

THE CONSTITUTIONALITY OF RESTRICTIONS ON CORPORATE POLITICAL CONTRIBUTIONS

In *Austin v. Michigan Chamber of Commerce*,¹ the Supreme Court held that a state may prohibit a corporation from using general treasury funds for “independent expenditures”² in connection with state elections.³ The decision marks the first time the Court directly has addressed the constitutionality of restrictions on corporations’ “independent expenditures.”⁴ Many commentators criticized the *Austin* ruling as a departure from prior first amendment rulings and as censorship.⁵ The decision, however, merely extends principles enunciated in earlier high Court opinions, dissents, and concurrences concerning campaign financing.

1. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990).

2. The Michigan statute defined an “expenditure” as:

a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question . . . (2) Expenditure includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage or defeat of any ballot question. (3) Expenditure does not include: . . . (c) An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot issue or candidate by name or clear inference or an expenditure for the establishment, administration, or solicitation of contributions to a fund or independent committee . . . (d) An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting.

MICH. COMP. LAWS § 169.206 (1979).

The statute defined an “independent expenditure” as “an expenditure as defined in § 6 [see preceding paragraph] by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.” MICH. COMP. LAWS § 169.209(1).

3. *Austin*, 110 S. Ct. at 1402.

4. See *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985); *Bellotti v. First Nat’l Bank*, 435 U.S. 765, 788 n.26 (1978).

5. See *Wall St. J.*, April 5, 1990, at A23 (criticizing the *Austin* decision for allowing states to bar corporations from telling voters what they think of candidates; the author suggests this is “no great leap” from prohibiting corporate speech on “causes and issues”); *St. Louis Post-Dispatch*, April 8, 1990, at B3, col. 5 (syndicated columnist George Will claimed the *Austin* ruling “contradicted 70 years of First Amendment law”). *But see N.Y. Times*, Oct. 21, 1990, § 3, at 13 (S.P. Sethi argued that the Court’s ruling advanced the interests of minority shareholders and removed barriers to entry in the marketplace for ideas); *L.A. Times*, March 28, 1990, Part A, at 4 (quoting Federal Election Commission spokesman Fred Eiland applauding the decision, saying, “If the decision had gone the other way, it would have opened a huge hole in the law and allowed corporate and labor money to pour into election campaigns”).

The seminal case in the area of campaign financing is *Buckley v. Valeo*.⁶ The Court in *Buckley* distinguished "independent expenditures" from "contributions"⁷ and held that restrictions on the former violated the first amendment's guarantee of free speech, while restrictions upon the latter did not.⁸

The Court drew upon *Buckley* in *Bellotti v. First National Bank of Boston*,⁹ and struck down a Massachusetts statute that prohibited corporations from making contributions and independent expenditures to influence referenda.¹⁰ Justice Powell, writing for the majority, opined that the Massachusetts Legislature could not restrict the spending at issue, which it viewed as political discourse, solely because it emanated from a corporation.¹¹ The Court distinguished limitations on spending in the

6. *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. Justice Marshall later withdrew his support for the distinction between independent expenditures and direct contributions, finding that experience had proved the distinction meaningless. See *infra* note 21 and accompanying text.

8. *Buckley*, 424 U.S. at 19-21. Many statutes distinguish expenditures from contributions. See, e.g., IOWA CODE ANN. § 56.29 (West Supp. 1989); KY. REV. STAT. ANN. § 121.025 (Michie Supp. 1988); MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1989); MINN. STAT. ANN. § 211B.15 (Supp. 1989); MONT. CODE ANN. § 13-35-227 (1987); OHIO REV. CODE ANN. § 3599.03 (Page 1988); OKLA. STAT. ANN. tit. 74, § 4219 (West Supp. 1989); TENN. CODE ANN. § 2-19-132 (1985); W. VA. CODE §§ 3-8-8 to 3-8-13 (1987); WIS. STAT. ANN. § 11.38 (West 1986 & Supp. 1988).

Expenditures are outlays of resources not coordinated through a candidate's campaign machine and whose source is unknown to the candidate, while contributions are transfers of resources from a donor directly to a candidate or his campaign. *Buckley*, 424 U.S. at 19-21.

The *Buckley* Court reasoned that contributions serve merely as symbols of support for a candidate but do not communicate the basis for the support. *Buckley*, 424 U.S. at 21. As such, contributions could not qualify as free speech because they could become political debate only through the speech of the recipient. *Id.* Further, the Court found that direct contributions involve a threat of corruption or the appearance of corruption to the electoral process compelling enough to justify government restrictions on them. *Id.* at 26.

The *Buckley* Court defined "corruption" narrowly, as the quid pro quo exchange of financial resources for improper commitments from a candidate. *Id.* at 26-27, 47. The Court asserted that the contribution transaction, in which the candidate knows the donor's identity, poses this threat, but that the independent expenditure transaction, in which the candidate does not know the donor's identity, necessarily could not pose the same threat. *Id.* at 22. The Court also noted that independent expenditures communicate ideas and contribute to the political discourse and, therefore, qualify as free speech. *Id.* at 18-19.

9. 435 U.S. 765 (1978).

10. *Id.* at 767-68. Expenditures and contributions made to influence referenda that affected the property, business, or assets of a corporation were an exception to the general ban. *Id.*

11. *Id.* at 784. The *Bellotti* appellants, two banks and three corporations, challenged the Massachusetts statute because they wanted to voice their opposition to a referendum to impose a graduated income tax on individuals. *Id.* at 768-70. The Court categorized the spending Massachusetts sought to regulate as valuable political discourse, "indispensable to decisionmaking in a democracy." *Id.* at 777. The Court noted that "[i]f the speakers here were not corporations, no one would suggest

referendum context from bans on spending in relation to candidate elections, noting that no possibility for corruption exists when a corporation expends resources to further a referendum issue.¹²

In *Federal Election Commission v. National Right to Work Committee*,¹³ the Court scrutinized and upheld a federal law forbidding corporations and labor unions from making contributions in connection with federal elections.¹⁴ The provision at issue served a dual purpose: 1) to

that the State could silence their proposed speech" and that the source of speech does not change its value. *Id.*

The Court rejected the State's argument that the great wealth of corporations empowered them to influence unduly the outcome of referenda and stressed that "the people in a democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. The Court conceded that if the State had shown that corporate advocacy had overwhelmed the voices of other participants in the political discourse, then the restrictions upon corporate advocacy might have been warranted. *Id.* at 789.

The Court also dismissed the State's argument that the restriction protected minority shareholders who might disagree with the views supported by their corporation. *Id.* at 792-95. Justice Powell pointed out that shareholders had invested in the corporation by their own "volition" and, because they were free to withdraw their resources at any time, were not compelled to contribute to the corporation's free speech with which they might disagree. Powell further argued that shareholders who disagreed with corporate spending on a given issue could lobby for replacement of the directors, adopt provisions to the corporation's charter to forbid such spending, or bring a derivative shareholder's suit challenging the disbursements. *Id.* at 795.

12. *Id.* at 790. Justices White and Rehnquist authored dissents in the *Bellotti* decision. White maintained that the use in the political arena of wealth acquired with the aid of special state-conferred benefits, such as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets, worked to create an unfair advantage that the state had an interest in preventing. *Id.* Justice White reasoned that "the expenditure of funds to promote political causes may be assumed to bear some relationship to the fervency with which they are held" and that, because "corporate political expression . . . is divorced from the convictions of shareholders," it fails to reflect the proportionate amount of support for a given proposition among voters and is unfair. *Id.* at 810.

White also argued that corporate political expenditures harmed the minority shareholders of the corporation by compelling them to provide financial assistance for beliefs with which they might disagree. *Id.* at 813. He argued that shareholders invest for profits and should not have "to choose between supporting the propagation of views with which they disagree and passing up investment opportunities." *Id.* at 818.

Rehnquist reasoned that the liberties of political expression are not essential to the furtherance of the economic purposes for which corporations are created and that the possibility that a corporation might use its economic power to obtain benefits through the political process justifies a state in limiting the political expenditures of corporations. *Id.* at 825-28.

13. 459 U.S. 197 (1982).

14. *Id.* at 298. The Federal Election Campaign Act of 1971 forbade corporations from making contributions or expenditures in connection with certain federal elections. *Id.* at 198 n.1. However, the federal scheme permitted corporations to organize political action committees (PACs) that could solicit funds from a limited number of persons who qualified as members. These committees could then make contributions and expenditures from these funds at their discretion. *Id.* at 201-02. The government alleged that the defendant had solicited contributions from people who did not qualify as members and, therefore, violated the statute. *Id.* at 197-98. In response to the prosecution's

prevent corporations from exercising undue influence over legislators through "war chests" amassed by the corporate form; and 2) to protect the first amendment rights of contributors who may be opposed to candidates the corporation supports. The Court concluded that these purposes justified an encroachment upon a corporation's first amendment rights.¹⁵

The Supreme Court in *Federal Election Commission v. National Conservative Political Action Committee, Inc.* (NCPAC),¹⁶ however, struck down restrictions on independent expenditures by certain political action committees.¹⁷ The majority held that, because committees like the NCPAC were "designed expressly to participate in political debate,"¹⁸ they did not pose the threat of corruption¹⁹ to the electoral process that the corporate war chests²⁰ in *National Right to Work* did. Therefore, the

appeal of a reversal of the defendant's conviction for soliciting nonmembers, the Court addressed the constitutionality of the restrictions on corporate expenditures and contributions. *Id.* at 206-10.

15. *Id.* at 207-08. The court distinguished *Bellotti* on the grounds that *Bellotti* involved expenditures in furtherance of expressing a view on a referendum; the spending in *National Right to Work Committee* occurred in the context of candidate elections in which there is greater potential for corruption or the appearance of corruption. *Id.* at 210 n.7. The Court further reasoned that the corporate form might pose a special danger of corrupting or appearing to corrupt the political process. Thus, the Court deferred to the legislature's "judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 209-10. The Court did not require Congress to find that corporations *actually* pose such a danger; instead, the majority argued that the mere *potential* for improperly influencing the political process justified a restriction on corporations' first amendment rights. *Id.*

16. 470 U.S. 480 (1985). The three NCPAC plaintiffs, the Democratic Party, the Democratic National Committee, and an individual, sought a declaratory judgment and an injunction to enforce a provision of the Presidential Election Campaign Fund Act. The Act established a system of public funding for presidential candidates. *Id.* at 482. Only candidates who elected to receive public funds were subject to its restrictions. *Id.* The provision at issue prohibited any political action committee, other than the one designated by the candidate, from making independent expenditures exceeding \$1,000 for the benefit of the candidate receiving public funding. *Id.*

17. *Id.* at 500.

18. Justice Rehnquist, author of the majority opinion, viewed the PACs as groups of individuals who had "pooled their resources to amplify their voices." *Id.* at 494. He considered it significant that in 1979-80, approximately 101,000 people contributed an average of \$75 each to the NCPAC. Rehnquist argued that to prohibit these people from so pooling their resources to amplify their voices "would subordinate those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.* at 495.

19. The Court again defined corruption narrowly as "the financial *quid pro quo*: dollars for political favors." *Id.* at 497-98. The Court's definition of corruption did not include the influence or clout a group might yield. In fact, Justice Rehnquist said that the fact that a politician might "alter or reaffirm his stance on an issue" in response to political messages paid for by PACs hardly can be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. *Id.* at 498.

20. *See supra* notes 13-15 and accompanying text.

Federal Election Commission could not restrict the activities of political action committees in the same way.²¹

In *Federal Election Commission v. Massachusetts Citizens for Life*,²² the Court held unconstitutional restrictions on independent expenditures against a corporation that: (1) had been organized for the purpose of promoting political ideas; (2) did not have any shareholders or others affiliated with it so as to have a claim on the corporation's assets or earnings; and (3) had not been established by a business corporation or labor union.²³ Writing for the majority, Justice Brennan maintained that Massachusetts Citizens for Life (MCFL) did not threaten the marketplace for ideas in the way that other corporations might and, therefore, the restrictions on independent expenditures were unconstitutional as to MCFL.²⁴

21. *NCPAC*, 470 U.S. at 498. Both Justice Marshall and Justice White authored dissents. *Id.* at 502, 518. Justice Marshall withdrew his support from that portion of the *Buckley* decision that distinguished contributions from independent expenditures. *Id.* at 519-20. Marshall argued that the restrictions on individual contributions to campaigns motivated people to use independent expenditures to benefit candidates who recognize and reward the expenditures just as if they were contributions. *Id.* at 519-20. Therefore, Marshall claimed that such a distinction ignores reality. *Id.*

Justice White, who had never accepted the *Buckley* distinction between contributions and independent expenditures, repeated his position. *Id.* at 508. White emphasized that functionally individual expenditures by PACs cannot be distinguished from contributions. *Id.* at 510. White contended that both present equal potential for corruption in a world of tacit understandings and implied agreements. Therefore, the courts should defer to Congress' determination that independent expenditures should be regulated closely. *Id.* at 510.

22. 479 U.S. 238 (1986). The Federal Election Commission sought to prosecute Massachusetts Citizens for Life (MCFL), a corporation, under the provisions of the National Campaign Finance Act. Under the federal regulations, MCFL's newsletter constituted an independent expenditure made from the general treasury funds of a corporation. However, MCFL was a non-stock, non-profit corporation organized by a group of individuals to promote pro-life policies. *Id.* at 241-42.

23. *Id.* at 263-64. Justice Brennan's analysis of the threat corporations pose to the electoral process differed from previous majority opinions. Prior cases had defined corruption narrowly, *see supra* note 8, but Brennan argued that recent opinions had expressed concern over the "corrosive influence of concentrated corporate wealth" and the need to protect the marketplace of ideas from the "unfair advantage" that large corporate treasuries confer upon their keepers. *Id.* at 267-58. Justice Brennan explained that a free market of ideas serves the interests of a democracy. Moreover, he noted that political "free trade" does not require all market participants to expend equal resources, but rather demands that the funds devoted to promoting a given idea roughly approximate the amount of support for that idea. *Id.* at 257-58. Brennan argued that expenditure restrictions assure that the resources expended promoting an idea roughly represent the popular support for the idea and in doing so "ensure that competition among actors in the political process is truly competition among ideas." *Id.* at 259. In the case of MCFL, Brennan maintained that the corporation derived its wealth not from the economic arena, but from people who agreed with its political objectives. Thus, the resources the corporation expended in the political marketplace represented the modicum of support for the views it promoted, making the expenditure restrictions unnecessary. *Id.*

24. *Id.* at 259. Justice Rehnquist, in dissent, argued that as a corporation, MCFL differed from other corporations only in degree and not in kind. *Id.* at 268. He maintained that the judiciary

Recently, the Supreme Court examined the validity of Michigan's statutory restrictions on independent expenditures in *Austin v. Michigan Chamber of Commerce*.²⁵ The Court concluded that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures,"²⁶ and not the mere fact that corporations are capable of accumulating large amounts of wealth.²⁷ The Court noted that corporate treasuries reflect the economic decisions of consumers and investors and that a corporation should not be able to transfer monetary power amassed in these markets into political clout through independent expenditures.²⁸ The majority concluded that the Michigan statute survived constitutional scrutiny as a "narrowly tailored solution" to the "serious danger . . . that corporate political expenditures will undermine the integrity of the political process."²⁹

should defer to the legislature's determination that corporations pose a significant danger of corruption to the electoral process and apply the restrictions to MCFL. *Id.* at 269.

25. 110 S. Ct. 1391 (1990). In *Austin*, the state restriction paralleled the federal scheme, requiring corporations to make political expenditures through PACs. *Id.* at 1395 n.1. However, the Michigan statute differed from the federal scheme in that it did not apply to labor unions. *Id.* The Chamber of Commerce challenged the regulation on equal protection grounds based upon this distinction. See *Michigan State Chamber of Commerce v. Austin*, 856 F.2d 783, 785 (6th Cir. 1988); *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397, 398 (W.D. Mich. 1986). The Chamber of Commerce dropped this ground before the appeal reached the high Court. One might cynically view the whole *Austin* litigation as a struggle between corporate employers in Michigan and the unincorporated unions with whom they deal.

26. *Austin*, 110 S. Ct. at 1398.

27. *Id.*

28. *Id.* at 1397. The majority distinguished the Chamber of Commerce from Massachusetts Citizens for Life. See *supra* notes 22-24 and accompanying text. The Court emphasized that the Chamber's bylaws set forth many varied purposes, dissenting members faced economic disincentives to disassociating with the Chamber, and business corporations dominated the Chamber's membership. *Id.* at 1398-1400.

29. *Id.* at 1402. The Court also rejected an equal protection challenge to the statute's exemption for media corporations. *Id.* at 1401-02. The majority argued that "the unique role of the press" as a forum for discussion, debate, and dissemination of information justified the exemption. *Id.* at 1402.

Justice Brennan concurred with the majority emphasizing that the Michigan statute did not prohibit corporations from disseminating their political views but merely required them to use PACs. *Id.* at 1402 (Brennan, J., concurring). Justice Brennan explained that his majority opinion in *MCFL* had recognized that the PAC requirements might "be unconstitutional as applied to some corporations because they do not present the dangers at which the expenditure limitations are aimed." Such a class, Brennan opined, would be small. *Id.* at 1404. Indeed, Justice Brennan maintained that the *MCFL* court had adopted the underlying principle of the Federal Election Campaign Act—that "substantial general purpose treasuries should not be diverted to political purposes." *Id.* at 1403. Brennan stressed that a case by case application of *MCFL* would not censor ideas or suppress speech but would only recognize characteristic differences among organizations. *Id.* at 1404 n.3. Justice Brennan also voiced great concern for minority shareholders and members of organizations who

The arguments voiced by the majority and dissenting opinions in *Austin v. Michigan Chamber of Commerce* are neither new nor groundbreaking. Instead, *Austin* represents only the latest repackaging of the ideas that appeared in the many cases concerning restrictions on political expenditures since the Court decided *Buckley v. Valeo*.³⁰ The early decision in *Bellotti v. First National Bank of Boston* favored a rather restrictive view of the government's power to limit political expenditures.³¹ However, the decisions in *Massachusetts Citizens for Life*³² and

hold views contrary to those of the organization, but who cannot disassociate themselves from the group. *Id.* at 1405-06. He emphasized that "the state surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the chamber's message." *Id.* at 1406.

Justice Scalia, in a dissenting opinion, claimed that the majority had combined two bad arguments to justify its position: (1) the special advantages state law confers on corporations justify infringements upon their first amendment rights; and (2) large corporate treasuries can distort the political process when they are used to sway public opinion. *Id.* at 1408-09 (Scalia, J., dissenting). Scalia demonstrated that neither argument, examined separately, could justify the restraints approved by the majority and that combining the two only confused matters. *Id.* at 1409. Scalia concluded that the majority's argument really masked a rule that expenditures must reflect the public support for a proposal, and he maintained that *Buckley* explicitly had rejected this idea. *Id.* at 1411.

Scalia further faulted the majority for finding that the Michigan Legislature had tailored the statute narrowly to prevent the spending of corporate "war chests" on political causes. *Id.* at 1413. Justice Scalia argued that a narrowly tailored statute would restrict the first amendment rights of only those corporations actually possessing "war chests," and not those that simply have the potential to amass such resources. *Id.* Scalia charged the majority with ignoring the "clear and present danger" test adopted by the Court fifty-three years prior. *Id.* at 1413.

Finally, Scalia criticized the majority for ignoring the basic tenants of our democratic system, which promote the free exchange of ideas, trust the electorate to make the best choice through collective decision making, and generally hold that "there is no such thing as too much free speech." *Id.* at 1416.

Justice Kennedy, in his own dissenting opinion, echoed many of the concerns of Justice Scalia. *Id.* at 1416 (Kennedy, J., dissenting). He argued that the Michigan statute created "distinctions based on the speech and the speaker" and as such, "engag[ed] in the rawest form of censorship." *Id.* at 1419. Further, Kennedy charged that the majority, in applying *MCFE*, acted as a censor because it only protected "a preferred class of nonprofit corporate speakers: small, single issue nonprofit corporations." *Id.*

Kennedy maintained that precedent dictates that the Court differentiate between expenditures and contributions. *Id.* at 1420. Thus, because the Michigan statute limited expenditures, it contravened the constitutional limits within which states may fight corruption of the political process. *Id.* Kennedy also noted that the majority redefined corruption to encompass the "corrosive and distortive" effects of corporate wealth on the electoral system. *Id.* Finally, Kennedy argued that the PACs were not adequate substitutes for free corporate speech because voters do not view PACs as credible sources of information. *Id.* at 1423.

30. See *supra* notes 1-24 and accompanying text.

31. See *supra* notes 9-12 and accompanying text.

32. See *supra* notes 22-24 and accompanying text.

*National Conservative Political Action Committee*³³ suggest that the Court had adopted a more permissive view of restrictions on political spending. By approving a system prescribing the means by which corporations may exercise their first amendment rights via independent expenditures, the Court in *Austin* adopted its most permissive view of limitations on political spending. Indeed, the four dissenters from the *Bellotti* decision, Justices White, Brennan, Marshall, and Rehnquist, comprise four of the six members of the *Austin* majority.³⁴

The *Austin* decision may prompt more states to require corporations to express their political views through political action committees. Ten states already have provisions analogous to the Michigan scheme upheld in *Austin*.³⁵ In states that choose to enact similar laws, the number of political action committees will increase.³⁶ For those corporations that form PACs in response to such legislation, the *Austin* decision will simply alter the vehicle for expressing corporate political opinion. Rather than make direct expenditures, corporations will resort to PAC expenditures to promote their views.³⁷ However, not all corporations will find it either feasible or practical to establish a PAC.³⁸ These corporations are generally small, financially weak, or larger, politically inactive corporations. When such corporations are denied access to the marketplace of ideas, the public is denied the benefit of their views in political discourse.

Furthermore, schemes similar to that in Michigan might fall prey to clever corporate officials. Corporate-sponsored PACs in Michigan can

33. See *supra* notes 16-21 and accompanying text.

34. *Austin*, 110 S. Ct. at 1394-95. The departure of Justices Brennan and Marshall from the Court leaves four members of the majority to defend the *Austin* decision.

35. See *supra* note 8.

36. The number of PACs undoubtedly will increase because, while not all corporations will choose to establish one, many will in order to continue to express their views on political issues and candidates.

37. These corporations, however, will pay a higher economic cost to express their views through PACs. See *infra* note 38.

38. PACs require substantial funds to operate, as both the majority and dissenting opinions in *Austin* note. See *Austin*, 110 S. Ct. at 1396, 1397, 1400. Mandatory procedures, such as hiring a treasurer for the separate fund, keeping detailed accounts of contributions, filing a statement of organization with state officials, and soliciting contributions from eligible persons all add to the costs of maintaining a PAC in compliance with state law. *Id.* at 1397. These costs can consume as much as 25% to 50% of a PACs total funding. *Id.* at 1423.

In light of the many costs of compliance, many corporations probably will not form PACs. For example, a small corporation that fails to qualify for the *Massachusetts Citizens for Life* exception, see *supra* notes 22-24 and accompanying text, may not have the resources to establish and maintain a PAC. Likewise, a larger corporation that involves itself in politics infrequently will choose not to incur the costs associated with operating a PAC.

solicit funds from their sponsor's shareholders, officers, directors, and certain upper-level employees.³⁹ A corporation could solicit contributions for its PAC from eligible employees with the understanding that the corporation would reimburse the employee either through a bonus or salary raise.⁴⁰ This arrangement would thwart the statutory scheme designed to prevent "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form . . . that have little or no correlation to the public's support for the corporation's [now the PAC's] political ideas."⁴¹ This problem, however, might be better left to the state legislatures and election commissions. Nevertheless, given the inability of small corporations to sustain PACs, statutory schemes such as that upheld in *Austin* might, ironically, strengthen or amplify the voices of the large corporations that successfully divert general treasury funds through employees to the corporation's PAC.

Justice Kennedy, in his dissenting opinion, argued that political action committees lack credibility with voters. Thus, Kennedy concluded that requiring a corporate speaker to use a PAC was tantamount to a denial of that speaker's right to speak.⁴² Oddly enough, the *Austin* decision may alter this situation. Kennedy asserts that PACs lack credibility because the public views them as "ad hoc organizations with little continuity or responsibility."⁴³ However, when a state requires corporations to utilize PACs, the credibility problem evaporates. Voters will learn that a statement by a corporate-sponsored PAC is the equivalent of a statement by the sponsoring corporation,⁴⁴ and the credibility of the corporation becomes that of the PAC.

The *Austin* decision ultimately may focus more attention on PACs and the problems they present. PACs recently have come under attack by critics who charge that they facilitate the purchasing of politicians, discourage new people with new ideas from entering the political arena, and

39. MICH. COMP. LAWS. § 169.255(2).

40. Some have questioned whether a corporate manager really has a choice when her superior requests that she contribute to their corporation's PAC. See Gross, *The Corporate PAC: Should We Pac It In?*, 34 FED. B. NEWS & J. 63 (1987).

41. *Austin*, 110 S. Ct. at 1397.

42. *Id.* at 1423 (Kennedy, J., dissenting).

43. *Id.*

44. This is necessarily true because the only way a corporation can express its political views in a state like Michigan is through a PAC. Therefore, voters can consider the PAC as an extension of the corporation with all the clout and credibility of the sponsoring corporation.

generally undermine the integrity and effectiveness of legislative bodies.⁴⁵ Moreover, many of the arguments launched against PACs resemble the *Austin* majority's attacks on corporate expenditures. For example, the *Austin* court claimed that one problem with allowing unrestrained corporate expenditures on political issues was that the resources spent supporting the corporation's view did not reflect the popular support for the position.⁴⁶ Similarly, one argument against PACs is that the well-organized organizations garner resources and wield influence disproportionate to the public support for the positions they promote.⁴⁷

In sum, the *Austin* decision affects corporate campaign spending both practically and theoretically. The practical effect of the decision promotes greater reliance on corporate-sponsored PACs, while raising larger theoretical questions concerning the desirability of PACs. The most significant aspect of the *Austin* decision, however, may not be what it does, but what it signals: a willingness on the part of the Supreme Court to uphold election reform measures aimed at the corruptive effects of wealth on the political process.⁴⁸

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45. See Boren, *Special Interest Money: A Threat to Democratic Government*, L.A. Daily J., May 27, 1988, at § 19, col. 1; Morris, *Get Off My PAC*, 92 CASE & COM., Mar.-Apr. 1987, at 30; Wash. Post, Sept. 6, 1990, at D1; Broder, *Bob Michel, Campaign Reformer*, Chicago Trib., June 24, 1990, at C3; N.Y. Times, May 13, 1990, § 4 at 18.

46. *Austin*, 110 S. Ct. at 1397.

47. See *Out of Order*, U.S. NEWS AND WORLD REPORT, Oct. 22, 1990, at 28; N.Y. Times, Jan. 23, 1990, § A, at 22 col. 1. Alternatively, proponents of PACs argue that most PACs serve a valuable function by giving a voice to causes whose constituents are geographically dispersed and have meager individual resources. Morris, *supra* note 45, at 30. Other PAC supporters assert that PACs are not corrupt and actually help authorities identify the individuals who would try to buy power whether or not PACs existed. Fein and Reynolds, *Money Is Not the Root of All Campaign Evils*, Legal Times, Aug. 26, 1990, at 16.

The debate over PACs and their effectiveness as a tool of election campaign reform is a topic beyond the scope of this Recent Development. The *Austin* decision will fuel the debate by allowing states to force corporations to utilize PACs.

48. This commentator is not alone in recognizing the Supreme Court's trend toward a more tolerant view of restrictions on election spending. See notes 30-33 and accompanying text. One author has argued that the *Austin* case indicates that the Court now may be receptive to addressing the corruptive effects of excessive wealth on the political process through campaign spending reform measures. Briffault, *Money's Weak Right to Talk*, Newsday, April 4, 1990, at 56.