealthy business class has a particular ideology, *id.* at 193-200, and that we are justified in restricting its use of campaign spending as a means toward further domination. *See generally, id.* at 123.

53. *Buckley*, 424 U.S. at 48-49.

54. 395 U.S. 367 (1969).

face.<sup>55</sup> The Court has traditionally distinguished the broadcast setting on the ground that the government is responsible for the inequity in speech opportunities, since it assigns exclusive rights to the airwaves.<sup>56</sup> However, it can be argued that the government is similarly responsible for the inequity in capital, for its laws provide the means for capital formation and protection for the property that is thereby accumulated.<sup>57</sup>

Nor is the concept that the government may seek to enhance certain speakers' rights at the expense of others limited to the broadcast medium. In *Pruneyard Shopping Center v. Robins*,<sup>58</sup> the Court effectively permitted state governments to restrict the speech rights of shopping mall owners by requiring them to provide access to their property for speakers with whom they disagree.<sup>59</sup> It had previously held that the First Amendment *required* such access in certain situations.<sup>60</sup> Despite subsequent cases that cut back on that holding,<sup>61</sup> the Court in *Pruneyard* still recognized that the government may seek to ensure speech opportunities for those without substantial resources by reasonable intrusions on the rights of property owners.

In *Buckley*, however, the Court was unwilling to ratify such a redistributive objective. It held that the *only* legitimate rationale for restricting campaign spending was to avoid both the reality and the appearance of corruption. The *Buckley* Court's image of corruption was limited to the direct, quid pro

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55. *CBS v. FCC*, 453 U.S. 367 (1981).

56. *See Red Lion*, 395 U.S. at 388-90. The *Red Lion* Court is generally understood to have treated broadcasters differently on the ground that the airwaves are a scarce resource. *Id.* at 390. However, all resources are scarce, so either this argument justifies similar regulation of all forms of speech, or it does not justify regulation with respect to broadcasting only. *See* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14-19 (1959). The Court in *Red Lion* addressed this criticism at the close of its opinion, and reasoned that even if scarcity itself is not a sufficient justification, the fact that the government is responsible for the favored position of current broadcasters justifies the regulation. 395 U.S. at 400.

57. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (established property rules concentrate sovereign power among those who control business and finance); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (coercive arrangements, as altered by governmental bodies, channel wealth).

58. 447 U.S. 74 (1980).

59. The Court in *Pruneyard* technically found that a state constitutional provision that mandated access for speech purposes to a shopping mall did not infringe the owner's First Amendment rights, 447 U.S. at 85-88, and thus did not reach the question whether the mall owner's rights could be infringed for the sake of providing access to others. However, the Court's reasoning on this point cannot be squared with several other cases in which it found mandated access requirements to violate the right not to support the speech of others. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n.*, 475 U.S. 1 (1986) (invalidating requirement that consumer group have access to utility billing envelopes four times a year, on ground that it would violate utility's right not to support speech of consumer group); *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply statute in part because it would infringe on newspaper's right not to publish what it does not want to publish).

60. *See e.g.*, *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (mere fact of private ownership in shopping center proprietors does not justify absolute injunction against nonemployee picketing of store in center); *Marsh v. Alabama*, 326 U.S. 501 (1946) (state cannot criminally punish individual who is distributing religious literature on the sidewalk of a company-owned town).

61. *Lloyd Corp. Ltd., v. Tanner*, 407 U.S. 551 (1972) (distinguishing and restricting holding of *Logan Valley*); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding that *Lloyd Corp.* had overruled *Logan Valley*).

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quo exchange of money for votes. This is corruption with a lower case “c,” as distinct from the “New Corruption” of *Austin*, which acknowledged the systemic corrupting distortion that unequal resources can cause in the electoral marketplace. The corruption recognized in *Buckley* occurs on the individual level, and is seen as an aberration. As an aberration, it implicitly affirms the legitimacy of the system; where we can avoid the reality and appearance of quid pro quo corruption, it suggests, the representative process works. For the same reason, the Court’s narrow view of quid pro quo corruption is congruous with a laissez-faire approach to the marketplace of ideas—it presumes that the marketplace will function with only minimal government intervention. Thus, the *Buckley* Court recognized the form of corruption that legitimizes the background norm, while refusing to acknowledge a form of corruption that challenges the system itself. This choice to ignore the much more serious problem doomed the Court’s campaign finance jurisprudence to incoherence.

2. *The legacy of quid pro quo: Incoherent distinctions.* The incoherence began in *Buckley* itself, as the Court drew an untenable distinction between contributions and expenditures. To contribute money to a candidate, the Court reasoned, is to speak indirectly through another, while independently expending money on speech in favor of a candidate is a direct speech act, more worthy of First Amendment protection.<sup>62</sup> Conversely, contributions pose a greater threat of corruption because they are more valuable to the candidate than independent expenditures, which are not subject to the candidate’s control.<sup>63</sup> Accordingly, since contributions are both less valuable speech and more inviting of corruption than independent expenditures, the Court upheld all the restrictions on contributions while invalidating all the limits on independent expenditures.

Both premises of the contribution-expenditure distinction can be attacked. From the speech-value perspective, it is by no means clear that it is of greater expressive value to pay an advertising firm to produce a commercial supporting a particular candidate, an independent expenditure under FECA, than to pay the candidate to have her staff produce the same commercial, a contribution under FECA. Nor is it evident, even from a narrow quid pro quo corruption perspective, why a candidate will not be just as beholden to the supporter who spends \$1,000,000 to purchase advertising time advocating her election as to the supporter who contributes \$1,000,000 directly to the candidate.<sup>64</sup> Particularly once the latter option is precluded, it seems that if the candidate is to be beholden to anyone, it will be to the supporters who spend the most money

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62. *Buckley*, 424 U.S. at 20-21.

63. *Id.* at 47.

64. DREW, *supra* note 6, at 134-45 (detailing ways in which “independent” expenditures function like contributions).

on her behalf.<sup>65</sup> Moreover, once corruption is recognized to include the distorting effects of concentrated wealth on electoral debate, this prong of the contribution-expenditure distinction collapses entirely.

Given its shaky foundations, the contribution-expenditure distinction was destined to fall. And fall it did, with the premise that contributions have less expressive value than expenditures being the first to go. Its analytical infirmity became apparent in *California Medical Association v. Federal Election Commission*.<sup>66</sup> In that case, the Court upheld a \$5,000 limit on contributions by individuals and groups to political action committees (PACs). California Medical Association argued forcefully that this limit on contributions was indistinguishable from a limit on expenditures, because its members had simply chosen to exercise their associational rights by pooling their money with others rather than spending it independently. A 4-member plurality rejected that argument, relying on *Buckley* for the proposition that contributions are less protected because they constitute "speech by proxy" rather than direct speech.<sup>67</sup> However, Justice Blackmun, the fifth and deciding vote, agreed with California Medical Association that contributions and expenditures could not be distinguished from the vantage point of First Amendment values.<sup>68</sup> He was willing to go along with the distinction only because of its second premise, namely that contributions have greater potential for corruption.<sup>69</sup>

The "speech by proxy" argument was dealt its fatal blows in *Citizens Against Rent Control v. Berkeley*<sup>70</sup> and *Federal Election Commission v. National Conservative Political Action Committee (NCPAC)*.<sup>71</sup> Its undoing was the right of association. The decision to contribute to an organization, a party, or a candidate is a decision to associate, Chief Justice Burger explained for the Court in *Citizens Against Rent Control*.<sup>72</sup> Contributions are a form of "collective expression," no less deserving of First Amendment protection than independent expenditures.<sup>73</sup> The Court in *Citizens Against Rent Control*, therefore, held unconstitutional a limit on contributions to organizations for the purpose of speaking on referendum issues.

Justice Rehnquist, in his opinion for the Court in *NCPAC*, put the all-but-final touches on the contribution-expenditure distinction's demise, even as he sought to retain it in name. At issue was the FEC's restriction on independent expenditures by PACs in support of candidates receiving public financing.

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65. *Id.*

66. 453 U.S. 182 (1981).

67. *Id.* at 196.

68. *Id.* at 202.

69. *Id.* at 203.

70. 454 U.S. 290 (1981).

71. 470 U.S. 480 (1985).

72. 454 U.S. at 295-96; *see also NCPAC*, 470 U.S. at 493-95.

73. 454 U.S. at 295-96.

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Pointing to *California Medical Association*, the FEC argued that PAC expenditures deserve less First Amendment protection because they are nothing more than the PAC contributors' "speech by proxy."<sup>74</sup> Justice Rehnquist refused to apply a lower level of scrutiny, arguing, as Chief Justice Burger had before him, that PAC expenditures reflect the pooling of resources for the purpose of amplifying the contributors' speech.<sup>75</sup> Once contributions are seen as a means for people to associate in order to amplify their voices, it makes no sense to accord them less First Amendment protection than expenditures. Justice Rehnquist nonetheless held onto the corruption premise of the distinction, maintaining that contributions to candidates pose a threat of corruption that contributions to PACs and other organizations do not.<sup>76</sup>

Thus, by the time the Court decided *NCPAC*, the first premise of the contribution-expenditure distinction had been effectively discredited. The only remaining basis for the distinction was the supposedly greater potential for corruption posed by contributions. This is a thin reed for treating contributions and expenditures differently, as it has never received empirical support, and seems contrary to most anecdotal evidence.<sup>77</sup> But more importantly, its validity depends on a narrow view of corruption. If corruption is understood more broadly to encompass the systemic distorting effects of wealth, there is no basis even in theory for distinguishing between contributions and expenditures. As I explain in part II, *Austin's* "New Corruption" drove the final nail into the coffin of the contribution-expenditure distinction.

A second distinction that guided the Court's approach to campaign finance issues, and which is similarly premised on the Court's narrow view of quid pro quo corruption, is that between candidate elections and referenda. Referenda are not subject to quid pro quo corruption because there are no candidates to bribe. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."<sup>78</sup> Accordingly, the Court has

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74. The FEC's argument in *NCPAC* was the flipside of California Medical Association's in *California Medical Association*. California Medical Association sought to have a limit on contributions treated as a limit on expenditures, while the FEC asked the Court to treat a limit on expenditures as a limit on contributions. In both cases, the Court rejected the invitations. In *NCPAC*, however, the Court's justification for maintaining the distinction only underscores the fundamental equivalence of contributions and expenditures.

75. 470 U.S. at 493-95. As Justice Rehnquist wrote: "To say that [PAC contributors'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.* at 495. Ironically, here Justice Rehnquist is willing to acknowledge that speech rights can be distorted by unequal distributions of wealth. *But cf.* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Court, per Chief Justice Rehnquist, upholds regulations that deny poor women dependent on federally funded family planning counseling the full information on all legal options that other women receive).

76. *NCPAC*, 470 U.S. at 496-96.

77. *DREW*, *supra* note 6, at 134-45.

78. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).



consistently struck down prohibitions on contributions and expenditures in connection with referenda campaigns.<sup>79</sup> But if corruption includes the distorting effects of large amounts of wealth on the political debate, corruption is no less troubling in referenda than in candidate elections.<sup>80</sup> Thus, this distinction also seems destined to fall in light of the *Austin* Court's redefinition of corruption.

The remaining distinctions drawn by the Court in its campaign finance decisions are specific to its *corporate* campaign spending jurisprudence—distinctions between corporations and individuals, for-profit and nonprofit corporations, media corporations and other corporations—and therefore are taken up in part II. I will argue that these distinctions, despite the *Austin* majority's attempts to save them, are also subverted by the Court's redefinition of corruption.

## II. PIERCING THE CORPORATE VEIL

It is no accident that the Court first acknowledged the systemic distorting effects of capital in a decision addressing the regulation of *corporate* campaign spending. The corporate form appears both to permit and to require special treatment. It permits regulation because a corporation is a creature of the state, and therefore it is easier to conceive of changing the rules that determine its construction. At the same time, the corporate form requires special regulation, because otherwise its economic advantages, provided and maintained by law, can be used to buy out the political marketplace of ideas.

The Supreme Court's approach to regulation of corporate campaign spending, however, is no more coherent than its treatment of limits on individual spending. At times, the Court has allowed Congress to treat corporate speakers quite differently from individual speakers;<sup>81</sup> at other times, it has suggested that corporate speech must receive the same First Amendment protection as individual speech.<sup>82</sup> It has rarely addressed the issue of corporate campaign spending head-on. Only once has it adjudicated a for-profit corporation's challenge to campaign spending restrictions.<sup>83</sup> The rest of the decisions that

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79. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Bellotti*, 435 U.S. 765.

80. See, e.g., *Citizens Against Rent Control*, 454 U.S. at 307 n.3 (White, dissenting) (detailing the distorting effects of massive one-sided corporate spending on referenda issues); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 623-25 (1982) (examples of effects of spending on referenda); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 647 n.8 (1982) (same).

81. 110 S.Ct. 1391; *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (upholding restriction on corporation's solicitations for political advocacy; no such restriction on individuals or unincorporated associations).

82. *Pacific Gas and Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986); *Bellotti*, 435 U.S. 765.

83. *Bellotti*, 435 U.S. 765.

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discuss corporate campaign speech involve labor unions and nonprofit corporations. For years, the Court did its best to avoid the constitutional issues presented even in the cases it did take. Perhaps as a result of this sidelong approach to the issue, the Court has done little to reconcile its contradictory leanings vis-à-vis corporate speech.

### A. *The First Seventy Years: Techniques of Avoidance*

Campaign spending regulation began with corporations. The first important calls for campaign finance reform came in the post-Civil War era, and were addressed to the concentration of corporate wealth produced by the industrial revolution. In 1894, Elihu Root argued for restricting corporate campaign contributions before the New York Constitutional Convention:

The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of \$50,000 or \$100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.<sup>84</sup>

After repeated entreaties from President Theodore Roosevelt and others to rein in corporate wealth in campaigns, Congress passed the Tillman Act of 1907, which barred corporations from making money contributions to candidates for federal office.<sup>85</sup> Congress subsequently expanded this restriction on several occasions, first to prohibit all corporate contributions,<sup>86</sup> then to include unions within the prohibition,<sup>87</sup> and finally, in 1947, to bar corporations and unions from making expenditures as well as contributions in connection with federal campaigns.<sup>88</sup>

When Congress enacted these regulations, its concern was quite plainly the systemic distorting effects caused by corporate wealth. It sought to “destroy[ ] the influence over elections which corporations exercised through financial

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84. ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (1916) *quoted in* United States v. UAW, 352 U.S. 567, 571 (1957)).

85. Tillman Act of 1907, 34 Stat. 864, 865, at ch. 420.

86. Federal Corrupt Practices Act of 1925, 43 Stat. 1070, 1074, at § 313.

87. War Labor Disputes Act of 1943, 57 Stat. 163, 167, at § 1509, *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862.; Labor Management Relations Act of 1947, 61 Stat. 136, 159-60, at § 304.

88. § 304, 61 Stat. at 159-60. For a brief history of the development of these restrictions, *see* UAW, 352 U.S. at 570-84; Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 401-13 (1972); *see also* FRANCES SORAUF, MONEY IN AMERICAN ELECTIONS 29-33 (1988).

contribution.”<sup>89</sup> Secondly, Congress felt that “corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.”<sup>90</sup> But Congress’s principal concern was that corporations had undue influence as a result of their concentrated wealth. The regulatory impulse was part of a wider trend toward limiting the newfound power of corporations and setting some limits on wealth inequity in industrial America:

The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life. The impact of the abuses resulting from this concentration gradually made itself felt by a rising tide of reform protest in the last decade of the nineteenth century. The Sherman Law was a response to the felt threat to economic freedom created by enormous industrial combines. The income tax law of 1894 reflected congressional concern over the growing disparity of income between the many and the few. No less lively, although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption.<sup>91</sup>

Similar concerns motivated Congress’s subsequent regulations, all of which were “calculated to avoid the deleterious influence on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.”<sup>92</sup>

Congress debated the constitutionality of restricting corporate activity each time it passed a new law, but on the few occasions that the laws were actually enforced, the Supreme Court went out of its way to avoid deciding the constitutional issues posed, even as it expressed serious concerns. Thus, in *United States v. Congress of Industrial Organizations*,<sup>93</sup> the Court’s first look at restrictions on corporate expenditures, it construed section 313 of the Federal Corrupt Practices Act not to apply to a union’s endorsement of a congressional candidate in its weekly newspaper. The plain language of the statute, which barred any expenditures in connection with a federal election, clearly covered this conduct. But the Court declined to adopt such an interpretation, because it would have raised “the gravest doubt” about the law’s constitutionality.<sup>94</sup> The Act’s legislative history suggested one narrowing construction: it was at least arguable that Congress did not intend to bar expenditures of funds raised voluntarily, such as from subscriptions and sales of the newspaper, as opposed to funds obtained from the union treasury or union dues.<sup>95</sup> The Court went

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89. *United States v. CIO*, 335 U.S. 106, 113 (1948); *see also* *United States v. UAW*, 352 U.S. 567, 572 (1957) (initial federal restrictions on corporate campaign spending reflected “popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions”).

90. *CIO*, 335 U.S. at 113.

91. *UAW*, 352 U.S. at 570.

92. *Id.* at 585.

93. 335 U.S. 106 (1948).

94. *Id.* at 121.

95. *Id.* at 116-20.

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even further than this legislative history, however, and held that the statute did not prohibit any regular union or corporate publications from taking positions on federal elections, whatever the source of its funds.<sup>96</sup>

This construction, improbable as it seemed, did allow the Court to avoid deciding the constitutionality of the statute. In so doing, however, the Court also largely defeated *both* stated purposes of the statute. The rationales Congress had put forth for regulating corporate and union campaign spending were two-fold: (1) to “destroy[ ] the influence over elections which corporations [and unions] exercised,”<sup>97</sup> and (2) to protect shareholders and union members who objected to the use of corporate or union funds to promote political causes that they do not support.<sup>98</sup> By the *CIO* Court’s reading, however, corporations and unions could spend treasury funds on endorsements of candidates as long as they did so in their regular publications, thereby creating a loophole for the exercise of considerable financial influence, and coercing dissenting shareholders and union members to support those candidates whom they might otherwise oppose.

Justices Rutledge, Black, Douglas and Murphy agreed that the indictments should be dismissed, but disagreed sharply on the reasoning.<sup>99</sup> They criticized the majority for disingenuously rewriting the statute, and concluded that properly interpreted, it prohibited the CIO’s conduct. They therefore reached the First Amendment issues, and found numerous constitutional infirmities in the statute, infirmities echoed in the dissents of Justices Scalia and Kennedy forty-two years later in *Austin*.<sup>100</sup> Justice Rutledge questioned whether the government’s interest in counteracting unions’ and corporations’ “undue influence” could be reconciled with a pluralistic democracy, reasoning that “[t]he expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative process.”<sup>101</sup> Even if it were legitimate to curb union and corporate influence, Justice Rutledge found the statute’s total prohibition on any spending by corporations and unions too restrictive.<sup>102</sup> And he considered the prohibition on “expenditures in connection with” any federal election too vague, particularly as on its face it could apply to expression by the corporate media.<sup>103</sup>

Thus, the first time the Court addressed the issue of campaign spending restrictions on corporations or unions, every member of the Court expressed

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96. *Id.* at 121.

97. *Id.* at 113.

98. *Id.*

99. *Id.* at 129-30 (Rutledge, J., concurring in the result).

100. See *infra* text accompanying notes 165-184. Neither Justice Scalia nor Justice Kennedy cites Justice Rutledge’s concurrence.

101. *CIO*, 335 U.S. at 143 (Rutledge, J., concurring in the result).

102. *Id.* at 146.

103. *Id.* at 151-54.

grave constitutional reservations, and the majority only avoided holding the statute unconstitutional by revising the statute so that it allowed precisely what Congress sought to forbid. The Court's initial approach did not bode well for future regulation of corporate speech.

The next time these issues arose, the Court again declined to decide the constitutional issues. In *United States v. UAW*,<sup>104</sup> the United States sought to prosecute the UAW under the Federal Corrupt Practices Act for using union dues to run television commercials endorsing certain congressional candidates. Following the Supreme Court's lead in *CIO*, the district court interpreted the statute not to cover the conduct alleged, and granted UAW's motion to dismiss. The Supreme Court reversed. This time the Court construed the statute to prohibit the alleged expenditures, but nonetheless declined to address the union's constitutional defenses because it believed they could be better decided after trial on a more complete record.<sup>105</sup> Justice Douglas dissented on constitutional grounds, joined by Chief Justice Warren and Justice Black, largely reiterating Justice Rutledge's analysis from *CIO*.<sup>106</sup>

The Court did not revisit corporate campaign spending until 1972. In *Pipefitters Local Union No. 562 v. United States*,<sup>107</sup> the Court again avoided the constitutional questions posed, this time reversing a conviction for improper jury instructions. Justice Brennan, writing for the majority, construed the Federal Corrupt Practices Act to forbid corporate and union expenditures in connection with federal campaigns only when the funds were not voluntarily obtained. Emphasizing Congress's secondary concern for protecting minority stockholders and union members, the Court concluded that this concern was not implicated as long as the funds had been donated voluntarily (i.e., did not come from union dues or the corporate treasury).<sup>108</sup>

The dissenters, this time Justice Powell and Chief Justice Burger, again took the majority to task for misconstruing the Federal Corrupt Practices Act. Under the majority's interpretation, the dissenters argued, Congress's primary purpose in enacting the legislation would be defeated. Congress was concerned not only with protecting minority union members and shareholders, but also, and more importantly, with minimizing the influence of labor unions and corporations on elections. By allowing unions and corporations to expend "voluntarily" raised monies, the majority had succeeded in "rendering ineffectual the basic intention of the Congress to prevent the intrusion of corporate

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104. 352 U.S. 567 (1957).

105. *Id.* at 592 (noting several factual questions which might be resolved at trial). As the dissent pointed out, however, few if any of these questions would have had any bearing on the union's constitutional challenge. *Id.* at 595-96 (Douglas, J., dissenting).

106. *Id.* at 593 (Douglas, J., dissenting).

107. 407 U.S. 385 (1972).

108. *Id.* at 409.

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and union power into our political system.”<sup>109</sup>

Justice Brennan’s response to this charge is instructive, for it reappears in *Austin*. He acknowledged that Congress was “concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections.”<sup>110</sup> But he then conflated the two concerns by maintaining that Congress’s concern with aggregated wealth ran only to the diversion of union and corporate *general treasury* funds, and not to “funds donated by union [or corporation] members of their own free and knowing choice.”<sup>111</sup> This reading of Congress’s concern brought the Federal Corrupt Practices Act into alignment with the recently enacted Federal Election Campaign Act of 1971, in which Congress had explicitly permitted corporations and unions to set up separate segregated funds consisting of voluntarily donated monies for political expenditures.<sup>112</sup> It also allowed the Court once again to avoid the constitutional challenge to restricting corporate campaign spending.

### B. *The Modern Approach to Corporate Spending*

As a result of the above three decisions, federal restrictions singling out corporate campaign spending were on the books for some seventy years before the Supreme Court even addressed the threshold question of whether corporate speech is entitled to different First Amendment protection from individuals’ speech. When the Court did finally address that question, its decision was something of a surprise. Brushing aside seventy years of history, the Court in *First National Bank v. Bellotti*<sup>113</sup> held that restrictions on corporations’ speech must be treated the same as limits on individuals’ speech. Since then, the Court appears to have been engaged in a prolonged attempt to revise (or reverse) *Bellotti*, culminating in *Austin*, which effectively comes out the other way. But in order to do so, the Court first had to see through the blinders of quid pro quo corruption and laissez-faire.

1. *Bellotti—Equating individual and corporate speech.* In *Bellotti*, the Court held that corporate speech deserves full First Amendment protection, and struck down a Massachusetts statute prohibiting corporate expenditures on referenda issues unrelated to the corporation’s business interests. Rejecting an argument that corporations should receive less First Amendment protection

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109. *Id.* at 449 n.6 (Powell, J., dissenting).

110. *Id.* at 416.

111. *Id.*

112. *Id.* at 409-10. Corporations and unions had been engaging in the practice of raising voluntary funds through political action committees for many years. In 1971, however, labor unions, “concerned that [their] right to establish political-action committees would be challenged by the Nixon Administration’s Justice Department, . . . backed an amendment . . . which stated that the prohibition of direct contributions of treasury money by unions and corporations did not prevent them from establishing PACs using voluntary contributions.” *DREW*, *supra* note 6, at 9.

113. 435 U.S. 765 (1978).

than human beings, the Court adopted a laissez-faire marketplace perspective, reasoning that a robust exchange of ideas requires that speech be protected irrespective of its source.<sup>114</sup> The Court rejected an argument that corporate spending skews the electoral marketplace, and reiterated its narrow view of corruption as limited to quid pro quo bribes. Thus, the decision is guided by the same twin metaphors that governed the Court's approach to individual campaign spending restrictions.<sup>115</sup>

A close reading of the *Bellotti* decision, however, shows signs of ambivalence on the subject of regulating campaign spending. In rejecting Massachusetts' rationales for the regulation, the Court simultaneously offered narrow case-specific reasons for finding the rationales insufficient, and registered broader doubts that questioned whether restricting corporate campaign spending would ever be justified. For example, Massachusetts argued that without regulation corporate participation would drown out the viewpoints of those less wealthy and diminish citizen participation.<sup>116</sup> The Court rejected this argument for want of evidence: "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . these arguments would merit our consideration."<sup>117</sup> At the same time, however, the Court implicitly questioned whether such a concern would ever be legitimate. It restricted its "corruption" analysis to quid pro quo bribes, and reasserted the laissez-faire principle that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."<sup>118</sup> And its statement of what the record would have to show—"imminent" danger—echoed the standard for proscribing subversive speech in *Brandenburg v. Ohio*,<sup>119</sup> a nearly impossible standard to satisfy.

The Court took a similarly ambivalent stance toward Massachusetts' second rationale—"protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."<sup>120</sup> Adopting a narrow approach, the Court maintained that the statute was not carefully tailored to further the stated end of protecting minority shareholders, because it barred corporate campaign expenditures even where all shareholders agreed with the corporation's point of view.<sup>121</sup> But in a footnote, the Court expressed skepti-

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114. *Id.* at 776-83.

115. *See supra* part I.C.1.

116. 435 U.S. at 789.

117. *Id.*

118. *Id.* at 790-91 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

119. 395 U.S. 444 (1969).

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

121. The Court found the restriction both underinclusive and overinclusive from the vantage point of protecting dissenting shareholders. It was underinclusive because while barring corporate expenditures in connection with a referendum, it allowed corporations to use treasury funds for lobbying or to advocate views on any issue that had not yet become a referendum issue. *Id.* at 793. The statute was overinclusive

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cism about the underlying premise that dissenting shareholders' views are in need of protection at all, since a shareholder "invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason."<sup>122</sup>

The *Bellotti* decision could have been very narrowly written. The statute at issue imposed viewpoint-based censorship. It was enacted in response to a series of referenda campaigns on graduated income tax proposals, in each of which corporations opposed to the tax far outspent its supporters and the proposals were subsequently defeated.<sup>123</sup> It singled out for specific prohibition expenditures on the income tax issue.<sup>124</sup> Thus, the statute appeared to be designed to suppress a particular point of view on a specific issue, the kind of legislation most vulnerable to First Amendment invalidation.<sup>125</sup> Although the majority twice adverted to this fact,<sup>126</sup> it did not limit its decision to this narrow ground, but also addressed the broader issues posed by corporate speech.

If, as *Bellotti* announced, corporations' rights to speak were as fully protected as an individual's, the time-honored tradition of restricting corporate expenditures in candidate elections would be unconstitutional. The Court had already invalidated such restrictions on individual expenditures,<sup>127</sup> and *Bellotti* appeared to reject the most obvious basis for distinction—that corporate speech deserved less First Amendment protection than individuals' speech. The *Bellotti* Court was careful in a footnote to distinguish the existing federal restrictions on corporate speech in candidate elections,<sup>128</sup> but its rationale seemed to sweep well beyond the particulars of the Massachusetts statute.

At the same time, however, the *Bellotti* Court's oscillations between broad language and specific facts suggested that the Court was not willing to write off corporate spending restrictions altogether. For example, the Court's nod to the possibility of demonstrating a threat to political integrity from corporate spending<sup>129</sup> reflects at least muted recognition of the potential problems posed by the use of private concentrations of wealth to buy up speech opportunities. In this area of polar dangers, the Court clearly stressed the perils of state censorship, but was not quite willing to ignore the converse dangers posed by

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because it barred corporate expenditures in referenda campaigns even if the shareholders unanimously supported the corporation's position. *Id.* at 794.

122. *Id.* at 794 n.34.

123. *Id.* at 769 n.3; *id.* at 810-11 (White, J., dissenting).

124. *Id.* at 768.

125. As the Court stated in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984): "There are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule." *Id.* at 804.

126. 435 U.S. at 785, 793.

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

128. 435 U.S. at 788 n.26.

129. *Id.* at 789.



unregulated corporate treasuries.

2. *FEC v. National Right To Work Committee—A deferential retreat.* The Court soon cut back on the broad protection for corporate speech advanced in *Bellotti*. In a series of cases challenging restraints on the political activity of nonprofit ideological corporations, the Court established a rationale for restricting campaign speech by for-profit corporations. The seeds for the rationale were sown in *FEC v. National Right to Work Committee (NRWC)*,<sup>130</sup> a brief and often-overlooked campaign finance decision. The *NRWC* decision is remarkable principally for what it does not say. It apparently sparked little controversy among the Justices. They issued a unanimous opinion upholding the restriction, allowed Justice Rehnquist, who dissented in *Bellotti*, to write the decision, and devoted only five pages to the constitutional issues. Yet, notwithstanding the Court's claim that its decision was "entirely consistent" with *Bellotti*,<sup>131</sup> the Court's approach and result could not have been more different. Where *Bellotti* demanded rigorous showings of imminent danger and closely-tailored remedies to justify regulating corporate speech, the Court in *NRWC* simply deferred to Congress's judgment that regulation of the corporate form was necessary. And where *Bellotti* refused to allow the state to treat corporations' speech differently from that of human beings, the Court in *NRWC* concluded that "there is no reason why [Congress] may not . . . treat[ ] unions, corporations, and similar organizations differently from individuals."<sup>132</sup>

The Federal Election Campaign Act requires corporations to create segregated funds comprised solely of monies voluntarily donated for campaign expenditures,<sup>133</sup> and restricts solicitation for donations to such funds to "members" or shareholders of the corporation.<sup>134</sup> The *NRWC*, an ideological nonprofit corporation without formal members, challenged the application to it of the provisions limiting solicitation of funds to "members."

The Court acknowledged that the challenged restriction infringed *NRWC*'s First Amendment rights of association, but concluded that those rights were "overborne by the interests Congress has sought to protect . . . ."<sup>135</sup> The interests that justified the infringement were precisely those deemed insufficient in *Bellotti*: "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,'"<sup>136</sup> and "to protect the individuals who have paid money into a corporation or union for purposes other than

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130. 459 U.S. 197 (1982).

131. *Id.* at 210 n.7.

132. *Id.* at 210-11 (citation omitted).

133. 2 U.S.C. § 441b(a), (b)(2)(C) (1988).

134. 2 U.S.C. § 441b(b)(4)(A), (C).

135. 459 U.S. at 207.

136. *Id.* at 207.

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the support of candidates from having that money used to support political candidates to whom they may be opposed.”<sup>137</sup> In *Bellotti*, the Court rejected the first rationale for lack of a record demonstrating that the structural problems alleged actually existed; in *NRWC*, the Court excused the absence of a record, stating that “it is the potential for such influence that demands regulation.”<sup>138</sup> The *Bellotti* Court rejected the second rationale after carefully measuring the fit between the statute and its stated purpose; in *NRWC*, the Court accepted without discussion the dubious claim that this interest justified imposing the restriction on a nonprofit ideological corporation, whose donors would have no reason to support it other than its political advocacy.<sup>139</sup>

The *NRWC* decision is short on reasoning and long on deference. Justice Rehnquist, who takes a dim view of corporations’ rights in any event,<sup>140</sup> maintained that the Court owed “considerable deference” to the history of “careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations. . . .”<sup>141</sup> The *NRWC* Court’s deference to congressional attempts to control corporations’ economic advantages is a far cry from its strict scrutiny approach in *Bellotti*.<sup>142</sup> Deference, however, is not enough to justify the infringement of First Amendment rights. *NRWC* marked a change in the Court’s attitude toward campaign regulation, but did not provide the substantive justifications necessary to sustain the change in subsequent constitutional disputes.

3. *FEC v. MCFL—The origins of a new approach.* The Court first gave

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137. *Id.* at 208.

138. *Id.* at 210.

139. The *NRWC* decision is also difficult to square with the Court’s pre-*Bellotti* treatment of federal campaign legislation. In *NRWC*, the Court essentially inverted the analysis used in *UAW* and *Pipefitters*, where it had emphasized the protection of minority shareholders and largely overlooked Congress’s structural concern about corporate power. Here, the Court focused almost entirely on the need to counteract the potential for corruption from corporate economic strength, virtually ignoring the argument about dissenting shareholders. No doubt it did so in part of necessity. It would be difficult to maintain that the solicitation provision was designed to protect *NRWC* members or shareholders, since *NRWC* had neither. And the particular restriction challenged limited *NRWC*’s ability to solicit nonmembers, a limitation which has no apparent relationship to members’ rights. Finally, as *NRWC* is an expressly ideological association, those who support it are far less likely to be “coerced” into supporting views they oppose.

140. In an approach similar in spirit to his positivist “bitter-with-the-sweet” analysis of procedural due process claims, see *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.), Justice Rehnquist believes that as creatures of the state, corporations are largely dependent upon state law for any liberty rights that they may or not have. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 822-28 (1978) (Rehnquist, J., dissenting); *Pacific Gas and Elec. Co. v. Public Utils. Comm.*, 475 U.S. 1, 32-35 (1986) (Rehnquist, J., dissenting). Accordingly, he consistently votes to uphold restrictions on corporate speech, although for reasons that no other Justice appears to subscribe to.

141. *NRWC*, 459 U.S. at 209.

142. The Court managed to reconcile *Bellotti* only by narrowly characterizing Congress’s concern as one attached to the corruption of *candidate elections*, a concern not present in referendum elections. *Id.* at 210 n.7. This distinction was consistent with the *Buckley* Court’s narrow conception of quid pro quo corruption, but it did not accurately reflect Congress’s actual structural concern, which related much more broadly to the undue influence corporations and unions have on the electoral process. See *supra* text accompanying notes 84-92.

substance to its new approach to corporate campaign spending in *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*.<sup>143</sup> As in *NRWC*, the issue before the Court concerned the application of corporate campaign spending constraints to a nonprofit ideological corporation. This time, the Court held the statute's application unconstitutional, but in reaching that result, the Court strongly endorsed Congress's power to regulate campaign spending by for-profit corporations. *MCFL*, a nonprofit corporation opposed to abortion, challenged the Federal Election Campaign Act requirement that corporations create separate segregated funds supported by voluntary contributions for expenditures in connection with federal campaigns.<sup>144</sup>

The Court wrote a wide-ranging opinion that said as much about the government's right to regulate expenditures of for-profit business corporations as it did about the rights of nonprofit ideological corporations to be free of regulation.<sup>145</sup> It is in *MCFL*, a decision joined by Justice Scalia among others,<sup>146</sup> and not in *Austin*, that the "New Corruption" decried by Justice Scalia in *Austin* first appeared. In *MCFL* the Court for the first time acknowledged that "the unfair deployment of wealth for political purposes"<sup>147</sup> can corrupt "the integrity of the marketplace of political ideas."<sup>148</sup> The danger is not simply that a particular politician will be beholden to a wealthy supporter, but that "competition among actors in the political arena [will not be] truly competition among ideas."<sup>149</sup>

The Court viewed the segregated fund requirement as a response to this form of corruption:

Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. 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

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143. 479 U.S. 238 (1986).

144. Without establishing a segregated fund, *MCFL* had prepared and widely distributed a "Special Election Edition" of its newsletter which listed and pictured candidates who shared its opposition to abortion and urged its readers to "VOTE PRO-LIFE." *Id.* at 243-44.

145. The Court had previously struck down restrictions on independent expenditures on the ground that expenditures do not present the danger of quid pro quo corruption, so it could have written a per curiam opinion invalidating the statute with citations to *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). See discussion *supra* part I.C.2.

146. Justice Brennan's opinion was joined by Justices Marshall, Powell, Scalia, and O'Connor. Justice O'Connor concurred separately only to register her disagreement with Justice Brennan's treatment of disclosure requirements as a burden on First Amendment interests. 479 U.S. at 265 (O'Connor, J., concurring in part and concurring in the judgment). She viewed the organizational demands of a segregated fund as the only significant burden on *MCFL*'s First Amendment interests. *Id.* at 266.

147. *Id.* at 259.

148. *Id.* at 257.

149. *Id.* at 259.

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of the corporation may be no reflection of the power of its ideas.<sup>150</sup>

By restricting a corporation's spending to monies donated voluntarily to an expressly political fund, the law ensures that the money the corporation has to spend for political purposes is in fact a rough barometer of its political support, rather than a barometer of its widget-manufacturing abilities.<sup>151</sup>

The Court concluded, however, that the segregated fund requirement could not be applied constitutionally to MCFL because it did not pose the danger of "unfair deployment of wealth for political purposes."<sup>152</sup> As a nonprofit ideological corporation, MCFL's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace."<sup>153</sup> People support MCFL if they support its political viewpoint; there is no other reason to "invest" in MCFL. At the close of its opinion, the Court noted three characteristics of MCFL that were "essential to [its] holding": (1) it was formed to promote political ideas, not to engage in business, so those who support it do so for political reasons only; (2) it has no shareholders, so its supporters do not have an economic disincentive for disassociation with it if they disagree with its political activity; and (3) it was not established by a union or a business corporation and did not accept contributions from such entities.<sup>154</sup> Corporations exhibiting these features do not pose the dangers that Congress sought to prevent and, therefore, their campaign expenditures may not be restricted.

The Court acknowledged that the class of corporations that would meet these criteria might be small, but insisted that it was nonetheless critical that they be free of regulation. Where freedom of speech is concerned, the Court

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150. *Id.* at 257-58 (citations omitted).

151. Even under such a regulatory scheme, however, the funds a corporation expends are an extremely rough barometer of popular support for its political ideas. *See infra* part III.

The Court in *MCFL* also shed new light on the second interest underlying regulation of corporate campaign spending—protection of minority shareholders. The Court acknowledged that this interest had been articulated as a ground for upholding the restrictions in *NRWC*, but then went on to undermine any possible reason for relying on this interest where, as in both *MCFL* and *NRWC*, the regulated corporations are nonprofit and ideological. Supporters donate monies to such organizations, the Court wrote, precisely because they agree with the group's ideological bent, and they understand that by associating with others they can amplify their voices. Such association therefore "necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor." 479 U.S. at 261. Given that delegation, there is little reason to protect contributors to, or members of, a nonprofit ideological corporation by limiting the corporation's speech.

The only problem with this analysis was that it appeared to contradict the Court's reliance in *NRWC*, albeit unexplained, on this interest to justify restricting a nonprofit corporation. Justice Brennan sought to distinguish *NRWC* by pointing to the difference between contributions and expenditures and noting that "the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures." *Id.* at 261-62. But as would become clear in *Austin*, the contribution-expenditure distinction itself makes no sense once the government's corruption concern is understood to include the distorting effects of wealth on the political marketplace of ideas. Such systemic distortion can be caused as easily by unequal expenditures as by unequal contributions.

152. 479 U.S. at 259.

153. *Id.*

154. *Id.* at 264.

stated, "we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction."<sup>155</sup> Thus, in finding the law's application to MCFL unconstitutional, the Court again took up the active review it had dropped in *NRWC*.

At the same time, however, the Court provided an affirmative legal rationale for regulating corporate expenditures. The significance of *MCFL* lies in its recognition, albeit in dicta, of the state's legitimate interest in counteracting the systemic corrupting effects of corporate wealth on political debate. That recognition, which extends far beyond the Court's restrictive quid pro quo vision of corruption, simultaneously necessitates a rejection of the laissez-faire model of the marketplace of ideas. In *MCFL*, the Court adopted an explicitly interventionist view of the government's responsibility vis-à-vis the marketplace of ideas. From this perspective, the fact that the government has granted corporations certain legal advantages authorizes the government to ensure that those advantages are not translated into unfair advantage in the political marketplace of ideas. In short, the Court in *MCFL* recognized that government may play a kind of First Amendment antitrust role in the marketplace of ideas; it can seek to offset unfair advantages of some speakers in order to render the field more competitive.

*MCFL's* recognition of this governmental role, however, was only dicta. It held that such regulation was *not* permissible as applied to the nonprofit ideological corporation before the Court. It was not until *Austin v. Michigan Chamber of Commerce*<sup>156</sup> that the Court expressly relied on this rationale to uphold a restriction on corporate speech.

4. *Austin v. Michigan Chamber of Commerce—New corruption and the demise of laissez-faire.* *Austin* made explicit and binding the themes that *MCFL* developed in dicta, thus placing the Court firmly on the road toward a First Amendment antitrust vision of the marketplace of ideas. In *Austin*, moreover, the Court for the first time linked as a constitutional matter the two interests always advanced for campaign finance regulation, and showed that they serve the same legitimate end—correcting the unfair advantage of the corporate form in the political marketplace of ideas.

The corporation at issue in *Austin* was again a nonprofit ideological corporation—the Michigan Chamber of Commerce. But three-quarters of the Chamber's 8,000 members were for-profit business corporations, and its interests principally were to further the business interests of its members. Thus, although it was a nonprofit corporation, and although its pro-business orientation was certainly as ideological as *MCFL's* pro-life views, the Chamber was intimately tied to and supported by for-profit corporations. The

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155. *Id.* at 265.

156. 110 S. Ct. 1391 (1990).

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majority found this distinction from *MCFL* critical and upheld a segregated fund requirement as applied to the Chamber of Commerce.

Justice Marshall wrote the opinion of the Court,<sup>157</sup> and Justice Brennan, the author of *MCFL*, concurred. The difference between the two opinions lay in their characterization of the compelling state interest. Justice Marshall's opinion stressed the state's interest in countering the systemic distorting effects of corporate wealth, while Justice Brennan highlighted the state's interest in protecting dissenting shareholders and members.

Justice Marshall's opinion made unmistakably clear what *MCFL* had established: that the government's interest in deterring "corruption" is not limited to "'financial *quid pro quo*' corruption," but includes "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>158</sup> He stressed that the significant fact is not simply that corporations have a lot of money, but that they have it because of "the unique state-conferred corporate structure."<sup>159</sup> "State law grants corporations special advantages . . . that enhance their ability to attract capital . . . . These state-created advantages also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"<sup>160</sup> Thus, Justice Marshall explicitly tied the state's *interest* in limiting the distorting impact of corporate wealth on public debate to the state's *responsibility* for the corporate concentration of wealth. If this reasoning were taken to its extreme, it might support an argument that the First Amendment *requires* the state to limit corporate political speech.<sup>161</sup> At a minimum, however, it provides a ground for finding the state's interest compelling.

Justice Brennan joined Justice Marshall's majority opinion, but also wrote separately to emphasize the importance of the state's other interest, protecting dissenting shareholders or members. Building on his opinion eighteen years earlier in *Pipefitters Local Union No. 562 v. United States*,<sup>162</sup> which had come close to characterizing this interest as Congress's only interest, Justice

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157. Justice Marshall's majority opinion was joined by Chief Justice Rehnquist and Justices Brennan, White, Blackmun, and Stevens.

158. 110 S. Ct. at 1397.

159. *Id.* at 1398.

160. *Id.* at 1397 (quoting *MCFL*, 107 S. Ct. at 627).

161. Indeed, Justice Marshall used just such an argument to construct a short-lived First Amendment right of access to private shopping malls. *See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (distinguishing and restricting holding of *Logan Valley*); *Hudgens v. NLRB*, 424 U.S. 507, 517-18 (1976) (holding that *Lloyd Corp.* had overruled *Logan Valley*). In the shopping mall cases, as here, Justice Marshall pointed to the state's role in protecting private wealth, thereby piercing the public-private distinction that otherwise frustrates efforts at achieving equality in spheres generally regarded as "private."

162. 407 U.S. 385 (1972); *see supra* text accompanying notes 107-112.

Brennan noted that the two interests are in fact integrally related: it is by protecting the dissenting shareholder that the state ensures that the corporation's voice reflects the amount of popular support for its ideas.<sup>163</sup> By piercing the corporate veil and looking to the rights of shareholders and members not to support political views they oppose, the state is able to distill the corporation's speech so that it reflects no more than the accumulation of its supporters' political views.<sup>164</sup>

The spirited *Austin* dissents, while perhaps a little belated given the developments in *MCFL*, accurately perceived that the *Austin* majority's approach heralded a new understanding of the First Amendment. Where the laissez-faire model had focused almost exclusively on the threats to free expression posed by public actors, the First Amendment antitrust model recognized that a robust and wide-open debate could also be undermined by powerful private actors. This recognition requires a wholesale rethinking of the role of the government in the marketplace of ideas.

The dissenters leveled three principal critiques at the majority's analysis: (1) they questioned whether the majority's rationale could be squared with *Buckley*, for it seemed to justify government regulation of individuals' campaign expenditures; (2) they saw no satisfactory way to distinguish media corporations from other corporations, and therefore questioned whether the majority's approach would justify regulating press coverage of campaigns; and (3) they attacked the majority's redefinition of the state's interest in averting corruption. The first two critiques are well-founded, but accepting them does not lead to the dissent's conclusion, namely, that government regulation is impermissible. The third critique is accurate; the majority did redefine the state's corruption interest. But the question is not which definition came first, but which one more accurately captures the real problem with campaign finance.

Both dissenting opinions ask why, if counteracting the distorting effects of concentrated wealth is a compelling state interest, the state could not also

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163. 110 S. Ct. at 1403-04 (Brennan, J., concurring).

164. The Chamber of Commerce maintained that even if these interests were compelling as applied to regulation of for-profit corporations, a point arguably conceded by Justice Kennedy's dissent, *id.* at 1405 (Brennan, J., concurring) (quoting *id.* at 1421 (Kennedy, J., dissenting)), they were insufficient to justify restricting the Chamber because, like *MCFL*, it is a nonprofit ideological corporation. Justices Marshall and Brennan both rejected that argument, concluding that the Chamber shared none of the three features found essential to the *MCFL* result. First, its purposes are not exclusively political, but include the provision of social and educational services for its members, and therefore its dues will reflect not only support for its political advocacy but also support for its other services. Second, while the Chamber itself has no shareholders, many of its members are corporations, which do have shareholders. To the extent that corporations pay their dues out of corporate treasuries, the Chamber's funds are ultimately attributable to shareholders with an economic disincentive to disassociate. Moreover, the Chambers' own members also have economic disincentives to disassociate, because they may value the nonpolitical services the Chamber provides. Third, and most importantly, the Chamber is comprised primarily of corporations, so that if it were free of the restrictions applicable to corporations it could be used to circumvent the limits on corporate political spending. *See id.* at 1399-1400; *id.* at 1404-06 (Brennan, J., concurring).

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restrict the campaign expenditures of wealthy individuals.<sup>165</sup> This is a good question, to which there may be no clear answer. But the absence of an answer, far from refuting the notion that the state has a compelling interest, only underscores how deep the problem of undue influence runs. Wealthy individuals, like corporations, exercise substantial influence (well beyond their votes) over the outcome of elections. Moreover, wealthy individuals, like corporations, owe their wealth in some measure to benefits and protections accorded by the state. Some of these state benefits are direct, such as the state's enforcement of private property rights, and others are indirect, such as the advantages accorded to the corporations from which many wealthy individuals' fortunes are derived. If the existence of concentrated wealth attributable in part to state-created advantages creates a compelling interest justifying the restriction of corporate spending, it may also justify limits on individual spending.

One possible way of distinguishing regulation of corporations is that their statutory character makes it easier for the state to construct a rule "narrowly tailored" to its compelling interest. The artificial quality of the corporation permits the State to manipulate the statutory rules so that they are narrowly tailored to good instrumental ends. Thus, FECA does not prohibit corporate speech outright, but creates a set of rules for corporate speakers designed to separate the corporation's political appeal from its economic strength.

Individuals and their rights, in contrast, are seen as natural, and therefore less easy to divide and distill. But this is surely a superficial distinction. Socially constructed legal rules similarly lead to and maintain great disparities in wealth accumulated by individuals.<sup>166</sup> More importantly, what individuals may do with the social resources they accumulate is ultimately as subject to socially constructed rules as what corporations can do. For example, we do not permit wealthy individuals to purchase slaves, babies, illegal drugs, or, for the most part, the services of prostitutes. We set certain limits on what individuals can do with their money for the greater good of the collective, or to protect other persons' rights, just as we restrict corporate campaign financing to further the greater good of the collective and to protect the rights of the less wealthy. Thus, the statutory nature of a corporation does not appear to justify singling out corporations for restrictions.<sup>167</sup>

A second possible distinction between individuals and corporations—one rejected by the Court in *Bellotti* and *Pacific Gas and Electric Co. v. Public*

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165. *Id.* at 1411 (Scalia, J., dissenting); *id.* at 1421-22 (Kennedy, J., dissenting).

166. *See supra* note 57 and accompanying text.

167. Moreover, the failure to restrict individual spending will also undermine the "purifying" effect of the segregated fund requirement. If the individuals who benefit most from the corporate form are free to expend large amounts of money, the corporation's wealth will be infused into the political marketplace of ideas by passing through the individuals most indebted to the corporation.



*Utilities Commission*<sup>168</sup>—might focus on the relative value of their speech. If we focus on value to the speaker rather than value to the audience, a corporation's speech may be less deserving of First Amendment protection than an individual's. C. Edwin Baker argues, for example, that the First Amendment is designed to protect the freely-chosen expression of speakers, in order to further liberty interests in self-realization and self-determination. Corporations, he maintains, do not engage in freely-chosen expression, because they are constrained by the drive for profits, and therefore do not deserve First Amendment protection.<sup>169</sup>

But individuals are also constrained in their expression, by such forces as ideology, culture, class, and economics. Moreover, the profit motive, while it may constrain, does not *determine* the content of a corporation's speech. A corporation that concluded that support of the arts would serve its profit interests, for example, might well have at least the same range of choice of art to support as would a human being or an unincorporated association. More importantly, the liberty approach ignores the structural value that a corporation's speech might have for listening human beings—the value that led the Court in *Bellotti* to accord corporate speech protection in the first place. Corporations are important participants in our social structure, and the public has a First Amendment interest in hearing their positions articulated.

The question whether *Austin*'s approach applies to media corporations may be even more difficult. The Michigan statute in *Austin* exempted from regulation any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or in opposition to a candidate for elective office . . . in the regular course of publication or broadcasting."<sup>170</sup> The majority acknowledged that such differential treatment of media corporations required a compelling state interest, but found one in the state's desire not to hinder the press from performing its institutional function of "reporting on and publishing editorials about newsworthy events," in this case, a political campaign.<sup>171</sup>

As Justice Scalia pointed out, however, this rationale suggests that while the state *may* exempt media corporations from such regulations, it is not *required* to do so. Indeed, the special role of the media could just as well argue for regulating media corporations, because the media are particularly well positioned to exert undue influence on the political debate.<sup>172</sup> Moreover, the

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168. 475 U.S. 1 (1985).

169. BAKER, *supra* note 16, at 194-224.

170. MICH. COMP. LAWS § 169.206(3)(d) (1979); *cf.* 2 U.S.C. § 431(9)(B)(i) (1988).

171. 110 S. Ct. at 1402.

172. *Id.* at 1414-15; see also *First Nat'l Bank v. Bellotti*, 435 U.S. at 796-97 (Burger, C.J., concurring) ("[I]t could be argued that . . . media conglomerates . . . pose a much more realistic threat to valid interests than do [corporations] not regularly concerned with shaping popular opinion on public issues."). The perennial issue of the effect of television predictions of election results is only a small example of the problem. Candidates' preoccupation with obtaining and spinning media campaign coverage underscores

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majority's reasoning seems inconsistent with the principle that the press is not to be accorded greater First Amendment rights than are other speakers.<sup>173</sup> And as Justice Kennedy maintained, the fact that media corporations are in the business of communicating with the public does not distinguish them from many non-media corporations that also communicate with the public.<sup>174</sup>

From the structural point of view that the First Amendment antitrust model necessitates, however, there may be reasons for treating the press differently. First, as Justice Marshall argued, the press serves an important institutional role in the marketplace of ideas, and provides "a powerful antidote to any abuses of power by governmental officials."<sup>175</sup> Just as recognizing the "New Corruption" means acknowledging that all speakers need not be treated exactly alike, so the adoption of a structural First Amendment analysis may justify taking into account the press's institutional role.<sup>176</sup>

Second, the fact that a media corporation's business is speech, not refrigerators, may lessen the wealth-distortion concern. At least to a rough extent, the media corporation's treasury will reflect the popularity of its speech. One chooses to read the *Washington Post*, the *Washington Times*, the *Wall Street Journal*, *USA Today*, or the *Daily World* at least in part because of the political content of the newspaper's speech. The media corporation's economic success, therefore, is more closely related to the public's support for its ideas than, say, General Motors's success. While this is complicated by, among other things, the complex relationship a paper has with its audience and its advertisers, there is arguably at least some correlation. Thus, there might be less cause for concern about wealth distortion caused by media corporations.<sup>177</sup>

In any event, the fact that media corporations and wealthy individuals also appear to pose a danger of undue influence does not necessarily mean that the impulse to respond to the distorting effects of corporate wealth is wrong. It only reveals how difficult it is in a capitalist society to offset the distorting effects of unequal private resources on public debate. There may be good policy reasons for focusing on corporations—as a group they may pose the

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the pervasive influence that the media have.

173. 110 S. Ct. at 1414 (Scalia, J., dissenting); *Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring) ("[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it . . . . '[L]iberty of the press is no greater and no less' . . . than the liberty of every citizen of the Republic."); see also *Bellotti*, 435 U.S. at 798-802 (Burger, C.J., concurring).

174. 110 S. Ct. at 1425 (Kennedy, J., dissenting).

175. *Id.* at 1402 (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

176. Cf. *BAKER*, *supra* note 16, at 229-34 (arguing that the First Amendment's press clause should be interpreted as a structural protection for the press).

177. To the extent that the media corporation also has other business interests, this may be less true, although the statutory exception extends only to the media corporation's regular course of publishing or broadcasting. A more narrowly tailored rule might require the corporation to separate its media income from its non-media income for purposes of speech in political campaigns. Moreover, this concern might be partially met by a requirement that the media disclose its financial ties in the subjects it covers.

greatest danger of distortion<sup>178</sup>—but there is little reason to stop at corporate spending. Moreover, as the difficulty in distinguishing corporations from other wealthy economic actors demonstrates, the problem of wealth distorting speech is so widespread and deeply ingrained that attempts to respond to it will inevitably run up against competing constitutional interests. But the difficulty of the task does not mean it should be abandoned; the dangers posed by concentrated private wealth, reinforced by government rules, cannot be ignored.

It is precisely the *Austin* Court's recognition of the dangers posed by concentrated wealth that most troubled Justices Scalia and Kennedy. Justice Scalia directed his harshest criticism at the Court's articulation of a "new" form of corruption: the systemic distorting effects of wealth. Significantly, however, neither Justice argued that the "new" definition did not comport with reality. Rather, both focused their criticism on the implications such a recognition has for the relationship of government to the marketplace of ideas. Recognition that public debate is tainted by "the corrosive and distorting effects of immense aggregations of wealth" leads to empowerment of the government to regulate the debate.<sup>179</sup> And that, Justice Scalia asserted, is "incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."<sup>180</sup>

There are indeed legitimate reasons to be wary of empowering the government to ensure a "fair" debate. Caution is especially warranted when the debate being regulated concerns whether the regulators themselves will remain in office.<sup>181</sup> Money is not the only resource that is unevenly allocated in electoral campaigns. The most important advantage a candidate can have is incumbency, and challengers often need to outspend incumbents to offset this advantage. Given the inherent advantages of incumbency, there is a danger that equalizing monetary resources will favor incumbents and solidify the status quo.

In addition, as Justice Scalia pointed out, the corporate sector's powerful private voices may play an important role in checking the powerful public voice of government; curtailing such voices may therefore have the effect of "augment[ing] the always dominant power of government."<sup>182</sup> In other words, it may be necessary, to maintain a balance of power between the public and private spheres, to allow private concentrations of wealth to flourish. Certainly these factors deserve consideration in reviewing government interven-

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178. *See supra* note 52.

179. 110 S. Ct. at 1411 (Scalia, J. dissenting).

180. *Id.* at 1408.

181. *Id.* at 1412, 1415.

182. *Id.* at 1416.

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tions into the marketplace.

The dissenters' approach, however, would go further and reimpose the blinders that have hampered First Amendment doctrine from the beginning; they would prefer a return to the laissez-faire model of First Amendment jurisprudence. Under that theory, government intervention into the marketplace of ideas is strictly forbidden, and the danger from the private sphere is accepted as natural—something about which the state can do nothing. Congress has not taken that attitude toward corporate campaign speech since 1907. While Justice Kennedy is correct that the *Austin* majority “impose[d] its own model of speech” in upholding the restriction at issue,<sup>183</sup> so too would the dissenting Justices have imposed their own model had they prevailed. Some model must be imposed. The question is whether the majority's model, which recognizes the distorting potential of wealth, or the dissenters' model, which would ignore it altogether, is more “removed from economic and political reality.”<sup>184</sup> The next section addresses that question.

### III. DEMOCRATIC CAPITALISM: A CONTRADICTION IN TERMS?

The disagreement between the majority and dissenting opinions in *Austin* is not a new one; in fact, it uncannily recapitulates a debate that consumed the Court and the nation from the turn of the century through the New Deal. In the era marked by *Lochner v. New York*<sup>185</sup> and its progeny, the Supreme Court invalidated approximately 200 statutes designed to offset inequality in the economic marketplace.<sup>186</sup> The Court repeatedly held that departures from government “neutrality” toward the market impermissibly interfered with the liberty of contract protected by the due process clause.<sup>187</sup> The Court in the *Lochner* era, like the *Austin* dissenters, treated laissez-faire as a constitutional mandate, and viewed inequalities in the market as natural and beyond government control.<sup>188</sup> Critics of *Lochner*, like Justice Marshall in *Austin*, maintained that the market was not natural, but was politically constructed by government rules and regulations, and therefore the government could alter

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183. *Id.* at 1426 (Kennedy, J., dissenting).

184. *Id.*

185. 198 U.S. 45 (1905).

186. GEOFFREY STONE, ET AL., CONSTITUTIONAL LAW 802 (1990).

187. *See, e.g.*, *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating gasoline price regulation); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating statute barring employers from requiring employees not to join union); *Lochner*, 198 U.S. at 45 (invalidating maximum hours law).

188. As the Court stated, “it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.” *Coppage*, 236 U.S. at 17.

the rules to offset the inequalities that its rules had produced.<sup>189</sup> Justice Marshall's recognition in *Austin* that concentrations of corporate wealth create inequalities in the political marketplace and justify government intervention can thus be seen as an extension of the lesson of the *Lochner* era to the "marketplace of ideas." Justices Scalia and Kennedy would take us back to *Lochner*.

Seen in this light, *Austin* appears less revolutionary than inevitable. The Court merely acknowledged in the campaign speech context what it had long ago recognized in the economic market: the end of *laissez-faire*. Congress had been operating on that premise since 1907, when it first regulated corporate campaign spending. Thus, on one level *Austin* is merely a belated judicial recognition that concentrations of corporate wealth threaten the norms of equality intrinsic to a full and fair public debate and to democratic government.

Justices Scalia and Kennedy are correct, however, that this recognition has potentially revolutionary repercussions. It collapses the two central distinctions that have heretofore guided the Court's campaign finance jurisprudence. Once "corruption" is understood to encompass the systemic distorting effects of wealth, expenditures are just as corrupting as contributions and referenda elections are just as subject to being corrupted as candidate elections. Even the distinctions relied upon in *Austin* are undermined by the "New Corruption": distortion can be caused not only by for-profit corporations, but also by wealthy individuals, nonprofit corporations, associations, and the media. Thus, every distinction the Court has erected in the field of campaign finance is called into question by the Court's belated recognition that economic power can skew democratic speech.

More fundamentally still, the recognition of the threat posed by private economic actors to the marketplace of ideas requires a rejection of the blindered *laissez-faire* approach to First Amendment doctrine. If First Amendment and democratic values can be undermined not only by government action but also by private sources of power, the Court, and our elected officials, must walk a fine line between two substantial dangers. It is no longer enough to construct a First Amendment "fortress" against government action; we must at the same time empower government to minimize the threats to speech rights posed by private concentrations of wealth. The Court has been walking this line, with great difficulty, throughout its campaign finance decisions. Its only consistent strategy was the deferential avoidance that characterized its first seventy years of campaign finance review.<sup>190</sup> Once the Court actually began to address the issue, it began to waver. In retrospect, *Buckley* foreshadowed

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189. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law on ground that state may seek to rectify inequalities in bargaining power); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 578-79 (2d ed. 1988).

190. See *supra* part II.A.

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the Court's subsequent fluctuations; it simultaneously applied both deferential and exacting scrutiny in a single case, upholding all contribution limits while striking down all expenditure limits.<sup>191</sup> In *Bellotti*, the Court adopted an extremely stringent standard and rejected all claims that government should be permitted to respond to inequities in private speaking power.<sup>192</sup> The Court swung back to a deferential stance in *NRWC*<sup>193</sup> and then returned to stringent review in *NCPAC*.<sup>194</sup> Most recently, in *MCFL* and *Austin*, the Court has taken up something of a middle ground, applying strict scrutiny but recognizing a compelling interest in counteracting the distorting effects of private wealth.<sup>195</sup> While this wavering approach reflects confusion, it also reflects the genuine competing concerns that the campaign finance issue presents—the twin dangers of state censorship and private domination.

The difficulties presented by campaign finance are in some sense inherent to democratic capitalism. We have a political system premised on equality, but an economic system based on the promise of inequality. As a constitutional matter, we guarantee equal protection of the laws, the equal right to vote, and an equal right to participate in the public debate. These rights are considered essential to our civic culture; we fought a Civil War over the first two, and the last is viewed as fundamental to the operation of democratic self-government.

At the same time, we also guarantee rights that maintain, encourage, and reinforce a regime of economic inequality. The rights of property are fundamental to our social and economic organization, and the system of “free enterprise” runs on promises of greater rewards to some than to others. As the Supreme Court has acknowledged, “wherever the right of private property exists, there must and will be inequalities of fortune.”<sup>196</sup> While property rights are formally equal, in that they protect everyone who owns property, they are only equal in the sense depicted by Anatole France’s critique of French laws forbidding rich and poor alike from sleeping under bridges.<sup>197</sup> Similarly, the rewards promised by success in the market are formally available to all, but in reality opportunities are by no means equal. We fought a Cold War for forty years over these rights of inequality, and now that we have apparently won that war, we are especially unwilling to give them up. At the same time, the stark reality of inequality places great strains on our society.

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191. See *supra* part I.C.1.

192. See *supra* part II.B.1.

193. See *supra* part II.B.2.

194. See *supra* text accompanying notes 71-76.

195. See *supra* part II.B.3-4.

196. *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

197. “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” ANATOLE FRANCE, *LE LYS ROUGE*, ch. 7 (1894) quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 655 (1980).

The problem of homelessness has become a national epidemic, and the gaps between rich and poor, and black and white, remain embarrassingly wide for a country assertedly committed to equality.<sup>198</sup>

When fundamental rights promising equality are overlaid on a background of economic inequality, also protected by fundamental rights, disjunctures and contradictions are inevitable.<sup>199</sup> Efforts to achieve equality in such contexts will often paradoxically require empowering the government to engage in conduct that appears on the surface to replicate the problem. Just as opponents of campaign finance regulation see the government as engaging in censorship when it seeks to respond to the social reality of economic inequality,<sup>200</sup> so opponents of affirmative action characterize the government's actions as racist when it seeks to respond to the social reality of racial inequality.<sup>201</sup> In both contexts, a policy of absolute government "neutrality," which is on a formalist view mandated by the Constitution, not only fails to achieve equality but perpetuates and exacerbates the underlying reality of inequality.<sup>202</sup>

The most curious fact about the campaign finance cases is that they seem to run against the grain. In virtually every other constitutional context, the

198. In 1984, the richest 20% of the American population earned 42.9% of the nation's total income, while the richest 5% earned 16.0%. At the same time, the poorest 20% earned only 4.7% of the nation's income. FRANK LEVY, *DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION* 14 (1987). These gaps particularly affect African-Americans. For every dollar a white family holds in assets, black families hold 9 cents. Jeremiah Cotton, *Opening the Gap: The Decline in Black Economic Indicators in the 1980s*, 70 SOC. SCI. Q. 803, 815 (1989). Forty-three percent of black children are born into poverty, defined by the government as an income less than \$12,675 for a family of four. *America's Blacks: A World Apart*, THE ECONOMIST, Mar. 30, 1991, at 17. The unemployment rate for African-Americans is more than twice that for Whites. *Id.*

199. The campaign finance context is by no means the only legal issue plagued by this conflict; many of the most controversial and unsettled problems of constitutional doctrine can be attributed at bottom to the conflict between democratic norms of equality and capitalism's demand for inequality.

The conflict is perhaps most directly posed in the equal protection cases addressing "fundamental rights." In some of the earlier decisions in this line of cases, the Court held that our commitment to equality required the state to equalize the playing field by providing the indigent with the means to exercise certain constitutional rights. *Griffin v. Illinois*, 351 U.S. 12 (1956) (where a state chooses to provide an appeal as of right from a criminal conviction, it must provide indigent defendants free trial transcripts); *Douglas v. California*, 372 U.S. 353 (1963) (state must provide indigent defendants free counsel for criminal appeal as of right). In its more recent decisions, however, the Court has generally held that the state does not violate a constitutional right by failing to subsidize its exercise, even for those who cannot enjoy the right without such a subsidy. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (government does not violate constitutional rights by providing indigent pregnant women with one-sided counseling regarding childbirth while barring discussion of abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (government does not violate constitutional rights by subsidizing childbirth but not abortion through Medicaid).

200. *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391, 1419 (1990) (Kennedy, J., dissenting) ("By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for election.").

201. See, e.g., *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3045 n.1, 3046 (1990) (Kennedy, J., dissenting) (comparing FCC affirmative action policy to South African apartheid laws and Nazi Germany laws).

202. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.").

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Court has moved away from notions of substantive equality and denied claims that the distribution of private resources threatens constitutional values.<sup>203</sup> Why is the Court willing to grant a role for government intervention in this isolated arena?

One explanation for the Court's unique approach to the campaign spending cases is that in this context the reality of inequality is too widely acknowledged to be ignored. As the Court has repeatedly reminded us, the American people have been suspicious of corporate campaign spending since the turn of the century. Campaign spending is a regular subject of debate in Congress and the media, and is revisited by the populace every election. A populist strain in the American people means that candidates can win votes and sometimes even elections by running against "big money," so that President Bush feels safe calling for an end to political action committees. And it is certainly plausible that the disappointing voter turnouts that have characterized American elections for so long are in part due to cynicism about the overwhelming power of moneyed interests.

At the same time that there appears to be widespread agreement that a problem of inequality exists, there is also a strong normative drive to reduce inequality in the campaign context. The legitimacy of a democratic state rests on its elections. The principle that all persons should have an equal right to vote is central to that legitimacy. It is so central that voting rights is one of the only areas of civil rights law that has not been gutted by the Rehnquist Court. It is perhaps for similar reasons that campaign spending regulation is one of the only areas where the Court has recognized the distorting effects of private wealth on constitutional rights. A strong strain of equality runs through our collective vision of the electoral process, and gross disparities in campaign spending rightly offend that normative vision.

Professor Powe has argued that if we are concerned about the distorting effects of inequitable wealth distribution on the marketplace of ideas, we should address the problem at its source, by redistributing wealth.<sup>204</sup> He maintains that other means of addressing the problem are less satisfactory from a First Amendment perspective because they almost inevitably empower the government to take action addressed to speech itself, which is a dangerous proposition. But there is little or no political support for the kind of redistribution that might make a difference, as the public's reaction to the mere mention of taxes suggests. Must we give up on the values of equality implicitly or explicitly guaranteed in the Constitution because the majority lacks the political will to redistribute wealth? The very coexistence of rights of equality and rights of inequality in the Constitution suggests that it is not an all-or-nothing

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203. See *supra* notes 13, 199.

204. L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 282-83.



proposition. And it is certainly far less intrusive to limit the advantages people and institutions can gain through their wealth in certain spheres—e.g., campaign speech—than it would be to redistribute wealth altogether.

#### IV. CONCLUSION

In one sense, Justice Scalia's focus on metaphor in *Austin*<sup>205</sup> was absolutely right; the difference between the majority and the dissent can best be characterized as a battle of economic metaphors. Both opinions rest metaphorically on the marketplace of ideas, but their visions of the government's role in that marketplace could not be more different. Justice Scalia's First Amendment metaphor is laissez-faire. In this view, government intervention is the evil to be feared, especially where, as in the campaign context, the speech at issue is political and concerns the question of representation. From this essentially libertarian perspective, freedom of speech is synonymous with the absence of government regulation. This model is not without support in the case law. First Amendment doctrine was built on a libertarian frame, and the Court has constructed some fairly effective bulwarks against government proscriptions on political speech.<sup>206</sup> Moreover, this view is grounded on a basic First Amendment principle: government regulation of political speech poses a grave threat to a free and democratic society.

The weakness of Justice Scalia's laissez-faire model is that it ignores the second and potentially equally grave threat to a free and democratic society: domination of the political marketplace of ideas by vast concentrations of wealth. The metaphor in the *Austin* majority that Justice Scalia denounces—the "New Corruption"—recognizes that problem. A better metaphor for the majority's approach, one that captures the institutional consequences of the "New Corruption," is First Amendment antitrust. The Court's acknowledgment of the problem of economic domination empowers the government to take an interventionist role, in the words of Justice Frankfurter, to "purge national politics of . . . the pernicious influence of 'big money' . . . ."<sup>207</sup> This vision is less libertarian and individualistic than Justice Scalia's, but it may in fact be more true to the First Amendment's traditional guiding metaphor of the "marketplace of ideas." First Amendment antitrust adopts the structural and egalitarian vantage point that the "marketplace" image at its best connotes,<sup>208</sup> and embraces government regulation as consistent with the First Amendment where the regulation is designed to counteract the effects of economic inequali-

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205. 110 S. Ct. at 1411 (Scalia, J., dissenting).

206. See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

207. *United States v. UAW*, 352 U.S. at 572.

208. See *supra* part I.A.

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ty in that market.

*Austin* shows the Court relinquishing its hold on the laissez-faire model of free speech, a model that protects against government interference but fails to account for the substantial interference caused by private sources of wealth and power. *Austin* confirms that, far from being “wholly foreign”<sup>209</sup> to the First Amendment, the concept that the government might restrict the speech rights of some in order to enhance the relative speech rights of others is sometimes necessary to a meaningful First Amendment guarantee. If *Austin* is extended beyond the corporate context, it suggests that the First Amendment should not be a bar to legislative efforts to reduce inequities in campaign speech opportunities, be they expenditures or contributions, in candidate elections or referenda.

But even this—the *Austin* revolution—may not be sufficient. The political branches to which we turn for initiative in righting the First Amendment skew of big money are themselves products—or at least survivors—of the skewed system. Political action committees, whose substantial donations strongly favor incumbents,<sup>210</sup> lobby most vigorously against regulating campaign spending,<sup>211</sup> and campaign finance reform legislation is notoriously difficult to enact.<sup>212</sup>

Perhaps an affirmative First Amendment mandate is needed after all, much like the mandate hinted at in *Red Lion Broadcasting Co.* It would require government to ensure that the political marketplace not be overrun by concentrations of wealth. The mandate might be satisfied by any number of administrative regimes, since as we have seen, the issue necessarily presents competing First Amendment concerns and values. Where it is demonstrated that concentrated sources of wealth have unduly influenced the marketplace of ideas, the Court might mandate that *some* steps toward equalization be taken, and then oversee the steps that are taken to insure that they do not favor incumbents. A broader and more equitable system of public financing, subsidized television and radio advertising, and more balanced limits on contributions *and* expenditures, could all move the system a step closer to equality. The problem, of course, is in defining when the marketplace is “overrun,” “distorted,” or “unduly influenced,” or conversely, when it is “closer to equality.” These definitions are inherently value-based, and will depend on the

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

210. See MAGLEBY & NELSON, *supra* note 6, at 81-83; LARRY SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 73-78 (1984).

211. See, e.g., DREW, *supra* note 6, at 33; *Public Financing of Congressional Elections: Hearings Before the House Comm. on House Admin.*, 96th Cong., 1st Sess. 214 (March 15-27, 1979) (Rep. Abner Mikva, D-Ill., predicting that, “[a]s the special interest Political Action Committees become more entrenched, they will become an insurmountable lobby against campaign finance reform.”).

212. See MAGLEBY & NELSON, *supra* note 6, at 20-26 (detailing some of the reasons why campaign finance reform initiatives often fail).

respective constitutional emphases we place on equality and inequality. But if this is a constitutional mandate, and if the problem is a distorted political process, its resolution cannot be left entirely to that political process.

There is of course no chance that today's Supreme Court would recognize such an affirmative First Amendment obligation to redress the effects of economic inequality. The implementation problems would likely dwarf those the Court continues to face from its desegregation decree in *Brown v. Board of Education* some thirty-seven years ago. But at this point, perhaps such an affirmative judicial role is not required. Notwithstanding all the reasons for distrusting the political process, Congress and the state legislatures continue to attempt to reform the campaign finance scheme. At a minimum, the Court must not close its eyes to the problem it has now acknowledged. As it does in the broadcast media context, the Court should permit government to engage in good-faith, narrowly-tailored efforts to respond to the distorting effects of wealth on the political marketplace of ideas, so long as those legislative efforts do not appear to have the purpose or effect of protecting incumbents.<sup>213</sup> The standard set forth in *Austin*—strict scrutiny with the recognition of a compelling interest in counteracting the distortion of wealth—serves this end by ensuring careful, but not fatal, scrutiny. Unlike prior standards, it pays attention to both sides of the problem.

The alternative is a retreat to a libertarian laissez-faire approach. Such a retreat would not be surprising, given the Court's direction on other issues of economic inequality and constitutional rights. But it would be unjustifiable. The problem of wealth distortion has been acknowledged and cannot again be swept under the rug by a metaphor founded on an eighteenth century vision that does not comport with reality. Justice Scalia's concern that the First Amendment not be "brought down . . . by poetic metaphor"<sup>214</sup> counsels for updating the metaphor precisely as the *Austin* majority has, by acknowledging the legitimacy of a First Amendment antitrust role to preserve the marketplace of ideas.

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213. Of course, as the Court has done in the broadcast context, it is quite possible that the Court will restrict *Austin* to its particular context—corporate campaign speech—and continue to strike down efforts to effect similar changes outside that limited context. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (upholding right of reply and fairness doctrine as applied to broadcasters) with *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply statute as applied to newspaper).

214. 110 S. Ct. at 1411 (Scalia, J., dissenting).