Corruption, Corrosion, and Corporate Political Speech

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I am grateful to Professor Robert L. Heath, University of Houston School of Communication, Professor Peter Linzer, University of Houston School of Law, and Christy McCrary, University of Texas School of Law, for their assistance in the preparation of this Article.

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I. INTRODUCTION

(Virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically 'corrosive,' which is close enough to 'corruptive' to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.)

Corporations cannot speak, but they can spend and thereby have a voice. Here lies the crux of a first amendment problem: To what extent can or should the government regulate the ability of corporations to spend for the purpose of influencing public policy? On one hand, those seeking to prohibit corporate political spending fear corporate dominance of the political process. By virtue of their economic strength, corporations are seen as privileged “deep pockets” that corrupt our political system by drowning out individuals and other groups in society.

On the other hand, corporate strategists consider active political involvement to be indispensable in protecting business interests against ever-increasing and potentially unwise government regula-

2. See generally C. LINDBLOOM, POLITICS AND MARKETS (1977)(corporations have a privileged and disproportionately powerful role in government).
tion. Our form of government assumes that wise policy is possible only if those who understand the policy are allowed to address it in public discourse. By attempting to correct unwise public policies, corporations speak beyond their own narrow self-interest. According to this view, corporations are no different from any other group in society with legitimate political concerns and responsibilities—corporations have a right to be heard.

This Article studies the legal status of corporate political speech in the referendum/initiative process and questions whether the current ability of corporations to participate in that process should be abridged. Although proponents of campaign finance reform question the legitimacy of corporate participation in both candidate elections and ballot proposition campaigns, this Article will focus only on the latter issue.

Despite many state legislative attempts to limit or prohibit corporate participation in ballot proposition campaigns, the U.S. Supreme Court in *First National Bank of Boston v. Bellotti* appeared to recognize a corporate right to participate in the referendum process based on the first amendment. Although a few commentators agree with the Court’s reasoning in *Bellotti*, most have strongly criticized the decision. Both sides of the argument raise valid points. While a number of studies have shown that corporate spending can have a disproportionate impact on the ballot issue process, corporate input and expertise may be needed to resolve many of the social and economic problems currently on the political agenda.

Can we somehow protect the ability of individuals, corporations, and other groups to engage in political discussion concerning ballot issues and, at the same time, lessen the chances of any element overpowering another? The search for a compromise has taken on increasing significance because corporate political speech is currently in great

9. See infra text accompanying notes 247-75.
danger. Recent scholarly suggestions, such as Carl Mayer's proposed constitutional amendment to declare corporations excluded from the Bill of Rights, would do away with all corporate rights of free speech. More importantly, in a series of decisions culminating with *Austin v. Michigan Chamber of Commerce*, the Supreme Court has redefined political "corruption," setting the stage to reconsider *Bellotti* and deny first amendment protection to corporate political speech.

This Article will describe the ballot issue process in America and will examine the rise and likely fall of first amendment protection for corporate political speech on ballot issues. Additionally, it will evaluate three major criticisms of the *Bellotti* decision: first, that corporations are not "persons" worthy of constitutional protection; second, that corporate political spending impermissibly infringes on shareholder rights; and, third, that corporate spending on ballot issues un­duly influences, and thereby corrupts, the direct legislative process. Finally, this Article will analyze proposed solutions to the problem of lopsided spending in ballot issue campaigns, and will take the position that the governmental interest in eliminating "unfair political advantages" would be served more equitably by legislation limiting political expenditures by all individuals and groups than it would by denying corporations the protection of the first amendment.

**II. DIRECT DEMOCRACY IN AMERICA**

**A. Direct Democracy Defined**

During the past twenty years, American politics has experienced a resurgence in the use of direct democracy. "Direct democracy" and "direct legislation" refer to the initiative or referendum process, whereby individuals, as opposed to elected representatives, speak directly on public policy issues by voting on ballot propositions. The most frequently cited reason for the increasing importance of direct democracy is the public's growing distrust of representative government, which heightened following the Watergate scandals. Specifically, proponents of direct legislation claim it encourages citizen participation in government by placing substantive decision-making power in the hands of the people, thereby bypassing corrupt legislators who are controlled by special interests. At the same time, direct

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14. Magleby, *supra* note 13, at 14-15. Other reasons for this upsurge include the
legislation has been criticized because of the large dollar amounts spent in initiative and referendum campaigns.\textsuperscript{15}

Although statutes vary from state to state, two basic types of ballot propositions are used to implement direct legislation. The \textit{initiative} is a procedure whereby citizens can initiate legislation and/or state constitutional amendments by petition, without legislative action.\textsuperscript{16} The second type of ballot question is the \textit{referendum}, which provides for popular vote on proposed or existing laws. Citizens have the power to accept or reject laws proposed or enacted by the legislature when these laws are referred to them by petition or by the legislature itself.\textsuperscript{17} Only fourteen states\textsuperscript{18} do not use either process for statewide legislation. However, local ballot propositions flourish across the nation, even in some of the states that do not permit them at the state level.\textsuperscript{19}

\section*{B. History of Direct Democracy}

Although plebiscitary democracy can be traced back to ancient Athens, the process did not take hold in America until the beginning

\begin{itemize}
  \item growth of single-issue politics and the corresponding weakening of political parties, as well as the extensive media attention given to ballot issues. \textit{Id.} at 5-7.
  \item In 1982, for example, proponents and opponents of two Michigan ballot questions, proposing limits on automatic rate modifications for fuel costs, broke previous state records with combined spending totals of $5.69 million. B. Zisk, \textit{Money, Media and the Grass Roots}, 201 (1987). The same year, California campaigners set a national record for a single ballot question by spending $9.9 million on a gun control initiative. \textit{Id.} at 204.
  \item Twenty-six states and the District of Columbia have adopted some form of the initiative. Fifteen states use the "direct" initiative whereby petitions containing a certain number of voter signatures are required for ballot status. Eight states provide for the "indirect" or "statutory" initiative pursuant to which voter proposals must be considered by the state legislature after the required number of signatures are obtained. Only if the legislature fails to act on the proposal within a certain time limit is the proposal placed on the ballot. Five of these eight states provide for both the direct and indirect initiative procedure. An additional three states allow voters to require the legislature to refer enactments to the public for ultimate approval or rejection. Eule, \textit{Judicial Review of Direct Democracy}, 99 \textit{Yale L.J.} 1503, 1509 n.22, 1587-88 (1990); Magleby, \textit{supra} note 13, at 36.
  \item Thirty-six states and the District of Columbia use some form of the referendum process for state statutes (including 24 that also have the initiative). Every state except Delaware provides for voter approval of state constitutional amendments. Eule, \textit{supra} note 16, at 1509-10.
  \item Alabama, Connecticut, Delaware, Hawaii, Indiana, Louisiana, Minnesota, Mississippi, New Hampshire, South Carolina, Tennessee, Texas, Vermont, and West Virginia. \textit{Id.} at 1510 n.23.
  \item It has been estimated that statewide ballot propositions represent only about two percent of the country's direct legislation. \textit{Id.} at 1510.
\end{itemize}
of the twentieth century. At that time, Progressives championed social, economic, and political reforms that reflected belief in the individual citizen and distrust of political and economic organizations. Progressives supported direct democracy as a way to overthrow powerful political machines and transfer power from special interest groups back to the individual.

The Progressive movement had lost momentum by 1920, however, and interest in direct legislation died, partially because very few states used the process with any regularity. But by the late 1970s, direct democracy had become a serious political phenomenon again and states that had legislated for direct democracy began to use it. In the November 1988 elections, a total of 230 local and statewide initiatives and referenda appeared on the ballots in a total of forty-one states—the most ballot propositions placed before voters in fifty years.

Despite widespread popular support, the direct legislative process has been controversial both during the Progressive era and today. Recent criticism of direct democracy has centered primarily on the apparent conflict between the intended purpose of direct democracy—to remove government from the hands of the special interests—and

20. MAGLEBY, supra note 13, at 3. In 1898, South Dakota became the first state to adopt the initiative. Twenty-one states had followed suit by 1918, most of which were located in the West and Midwest. Id. at 38-40.
23. MAGLEBY, supra note 13, at 5.
24. In 1977 congressional hearings were held on a proposed constitutional amendment to establish a national initiative.

Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 9-11 (1977)(introduced by Sen. Abourezk). The amendment, which was endorsed by Ralph Nader, was shown by public opinion polls to have significant popular support. MAGLEBY, supra note 13, at 13, 77. Furthermore, during the 1980s, at least 20 states considered legislation to either establish some form of direct legislation or enlarge existing procedures. Id. at 1.
25. MAGLEBY, supra note 13, at 70.
27. Two-thirds of the 1009 Americans questioned in a 1987 Gallup poll replied that citizens should be able to vote directly on some state and local laws. CRONIN, supra note 15, at 4.
28. Direct democracy has been challenged as an unconstitutional denial of the federal obligation to provide republican government pursuant to Article IV, Section 4 of the Constitution. See, e.g., Pacific Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912)(status of Oregon initiative held to be nonjusticiable political question). But see City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668 (1976)(referendum not found to be a delegation of power). See generally CRONIN, supra note 15, at 34-37; Linde, When is Initiative Lawmaking Not Republican Government?, 17 HASTINGS CONST. L.Q. 159 (1990).
the massive increase in corporate spending on ballot issues. Concern over corporate dominance of ballot propositions in the 1970s resulted in numerous state statutes prohibiting or limiting corporate contributions and expenditures in state referendum questions. In 1978, the U.S. Supreme Court in *First National Bank of Boston v. Bellotti* invalidated a Massachusetts statute limiting corporate expenditures in ballot issues, in a decision that for the first time considered the role of corporate spending in the process of direct democracy.

III. THE RISE OF CORPORATE SPEECH

At the same time as the revival in interest in direct democracy, the Supreme Court began to grant constitutional protection to two types of corporate speech: commercial and political. In the commercial speech cases, the Court granted first amendment protection to truthful, nondeceptive advertising: advertising that did not "corrupt" the economic process. And in the political speech cases, the Court granted first amendment protection to corporate political expenditures in ballot issue campaigns, reasoning that such spending presented no threat of corruption to the political process.

A. Commercial Speech

In the mid-1970s, the Court reversed precedent and awarded first amendment legitimacy to commercial speech in a series of cases that recognized the value of advertising in a free market economy. In 1980, the right of commercial speech was extended to corporations in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.

In *Central Hudson*, the Supreme Court struck down the New York Public Service Commission's ban on advertising by electric utilities as violative of the first amendment. Justice Powell, writing for an eight-to-one court, established a three-part test to determine the constitutionality of any government regulation of truthful, nondeceptive advertising that concerns lawful activities. First, the government must assert a substantial state interest to justify the regulation. Second, the

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government must show that the regulation directly advances that state interest. Third, the regulation must be narrowly drawn so as to be no more intrusive on first amendment rights than necessary to serve this state interest.\textsuperscript{34} If the state can meet these three requirements, the advertising in question may be restricted or prohibited.

Applying these guidelines to the \textit{Central Hudson} facts, the Court found that the commission’s rule was overbroad. Although the commission’s interest in conserving fuel was found by the Court to be substantial, the Court reasoned that less intrusive action (such as promotional advertisements promoting energy conservation) could have adequately served that interest.\textsuperscript{35} The lone dissenter, Justice Rehnquist, objected that by balancing first amendment rights against state interests, the Court was improperly substituting its judgment for that of the state legislature.\textsuperscript{36}

\section*{B. Political Speech}

\subsection*{1. Buckley v. Valeo}

With respect to political speech, the Court in 1976 upheld campaign contribution limits and invalidated political expenditure limits imposed by the Federal Election Campaign Act (FECA),\textsuperscript{37} based on the Court’s perception of the risk of political corruption associated with each. By characterizing political spending as speech rather than conduct, the Court in \textit{Buckley v. Valeo}\textsuperscript{38} subjected political spending limits to strict judicial scrutiny.\textsuperscript{39}

In that case, the Court, in a per curiam opinion, upheld limits on federal campaign contributions as necessary to protect the electoral process from corruption or the appearance of corruption associated with large campaign donations to political candidates.\textsuperscript{40} Corruption, as defined by the Court, was limited to the exchange of political favors for campaign contributions—what the Court termed “quid pro quo arrangements” between candidates and their supporters.\textsuperscript{41}

On the other hand, the Court invalidated FECA’s expenditure limitations as “direct and substantial restraints on the quantity of political speech.”\textsuperscript{42} Unlike the contribution limits, the Court said the expenditure limits could not be justified as an attempt by Congress to prevent

\begin{enumerate}
\item \textit{Id.} at 569-70.
\item \textit{Id.} at 584-85.
\item Buckley v. Valeo, 424 U.S. 1 (1976).
\item For a critical analysis of the Court’s conclusion that money is speech, see Wright, \textit{Politics and the Constitution: Is Money Speech?}, 85 \textit{Yale L.J.} 1001 (1976).
\item Buckley v. Valeo, 424 U.S. 1, at 23-38.
\item \textit{Id.} at 26-27.
\item \textit{Id.} at 39.
\end{enumerate}
corruption or the appearance of corruption. The Court was convinced the lack of prearrangement between a candidate and a spender in the expenditure context would eliminate any danger of quid pro quo arrangements.

Although it had been argued that the expenditure restrictions served the public interest by equalizing the ability of persons and groups to be heard in election campaigns, the Court emphatically denied the government's ability to do this, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." And with respect to the government's asserted interest in reducing the costs of political campaigns, the Court held that the government is precluded by the first amendment from controlling the amount of spending—and therefore the amount of speech—in political debate.

In a separate opinion, Justice White argued that the expenditure limitations were content-neutral regulations regarding the giving and spending of money that affected speech only indirectly. Justice White stated that it made no sense for the Court to accept Congress' judgment that political contributions pose a danger of illegal political favors while rejecting Congress' judgment that expenditures also pose such a danger.

*Buckley v. Valeo* is important to corporate political speech because it overturned federal political expenditure limits, and identified the exchange of political favors ("quid pro quo corruption") as the only justifiable government interest for spending prohibitions. By viewing candidates but not elections as subject to the corrupting influence of money, the Court implied that any limitations on ballot issue campaign spending, including corporate expenditures, would be unconstitutional.

2. *First National Bank of Boston v. Bellotti*

The second landmark corporate political speech case presented the very question addressed by this Article—can corporations constitu-

43. Id. at 45.
44. Id. at 46-47.
45. Id. at 48-49.
46. The Court of Appeals had stressed that spending for federal elections had increased almost 300% between 1952 and 1972. Id. at 57.
47. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." Id.
48. Id. at 259.
49. Id. at 281.
50. Before *Buckley* was decided, 18 states had enacted legislation prohibiting or limiting corporate expenditures in ballot proposition elections. CRONIN, supra note 15, at 101-02.
tionally be prevented from spending in ballot issue campaigns? In 1978, the Court ruled by a five-to-four margin that they could not. In that case, First National Bank of Boston v. Bellotti, the Court invalidated a Massachusetts statute that forbade corporations from making contributions or expenditures in regard to state referendum questions that did not materially affect their property or business.

In an opinion by Justice Powell, the Court began by describing the plaintiffs' proposed speech as being "at the heart of the First Amendment". According to Justice Powell, political speech is worthy of constitutional protection because it furthers the open and informed discussion that is required for self government—regardless of whether the speech comes from an individual or a corporation. As it did in the earlier commercial speech cases, the Court focused on the public's right to receive information, rather than on any corporate right of expression.

Second, the Court rejected the state court's reasoning that, as against a state, any first amendment rights belonging to corporations stem from their property rights under the fourteenth amendment. Rather, the Court said that freedom of speech for both individuals and corporations falls within the right to liberty safeguarded by the fourteenth amendment. The Court also discredited the idea that media corporations are entitled to greater first amendment privileges than ordinary business corporations, stating that "the press does not have a monopoly on either the First Amendment or the ability to enlighten.

Massachusetts proffered two legitimating state interests for its statute: (1) that it encouraged individuals to participate in government, thereby avoiding corruption and maintaining public confidence in the electoral process; and (2) that it protected shareholders whose political views differed from those held by management. The Court

54. Id. at 777.
55. Id. at 776.
56. Id. at 778.
57. Id. at 780.
58. Id. at 782. Prior Court decisions granting first amendment rights to either media corporations or commercial speech were decided not because the speech pertained to the corporations' businesses, Justice Powell said, but rather because the speech furthers the public's interest in open access to information. Id. at 781-82. This distinction between first amendment rights given those corporations which could claim freedom of the press and non-media corporations dated from Grosjean v. American Press Co, 297 U.S. 233 (1936). See infra note 205 and accompanying text.
60. Id.
was unimpressed with the corruption argument in the context of a referendum issue, noting that it might suffice as a compelling interest where partisan candidate elections were involved.\textsuperscript{61} However, the Court said Massachusetts had failed to show any evidence or legislative findings indicating that corporate advocacy in a referendum would exert an undue influence on the outcome of the vote.\textsuperscript{62} Mere persuasive effect, Justice Powell said, does not negate first amendment protection.\textsuperscript{63}

The Court also rejected Massachusetts' contention that the statute protected shareholders, finding that the law failed to do so by reason of being both over- and underinclusive.\textsuperscript{64} The fact that the statute prohibited a corporation from supporting a referendum even if its shareholders unanimously authorized the expenditure made it overinclusive, in the Court's opinion.\textsuperscript{65} The Court found the statute to be underinclusive because, while it disallowed corporate expenditures, it did not prohibit corporate activities (such as lobbying) in support of a referendum position.\textsuperscript{66} Furthermore, in order to protect shareholders or other members of large, wealthy associations, the statute logically should have included business and investment trusts and labor unions. The Court was not convinced that shareholders were even in need of protection to begin with; the Court said that normally, shareholders can protect themselves through their power to elect the board of directors, to insist on protective provisions in the corporate charter, and to bring derivative court actions to contest specific corporate expenditures.\textsuperscript{67}

In a dissent joined by Justices Brennan and Marshall, Justice White stated that the first amendment rights of individuals deserve greater protection than those of for-profit corporations.\textsuperscript{68} State regulation of corporate political speech was seen by Justice White not as unconstitutional "equalization" of resources, but rather as preventing wealthy, state-created corporations from purchasing an unfair advan-

\textsuperscript{61. Id. at 788.}
\textsuperscript{62. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating First Amendment interests, these arguments would merit our consideration . . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.}
\textsuperscript{63. Id. at 789.}
\textsuperscript{64. Id. at 790.}
\textsuperscript{65. Id. at 792-94.}
\textsuperscript{66. Id. at 794.}
\textsuperscript{67. Id. at 794-95.}
\textsuperscript{68. Id. at 807.}
tage in the electoral process. Justice White predicted that even a complete prohibition of corporate political speech would not significantly reduce open discussion of ideas because individual corporate executives, employees, and shareholders would still be free to express their individual views, at their own individual expense.

In his dissent, Justice Rehnquist argued that a corporation does not share all the constitutional rights of natural persons, but rather only those that are "necessarily incidental" to the corporation's business. These "necessary" rights, Justice Rehnquist said, would include property rights under the due process clause of the fourteenth amendment for all business corporations, publication rights under the first amendment for media corporations, and commercial speech rights for some business corporations.

However, Justice Rehnquist was of the opinion that the right of political expression is not equally necessary for all commercial corporations. States may logically conclude, Justice Rehnquist said, that corporations pose special dangers in the realm of politics by virtue of the advantages granted to them under state law. In this case, Massachusetts allowed corporations the right of political speech regarding matters concerning their property, thereby providing as much first amendment protection as Justice Rehnquist believed was required by the fourteenth amendment.

In analyzing the Bellotti ruling, it is especially important in light of later cases to note the government interests rejected by the Court as insufficient to support Massachusetts' legislation. The protection of dissenting shareholders, the prevention of undue influence resulting from corporate advocacy, and the equalization of political opportunity were all spurned by the Bellotti majority as rationales to justify spending restrictions. The Court appeared to say that corporate political advocacy in ballot issue campaigns could be limited only if it could be proved to exert undue influence on the democratic process; however, the Court went on to emphasize that advocacy could not be considered corruptive just because it was effective.

The immediate effect of the Buckley and Bellotti decisions was increased spending on ballot propositions by business corporations. State statutes forbidding corporate expenditures in ballot issue cam-

69. Id. at 809.
70. Id. at 807-09.
71. Id. at 824-25.
72. Id.
73. Id. at 825-27.
74. Id. at 826-27.
75. Id. at 827-28.
76. Id. at 790-92.
Campaigns were repealed or judicially invalidated. However, many state and local governments retained limits on corporate contributions to political committees in referendum and initiative campaigns.

3. Consolidated Edison v. Public Service Commission

Two years after Bellotti and on the same day as the Central Hudson decision, the Court again confirmed that first amendment protection for corporate political speech is based on the rationale that the public has the right to be exposed to political ideas from all sources. In Consolidated Edison v. Public Service Commission, the Court invalidated the New York public service commission's regulation prohibiting private utility corporations from issuing bill inserts dealing with controversial public policy matters.

The Court treated Consolidated Edison as a case of political, not commercial, speech even though the utility obviously had an economic interest in furthering its own cause. In Central Hudson, commercial speech had been defined as an “expression related solely to the economic interests of the speaker and its audience” and “speech proposing a commercial transaction.” Consolidated Edison refined this definition and held that corporate speech concerning issues of public policy should be characterized as political speech even if it directly or indirectly affected the corporation's business. The existence of an economic motive was no longer dispositive. Comparing Consolidated Edison and Central Hudson shows that political speech was given a higher degree of protection under the first amendment than commercial speech.

4. Citizens Against Rent Control v. City of Berkeley

In 1981 in Citizens Against Rent Control v. City of Berkeley, the Supreme Court reiterated its position that no danger of political corruption exists in the referendum or initiative process. That case involved a City of Berkeley campaign ordinance limiting contributions to political committees to $250 in both candidate elections and ballot measures. In order to comply with Bellotti, the ordinance specifically did not limit independent or corporate expenditures.

The California Supreme Court upheld the Berkeley ordinance as furthering the compelling governmental interest in preventing corruption of the political process by excessive special interest group

78. Id.
83. 27 Cal. 3d 819, 614 P.2d 745 (1980).
spending. The state court maintained that ballot issue campaigns could be “corrupted” by the dominating influence of big spenders who stifle individual participation, resulting in voter disillusionment with the political process.84

The U.S. Supreme Court reversed the state court by a vote of eight to one, relying primarily on the first amendment’s guarantee of freedom of association. The Berkeley ordinance placed contribution limits only on those wishing to donate funds to political committees; contributors were free to make unlimited independent expenditures. The Court thought that this hindered the ability of a group to pool its resources to amplify its members’ voices.85

The Court distinguished Buckley as involving candidate contribution limits, which it said were justified as an attempt to eliminate the danger of actual or apparent quid pro quo exchanges between candidates and contributions. Where ballot measures are involved, the Court stated that this danger of political corruption did not exist.86 In other words, the Court viewed contributions to political committees in ballot issue elections more like independent expenditures than candidate contributions.

Justice Rehnquist concurred in the opinion of the Court because the ordinance applied to both individuals and corporations. Had the ordinance applied solely to corporations, Justice Rehnquist said he would have upheld it.87 Corporations, in his view, must subject themselves to state regulation of speech and association in exchange for the special corporate advantages granted to them by the state.88

Justice White again dissented from the Court’s decision, stating that the ordinance constituted no more than a negligible intrusion on expression and association.89 Although he disagreed with the Court’s opinion that ballot measures pose no dangers of quid pro quo exchanges between contributors and candidates, Justice White also questioned why the Court refused to consider other possible interests that could justify the ordinance, such as the government’s concern with upholding the individual citizen’s confidence in political processes.90

85. "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." Id. at 296.
86. Id. at 297.
87. See id. at 300.
89. Id. at 304.
90. Id. at 306. White cited statistics from a 1981 California Fair Political Practices Commission report which stated that large contributions from corporate sources have contributed to a steady erosion of the private individual’s influence in politics. White also referred to studies purporting to show that large contributions can “skew” the outcome of local ballot measure campaigns. Id. nn.2-3.
After the Buckley, Bellotti, and Berkeley decisions, commentators began to question the constitutionality of FECA's prohibition on direct corporate contributions and expenditures in federal elections. However, Berkeley turned out to be the last of the Supreme Court cases to rely on quid pro quo exchanges as the only type of political corruption sufficient to justify abridgement of political speech. Beginning in 1982, the Court apparently reexamined its reasoning in these corporate political speech cases and began adopting the arguments made by Justice White and current Chief Justice Rehnquist in their Bellotti dissents.

IV. THE DECLINE OF CORPORATE POLITICAL SPEECH

Although Bellotti did not go so far as to expressly grant first amendment rights to corporations, the decision left considerable doubt whether any restriction on corporate political spending would be upheld. The Court in Bellotti gave little consideration to legislative discretion; however, Justice Powell implied that if and when the state could offer evidence that corporate speech undermined the democratic process, the problem would deserve reconsideration. In 1982, the Court decided the first of a series of cases that signaled a turnaround in judicial policy from its Bellotti decision. In this more recent line of cases, the Court has redefined "corruption" in the political process and has approved the same governmental interests it rejected in Bellotti: the protection of minority shareholders from forced endorsement of management's speech, the equalization of speech in political campaigns, and the prevention of corporate domination in political campaigns.

A. FEC v. National Right to Work Committee

In FEC v. National Right to Work Committee (NRWC), the Supreme Court held that a narrow interpretation of who a corporation can solicit for PAC contributions under FECA did not violate the contributors' first amendment rights of association under Buckley. In an opinion written by Justice Rehnquist, the Court stated that two


Federal law prohibits corporations from making direct contributions to candidates for federal office. Instead, corporations may create separate segregated funds (commonly referred to as political action committees, or PACs) that are financed by the voluntary contributions of their shareholders and officers, or, in the case of nonstock corporations, their members. 2 U.S.C. § 441b(b)(2)(C)(1988).


94. Id. at 207.
governmental interests were sufficient to justify the limitation on persons who could be solicited by a nonprofit corporation.

The first compelling interest cited by the Court was the prevention of actual or potential political corruption resulting from corporate candidate contributions. The Court's discussion of political corruption did not center around quid pro quo arrangements between corporations and candidates as in Buckley and Bellotti, but rather focused on the singular nature of corporations. State law provides certain advantages to corporations that encourage the accumulation of capital and corporate productivity, and the Court suggested that this wealth affords corporations an unfair advantage when corporate monies are spent in the political arena. The Court thereby accepted the view first articulated in Justice White's dissent in Bellotti that the state-granted benefits of the corporate form justify government regulation of corporate political contributions.

Second, the Court concluded that the regulation was necessary to protect persons who contribute to corporations for purposes other than supporting political candidates. The Court reasoned that corporate contributors should not end up subsidizing political speech with which they might not agree. In effect, the Court was relying on the protection of shareholders argument it rejected in Bellotti for being both under and overinclusive. And for good measure, the Court also mentioned the erosion of public confidence in the electoral process through the appearance of corruption as a possible compelling interest for government regulation of corporate political spending.

Clearly, NRWC differed from Bellotti in that it involved corporate candidate contributions instead of corporate political expenditures in ballot issues. Nevertheless, the Court's reasoning in NRWC remains clearly inconsistent with its reasoning in Bellotti. The Court in Bellotti was intent on protecting political expression regardless of the identity of the speaker. By contrast, in NRWC, the Court justified broad state power to control corporate political spending—even with respect to a nonprofit, issue-oriented corporation like the National Right to Work Committee.

B. FEC v. National Conservative Political Action Committee

In 1985, the Court again took up the issue of corporate political expenditures, in FEC v. National Conservative Political Action Com-

95. Id. at 207-08.
96. "The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." Id. at 209-10.
97. Id. at 207-08.
98. See id. at 208.
99. Id.
In that case, the Supreme Court by a seven-to-two vote invalidated a Presidential Election Campaign Fund Act (PECFA) provision limiting political committees’ independent expenditures to $1000 on behalf of any presidential candidate receiving public financing. Referring to the expenditure/contribution dichotomy established in Buckley, the Court said that the PECFA limitation violated the first amendment rights of PAC contributors to pool their resources in order to express their views.

In holding that no compelling governmental interest existed to support the statute, the Court again cited Buckley for the proposition that the exchange of political favors for campaign contributions is the only type of political corruption sufficient to justify campaign financing limits. The potential for political quid pro quos, described by the Court as the “hallmark of corruption,” involved in uncoordinated, independent PAC expenditures was seen as too hypothetical to warrant restriction. In reaching this conclusion, the Court emphasized that the PACs in question received a large number of small, individual contributions and that the contributors “obviously” agreed with the PACs’ message as evidenced by their donations.

Justice Rehnquist, writing for the Court, distinguished NRWC as turning on the National Right to Work Committee’s corporate status. He described NRWC as illustrating the “well-established constitutional validity” of legislative limits on corporate contributions to candidates. Bellotti, on the other hand, simply held that corporate expenditures on general public issues have a higher constitutional status than candidate contributions. Left open was the question of whether a corporation could be limited in making independent expenditures that would benefit a candidate.

100. 470 U.S. 480 (1985).
103. Id. at 497.
104. Id. at 498. The FEC’s trial court evidence, consisting of high-level Reagan administration appointments of persons connected with the PACs and newspaper articles showing a public distrust of PACs, was considered by the Court to be inadequate to show actual or apparent corruption. Id. at 499-500.
105. Id. at 495.
106. Although the PACs in NCPAC were incorporated, the Court noted that the challenged provisions of the PECFA Act applied not only to corporations, but to all political committees whether incorporated or not. Therefore, because the statute applied to both informal neighborhood groups as well as to wealthy corporate PACs, the Court viewed NRWC as inapplicable in the NCPAC case. Id. at 496.
107. Id. at 495. The Court cited NRWC for the proposition that “[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals.” Id.
108. Id. at 495-96.
109. Id.
Justice White\textsuperscript{110} dissented on the grounds that the statute was supported by compelling public interests such as but not limited to the need to avoid real or apparent political corruption.\textsuperscript{111} Congress acted reasonably, Justice White said, in believing that PACs have significant contact with candidates such that the threat of corruption is not eliminated when contributions take the form of independent expenditures.\textsuperscript{112} Other government interests that Justice White believed were served by the legislation included maintaining public confidence in the integrity of federal elections, equalizing the resources available to candidates, holding down overall campaign costs, and reinforcing the legislative limits on direct campaign contributions.\textsuperscript{113}

What are the implications of \textit{NRWC} and \textit{NCPAC} on corporate political expenditures in ballot issue campaigns? In these decisions, the Court drew a distinction between political spending by business corporations as opposed to other political groups. In \textit{NRWC}, the Court held that corporate political spending could be restricted to protect dissenting shareholders and to prevent unfair advantages resulting from corporate wealth. The \textit{NCPAC} decision focused on the associational rights of individual PAC contributors to engage in political advocacy. In these two cases, the Court recognized that shareholders of a business corporation invest not for political reasons, but for profit motives. The Court had begun to perceive business corporations, with their state-granted advantages, as a danger to the political process.

C. \textit{Pacific Gas & Electric Co. v. Public Utilities Commission}

One year after \textit{NCPAC}, in 1986, the Supreme Court decided two cases with very different implications regarding corporate political speech. In the first, \textit{Pacific Gas & Electric Co. v. Public Utilities Commission},\textsuperscript{114} a plurality of the Court\textsuperscript{115} appeared for the first time to

\begin{itemize}
  \item \textsuperscript{110} Justices Marshall and Brennan also dissented, with Justice Marshall indicating that he no longer supported the constitutional distinction set forth in \textit{Buckley} between political expenditures and contributions. \textit{Id.} at 521.
  \item \textsuperscript{111} \textit{Id.} at 508.
  \item \textsuperscript{112} \textit{Id.} at 509.
  \item \textsuperscript{113} \textit{Id.} Justice White also noted that although the Court never identified whose first amendment rights it was protecting, it appeared to emphasize the associational rights of PAC contributors. \textit{Id.} at 512-13. But, according to the Court's decision in \textit{California Medical Association v. FEC}, 453 U.S. 182 (1981), PAC contributors do not engage in direct speech; they are merely giving money to an organization. Justice White pointed out that the Court in \textit{California Medical Association} characterized PAC donations as speech by proxy, undeserving of full first amendment protection. FEC v. \textit{National Conservative Political Action Comm.}, 470 U.S. 480, 512-14 (1985).
  \item \textsuperscript{115} Justice Powell's opinion was joined by Chief Justice Burger and Justices Brennan
recognize a first amendment right belonging directly to business corporations. Justice Powell, writing for a majority of the participating Justices, analogized a corporate newsletter to the institutional press, finding the newsletter completely protected by the first amendment despite its corporate source. Unlike his reasoning in Bellotti, Justice Powell did not invoke the first amendment rights of the audience in order to conclude that the newsletter rose to the level of constitutionally protected speech.

For sixty-two years, Pacific Gas & Electric (PG&E) had distributed a newsletter to its customers in the same envelope as its billing statements. A consumer interest group, Toward Utility Rate Normalization (TURN), asked the state utilities commission to forbid PG&E from including political editorials in its newsletter on the grounds that the ratepayers were being forced to subsidize the utility's political speech. Instead, the commission allocated the space to TURN four times a year for two years, to use for whatever purposes it desired.

The Court was unable to agree on an opinion; however, a majority of the eight participating Justices agreed that the order violated PG&E's first amendment rights. Because the order awarded access to PG&E's billing envelopes only to those groups that opposed PG&E's policies, Justice Powell said it created a burden on PG&E's protected expression. Although PG&E had no right to be free from opposing viewpoints, the plurality thought PG&E should not be forced to assist in disseminating those views. PG&E had a right, Justice Powell said, to be free from government restrictions that abridge its own

and O'Connor. Justice Marshall concurred in the judgment but wrote a separate opinion. Id.


118. The newsletter routinely contained political editorials, energy conservation tips, human interest features, and information about utility services and charges. Id. at 5.

119. TURN was required to include a disclaimer on its inserts stating that they did not come from PG&E. Furthermore, the Commission reserved the right to grant access to the envelopes to other groups in the future. Id. at 7.

rights in order to 'enhance the relative voice' of its opponents.'121

Justice Rehnquist, joined by Justices White and Stevens as to his first point, had two main objections to the plurality opinion. First, he said that any deterrent effect on PG&E's speech because of the right of access granted to TURN was both remote and speculative.122 His second objection to the Court's decision centered on PG&E's corporate nature. Justice Rehnquist postulated that negative free speech rights are part of an individual's freedom of conscience; they are recognized as part of each individual's interest in self-expression and should not, therefore, be extended to corporations.123

Justice Stevens also dissented from the Court's decision, viewing the order as a permissible state regulation of commercial speech.124 Because PG&E's messages were intended to advance the corporation's commercial interests, whether by political or other means, Justice Stevens said the commission was authorized to require PG&E to include public interest group messages in its billing envelopes as long as such messages were reasonably related to the purpose of the billing statements.125

Pacific Gas & Electric differs from previous corporate speech cases because the plurality opinion focuses on the free speech rights of the corporation, rather than those of the listener. However, Pacific Gas & Electric did not involve corporate political contributions or expenditures, and falls instead within the realm of the Court's compelled expression cases, an area where the Court's reasoning has been described as "neither consistent nor adequate."126

D. FEC v. Massachusetts Citizens for Life

In the second 1986 case, FEC v. Massachusetts Citizens for Life (MCFL),127 the Supreme Court underwent a striking change in its definition of political corruption that is sufficient to justify political spending limits, expanding it to include more than just the quid pro quo arrangements identified in NCPAC and Buckley.128 In an opinion by Justice Brennan, the Court in MCFL held five to four that the pro-

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122. Id. at 30 (Rehnquist, J., dissenting).
123. "To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality." Id. at 33.
124. Id. at 36 (Stevens, J., dissenting).
125. Id. at 38-39.
128. This marked change in rationale prompted one commentator to write that "[t]he implication in Bellotti that spending on referenda or initiatives could not be prohibited absent a showing of imminent danger to the democratic process has been abandoned by the Supreme Court." Garrison, supra note 91, at 201.
hibition on direct corporate candidate contributions in FECA section 441b violated the first amendment when applied to a nonprofit, issue-oriented corporation. The decision clearly implied that section 441b was constitutional with respect to for-profit corporations.

In analyzing whether the burden on political speech imposed by section 441b as applied to the defendant corporation (MCFL) could be justified by a compelling state interest, the Court explained that government regulation of corporate political activity was proper to protect the marketplace of political ideas. Direct corporate spending on election matters would not reflect popular support for ideas, but rather the economic decisions of consumers and shareholders. Although the majority admitted that free political trade in ideas does not mean that all participants must have exactly equal resources, it said that government regulation of corporate expenditures is permissible to eliminate the "corruption" described as the "unfair deployment of wealth for political purposes." While still purporting to rely on the elimination of "corruption" as the rationale for section 441b, the Court in effect changed its Bellotti definition of corruption from the exchange of money for political favors to the elimination of "unfair advantage" in the political marketplace and opened the door to the notion that equalization of speech is permissible under the first amendment.

Because MCFL's corporate purpose involved the dissemination of ideas rather than the amassing of capital, the Court determined that the corporation posed no danger of this new type of political corruption. And although the Court recognized the importance of protecting shareholders from subsidizing speech they might not support with respect to business corporations, it noted that this rationale also did not apply to MCFL. Any contributor who disagreed with MCFL's particular expenditures, the Court said, could simply refuse to make further donations.

Based on this analysis, the Court created an exception to section 441b for nonprofit, ideological corporations that (1) are formed for political purposes and cannot engage in business activities; (2) have no shareholders or members with a claim on corporate assets or earnings; and (3) are not established by business corporations or unions and do...

130. Id. at 257.
131. Id. at 258.
132. Id. at 259. Corporate political expenditures financed through segregated funds made up of voluntary contributions, on the other hand, were not seen as involving this type of corruption because, in the Court's view, these funds more accurately reflect popular support for political positions. Id. at 258.
133. Citizens had no shareholders, but only "contributors" who the Court felt were fully aware of Citizens' political purposes. Id. at 260-61.
134. Id. at 261.
not accept contributions from either.\textsuperscript{135}

The dissenters, Chief Justice Rehnquist, along with Justices White, Blackmun, and Stevens, felt that "special advantages" granted by the states to nonprofit as well as for-profit corporations warranted restricting all corporate political activity.\textsuperscript{136} But despite their disagreement regarding the result in \textit{MCFL}, the dissenters had actually won the day. The majority opinion had adopted both Justice White's expanded version of political corruption and Chief Justice Rehnquist's rationale that corporations, as creatures of the state, could be subjected to increased regulation.

\textbf{E. \textit{Austin v. Michigan Chamber of Commerce}}

In 1990 the Supreme Court answered the question it left open in \textit{NCPAC}: whether a corporation's independent expenditures benefiting a candidate could be limited. In \textit{Austin v. Michigan Chamber of Commerce}\textsuperscript{137} the Court upheld a Michigan statute prohibiting corporations from making such independent expenditures from its general treasury funds.

In 1985, the Michigan Chamber of Commerce challenged section 54(1) of the Michigan Finance Act\textsuperscript{138} after the Chamber attempted to purchase with general treasury funds a newspaper advertisement supporting a particular candidate to the Michigan House of Representatives. In an opinion by Justice Marshall, the Supreme Court held six to three that the Finance Act did not violate either the first or the fourteenth amendments. Making a perfunctory reference to \textit{Bellotti} for the proposition that the Chamber's incorporated status would not automatically remove its speech from the protection of the first amendment,\textsuperscript{139} the Court began by affirming that the state had a compelling interest in regulating corporations' political expenditures in order to avoid corruption or the appearance of corruption.\textsuperscript{140}

However, Justice Marshall made clear that corruption now meant something more than the quid pro quo arrangements described as the "hallmark of corruption" in \textit{NCPAC}.\textsuperscript{141} Because state law grants corporations "special advantages"\textsuperscript{142} that allow corporations to be both profitable and powerful, the Court said the state is justified in restrict-

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.} at 264.
  \item \textsuperscript{136} \textit{Id.} at 268-69.
  \item \textsuperscript{137} \textit{Austin v. Michigan Chamber of Commerce}, 110 S. Ct. 1391 (1990).
  \item \textsuperscript{138} \textit{Mich. Comp. Laws} § 169.254 (1979).
  \item \textsuperscript{139} \textit{Austin v. Michigan Chamber of Commerce}, 110 S. Ct. 1391, 1396 (1990).
  \item \textsuperscript{140} \textit{Id.} at 1397.
  \item \textsuperscript{141} \textit{FEC v. National Conservative Political Action Comm.}, 470 U.S. 480, 497 (1985).
  \item \textsuperscript{142} \textit{Austin v. Michigan Chamber of Commerce}, 110 S. Ct. 1391, 1397 (1990). The advantages listed by the Court included limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. \textit{Id.}.
\end{itemize}
ing corporate political spending in order to eliminate "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."\textsuperscript{143} In \textit{Austin}, the political corruption to be prevented is the possibility that corporations may use their vast resources to corrode and distort the political process.

The Court had no trouble finding that the Finance Act was narrowly tailored to eliminate the distortion caused by corporate spending because corporations could still make independent political expenditures in support of a candidate through the use of segregated funds.\textsuperscript{144} According to the Court, the Finance Act's segregated fund provision ensured that political expenditures made by corporations reflected actual public support for political ideas advanced by such corporations.\textsuperscript{145} And the fact that not all corporations possess "vast resources" also failed to concern the Court. The statute was not underinclusive, the Court said, because all corporations, large or small, profitable or not, receive the benefits of corporate structure and therefore have the potential for distorting the political process.\textsuperscript{146}

Neither did the Court find the statute overinclusive for applying to nonprofit corporations such as the Chamber. In so deciding, the Court distinguished the Chamber from the purely ideological antiabortion organization involved in \textit{MCFL} in three ways. First, the Court noted that the Chamber engaged in nonpolitical activities and had more varied purposes including some which were not inherently political.\textsuperscript{147} Second, although the Chamber lacked shareholders, the Court found that many of its members would be reluctant to give up their membership even if they opposed the proposed advertisement.\textsuperscript{148} Therefore, the Court described the Chamber's members as more like shareholders of a business corporation than the members of a purely political group. Finally, the Court noted that the Chamber was obviously not free from the influence of business corporations because most of its members were for-profit corporations.\textsuperscript{149} If the Chamber were to be excluded from the Finance Act, the Court said that busi-

\textsuperscript{143.} \textit{Id.}
\textsuperscript{144.} \textit{Id.} at 1398.
\textsuperscript{145.} \textit{Id.}
\textsuperscript{146.} "[W]e accept Congress' judgment that it is the potential for such influence that demands regulation." \textit{Id.} (emphasis in original).
\textsuperscript{147.} \textit{Id.} at 1399.
\textsuperscript{148.} The Court believed that members who disagreed with the Chamber's political views might retain their memberships in order to maintain business contacts or to participate in the Chamber's educational activities. \textit{Id.}
\textsuperscript{149.} Approximately three-fourths of the Chamber's members were business corporations. \textit{Id.} at 1400.
ness corporations could in effect escape the Finance Act's provisions by funneling money through the Chamber's general treasury.\textsuperscript{150}

By agreeing that the state was justified in regulating only corporations (and not unincorporated associations such as labor unions) because of the legal advantages given by state law only to corporations, the Court was able to dispose of the Chamber’s equal protection argument.\textsuperscript{151} Furthermore, the Court held that the Finance Act’s media exemption was permissible under the fourteenth amendment because it protected the press’ unique societal role and ensured that the Finance Act did not prevent stories and editorials about newsworthy events.\textsuperscript{152}

Justice Brennan’s concurring opinion emphasized that the Finance Act served a distinct state interest by preventing business corporations from forcing shareholders to subsidize political speech with which they disagree.\textsuperscript{153}

Justice Stevens also wrote a brief concurring opinion stating that the danger of actual or apparent corruption of elected officials provided an adequate justification for state regulation of corporate participation in candidate elections.\textsuperscript{154} Justice Stevens, however, did not necessarily intend for the decision’s rationale to be extended to the referendum or initiative context.

Justice Scalia wrote a scathing, lengthy dissent in which he objected both to the Court’s new definition of corruption and to the notion that equalization of speech is permissible under the first amendment. He agreed with the Court that certain uses of “massive wealth” in the electoral process pose a possibility of corruption that would justify regulation of speech. Indeed, when money is given directly to a candidate, Scalia said that such a danger exists—the risk of the quid pro quo arrangements outlawed in \textit{Buckley}.\textsuperscript{155} But here, Justice Scalia said, the Court has redefined corruption to mean any potential “corrosive” influence of corporate wealth.\textsuperscript{156} By requiring that corporate political expenditures reflect actual public support for the political ideas expressed, Justice Scalia said the Court has adopted the

\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 1401.
\textsuperscript{152} \textit{Id.} at 1401-02.
\textsuperscript{153} “[T]he statute merely requires those corporations wishing to make independent expenditures in support of candidates to do so through segregated funds or political action committees (PACs) rather than directly from the corporate treasur-ies.” \textit{Id.} at 1402.
\textsuperscript{154} Justice Stevens cited \textit{Bellotti} to emphasize “there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.” \textit{Id.} at 1407. In other words, Stevens agreed with the Court’s decision because it was a candidate election case.
\textsuperscript{155} \textit{Id.} at 1409-10.
\textsuperscript{156} \textit{Id.} at 1411.
"equalizing" approach to political expenditures that was specifically rejected by the Court in *Buckley*.157

In response to Justice Brennan's concern for the protection of shareholders, Justice Scalia argued that the Finance Act actually protected political candidates more than it did dissenting shareholders.158 The Finance Act permitted corporations to take as many ideological and political positions as they pleased, so long as they were not "in assistance of, or in opposition to, the nomination or election of a candidate."159 Furthermore, Justice Scalia asserted that even if the Finance Act *did* protect shareholders, that would not be a sufficient compelling need to support the resulting restriction on political speech.160 Shareholders invest in corporations to make a profit, and they know that management may make some decisions to which they are ideologically opposed in pursuit of that profit. Shareholders are adequately protected either by selling their stock or by their ability to organize and oppose such actions, Justice Scalia said.161

Finally, Justice Scalia maintained that the Finance Act's exception for media corporations could not be justified by the Court's rationale of preventing disproportionate expression of political views.162 Media corporations, he asserted, have both greater power and greater opportunity to overinform. Therefore, the unique societal role of the press mentioned by the Court actually provides an especially strong reason to include it, rather than exclude it, from the Finance Act.163

Justice Kennedy also wrote a dissenting opinion, which was joined by Justices Scalia and O'Connor, in which he objected to the Court's decision because it upheld a direct restriction on the independent expenditure of funds for political speech.164 He noted that Michigan admitted, apparently during oral argument, that among those communications prohibited by the Finance Act were the publication by a nonprofit corporation of its own assessment of a candidate's voting record. "[I]t is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union, or the Michigan State Chamber of Commerce, to advise the public how a candidate voted on issues of urgent concern to their members."165

157. *Id.* at 1411. Justice Scalia boiled the Court's rationale down to the following statement: "Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns." *Id.* at 1416.

158. *Id.* at 1412.

159. *Id.* at 1411.

160. *Id.* at 1412.

161. *Id.*

162. *Id.* at 1414.

163. *Id.*

164. *Id.* at 1416.

165. *Id.* at 1418. However, assuming that it is independent from the influence of busi-
After *Austin*, what is the status of corporate political speech in the initiative or referendum context? Although *Austin* involved a candidate election rather than a ballot issue campaign, the Court in effect discarded the *Bellotti* rationale by redefining "corruption" as the "corrosion" resulting from the impact of corporate wealth in the political process. Additionally, the Court in *Austin* accepted the very government interests rejected in *Bellotti* as justifications for limits on corporate speech, conceiving of corporations as "state-created" entities subject to unlimited state regulation. Furthermore, the *Austin* Court upheld an expenditure limit, without expressing any concern for the *Buckley* distinction between expenditures and contributions. Should the question of whether corporations have a first amendment right to participate in ballot issue campaigns come before the Court again, the *Bellotti* decision could be overruled. Therefore, it is crucial to ask whether *Bellotti* in fact should be overruled.

V. ARE CORPORATIONS "PERSONS"?

One fundamental criticism of the *Bellotti* decision is that it assumes that corporations are "persons" entitled to the protection of the Bill of Rights.166 In fact, corporations are never mentioned in the Constitution or the Bill of Rights; these documents speak only of "persons" and "citizens." How, then, can constitutional rights that appear to belong only to individuals be asserted by corporations?

In determining questions of corporate constitutional rights, the Supreme Court has used at least three competing theories of the corporation—the "artificial entity" theory, the "association" theory, and the "person" theory.167 It is important to understand these theories and how they developed because the choice of theory espoused by the Court has consistently determined whether corporations are considered to be entitled to the constitutional right at issue. In first amendment cases, the Court is returning to the artificial entity view of the corporation. This trend has serious implications for the legal status of corporate political speech.

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167. These are the names by which I refer to the three theories. Other authors use different names. For example, Sanford Schane calls the first theory the "creature" theory and the second one the "group" theory. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 51 TUL. L. RSV. 563, 564 (1987). Morton Horwitz refers to the third one as the "real entity" theory. See Horwitz, *infra* note 179.
A. Artificial Entity Theory

Which came first, the corporation or the law? The artificial entity theory of the corporation, which had its origins in republican and imperial Rome and the medieval Church, would answer "the law." According to this theory, an overt act of the government was required to create a legal corporation. Corporations were mere artificial beings, originating from and dependent on the will of the civil or religious authority. Although legal scholars tend to believe that the converse was true—that corporations preexisted the law—the artificial entity notion was politically useful to the Roman state, the Church and, later, the British Crown, in bringing corporations under the government's control.

Although by 1628 the law in England was firmly settled that a corporation could not be created except by an act of the Crown, American legislatures and courts did not devise rules or policies about business corporations until the end of the eighteenth century. Business corporations were scarce in America before 1780; at the time the Constitution was drafted, only twenty-six domestic corporations existed. After 1790, however, use of the corporate form expanded at an unprecedented rate. Businesses turned to incorporation for practical purposes; the corporate form proved to be an efficient organizational structure for raising and concentrating capital.

Along with this explosion in demand for corporate charters, American corporation law developed in light of American experience with little reference to the law of England. The only distinct borrowing from English common law with regard to corporations was the notion that corporations were created by special state privilege to pursue a public purpose. At the time, this theory made sense. Incorporation was effected by special charters that were granted by state legislatures on a one-at-a-time basis. Most incorporated organizations served some state function, such as road building or banking, rather than general business purposes.

170. HURST, supra note 168, at 3, 7.
171. Prentice, supra note 8, at 602 n.17.
172. Whereas only 335 corporate charters were issued to American businesses in the entire eighteenth century, 181 were granted in the four years between 1796 and 1800. In Pennsylvania alone, 2333 special charters were issued to business enterprises from 1790 to 1850. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 189 (2d ed. 1985).
173. HURST, supra note 168, at 14, 19.
174. Id. at 8-9, 15.
175. For example, more than half of the special charters granted from 1780 to 1801
Furthermore, in the early nineteenth century, incorporation was frequently accompanied by state-granted special action franchises allowing the grantee to pursue some activity denied to the general population.\textsuperscript{176} At the time, these monopoly rights were seen as necessary for economic development. Additionally, subsidies were often awarded to corporations in order to encourage industrial expansion in the new nation and to protect enterprises that might otherwise prove too risky to undertake.\textsuperscript{177} In return for these special favors, the state had the right to strictly regulate corporate activity, and even required profit sharing in some instances.\textsuperscript{178}

This state regulation and participation in corporate activity was accomplished not primarily, as today, through regulatory legislation but rather through provisions of special charters.\textsuperscript{179} This led to development of the ultra vires doctrine, which provides that a corporation cannot act beyond the powers granted to it in the corporate charter.\textsuperscript{180} Strict construction of corporate charters reinforced the notion that incorporation was a special privilege granted by the state’s largess.\textsuperscript{181}

The artificial entity theory of the corporation, then, was the dominant American view of corporations in the eighteenth and early nineteenth centuries. The theory was used, and is still used, to limit corporate power.

B. Association Theory

Although the special charter system, including strict construction of charter provisions, was meant in theory to subject corporations to meaningful state control, in practice it proved ineffective.\textsuperscript{182} State legislatures were deluged with requests for special charters and could not spare the time either to draft each individually or to supervise those

\begin{itemize}
\item were for transport enterprises, 20\% were for banks or insurance companies, 10\% were for local public services, while less than 4\% were for general business corporations. \textit{Id.} at 17.
\item Id. at 33.
\item Hovenkamp, \textit{The Classical Corporation in American Legal Thought}, 76 GEO. L.J. 1593, 1635 (1988).
\item FRIEDMAN, supra note 172, at 192.
\item Id. at 186-87.
\end{itemize}

181. The most famous expression of the artificial entity theory was made by Chief Justice Marshall in \textit{Dartmouth College v. Woodward}:

\begin{quote}
A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. \textit{Dartmouth College v. Woodward}, 17 U.S. (4 Wheat) 518, 636 (1819).
\end{quote}

182. FRIEDMAN, supra note 172, at 190.
that had been already granted. By the 1840s, state legislatures were awarding special charters by rote, and variations in charter provisions began to disappear. At the same time, Jacksonian Democrats began to call for “free incorporation” and an end to the system of special charters and state subsidies. Although the Jacksonians did not object to the corporate form itself, they viewed the special charter system as undemocratically favoring the wealthy. In response, state legislatures began to enact general incorporation statutes in the 1840s and 1850s, making the ability to incorporate available to anyone and providing standard charter provisions. Additionally, courts began overturning public subsidies to business corporations on the grounds that state legislatures could tax only for a “public use” and that public use could not be inferred solely from corporate status.

Both the demise of the special charter system and the decline of public subsidies contradicted the notion that corporations derived their powers from the state. General incorporation laws made incorporation a cheap and easy standard procedure as opposed to a state-awarded privilege. The artificial entity theory of the corporation could no longer justify state regulation of corporate activities. Hoping to expand corporate rights, several members of the New York corporate bar proposed the association theory of the corporation in the 1880s.

According to the association theory, corporations received their powers not from the state, but rather from their individual shareholders. Proponents of the association theory viewed the corporation as an association of individuals—in essence, as a partnership. In particular, some of the association theory’s supporters were concerned with establishing a corporate right to hold property. By making the corporation’s rights simply an aggregate of its shareholders’ rights, the private nature of corporate property could be adequately protected.

In Santa Clara Co. v. Southern Pacific Railroad, the Supreme Court affirmed in a terse, one sentence holding that corporations qualify as “persons” under the fourteenth amendment. Although Santa Clara has been cited as an example of the “person” theory of the cor-

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183. Id.
184. Id. at 190-91.
185. Hovenkamp, supra note 177, at 1634-35.
186. Id. Furthermore, a public furor arose when a large number of subsidies were given to ventures that ultimately failed. Id. at 1635.
187. Id. at 1636.
188. Id.
190. Horwitz, supra note 179, at 184.
191. Mark, supra note 189, at 1458.
192. 118 U.S. 394 (1886).
poration, that theory did not actually appear in legal thinking for another decade. According to commentators, the Supreme Court in *Santa Clara* was simply applying the association theory that corporate property was protected under the fourteenth amendment as property of the shareholders.\textsuperscript{193}

Although the association theory provided a useful justification for protecting corporate property, it soon became obvious that the partnership analogy could be stretched only so far. For one thing, the association theory threatened the doctrine of limited shareholder liability. If shareholders were compared to partners, they logically should have been liable for corporate debts to the full extent of their property beyond their interest in the corporation.\textsuperscript{194} Furthermore, by treating corporate property as the property of individual shareholders, the association theory assumed that shareholders exercised control over the corporation. This assumption was the theory's fatal flaw. During the 1890s, the fundamental nature of the shareholder/corporation relationship had changed, and it could no longer be asserted that the corporation owed its success to its shareholders.\textsuperscript{195}

One change had to do with statutory rules regarding internal corporate governance. Although the association theory required unanimous shareholder consent to corporate sales of assets and other major corporate changes, the unanimous consent rule made corporate mergers practically impossible. As a result, state legislatures in the 1890s began changing their laws to provide for majority rule in corporate affairs.\textsuperscript{196}

It had become obvious that management wielded the real power over corporate activities, despite the association theory's premise that directors were subordinate to shareholders. In reality, shareholders had little say over the operations of the business; their role was limited to that of passive investor. Individual shareholders could neither use corporate property as their own nor dissolve the corporate entity, and their limited liability for corporate debts resulted in limited participation in corporate affairs.\textsuperscript{197} In order to reflect the de facto separation between corporate ownership and control, the law developed a third theory of corporate personality, the "person" theory.

C. Person Theory

Philosophical questions about the nature of corporations had fascinated German and French political thinkers during the nineteenth

\textsuperscript{193} See, e.g., Horwitz, *supra* note 179, at 178; Hovenkamp, *supra* note 185, at 1642; Mark, *supra* note 189, at 1463.

\textsuperscript{194} Horwitz, *supra* note 179, at 185.

\textsuperscript{195} Mark, *supra* note 189, at 1465.

\textsuperscript{196} Horwitz, *supra* note 179, at 201-02.

\textsuperscript{197} Mark, *supra* note 189, at 1474.
century. Otto von Gierke, in particular, advanced the idea that groups (and, therefore, corporations) are natural extensions of human society. Corporations, Gierke said, are not just artificial creations derived from law, but rather legitimate entities that exist regardless of and separate from the law's recognition. In other words, corporations are as "real" and "natural" as any person and exist independently of their shareholders and the state. Gierke's work was introduced to English and American scholars in 1900 by Frederic Maitland, who agreed that corporations deserve as much judicial recognition as natural persons.

By the end of the nineteenth century, incorporation was no longer a state privilege and had become the primary means of American business enterprise. New business needs demanded a new legal approach to corporations. While the artificial entity theory restricted economic growth by limiting the formation of new companies, the association theory failed to recognize the facts of corporate decision making. In contrast, the person theory more accurately described corporate realities, as well as legitimated corporate autonomy.

Because the corporation under the person theory existed independently of its shareholders, its membership could change without destroying the corporation. Furthermore, shareholder unanimity would no longer be required for corporate mergers. Because a corporation could hold property and incur debts in its own name, it followed that shareholders would assume only limited responsibility for the company's liabilities. Because the corporation was viewed as a person, it had the ability to delegate authority to its officers and directors, who served as corporate agents. And because corporate officers and directors then became the appropriate parties to assert the corporation's rights, the shareholders lacked standing to participate in litigation involving the corporation.

Nineteenth century decisions of the Supreme Court mirrored the complexity of the corporate personality question by reflecting all three competing theories of the corporation. In general, the artificial

198. Maitland, Introduction to O. Gierke, Political Theories of the Middle Age at xviii-xliii (1987).
199. Id. at xxv-xxvi.
200. Horwitz, supra note 179, at 179.
201. Id. at 180.
202. Mark, supra note 189, at 1470.
203. Schane, supra note 167, at 568.
204. Horwitz, supra note 179, at 202.
205. Schane, supra note 167, at 568.
206. This final rationale for the eventual adoption of the person theory by the federal courts is emphasized by Hovenkamp, who stated, "[t]he thought that every shareholder could challenge a rate regulation as confiscatory would make any federal judge shudder." Hovenkamp, supra note 177, at 1643.
entity theory was used to deny corporate rights, and the person theory was used to grant them.207

According to Morton Horwitz,208 the first Supreme Court decision to fully embrace the person theory of the corporation was the 1905 case of *Hale v. Henkel*,209 in which the Court granted corporations fourth amendment protection against unreasonable searches and seizures. The Court remained hesitant to adopt wholeheartedly a new concept of the corporation, as evidenced by its refusal in the same case to grant corporations the fifth amendment privilege against self-incrimination. By the early twentieth century, however, the person theory of the corporation had prevailed in American jurisprudence.210

D. Corporate Speech and Theories of Corporate Personality

These theories of corporate personality relate to the question of corporate rights to political speech under the first amendment in three significant ways. First, the Court has used the different theories of corporate personality to justify seemingly disparate results regarding corporate constitutional rights. For example, by the time the Supreme Court granted first amendment protection to corporate political speech in *Bellotti*, it had already considered the first amendment rights of unincorporated associations, newspaper corporations, and labor unions. In these cases, the Court used the artificial entity theory to deny corporate first amendment rights and the person theory to grant them.211

Second, it is important to understand that despite the criticism of *Bellotti* that corporations are not persons and should not be treated as such for purposes of the first amendment, *Bellotti* was not decided


208. Horwitz, supra note 179, at 182.

209. 201 U.S. 43 (1905).


211. For example, in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court used the person theory to grant a newspaper corporation a first amendment right to sell advertisements without interference by the state. The Court relied on precedents holding that corporations are "persons" under the fourteenth amendment and held that the liberty clause of that amendment prohibited states from interfering with the newspaper corporation's first amendment rights. Id. at 244.

The Court's reasoning in *Grosjean*, however, directly conflicted with its earlier holding in Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906), where the Court had specifically denied that a corporation was entitled to liberty rights under the fourteenth amendment, saying that the due process clause of that amendment protected only the property interests of corporations. Id. at 255.

In 1939, three years after *Grosjean*, the Court relied on *Riggs* to deny first amendment rights to several unincorporated labor unions and one nonmedia corporation (the ACLU) in Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).
pursuant to the person theory of the corporation. Justice Powell, in his majority opinion, emphasized that the Court was not holding that corporations have first amendment rights, but rather that listeners have first amendment rights to hear political ideas.\(^\text{212}\) In fact, Carl Mayer has persuasively argued that after 1960, the Court stopped relying on theories of corporate personality and instead took a pragmatic approach to intangible corporate rights that Mayer calls "constitutional operationalism".\(^\text{213}\)

Under that pragmatic view, instead of looking to the characteristics of the corporation to determine whether it should be accorded a particular constitutional right, Mayer believes that the Court looks to the underlying purpose of the amendment in question. For example, in Bellotti, Mayer contends that the Court saw the fundamental purpose of the first amendment to be the development of a free market of ideas. To serve that paramount purpose, the Court had to grant first amendment rights to corporations.\(^\text{214}\)

Finally, and most critically, an understanding of the theories of corporate personality is necessary to grasp the implications of Justice Rehnquist's resurrection of the artificial entity theory in recent Court decisions. In his Bellotti dissent, Justice Rehnquist argued that corporations are no more than artificial creations of the state, entitled only to property rights under the fourteenth amendment. Therefore, he said, corporations have no liberty right of political expression.\(^\text{215}\) Again in his Central Hudson dissent, Rehnquist asserted that corporations, which exist only through state law, could be subjected to stringent state control.\(^\text{216}\) In a major shift away from the Bellotti rationale, the Supreme Court has adopted Justice Rehnquist's characterization of corporations as creatures of the state in the NRWC,\(^\text{217}\) NCPAC,\(^\text{218}\) and Austin\(^\text{219}\) decisions.

In MCFL, the Court specifically singled out business corporations as the recipients of the bulk of these state law advantages.\(^\text{220}\) By em-

\(^{212}\) See supra text accompanying note 55.

\(^{213}\) Mayer, supra note 11, at 650.

\(^{214}\) Id. at 633-34. The language of Bellotti supports Mayer's position. For example, Justice Powell stated that "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history and purpose of the particular constitutional provision." Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

\(^{215}\) Id. at 824-26 (Rehnquist, J., dissenting).


\(^{220}\) In a footnote to that decision, Justice Brennan wrote that "[w]hile business corpo-
ploying the rhetoric of the artificial entity theory, the Court has laid the groundwork from which *Bellotti* could be overruled and first amendment protection could be denied to the political speech of business corporations, while still granting protected status for the speech of other powerful organizations such as media and ideological corporations, and unincorporated associations.

VI. DOES CORPORATE POLITICAL SPEECH VIOLATE THE RIGHTS OF DISSenting SHAREHOLDERS?

A second criticism of *Bellotti* claims that allowing corporations to engage in political speech necessarily violates the first amendment rights of corporate shareholders who disagree with the positions taken by corporate management. Under this view, corporate speech does no more than amplify management's position with funds actually belonging to shareholders and, therefore, is undeserving of first amendment protection. Managers and shareholders of corporations, it is claimed, have adequate ability to advocate political views in their individual capacities with their individual funds.

Justice White raised this argument in his dissenting opinion in *Bellotti*, where he concluded that the state should be allowed to prohibit officers and directors from using corporate funds to promote ideas "necessarily representing their own personal views about political and social questions." By comparing shareholders with union members, Justice White relied on a line of Supreme Court cases holding that the state can require labor unions to procure the express consent of their membership before using union dues for political purposes.

On the other side of the argument, commentators who agree with the *Bellotti* result point out that dissenting shareholders have more viable remedies to protest ideologically repugnant speech than do union members. Shareholders can sell their shares or, at least theo-
retically, vote out the current directors, whereas union members cannot resign their union membership without suffering a loss of employment. This presupposes, of course, that shareholders are both aware and concerned about corporate political expenditures.\textsuperscript{226}

Another argument against the need to protect the speech rights of dissenting shareholders focuses on the realities of corporate structure. The procedures of corporate governance forbid investors from dictating to management about most corporate decisions, outside of their ability to vote their shares. But why should communication by management be viewed as more repugnant than other types of decision-making by management? Dissenting shareholders might just as well object to certain corporate business practices, or to the content of corporate advertising campaigns. Taken to its logical extreme, the protection of minority shareholders would require a total redesign of the corporation.

The majority in \textit{Bellotti} did not specifically reject the protection of minority shareholders as a permissible state objective; rather, it held that the Massachusetts statute in question failed to do so by reason of being both over- and underinclusive.\textsuperscript{227} However, the protection of minority shareholders reemerged as a legitimate state interest sufficient to justify government regulation of corporate political expression in the cases of \textit{NRWC, MCFL}, and \textit{Austin}. For example, Justice Brennan's opinion in \textit{MCFL} specifically compared business corporations to unions, stating that because dissenting stockholders and union members "depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union."\textsuperscript{228}

And in the \textit{Austin} decision, despite Justice Scalia's forceful protest,\textsuperscript{229} the Supreme Court found that members of the Chamber were analogous to corporate shareholders, who might be disinclined to forgo a profitable investment in a business corporation just because

\textsuperscript{226} Although the "Wall Street Rule" enables investors to "vote with their feet," some believe it has little ultimate effect on management's activities. Schwartz, \textit{Corporate Governance}, in \textit{CORPORATIONS AND THEIR CRITICS} 225 (T. Bradshaw and D. Vogel eds. 1981). However, at least one analyst has concluded that management pursues organizational goals rather than personal ones when conducting corporate political activities. Prentice, \textit{supra} note 8, at 633-35.


\textsuperscript{228} Federal Election Comm'n \textit{v} Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260 (1986).

\textsuperscript{229} Scalia described it as "fanciful" to suggest that the Michigan statute at issue "makes any significant contribution towards insulating the exclusively profit-motivated shareholder from the rude world of politics and ideology." \textit{Austin v. Michigan Chamber of Commerce}, 110 S. Ct. 1391, 1412 (1990)(Scalia, J., dissenting).
they disagreed with the corporation's political speech. In effect, the Court said that shareholders should not be forced to choose between financing speech with which they disagree or relinquishing a profitable investment.

Advocates of shareholder rights hailed the Austin decision as empowering shareholders to influence management on decisions affecting their vital interests. However, the existence and importance of institutional investors should not be overlooked in evaluating the Court's newfound concern regarding shareholder protection. It has been estimated that institutional investors currently hold approximately sixty percent of all common stock in American corporations, and that percentage is growing. These institutional investors are taking a stronger role in corporate affairs by actively submitting shareholder proposals dealing with social and political issues.

If the majority of American stock is held by institutions, it makes little sense to talk about protecting the free speech rights of individual shareholders through prohibitions on corporate political speech. Title to securities in public pension funds, for example, is generally held by a single trustee who determines how to vote the shares based on advice from the board of directors of the fund. The real owners of the securities, the beneficiaries of the pension plans, do not make the decisions on how to vote the shares in the pension's portfolio. Therefore, in many cases, individual shareholders are not in a position to vote their shares at all. Although a complete ban on corporate political spending would certainly protect individual shareholders from endorsing political expression with which they disagree, it would also stifle corporate expression that individual shareholders may support or that might better serve their economic interests.

Rather than giving shareholders veto power over corporate political spending, a more logical way to protect shareholder interests might be to enact legislation requiring that shareholders be informed

230. Id. at 1399.
232. For example, insurance companies, banks, and pension funds.
234. During the 1985-86 proxy year, institutions presented 33 shareholder proposals to public companies under SEC rules; by 1988-89, the total number of institutional proposals had risen to 124. Id.
235. Id. at 14.
236. Any law restricting corporate political speech on the grounds of minority shareholder protection would have to prohibit all corporate political activity, including lobbying, in order to escape the charge of underinclusivity. Although corporate lobbying is subject to regulation under the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1988), such lobbying was recognized as legitimate by the Supreme Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). See Prentice, supra note 8, at 629-30.
of corporate political expenditures. Shareholders cannot exercise their existing rights under corporate procedures if they are not aware of the corporation's political activities. However, shareholders are generally not informed of corporate political advocacy and may find corporations unwilling to provide this information when they ask. Moreover, it is difficult for shareholders to obtain such information from state election commissions without having some reason to believe their company would have contributed to a certain campaign.

In response to the *Bellotti* decision, the Securities and Exchange Commission in 1980 issued a staff report recommending that the SEC require disclosure of corporate ballot issue expenditures in proxy materials or the annual report to shareholders. The recommendation took cognizance of the fact that dissenting shareholders can exercise their rights under corporate law only if they are informed of corporate political expenditures. After learning the size of the contributions being made, shareholders might question how the issue relates to the company's business.

Would such disclosure be effective? Without question, many investors simply do not care about the political activities of the corporations in which they hold stock. Furthermore, for the sixty percent of the American market controlled by institutional investors, individual fund participants would not even receive the disclosures. However, in recent years, increasing public apprehension about the social and environmental consequences of corporate activities has resulted in a class of investors who shun corporations they perceive as socially irresponsible. If the SEC mandates that information about corporations' political expenditures be made available through corporate annual re-

237. In 1978 and 1979, the Council on Economic Priorities queried 13 corporations about whether they told their shareholders about their extensive involvement in ballot issue campaigns. The Council also examined the companies' annual reports for those two years. Ten of the 13 corporations refused to respond to the questionnaire, and only one responded fully. The respondent stated that the company would inform shareholders of contributions to ballot questions upon request; however, it had never received such a request. Eight of the companies made no mention of their contributions in their annual reports, and even those that did neglected to specify the extent of their involvement. *Lydenberg, supra* note 15, at 35-37.

238. *Id.* at 35.


240. *Lydenberg, supra* note 15, at 34.

ports, it would appear that at least some of these concerned investors would be willing to bear the burden of locating and digesting such information.

Although the SEC has taken no public action on the disclosure recommendation, an SEC requirement for corporate disclosure to shareholders on contributions to ballot question campaigns could provide a way to protect shareholder rights without denying political expression to corporations. A disclosure requirement would keep investors and other special interest groups informed of corporate political expenditures and would provide a record for potential shareholders to examine before making investment decisions. Although a corporation's past political spending would not provide any guarantee regarding future spending, disclosure would ensure that shareholders could at least retroactively defend their interests. Furthermore, such a requirement would protect shareholder rights by requiring more speech, rather than by prohibiting it.

VII. DOES CORPORATE SPENDING RESULT IN UNDUE INFLUENCE IN BALLOT ISSUE CAMPAIGNS?

Many critics claim that the Bellotti decision has resulted in corporate dominance of the ballot issue process. According to this view, unlimited corporate spending squeezes out the voices of those individuals and groups that are less well financed. This power of the purse may distort and undermine the process of direct democracy, disillusioning voters who become less likely to participate in government.

In Bellotti, the Supreme Court admitted that corporate spending might influence referendum votes, but said that Massachusetts had failed to show any evidence or legislative findings indicating that corporate advocacy in a referendum would exert an undue influence on the election outcome. The Court's assumption that corporate financial dominance has no significant effect on the political process has


245. See Shockley, supra note 242, at 399-400.

been castigated as naive and has led commentators to speculate that if a direct, causal connection were shown between corporate spending and election results, the Court would be willing to reconsider the *Bellotti* decision. Since 1978 a number of studies have been conducted to determine whether corporate spending disproportionately affects the outcome in referendum campaigns.

A study of three 1976 Colorado ballot issues undertaken by the Media Access Project (MAP) found a strong correlation between voter behavior and overwhelming corporate spending opposing passage, which included corporate domination of television and radio advertising. All three initiatives were headed for victory according to pre-election polls but ended up being defeated. Citizens groups supporting passage did not have the financial wherewithal to compete with corporate interests and were, ultimately, unsuccessful.

Based on their findings, MAP investigators acknowledged that factors other than spending play a part in determining ballot election outcomes. These include media editorial positions, campaign organizational strength, initial popularity of the measure, complexity of the measure, perceived cost of the measure to taxpayers, and the position taken by opinion leaders. However, the study concluded that the corporate opponents used financial superiority to wage media campaigns, thereby reaching more voters than the other side.

In 1980, the Council on Economic Priorities (CEP) studied the impact of corporate spending on ballot issue campaigns held in twelve states. The study determined that although financial superiority does not guarantee victory in ballot issue campaigns, it does provide an apparent advantage. In the fourteen campaigns where corporate spending dominated, the CEP reported that business interests were successful eleven times (seventy-eight percent).

The study also learned that both state and local ballot issue cam-

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247. CRONIN, supra note 15, at 107; Easley, supra note 30, at 724; Hart & Shore, supra note 244, at 814.

248. Mastro, Costlow & Sanchez, supra note 29, at 318-19. It should be noted that MAP did not undertake the research with an objective point of view. MAP described itself as a nonprofit, nonpartisan public interest law firm that represented citizen groups and individuals concerned about “insuring that information in society flows freely without undue influence by corporate power.” Id. at 316 n.2.

249. Id. at 317.

250. Id. at 327 n.46.

251. Id. at 326-27.


253. Id. at 2. One of the three campaigns where the financial underdog won a ballot proposition involved a Montana initiative to ban nuclear waste disposal in the state. In that campaign, the antinuclear side was outspent 58-to-1, yet still emerged victorious. Id. at 40.
campaigns in which corporations participated were much costlier than those that did not involve corporate interests. Additionally, the business-backed side of ballot issue campaigns frequently tried to hide the presence of corporate funds in order to create an illusion of public support. For example, "citizens" committees that supported nuclear development in Maine, Missouri, and Oregon were actually funded with business dollars.

Finally, although the CEP noted that unions and other special interest groups occasionally dominate ballot issue spending, it concluded that corporations are generally more adept in raising money to finance ballot campaigns. Unions, the only other group having access to funds on a scale comparable to corporations, could not give huge, single contributions or mobilize support on a national scale the way corporations did.

In another study, Daniel Lowenstein analyzed twenty-five California ballot propositions in which significant one-sided spending occurred between 1968 and 1980. His aggregate data showed that one-sided spending in ballot issue campaigns is much more effective when it is used in opposition to a ballot proposal than in support of a measure—even when the proposal is a popular one. Lowenstein explained this result, which he called the "spending effectiveness phenomenon," by showing that the campaign messages distributed by the big spenders characteristically used deceit, distortion, and appeals to superficial or irrelevant topics.

254. Id. at 1, 5. This was attributed, at least in part, to the large amounts expended by individual corporations. For example, the Union Electric Company paid $1.15 million to oppose a Missouri initiative that would have delayed the opening of the state's first nuclear power plant, and a tobacco company spent $1.14 million to fight two local antismoking initiatives in California and Florida. Id. at 3-4.

255. Id. at 4.

256. Id. The committee against nuclear prohibition in Missouri, which referred to itself as a citizens committee with more than 25,000 individual members, received only $7373 of its $1,790,857 in contributions from unincorporated sources. Id. at 4-5.

257. Id. at 14.

258. Id. at 14-15.

259. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment. 29 UCLA L. REV. 505 (1982). He defined "one-sided" as spending that exceeded $250,000 and that was at least twice as high as expenditures on the other side of the issue. Id. at 511. He found spending disparities of as much as 37-to-1 in the ballot measures he studied. Id. at 520.

260. In the study, big spending was shown to be successful 16 times (64%) and unsuccessful nine times (36%). However, of the 10 propositions that were opposed by big spending, nine were defeated (90%). Of the 15 propositions supported by big spending, seven were successful (46%) and eight (54%) were defeated. Id. at 518.

261. Id. at 517. Lowenstein argued that these techniques were successful because it is easier to change the voters' perceptions of the consequences of a measure than it is to change their basic attitudes about the issues involved. Id. at 569-70.
Another analysis of California ballot initiatives confirmed Lowenstein's findings that although proponents cannot buy passage of an initiative by outspending the opposition, those who are opposed to a measure can "virtually guarantee" its defeat by engaging in disproportionate spending.262 David Magleby's California research project, which covered the years 1954 to 1982, revealed that in cases where initiative opponents were responsible for at least two-thirds or more of the total campaign expenditures, they defeated their opponents eighty-seven percent of the time.263 Magleby referred to groups such as organized labor, public utilities, tobacco companies, and glass and aluminum bottlers as big spenders in the initiatives studied, and he speculated that their high-spending strategies were probably prudent.264 A 1985 article by John Shockley cited two additional studies that support Lowenstein's spending effectiveness phenomenon. The first, a survey of 1980 and 1981 initiatives by analysts for the Initiative News Report, found that although one-sided spending had a success rate of sixty percent when supporting a measure, it won eighty-one percent of the time when it was on the opposing side.265 The second, a group of studies by Steven Lydenberg on ballot issues held in 1978 and 1979, as well as the 1980 CEP research discussed above, concluded that when the "corporate" side spent considerably more money to defeat ballot proposals than the proponents spent in favor of them, the corporate side won eighty-one percent of the time.266 Because the results of pre-election polls showed many of these measures ahead in popularity before the opposition spending began, Shockley concluded that big spending had effectively determined the outcome of the election.267

Finally, in a comparative study of major ballot questions in four states from 1976 to 1982, Betty Zisk concluded that "[t]he single most important finding in this study concerns the crucial role of

262. MAGLEBY, supra note 13, at 147.
263. Id.
264. "[O]ne loss could spawn a host of other ballot measures and give energy to legislative efforts at the local, state and even national levels." Id. at 193.
265. Shockley, supra note 242, at 394 n.67. However, where initiatives faced minimal spending, 71% of them were approved, and in those instances where roughly equal spending occurred, 60% were approved. Id.
266. Id. at 394.
267. Id. at 395. Although Shockley agreed that money is certainly significant in determining ballot proposition outcomes, he listed five other factors that are also influential: (1) how effectively available money is spent; (2) the depth and breadth of coalitions for and against particular ballot measures; (3) the complexity of the issues involved; (4) the ballot wording of initiative proposals; and (5) the placement of ballot issues on the ballot. However, Shockley emphasized that these nonfinancial determinants do not nullify the effect of disproportionate spending on ballot election outcomes. Id. at 397-98.
money in campaigns on ballot questions."\textsuperscript{269} In fifty-six of the seventy-two campaigns she studied, or seventy-eight percent of the time, the high-spending side won the election. She also corroborated Lowenstein's finding that one-sided spending was more effective in opposition than in support of ballot measures.\textsuperscript{270}

Although Zisk agreed with Lowenstein that deceptive campaign rhetoric characterized one-sided spending campaigns, she found that two-sided high spending made the problem worse. When both sides had money to spend, her data indicated that both sides relied on slogans and misrepresentation.\textsuperscript{271} She concluded that high-spending campaigns are not effective in actually informing voters about the issues and that "two heavy spenders may simply cause twice the confusion of one rather than one forcing the other to confront the real issues."\textsuperscript{272}

Corporations were not the only high spenders identified in Zisk's research. Others included: (1) traditional interest groups such as labor unions, educators, chambers of commerce, and business corporations; (2) public interest groups such as environmentalists; and (3) ad hoc groupings such as single-issue citizens groups.\textsuperscript{273} In the fifty issues studied between 1976 and 1980, she found corporate spending involved in twenty-six of them (fifty-two percent). In just over one-third of those instances, corporate support was divided and different sets of business interests opposed each other on the same issue.\textsuperscript{274}

Wealth, of course, cannot always purchase the defeat of every ballot proposal. Many studies include one or two examples of ballot propositions that passed despite high opposition spending.\textsuperscript{275} However, very few scholars have argued that money has little or no effect on ballot measure campaigns, and of those that do, many rely on aggregate data. It has been argued that these writers reached erroneous conclusions by failing to distinguish between those ballot proposals supported and those opposed by high spending.\textsuperscript{276}

Based on these various studies, it appears undeniable that disproportionate spending exerts an undue influence in ballot issue cam-

\textsuperscript{269} Id. at 245.
\textsuperscript{270} Id. at 116.
\textsuperscript{271} "Scapegoating and deception (the California water plan), fear arousal (California gun control), diversionary tactics (Oregon's self-service gas), and oversimplification ('D is dumb' in Michigan) abound in two-sided campaigns as well as in those that are lopsided." Id. at 231.
\textsuperscript{272} Id. at 154-55.
\textsuperscript{273} Id. at 240-42.
\textsuperscript{274} Id. at 96.
\textsuperscript{275} See, e.g., Easley, supra note 30, at 690; MAGLEBY, supra note 13 at 147.
\textsuperscript{276} Lowenstein, supra note 259, at 511-12. For example, in a 1979 article assessing a national initiative proposal, Ronald Allen maintained that one-sided spending in ballot propositions is not significant. However, in a footnote, he recognized Shockley's research and allowed that one-sided opposition spending might be im-
CORPORATE POLITICAL SPEECH

VIII. EVALUATION AND CONCLUSION

In *Bellotti*, the Court rejected Massachusetts' proffered state interest in eliminating undue corporate influence on referendum questions because the state failed to show any evidence that such undue influence existed. Since that decision, a number of studies, including those discussed above, have shown the dominating impact of high spending in ballot measure campaigns.

Additionally, the Court in *Austin* has redefined "corruption" to no longer mean the danger of quid pro quo exchanges of political favors for money, but rather the distorting influence of large political expenditures made by corporations that do not reflect actual public support for the ideas advanced. The *Austin* Court also accepted the protection of minority shareholders as a compelling state interest, approved expenditure restrictions in candidate campaigns, and used language presaging a return to the artificial entity theory of the corporation. As a result, state legislatures may be enticed to enact or reenact legislation prohibiting or limiting corporate expenditures in ballot issue campaigns, and the Court eventually will have to determine if denying first amendment protection to corporate political speech is the best way to deal with unequal distribution of wealth.

As with many other first amendment questions, the issue of corporate political speech presents conflicting values. In determining whether *Bellotti* should be overruled, the Court must weigh the benefits of corporate political speech to the marketplace of ideas against the detriments of potential corporate domination to the political process. On one hand, the first amendment mandates diversity of expression, which would ideally include corporate expression; on the other,
high-spending corporate domination of the ballot issue process threatens the first amendment rights of speakers with less wherewithal to be heard. No matter how the conflict is resolved, first amendment values must be compromised to some degree. It must be determined whether denying first amendment rights to corporations would solve the problems associated with ballot issue domination by high-spenders, or would create additional concerns. Furthermore, any solution to the problem of corporate domination in ballot issue contests must not cut so broadly as to deny more speech rights than necessary to address the issue at hand.

To properly evaluate proposed reforms to eliminate the problem of corporate domination of ballot propositions, these conflicting interests must be taken into account. Reform suggestions range from the extreme to the utilitarian, from excluding corporations entirely from the protection of the first amendment to relying solely on financial disclosure laws to publicize unequal spending levels. This Article will consider eight proposed solutions to the corporate domination problem and will conclude that imposing reasonable spending limits on all individuals and groups is the only effective way to remove the dangers of high and disproportionate spending.

A. Proposed Solutions

1. Deny all free speech rights to corporations.

Several commentators have argued that business corporations should not be granted first amendment rights at all.277 This approach would attempt to solve the problem of corporate dominance in ballot issue campaigns by denying the existence of competing interests. By exposing corporate political speech to unlimited state regulation, these solutions presume that corporate speech has no intrinsic merit and adds nothing to the public policy process.

Would the public interest really be served by prohibiting corporate political expression? The Bellotti decision rests on the public's right to receive information. If we are a government by the people, the people must have access to information in order to make informed choices. By ensuring expression of diverse points of view, the first amendment allows democratic processes to operate effectively. Corporations are a major force in our society and can be a valuable source of information and expertise with regard to important public policy issues. Legal scholars such as Alexander Meiklejohn have argued that the first amendment does not preclude government regulation of speech when

277. See, e.g., Mayer, supra note 11, at 660-61 (proposing a constitutional amendment excluding corporations from the Bill of Rights); Note, supra note 223, at 1860 (advocating that the Court overrule Santa Clara). A return to the artificial entity theory of the corporation would accomplish the same thing.
the regulation is needed to keep the marketplace of ideas from being controlled by a single speaker. However, any solution to the problem of corporate dominance in the initiative/referendum process that completely denies first amendment rights to corporate political speech would severely limit diversity of expression and would ultimately fail to serve the public interest.

A repudiation of all first amendment rights to corporations would cut far too broadly and result in other consequences that are hard to justify. For example, if corporations had no first amendment rights, libel plaintiffs would be allowed to recover against corporate publications without having to prove either negligence or actual malice. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that the first amendment requires that libel plaintiffs prove some level of fault, at least against defendants who disseminate information about matters of public concern to a mass audience. Without first amendment protection, corporate newsletters like the one at issue in *Pacific Gas & Electric*, which reached more than three million consumers, would be subject to a less strict standard for libel liability. No such distinction should be made without a finding that corporate publications make no worthy contributions to social dialogue.

More importantly, not only would such a solution do away with corporate political speech, it would remove constitutional protection for commercial speech as well. Should abortions again become illegal in Virginia, out-of-state, incorporated abortion clinics could then be prohibited from advertising in Virginia newspapers. This result was specifically rejected by the Supreme Court in *Bigelow v. Virginia*, on the grounds that Virginia citizens had a first amendment right to know that abortions could be obtained in other states. Denying first amendment rights to corporations ultimately impinges on listeners' first amendment rights to be exposed to diverse information from different sources, including incorporated ones.

Additionally, removing corporate speech from the protections of the first amendment would require a constitutional definition of the press in order to exempt media corporations, who presumably would still be free to speak. Despite Justice Stewart's contention that the press clause of the first amendment gives explicit protection to the institutional press, the Court has avoided fashioning such a definition.
Undeniably, Court decisions have contained language recognizing that the press has a special function in the American system of democracy. In addition, plenty of statutory definitions of the press exist, should the Court be willing to adopt one. For example, the Privacy Protection Act of 1980 makes it unlawful for a state official, without probable cause, to search or seize "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." However, this broad definition makes no attempt to identify the "institutional press," relying instead on the speaker's motivation to engage in public expression. Corporate public relations departments that produce newsletters similar to the one at issue in Pacific Gas & Electric would certainly not be excluded from first amendment protection based on this type of definition.

More specific definitions of the press have been formulated in various state shield laws that give varying degrees of protection to journalists who seek to keep their sources confidential. The definitions of who is covered by the statutes vary from state to state. Some states focus on regular employees of the traditional news media, granting protection, for example, to newspaper writers but not free-lancers or nonfiction writers. Others consider only the intent to communicate information to the public in determining who is covered by the statute. Those state shield statutes with narrow definitions of the press, however, have resulted in application problems and have often been amended to expand their coverage. If the Court were to adopt or uphold such a definition, it would have to evaluate the consequences such a definition might have in other first amendment areas, such as in determining the scope of a journalist's privilege or right of access under the first amendment. Furthermore, a narrow definition of the press would be likely to include wealthy media corporations and exclude less powerful ones—a result that would be at odds with the notion of reducing corporate domination of political speech.

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284. In Austin, for example, the Court said that a meaningful enough difference exists between media and other corporations to justify excluding the media from political expenditure limits, even if "the press' unique societal role may not entitle the press to greater protection under the Constitution." Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1402 (1990).


286. Id. at § 2000aa(a).


Some commentators have argued that any prohibition on corporate first amendment rights should exclude corporations formed for political or ideological purposes. This would allow the Court to continue to recognize the first amendment rights of nonprofit, nonbusiness political corporations whose primary purpose is political advocacy, based on the individual member’s rights of association. According to Charles O’Kelley, corporations have associational rights only when their members share a unity of views. Therefore, he concluded that the Court correctly granted first amendment rights to political associations such as the NAACP. However, it is not so clear that all members of political associations share similar views to any greater degree than do shareholders of business corporations. If members of political associations such as the ACLU do not enjoy an identity of viewpoints, the apparent difference between a nonprofit advocacy group and a for-profit business corporation remains the subjective determination that a commercial purpose is less admirable than a political one.

Is it fair to conclude that corporate shareholders have no inherent first amendment rights to associate because of the economic status of the corporation? A corporation, whether nonprofit or for-profit, is a vehicle for the expression of the common views of its members. Although stockholders of a modern, publicly traded corporation may not view themselves as investing in order to amplify their beliefs, it is reasonable to assume they nonetheless share the common goal of maximizing their investment. Corporate managers have a fiduciary duty to serve the shareholders’ interests by communicating on their behalf. Pursuant to what has been called the “enlightened self interest” school of thought regarding business’s role in society, corporations should anticipate the demands of society in order to actively shape public policy issues, thereby furthering shareholder interests.

289. See, e.g., O’Kelley, supra note 166, at 1363-66; Note, supra note 223, at 1857-58.
291. O’Kelley, supra note 166, at 1363.
292. Id. at 1365.
293. Easley, supra note 30, at 707-10.
294. See generally R. Hessen, IN DEFENSE OF THE CORPORATION, (1979)(corporations are created and maintained through the exercise of individual rights, especially freedom of association and freedom of contract).
Under this theory, corporate political speech, through advocacy advertising, lobbying, and political spending, is necessary to further shareholders' economic interests and to respond to societal concerns.

It has been argued that treating business corporations differently from nonprofit political associations for first amendment purposes would not reduce the diversity of expression or hamper the speech of those advocating a business point of view because corporate spokespersons could form nonprofit political associations with their individual funds. At least one such organization of business interests, the Michigan Chamber of Commerce, was found by the Court to be insufficiently political to qualify as a nonprofit, ideological corporation in the *Austin* case. Granted, the Michigan Chamber of Commerce accepted contributions from business corporations, and therefore was not financed solely through the use of personal funds.

Still, the question must be raised whether a corporation's speech is the same as, or can be replaced by, the speech of its individual managers, shareholders, and employees. Will management in its personal capacity, for example, be ready and willing to fill the void left by a prohibition on corporate expression? Certainly, instances can be found where corporate interests and the individual concerns of management would conflict. For example, 1990 was characterized in the popular press as the all-time worst year for the world's airlines, which lost approximately $3.5 billion. Several carriers were forced into bankruptcy, at least in part based on rising fuel costs caused by the Middle East crisis. Although jet fuel costs increased by approximately thirty-three percent consumer oil prices went up much more modestly. Faced with possible bankruptcy, airline corporations might be expected to advocate a reallocation of costs so that consumers would bear a proportionate share of the fuel price increase. If corporations were prevented from expressing political opinions, individual officers, directors, shareholders and employees of the airline would be faced with conflicting interests. These individuals, who would be personal consumers of oil as well as employees of or investors in an airline, might be reluctant to spend their own funds to advocate an increase in consumer prices that would also affect them personally.

Any proposal to return to the artificial entity theory of the corporation requires an examination of just how accurate its assumptions are. Does the business corporation really occupy a privileged position, rife with state law advantages denied to other groups and organizations? As noted by Ronald Hessen, neither perpetual life nor limited

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296. See, e.g., Note, supra note 223, at 1858.
298. Id.
299. Id.
liability are truly privileges bestowed on corporations by the state. Rather, perpetual life means only that corporations need not renew their charters, and limited liability is no more than an implied contract between shareholders and corporate creditors.\footnote{Hessen, supra note 294, at 17-18.}

The artificial entity view of the corporation depicts American business as dominated by a few giant corporations that are essentially free from marketplace and government restraints. While this may have been the case in the 1950s and even the 1960s, substantial changes in American business have occurred since then. Unstable economic conditions have killed the notion that big corporations automatically make big profits; hostile takeovers threaten management that once considered itself entrenched; deregulation and foreign competition have introduced many corporations to price competition; and consumer and public interest groups have challenged notions of corporate legitimacy.\footnote{Vogel, supra note 4, at 76-77.} American business is in the midst of what has been described as an entrepreneurial revolution. An estimated 500,000 new, small business corporations are currently being formed each year.\footnote{Id. at 601-03.} These factors indicate that the large business corporation, while still a major force in American society, is becoming less important rather than more powerful.

Even assuming that business corporations enjoy a privileged position in American society, they have paid dearly for their state law "advantages."\footnote{Id. note 11, at 601.} According to Mayer, government regulation of business has undergone four significant changes since 1960, the advent of what he calls "modern regulation."\footnote{Mayer, supra note 11, at 601.} First, although government regulation pre-1960 sought primarily economic results, government regulation after 1960 has aimed at social goals such as consumerism, environmental protection, and health and safety.\footnote{Id. at 601-03.} Second, modern government regulation is implemented increasingly on the federal as opposed to the state level.\footnote{For example, Mayer noted that while prior to 1965, only one federal agency existed to safeguard consumers or employees from corporate operations, by 1977, 10 federal agencies existed for this purpose. Id. at 602.} Third, modern regulation interferes in what used to be private corporate matters and is more systematically
enforced than pre-1960 regulation. Finally, modern regulation covers many different industries, making it less likely that any one industry can overly influence or "capture" a particular government agency. Modern regulation is also expensive. One commentator estimated the costs of federal regulation to business as $62.9 billion in 1976 and $97.9 billion in 1979. Even after the deregulation of several industries during the Reagan Administration, regulatory costs to business as a whole did not decrease. In some instances, state and local governments increased their regulatory efforts in response to federal deregulation, resulting in costly compliance problems for those companies doing business in more than one state. In fact, the price of modern regulation continues to rise. For example, it has been estimated that environmental regulation of industry ultimately resulted in increased consumer costs of more than $70 billion in 1985, and perhaps as much as $200 billion in 1990.

This regulation is regarded by many business leaders as excessive, nonproductive, and threatening to the competitive ability and productivity of American companies, especially as compared to relatively unregulated foreign competitors. These leaders believe that their interest in participating in the resolution of business regulation issues is as legitimate as any special interest group. They argue that without business input, resulting regulation is more likely to be ineffective and counterproductive. From the standpoint of fairness, it is hard to deny corporations the right to communicate on political issues when they have so much at stake. Moreover, that stake is shared by shareholders and consumers.

A final problem with removing corporations from the coverage of the first amendment has to do with whether the state can make corporations exchange their constitutional rights for any state law privileges they may receive. According to the doctrine of unconstitutional conditions, the government cannot remove first amendment protection for corporate political speech just because the state could refuse to charter corporations at all. For example, in Frost & Frost Trucking.
Co. v. Railroad Commission, the Court invalidated a state statute requiring incorporated private carriers to assume common-carrier liability in return for the use of the state highways. Such a condition, the Court said, was coercive because the company had no choice but to comply with the requirement. Similarly, the choice between being granted the right to do business with limited liability pursuant to the corporate form versus the right to political expression is no choice at all. Neither provides a satisfactory result. Corporations cannot exist unless they are incorporated and their ability to accumulate capital may depend on corporate structure. Similarly, their success in the marketplace may depend on their ability to communicate.

However, as noted by Kathleen Sullivan, Supreme Court precedent regarding unconstitutional conditions is far from consistent. If the Court characterized a prohibition on corporate expression as a penalty, the doctrine of unconstitutional conditions should invalidate the condition. On the other hand, if the Court opted to treat the condition as a mere offer to business persons to choose between different varieties of business organization, the condition could be upheld.

In summary, any solution to the problem of corporate dominance in ballot issue campaigns that completely denies first amendment rights to corporations cuts too broadly to be either constitutional or justifiable. First, such a solution erroneously assumes that corporate speech, including commercial speech, adds nothing to the marketplace of ideas, either because it lacks intrinsic merit or because it sees the corporation as indistinguishable from its individual members. Second, a prohibition on corporate speech would require a constitutional definition of the press, which, if narrow enough to exclude corporate speakers, could raise serious application problems. Furthermore, a total repudiation of corporate speech rights would infringe on the ability of shareholders to associate to further their economic interests and would contradict current theories of corporate social responsibility. Corporations are not necessarily as large and as powerful as they once were in American life, and they are subject to increasingly intrusive and comprehensive government regulation. With so much at stake, it could be argued that forcing corporations to choose between incorporation and the right to communicate is coercive and constitutes an unconstitutional condition.

2. Deny political speech rights to business corporations.

According to Justice Rehnquist's dissent in Bellotti, corporations should have first amendment rights only to the extent necessary to

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315. 271 U.S. 583 (1926).
316. Id. at 593.
protect their business and property interests pursuant to the property clause of the fourteenth amendment. Therefore, media corporations have first amendment rights, including the right of political advocacy, because they are in the business of speaking. And under this approach, business corporations that sell a product or service would be allowed to engage in commercial advertising.

Several commentators have endorsed this view in one form or another, and have called for a restriction of corporate political speech rights for business corporations. For example, David Ratner has suggested that a corporation be allowed to speak only on matters that directly further its corporate purpose. This would mean that media corporations could speak to publish and broadcast the news, ideological corporations such as the ACLU could speak to promote political beliefs and ideas, and business corporations could engage in commercial speech in order to turn a profit.

Again, this proposal would seem to solve the problem of undue corporate influence in ballot issue campaigns; however, it raises countervailing issues. First, it assumes that corporate political speech is valueless and ignores the first amendment rights of listeners to receive information from corporate sources. Second, it would require a constitutional definition of the press as described previously to determine which corporations are in the business of disseminating speech. Furthermore, it presupposes that corporate political activity does not serve any legitimate business purpose. Yet American business leaders have increasingly adopted a proactive approach to shaping public policy issues, rather than merely responding after the fact to expensive government regulation and legislation. Political speech, including lobbying, issue advertising, and political spending both through direct expenditures and corporate PACs, can have a major effect on a corporation’s bottom line. For example, in 1980, the Standard Oil Company spent almost $1 million to defeat a ballot measure that would have increased its taxes by as much as $75 million per year.

318. See supra text accompanying notes 71-72.
320. Shockley, supra note 242, at 380 n.9. Shockley also cites the example of the tobacco industry, which spent more than $6 million in 1978 to defeat a California proposition prohibiting smoking in public places. Id. at 380 n.8. He explained that "[i]f each American smoker smoked only one less cigarette a day, the tobacco
This outlay could certainly be characterized as a reasonable attempt to protect its property, profits, and the interests of its shareholders.

Additionally, this approach results in the anomaly of providing greater first amendment rights for commercial than for political speech. Historically, the Supreme Court has seen political speech, which enriches the marketplace of ideas, as more deserving of constitutional protection than commercial speech, which merely proposes a commercial transaction.\(^\text{321}\) This approach would require a major reversal of Supreme Court precedent and first amendment theory to place commercial speech above political speech on the hierarchy of protected expression.

In a variation on this solution, Richard Alderman has proposed that all speech by commercial entities, including business corporations and partnerships, be treated as commercial speech for first amendment purposes.\(^\text{322}\) Alderman would exclude corporations engaged in the communications or entertainment business, and civic, religious, or charitable organizations from the definition of commercial entity, but would include individual entrepreneurs, partners, and corporate managers when they are speaking in their official capacity. He would even consider the speech of media corporations (but apparently not ideological corporations) as commercial if the speech had an economic motive.\(^\text{323}\) Government regulation of economically motivated speech would, under this solution, be subject to the less strict standard of review established for commercial speech in Central Hudson. Obviously, this would remove the problem of treating political speech as inferior to commercial speech by redefining all corporate speech as commercial.\(^\text{324}\)

\(\text{industry would lose an estimated } \$450 \text{ million a year... In view of this projected loss, spending over six million dollars to stop California, which contains more than one-tenth of the American populace, from adopting an ordinance restricting smoking was economically reasonable.} \) Id. at 380 n.9.

\(\text{321. A comparison of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557 (1980), a commercial speech case, and Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980), a political speech case decided on the same day, illustrates the difference in analysis. In Central Hudson, the Court in its three-part test said that truthful advertising concerning a lawful activity could be restricted if the regulation advanced a substantial state interest without limiting speech more than necessary to achieve the interest. See supra text accompanying notes 33-36. However, in Consolidated Edison, the Court subjected a regulation of political speech to more exacting scrutiny. The state prohibition on noncommercial speech could be upheld only as a permissible time, place, manner or subject-matter regulation, or as a “narrowly tailored means of serving a compelling state interest.” Id. at 535. See supra text accompanying notes 80-81.} \)


\(\text{323. Id. at 744-46.} \)

\(\text{324. This solution would require the Court to overrule Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980), where it suggested that economic moti-}\)
Alderman's proposal relies on the assumption that commercial speech is accorded a "substantial measure" of first amendment protection. This in turn assumes that commercial speech will continue to be afforded such protection. However, since the Supreme Court's 1986 decision in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, the state may find it significantly easier to justify restrictions on commercial speech. In that case, the Court upheld Puerto Rico's restriction on nondeceptive advertising of legal casino gambling to native residents. Although in the five-four ruling the majority purported to apply the *Central Hudson* three-part test, it in fact adopted Justice Rehnquist's *Central Hudson* dissent. Writing for the majority, Rehnquist determined that Puerto Rico had a substantial interest in discouraging casino gambling among its citizens. Therefore, he concluded that the Puerto Rico legislature could reasonably have believed that the advertising prohibition directly advanced this interest and could reasonably have decided that no less intrusive means would have effected this goal.

Commentators have noted that the Court's approach in *Posadas* may never be extended beyond cases involving the promotion of products or services that, like gambling, have traditionally been heavily regulated. But should the Supreme Court rethink the commercial speech doctrine, does it make sense for the constitutional protection of all speech of economic entities to be modified accordingly? It seems inappropriate to tie all economically-motivated speech to the level of first amendment protection accorded commercial speech without considering the result if the Supreme Court changes the rules for commercial speech.

By characterizing all economically-motivated speech as commercial speech, this proposal could entirely remove corporations and their spokespersons from the political process. Under Alderman's plan, lobbyists and other individuals representing corporations could be prohibited from speaking, because their speech, too, would be regarded as commercial. In our modern society, could any speech be determined
to be purely political under Alderman’s analysis? Would a city council candidate’s speech be considered political if it were given at a fundraising dinner? Would a candidate’s motivation to run for elective office be an economic one if the position paid a salary? Or would the advertisement at issue in *New York Times Co. v. Sullivan*, 329 considered by the Court to be political speech, be commercial and therefore not entitled to the constitutional defense established in that case? This solution could seriously lessen diversity of expression by lowering the standard of constitutional protection not only for speech by business corporations, but for all economically-motivated speech.

3. Provide public financing for ballot issue questions.

Some commentators have suggested that to eliminate the disparate spending problem, public monies should be allocated to the underfunded side in grossly disparate ballot campaigns.330 This alternative assumes, of course, that recipients of public financing possess the political know-how to wage effective campaigns so that public expenditures ultimately make a difference in campaign outcomes. More importantly, it also raises many logistical concerns. Assuming that the public would support and pay for a system of public financing, someone would have to determine not only which issues should receive public funds, but also which groups or individuals. Ballot questions may involve an unlimited number of viewpoints, rather than just two sides. And even if only one "pro" and one "con" position exist, each side may have many different factions and supporters. Realistically, the state could not provide funding for each and every issue on the ballot.331

Public financing would be a costly solution to the problem of di-

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331. Lowenstein has suggested that once any side of a ballot measure had received an established threshold amount in contributions (he uses $50,000), it thereafter be required to report further contributions daily to a state agency. At such time as any side reported a total in excess of a specified amount (say, of $1 million or more), the agency would then provide to the other side one dollar for every additional dollar reported, offset by the amount by which the total for the second side also exceeded $1 million. Lowenstein, *supra* note 259, at 579.

Advantages of this plan include that public financing would only be provided for campaigns involving substantial spending, and disparities between sides would be limited to no more than $1 million. The high spending side would not lose incentive to raise money because each dollar it collected would continue to be used for its campaign activities, and high spenders would still be in a position to determine the scope of the campaign. *Id.* at 580.
proportionate corporate political spending. Reported expenditures on the twelve California ballot proposals considered in 1982 totalled more than $36 million.\textsuperscript{332} At least six of those ballot propositions involved spending by one or both sides of over $1 million.\textsuperscript{333} Using a system of public financing suggested by Lowenstein\textsuperscript{334} and based on Zisk's figures,\textsuperscript{335} public financing would have cost the state of California at least $14,149,300 in 1982. This sum would have included $783,000 to support a reapportionment proposition whose supporters reported no expenditures, and $2,483,600 to oppose a nuclear freeze proposal where that opposition reported expenditures of only six thousand dollars.\textsuperscript{336}

These figures lead to two conclusions. First, it should be asked whether large sums of public money should subsidize campaigns that appear to have little public backing. In these instances, does public financing really serve to reflect actual public support for political positions? Second, and more critically, will state legislators and taxpayers be willing to devote tax dollars for this purpose, especially at a time when state revenues are declining? Even under Lowenstein's plan, public financing will be administratively complex at the state level and even harder to implement at the local level. Considering these obstacles, public financing appears to be too complex and costly to be a workable solution.

4. Expand the fairness doctrine.

It has also been suggested that the fairness doctrine\textsuperscript{337} be enforced and expanded to provide free broadcast media time to financial underdogs in ballot issue elections or at least to require that broadcasters present both sides of ballot issues in news and public affairs programming.\textsuperscript{338} In order to prevent imbalances in coverage of ballot questions, this proposal would hold broadcasters to the same standards in referendum campaigns as in candidate elections. Under these requirements, for example, broadcasters that air editorials regarding ballot issues would be obliged to provide a reasonable opportunity for response from those with differing views; broadcasters would have to

\begin{itemize}
  \item \textsuperscript{332} Magleby, \textit{supra} note 13, at 149 and app. E.
  \item \textsuperscript{333} Zisk, \textit{supra} note 15, at 198-99.
  \item \textsuperscript{334} See \textit{supra} note 327.
  \item \textsuperscript{335} Zisk, \textit{supra} note 15, at 198-99. Her figures include expenditures only for major ballot issues.
  \item \textsuperscript{336} \textit{Id.} at 198. These figures assume that the underfunded side of a ballot issue need not raise a threshold amount to be eligible for public funding.
  \item \textsuperscript{337} The doctrine provided that broadcasters must provide a reasonable amount of air time for the discussion of public concerns and must also provide balanced coverage of all reasonable viewpoints on those matters addressed. \textit{See Fairness Report}, 48 F.C.C.2d 1 (1974).
  \item \textsuperscript{338} \textit{See, e.g.,} Mastro, Costlow & Sanchez, \textit{supra} note 29, at 333-36.
\end{itemize}
keep detailed records documenting their replies to requests for broadcast time; and broadcasters' compliance with the doctrine would be evaluated by the FCC under the "equal opportunities rule" rather than the "reasonableness" standard.339

In its favor, this solution recognizes the value of corporate expression to the voting public. It addresses the problem of disproportionate spending in initiative/referendum contests by mandating more, rather than less, speech. And by applying strictly to ballot propositions, it does not cut too broadly and infringe on unrelated free speech rights. However, this proposal seems unlikely to solve the undue influence problem for at least three reasons.

First, the fairness doctrine currently is not being enforced and its political future is uncertain.340 The doctrine itself raises questions about the propriety of government intervention in the editorial decisions of broadcasters.341 Second, it assumes that recipients of free air time have the financial wherewithal to use it effectively. Waging a convincing media campaign involves not only the expense of acquiring air time, but also the costs of conducting voter attitude studies, hiring media consultants, procuring equipment and expertise, and designing appealing advertisements.342 Free broadcast time, although a start, is not enough by itself to rectify disproportionate spending. Obviously, the doctrine does not apply to the print media. And before the doctrine was shelved by the FCC, some high-spenders in ballot campaigns had learned to refrain from using their funds in ways that would result in free air time for their opposition.343

Finally, it has been suggested that expanding the fairness doctrine will work only if increased media advertising does away with deception in ballot issue elections.344 In her study of two-sided high spending ballot question campaigns, Zisk found that both sides tended to oversimplify issues and relied on slogans and misleading advertising. She concluded that increased media access pursuant to a resurrected and enlarged fairness doctrine is likely to result in more distortion and no more information.345 Further research should be conducted re-

339. Id. at 339-41.
340. In 1987, the FCC announced it would no longer enforce the fairness doctrine except for certain rules regarding political editorializing and replies to personal attacks. In re Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043 (1987). Two years later, a federal court upheld the FCC's repeal of the doctrine, ruling that the agency's action was not arbitrary or capricious. Syracuse Peace Council v. FCC, 867 F.2d. 654 (D.C. Cir. 1989).
341. Easley, supra note 30, at 732.
343. LYDENBERG, supra note 15, at 53-54.
344. See Zisk, supra note 15, at 264.
345. Id. at 136.
garding two-sided high spending and fraudulent campaigning in the initiative/referendum context.

One possible remedy to this problem of deceptive advertising is for state and local governments to enact legislation creating a cause of action for false advertising in initiative and referendum contests. Oregon has tried such an approach, providing compensatory damages and attorney fee awards for intentional falsehoods in ballot proposition advertising. Because of conflicting first amendment rights, however, courts could be hesitant to find campaigners guilty of false advertising. Furthermore, much “deceptive” campaign advertising might be characterized as unverifiable opinion rather than absolute statements of fact. Though they might prevail under such a statute, underfunded plaintiffs would probably only be able to recover post election publicity.

5. Require shareholder consent to corporate political spending.

Victor Brudney has proposed that state legislation be enacted prohibiting business corporations from engaging in political activity without unanimous shareholder consent. According to this view, any action of the corporation that does not specifically advance its corporate purpose is ultra vires and therefore cannot lawfully be made without the consent of all the shareholders. Although in theory, this solution would not prevent corporate domination of ballot issue campaigns, in practice its likely effect would be to prohibit corporate political speech altogether. However, it would serve the shareholders’ interest in exercising control over, and staying informed of, corporate political activities.

Like the proposals discussed above that would allow corporate commercial speech but not political speech, this recommendation assumes that corporate political speech does not advance a proper business purpose. Yet, clearly, political spending (including lobbying) can have a very definite impact on the corporation’s bottom line. By allowing corporations to engage in commercial speech without shareholder consent, this solution also places commercial speech above political speech in terms of first amendment protection.

Furthermore, Brudney would exempt nonprofit, political advocacy groups from such a requirement because their purpose contemplates political advocacy. Brudney’s rationale behind this proposal is the protection of minority shareholders; however, his exclusion of political advocacy groups does not follow. Certainly, all members of polit-

347. Shockley, supra note 242, at 424.
348. Brudney, supra note 221, at 294-95.
349. Id. at 244-45.
350. See Id. at 294.
ical advocacy groups such as the ACLU do not agree on the issues (and the subtleties of those issues) supported by that group.

As far as protecting shareholders, corporate management makes many decisions with which shareholders may disagree. Why not protect shareholders against management's business decisions, which are likely to have much greater personal consequences to shareholders than political advocacy questions? For that matter, some shareholders may find certain corporate advertising campaigns distasteful. What justifies a greater level of shareholder protection when political speech, rather than commercial speech, is involved? It follows from the very nature of the corporate form that by investing in a corporation, shareholders consent to the procedures of corporate governance. They entrust all ordinary corporate matters, including political speech questions, to management in hopes of maximizing their investment.

As discussed above, a better solution might be for the SEC to require all corporations to disclose their political expenditures in their annual reports or proxy statements. Shareholders are usually kept in the dark about their corporation's political spending. By informing shareholders of corporate political activities even after the fact, shareholders would be able to exercise their existing rights under corporate procedures if they felt strongly enough. Such disclosure would also provide a record for examination by potential shareholders when making investment decisions. In these ways, corporate disclosure of political spending would further shareholder rights by requiring more speech, rather than by curtailing it.

6. **Enact financial disclosure laws.**

Another proposed solution to the disproportionate spending problem calls for states to enact laws requiring public disclosure of ballot issue campaign finances, including a list of those who contribute more than a specified minimum amount. The rationale behind these laws is that the public is better able to evaluate campaign rhetoric if it knows whose money is financing the message. If, for example, the public learns that business interests have engaged in massive spending to defeat a proposed ballot issue, voters may be more likely to look beyond the advertising slogans to evaluate the real issues and interests involved. Certainly, disclosure would not prohibit dominance of ballot issue campaigns by big spenders. But when grossly disparate levels of spending are publicized, voter antipathy could result in a backlash against high spenders, defeating their attempts to drown out the other side. Statutory disclosure requirements have the advantage of fea-

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351. See supra text accompanying note 237.
352. See, e.g., ZISK supra note 15, at 263.
353. CRONIN, supra note 15, at 116; Allen supra note 276, at 1036.
sibility, as well as their minimal impact on first amendment rights.

However, most states that allow ballot measures already have disclosure laws. Because many current laws do not require reporting until just before or after the election, the effectiveness of disclosure statutes has been questioned. In effect, the disclosure of much heavy spending comes too late to be meaningful. And because disclosure statements are filed with government officials such as the secretary of state, voters may never learn the source of campaign funds. More importantly, researchers have found little evidence that knowing the identity of campaign contributors has any effect on voters.

One way to ensure timeliness, and thereby increase the probable effect of such information on voters, would be to require principal donors to be disclosed in all political advertising. For example, disclosure statutes could demand that the top three contributors be identified in all advertisements sponsored by political committees. This would alleviate the problem noted by the Supreme Court in Berkeley that political committees often hide their true identity by using "seductive names."


To provide voters with meaningful data about ballot propositions, some states and cities mail voter's information pamphlets or handbooks to each registered voter before ballot proposition elections. These handbooks provide the text and a summary of each proposal, plus arguments for and against the ballot propositions. Although information guidebooks will not prevent disproportionate campaign spending, they ensure that voters at least have the opportunity to learn about both sides of ballot issues. Furthermore, they guarantee minimal exposure to the underfinanced side of ballot propositions without limiting first amendment rights of high spenders.

Voter information pamphlets will not achieve their purpose, however, if voters either do not read or do not understand them. Existing data indicates that most people do not read voter information materials, and that approximately two-thirds of the recipients cannot understand them.


355. Zisk, supra note 15, at 262-63. David Magleby reported that most of the California voters he studied did not consider information on campaign spending when deciding how to vote. Magleby, supra note 13, at 150.


358. Arizona, California, Massachusetts, Montana, North Dakota, Oregon, Rhode Island, and Washington.

359. For example, Los Angeles.
stand them. Using several readability assessment formulas, one researcher found that voter's handbooks in four states were written at or above the reading level of a third-year college student.

Furthermore, voter pamphlets are expensive. Costs of voter information handbooks have been estimated at more than $350,000 per election in Massachusetts to more than $2 million per election in California. Allocating state funding for voter information materials is equivalent to throwing money away unless the end product is both comprehensible and informative.

8. Enact contribution and expenditure limits.

While contribution limits in ballot issue elections have been proposed, contribution limits alone cannot prevent unlimited expenditures and therefore would not solve the undue influence problem. Ceilings placed on contributions can be easily avoided through direct expenditures and through the making of many small gifts through family members and business arrangements.

Expenditure limits, of course, were declared unconstitutional in Buckley and Bellotti. However, as discussed above, the Supreme Court has redefined "corruption" to include the disproportionate impact of wealth on the electoral process and has upheld an expenditure limit in the candidate election context in Austin. Furthermore, sufficient evidence currently exists to justify expenditure limits in ballot elections, even under strict judicial scrutiny.

Whether contribution limits coupled with expenditure limits...
would serve the conflicting first amendment values presented by the problem of disproportionate spending in ballot proposition campaigns depends on the nature of the spending restrictions. Contribution and expenditure limits that applied solely to business corporations would look suspiciously like a government attempt to equalize speech, which would raise troublesome first amendment questions as well as practical problems. Can either the Court or elected representatives restrict speech in order to balance the amount of speech presented with the degree of actual public support for a position? Even if such a scale could be devised, is the calibration of speech a proper job for the government? Justice Scalia questioned in his Austin dissent whether the government could be trusted to do this job. The notion that it is not the government's role to determine whose speech is allowed and whose speech is prohibited seems central to the meaning of the first amendment.

Furthermore, in attempting to equalize speech the government would have to devise a method of quantifying "public support." If corporations are powerful, that power may indicate an increased, rather than a lesser, level of support for corporate speech. Certainly, corporations are a major force in our economy and a preferred form of doing business. They employ millions of Americans and touch the lives of many more. Corporations are a pervasive presence in our society; perhaps "equality" would require that corporate speech should be given an extra measure of first amendment protection.

If equalization of speech is accepted as a permissible state interest, it seems illogical to apply contribution and expenditure limits only to corporate speakers. In a democracy, articulate speakers will always have an advantage over the inarticulate, and wealthy individuals and groups will be able to speak more effectively than those with fewer resources. Absolute equality of speech would be impossible to achieve, not to mention of dubious value. Carried to its logical extreme, equalization of speech would result in reduction of speech to the lowest common denominator.

Rather than attempting to equalize speech by restricting corporate spending so as to enhance the relative voices of others, a better approach would be to limit the spending of all participants in the ballot issue process. If, as the evidence presented in this Article shows, high and disproportionate spending creates an undue influence problem in ballot elections, then the state can justify contribution and expenditure restrictions as necessary to protect the electoral process. If the

366. "The state lacks 'moderators' who can be trusted to know when 'everything worth saying' has been said, and the legislature lacks the capacity to write laws that will tell a moderator when to make such a ruling." Karst, Equality as a Central Principle in the First Amendment, 43 U. CHI. L. REV. 20, 40 (1975).
rationale for limiting corporate political speech is to prevent financial
dominance in the political process, then such regulation should apply
to other wealthy groups and individuals as well.

Certainly, the idea of imposing spending limits in referendum and
initiative campaigns is not a new one. Judge J. Skelly Wright, for ex-
ample, called for "the imposition of spending limits at a level high
enough to assure adequate debate but low enough to permit all views
to find clear, unstifled expression."367

Recent research findings have shown that two-sided high spending
made the problem of deceptive and confusing campaign tactics in bal-
lot campaigns worse instead of better.368 If so, then neither giving
money to the underfunded side, nor restricting the amount by which
one side can outspend the other, will adequately protect the political
process. Instead, a relatively simple statute placing contribution and
expenditure limits on all speakers in ballot elections might be not only
the simplest but also the most effective means of achieving Judge
Wright's objectives. While such a solution clearly infringes on first
amendment rights, the infringement could be justified as necessary to
protect the political process from the dominating impact of high
spending in ballot measure campaigns.

In a ballot issue campaign, an individual or group may spend
money directly in order to defeat or approve a ballot proposition.
Likewise, an individual or group may contribute money to a political
association for it to spend in support or against a ballot proposition.
As mentioned above, it makes no sense to limit one form of political
spending and not the other. However, contribution limits restrict not
only speech, but associational rights as well. The Supreme Court
noted in Berkeley that contribution limits must not deny speakers the
ability to form groups for the purpose of amplifying their voices. Any
contribution and expenditure limits, therefore, should not disallow in-
dividuals and groups from combining their individual contributions.
These groups, whether preexisting political organizations, ad hoc
groups of citizens, or business corporations, would not be allowed to
spend more than the sum of their accumulated and ear-marked indi-
vidual contributions.

In order for across-the-board contribution and expenditure restric-
tions to be constitutional, they must be high enough to ensure clear

367. Wright, supra note 5, at 644. Another proposal involves basing a spending limit
for the richer side of a ballot proposition on the projected spending level of the
poorer side. This "spending differential limit," which would be different for
every high-spender in every ballot contest, would not limit overall spending, but
It is based on the assumption, however, that disproportionate spending,
rather than high-spending in general, has caused the undue influence problem in
ballot elections.

368. See supra notes 271-72 and accompanying text.
and effective communication of views. In *Buckley*, the Court invalidated a $1000 expenditure ceiling in federal candidate elections, saying that the limit was so low that it would exclude citizens and groups "from any significant use of the most effective modes of communication." The Court noted that as of January 1975, a full-page advertisement in a major metropolitan daily newspaper cost almost $7000, and that not even a quarter of a page could be had for $1000. Therefore, any contribution or expenditure limit must be high enough to ensure that speakers can purchase at least some access to media channels.

With these considerations in mind, local ordinances and/or state statutes could be drafted that would be both constitutional and also useful to prevent excessive spending in ballot issue campaigns. Spending limits should be keyed to the costs of media access and therefore would vary in different markets. For example, a legislature could determine that a $5000 contribution and a $5000 expenditure limit for all individuals, corporations, unions, and other associations in any local ballot issue campaign would be fair in a particular state. For statewide campaigns, the limits could be increased to $10,000. All persons or groups that made contributions or expenditures above a threshold limit of, say, $500 would be required to file a statement with local or state officials. These illustrative spending limits would be high enough to allow some access to the media for all concerned, yet prevent monied interests from spending millions of dollars in ballot issue campaigns.

The best solution to the problem of high-spending in the initiative and referendum context would not rely solely on spending ceilings. Stricter disclosure laws, including a requirement that major contributors be disclosed in all committee advertising, would make disclosure a more meaningful concept. An SEC regulation mandating that corporations reveal their political spending to existing and potential shareholders would help protect the rights of shareholders who may disagree with the corporate expenditures. State laws prohibiting deceptive advertising in ballot issue elections could improve the quality of campaigning. But without spending limits, it is doubtful that these measures can save the ballot issue campaign process from the dangers of high and disproportionate spending.

**IX. CONCLUSION**

In a series of cases culminating with the *Austin* decision, the Supreme Court has laid the foundation to overturn *Bellotti* and allow prohibitions on corporate spending in ballot issue campaigns. How-

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370. Id. at n.20.
ever, rather than prohibit corporate spending alone, a better approach would be to treat all speakers equally. The Court should let *Bellotti* stand on the grounds that the Massachusetts statute impermissibly discriminated against one class of organizational speakers—business corporations. For expenditure and contribution limits to pass constitutional muster, they should apply to special interest groups, labor unions, trade associations, ad hoc groups of citizens and business corporations alike. However, because business corporations are the most frequent big spenders in ballot issue campaigns, such limits would have a greater impact on business corporations—as they should. Furthermore, spending limits should also apply to expenditures and contributions by individuals in order to prevent evasion of the organizational limits and to recognize that organizations have no corner on the market for immense wealth. The integrity of the marketplace of ideas will be better protected by limiting the speech of all interests, than by prohibiting the speech of one.