

An Analysis of the Continued Viability of Corporate Speech Rights

This document was submitted to the Maine State Legislature Joint Judiciary Committee on May 18, 2005 as an addendum to the testimony of Robert Monks, supporting bill LD 1495. The bill aimed to revoke corporate claims to enjoy constitutional rights, including “free speech” rights to influence elections and ballot questions.

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A Brief Timeline of Corporate Political Speech

1907 – The Tillman Act prohibits contributions by corporations to political candidates from general treasury funds

1971 – FECA § 610 allows corporations to form segregated funds (PACs) for making political contributions

1976 – *Buckley v. Valeo* upholds a scheme requiring corporations to limit their involvement in electoral politics to the use of segregated funds. The case also establishes a distinction between limits on contributions to candidates (which are acceptable) and independent expenditures (which are not)

1978 – *First National Bank of Boston v. Bellotti* holds that corporations have a First Amendment right to speak about ballot initiatives

1980 – *Consolidated Edison v. Public Service Commission* reaffirms *Bellotti*'s holding that the value of speech is independent of the speaker

1981 – *Citizens Against Rent Control v. Berkeley* establishes an associational right to contribute money to PACs in the referenda context

1982 – *FEC v. National Right to Work Committee* upholds a law that prevents a non-profit corporation from soliciting money for its PAC to be used for political contributions from individuals who are not members of the corporation

1985 – *FEC v. National Conservative PAC* invalidates limits on uncoordinated expenditures by corporate PACs

1986 – *Pacific Gas and Electric Company v. Public Utility Commission* extends *Consolidated Edison* to the compelled speech context

1986 – *FEC v. Massachusetts Citizens for Life* strikes down a law prohibiting independent expenditures on behalf of candidates out of treasury funds, as applied to a non-profit ideological advocacy group

1990 – *Austin v. Michigan Chamber of Commerce* upholds restrictions on independent expenditures from general treasury funds by a non-profit which is not an ideological advocacy group, and recognizes that there is a compelling government interest in preventing corporate aggregations of wealth unrelated to the popularity of the corporation's ideologies, from distorting public debate

2003 – *FEC v. Beaumont* limits *MCFL* to independent expenditures by holding that advocacy corporations can be prevented from contributing general treasury funds directly to a political candidate

2003 – *Nike v. Kasky* implies (largely in dicta) that corporations have a right to speak about matter of public concern

2003 – *McConnell v. FEC* upholds limitations on “electioneering communications” funded from general treasury funds of corporations

Questions Presented

This memo addresses three questions. First, to what extent does a traditional business corporation^[1] currently enjoy a First Amendment right to speak on matters of public concern that do not materially affect that corporation's financial interests.^[2] Second, to the extent that such a right has been recognized, what logic has been used to justify that right, and to the extent that it has been limited, what logic has been used to justify the limitation? Third, to what extent do the current members of the Supreme Court believe that corporations should have First Amendment rights, and what sort of factual showing or scenario might persuade them to reverse *First National Bank of Boston v. Bellotti*.^[3]

Brief Answer

Only in the domain of electoral politics^[4] has the Supreme Court upheld restrictions on corporate speech that would have been constitutional if the speaker was an individual.^[5] Moreover, each of the nine justices currently sitting on the Supreme Court has, in just the last two years, signed an opinion at least implicitly reaffirming corporate speech rights. While this strongly suggests that the Court will be unreceptive to reconsidering the *Bellotti* decision, the situation is a bit more complicated. Although the Court has been willing to restrict corporate speech only in the electoral domain, the logic it has used in that context seems equally applicable to corporate speech generally. Moreover, some of the arguments that the Court has embraced in cases upholding limitations on corporate electoral speech were expressly rejected in *Bellotti*.^[6] Whether the Supreme Court would consider limiting non-electoral corporate speech is very much an open question.

Question 1- What is the State of the Law?

Background

The story of limitations on corporate speech rights begins in 1907 with the passage of the Tillman Act which prohibited corporations from making contributions from their general treasuries to political candidates. This law was continuously in place until 1971 and the passage of the Federal Election Campaign Act, which, *inter alia*, prohibited corporations from making contributions to or expenditures for political candidates except through the use of segregated funds.^[7] FECA was ultimately challenged in *Buckley v. Valeo*.^[8] Two features of *Buckley* are important for these purposes. First, the segregated fund rule for corporate electoral speech survived unscathed. Second, a general principle was enunciated that the government can limit contributions to candidates made by individuals, but cannot limit uncoordinated expenditures made by individuals on their preferred candidate's behalf. This second principle is important because the Court has been willing to suspend it for corporations – the only significant way in which corporations have been treated differently from individuals for First Amendment purposes.

First National Bank of Boston v. Bellotti^[9]

In 1978, the Court held 5-4 in *First National Bank of Boston v. Bellotti* that political speech by a corporation receives First Amendment protection. Writing for the Court, Justice Powell^[10] framed the question of whether a ban on corporate expenditures regarding a referendum not materially affecting its assets was permissible, not in terms of whether corporations have First Amendment protection, but rather whether speech which has the capacity to inform debate on a matter of public concern loses First Amendment protection if the speaker is a corporation. He concluded that the speaker should not rob the speech of its protection. He then found that because the law at issue allowed corporations to speak on some issues (those materially affecting them financially) but not others, the law was content discriminatory.^[11] Furthermore, he invoked anecdotal evidence that the restriction was imposed in the hopes of achieving passage of a particular referendum to suggest that it was at least intended to be viewpoint discriminatory.^[12] As a result, the Court applied strict scrutiny. The government responded by saying that it had a compelling interest in maintaining the involvement of the individual citizens in the face of massive accumulations of corporate wealth, and that

it needed to protect shareholders who dissented from the corporation's stance.^[13] The Court rebuffed the first argument as empirically unfounded and on the grounds that the First Amendment does not allow the dampening of some voices to aid other speakers^[14]; the Court suggested that the second argument was not consistent with the statute because it would be over and under inclusive (under-inclusive because it did not ban corporate lobbying, over-inclusive in that it banned advocacy by closely held corporations whose shareholders might be unanimous). The Court struck down the law.^[15]

Justice White dissented.^[16] Although he acknowledged that corporations do have speech rights, he argued that the state can legitimately prevent corporations from using the wealth they are allowed to acquire to leverage political power. Furthermore, because a corporation does not have an interest in self-expression, a primary animating principle behind the First Amendment does not apply to corporate speech. He also argued that both compelling interests asserted by the government deserved greater weight than Powell was willing to credit them.

Justice Rehnquist dissented separately, arguing the corporations are entities created by the state, and that states should have almost complete freedom to limit their powers (except for violating their Due Process rights). This view was partially animated by the belief that the First Amendment does not apply with the same force to the states that it does to the federal government.

Consolidated Edison Co. v. Public Service Commission of New York ^[17]

The Court^[18] struck down a law prohibiting a public utility from including an insert, discussing an issue of public concern, in monthly billing envelopes. The Court cited *Bellotti* for the proposition that the value of the speech is not dependent on the identity of the speaker, and found that the law could only be sustained if supported by a compelling government interest. The Court rejected a claim that protecting ratepayers, who were a captive audience, from the speech constituted such an interest.^[19]

Citizens Against Rent Control v. Berkeley ^[20]

Though this case concerns associational freedom, not corporate speech, it is significant as it held that referenda are different from elections in that limits cannot be imposed on contributions to organizations advocating for or against a referendum. Five justices^[21] reaffirmed *Bellotti*'s claim that "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electoral is hardly a reason to suppress it."^[22] Associational freedoms were found to be unconstitutionally burdened by the law.

Justice Rehnquist concurred separately for the purpose of distinguishing *Bellotti* and reaffirming his dissent there.^[23]

FEC v. National Right to Work Committee [NRWC] ^[24]

Justice Rehnquist wrote for a unanimous court in this 1982 case the upheld a campaign finance law that prohibited a non-profit corporation from soliciting donations for its segregated fund from anyone except its members. This case features an early formulation of language that "substantial aggregations of wealth which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions."^[25] This language was to be oft quoted and would take on greater significance in later cases.

National Conservative PAC v. FEC ^[26]

Justice Rehnquist wrote for the Court^[27] in this case which struck down expenditure limits applied to PACs. The Court found the expenditures at issue to be speech at the core of the First Amendment, and that the limitation was not justified by a finding of corruption. It went on to conclude that even if war chests were found to be a legitimate concern, the statute was overbroad because it applied to smaller organizations (including unincorporated ones) that could not pose a true threat. While he led the Court in striking down the limitation, Rehnquist did point out, “In *Bellotti*, of course, we did not reach, nor do we need to reach in these cases, the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office.”^[28] Justices Marshall and White each authored dissents to criticize *Buckley* (the foundation of the Court’s holding), especially the distinction between expenditures and contributions.

Pacific Gas and Electric Company v. Public Utilities Commission ^[29]

In this 1986 case, the Court found that a public utility with a state conferred monopoly could not be made to periodically replace a newsletter it regularly included in monthly billing statements with a message from an advocacy group asserting a position contrary to that of the utility. A plurality^[30] found that “[t]he identity of the speaker is not decisive in determining whether speech is protected.”^[31] The Court recognized a corporate right against compelled speech on the grounds that if the company’s views were to be conflated with that of the other speaker, it could detract from the corporation’s message.

Burger concurred to explain that he would have ended the inquiry with the analysis that compelled speech was at issue. Marshall concurred, but specified that he did not feel corporate rights were coextensive with individual rights. Justice Rehnquist, joined by White and Stevens, dissented, arguing, “Nor do I believe that negative free speech rights, applicable to individuals, and perhaps the print media, should be extended to corporations generally.”^[32]

FEC v. Massachusetts Citizens for Life [MCFL] ^[33]

This fractured 1986 decision held that a ban on independent expenditure of general treasury funds is unconstitutional as applied to an ideological advocacy non-profit. Five justices^[34] found that:

“Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of ‘traditional [corporation] organized for economic gain,’ that has been the focus of regulation of corporate political activity.”^[35]

The Court found that it was impermissible to impose additional burdens on this association merely because it adopted the corporate form, given that as an ideological association, there was no possibility that its speech would be contrary to the belief of dissenting members.

Justice Rehnquist dissented^[36] because he felt that the Court should continue the path undertaken in *NRWC* of “endors[ing] the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”^[37] He found the government interests in both preventing corruption and protecting dissenting members to be sufficiently compelling to uphold the law.

Austin v. Michigan State Chamber of Commerce ^[38]

In 1990, six justices^[39] voted to uphold a Michigan law that prohibited independent campaign expenditures by corporations from their general treasury funds, as applied to a non-profit chamber of commerce. The Court held that while “expressive rights are implicated”^[40] by such a statute, the law was narrowly tailored to a compelling government interest. In finding a compelling interest, the Court first discussed the need to avoid corruption and the appearance of corruption, concerns that had justified the limitations in *Buckley*. The Court did not stop there, however, also mentioning that state-conferred economic benefits give corporations an “unfair advantage in the political marketplace” because the result of economic advantages is that “the power of the corporation may be no reflection of its ideas.”^[41] As a result, the “corruption” interest was read broadly to include a compelling interest in “the restriction of the influence of political war chests funneled through the corporate form.”^[42]

Scalia authored a vitriolic dissent in which he described the compelling interest recognized by the Court to be a “hitherto unrecognized genus of political corruption”^[43] and decried the decision as “Orwellian.” Justice Kennedy also dissented, joined by Scalia and O’Connor, in an opinion which particularly stressed that “where political speech is concerned, freedom to speak extends to all nonprofit corporations,”^[44] (not just MCFL corporations). He argued that the law was content discriminatory and not narrowly tailored, but rather “too blunt an instrument.”^[45]

FEC v. Beaumont ^[46]

This 2002 case held that an *MCFL*-type corporation (i.e. one more akin to a voluntary political association) can be prohibited from contributing general treasury funds to a candidate. Justice Souter’s majority^[47] found *NRWC* to govern, and distinguished *MCFL* on the grounds that it addressed independent expenditures, not contributions. The Court quoted extensively from *Austin* regarding the appearance of corruption, and the risks posed by corporate war chests aggregated through special benefits conferred by the government.

Kennedy concurred in an opinion where he expressly disclaimed any reliance on *Austin*, and said that while he would be open to rethinking that contribution-expenditure distinction, until the Court was prepared to do so, he would uphold the law. Thomas, joined by Scalia, argued in dissent that campaign finance laws must always survive strict scrutiny, and that this restriction could not do so.

Nike v. Kasky ^[48]

This case concerned a suit against Nike alleging false advertising because of claims it made concerning its labor practices in Southeast Asia. While the Court ultimately dismissed certiorari as being improvidently granted, two opinions were authored, both of which include extended discussions of corporate speech. Stevens authored a concurrence, joined by Souter and Ginsberg, in which he argued that dismissal of certiorari was appropriate because it would be premature for the Court to rule before a lower court had determined whether Nike’s speech was commercial or political.^[49] The opinion made clear that if the speech was found to be political, it would be entitled to protection, saying, “the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike’s labor practices, but with similar practices used by other multinational corporations. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal.”^[50]

Justice Breyer took things one step further, authoring a dissent, joined by Justice O’Connor, in which he expressed the view that the Court should have reached the merits of the issue and found for Nike.^[51] He argued that the lawsuit “create[s] concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not. *See First Nat. Bank v. Bellotti*.”^[52] Breyer felt that constitutionally protected free speech was jeopardized by the indeterminacy that would result from the Court

dismissing certiorari, and that the statute could never survive the heightened scrutiny he thought had to be applied.

It is dangerous to read too much into this decision because the respondent did not ask the Court to overturn *Bellotti*, and the justices may have been unwilling to even consider the possibility unprompted. The Stevens concurrence, however, does cite favorably an amicus brief by ExxonMobil which called for the Court to broadly construe corporate speech rights. It is worth noting, though, that the *Austin* Court applied heightened (in fact, strict) scrutiny and sustained the limitation at issue there, so Breyer's opinion does not erect an insurmountable hurdle for corporate speech regulation.

McConnell v. FEC ^[53]

The Court upheld in significant part the Bipartisan Campaign Reform Act, which, among other things, prohibited corporations from spending general treasury funds on electioneering communications (advertisements that refers to a clearly identifiable candidate for public office) during the months immediately preceding a federal election. While this extremely fractured opinion is hard to summarize, the significant aspect for these purposes is that Justices O'Connor, Breyer, Souter, Stevens, and Ginsburg voted to uphold these restrictions. Particularly, the interests in both limiting the compulsion of dissenting shareholders and in guarding against the corrupting effects of corporate war chests motivated the majority.

Kennedy, Thomas, and Scalia each authored strongly worded dissents, pillorying both this decision, and the *Austin* decision which was seen to underlie it. Scalia explicitly reaffirmed *Bellotti*, and Kennedy and Thomas both cited it with approval. Kennedy, as in *Austin*, wrote a more tempered dissent than Scalia, and again (at least in part) emphasized the impact of the law on non-profit corporations. Perhaps most surprisingly, Rehnquist joined Kennedy's opinion (he traded places with O'Connor to preserve the *Austin* majority).

Summary

In short, current doctrine allows an absolute ban on expenditures from general corporate treasuries for both electoral contributions and independent expenditures, including electioneering communications. These limitations have not been extended to referenda and general speech on matters of public concern. The Court has not upheld limits on spending from segregated funds (they might run afoul of the associational freedoms described in *MCFL* and *NCPAC*), but has limited corporations to only soliciting for their segregated funds from corporate shareholders. Yet while no bans on non-electoral corporate speech have been upheld, the Court has recognized a compelling interest in preventing the distortion of the speech market resulting when corporations leverage their economic advantages in the speech realm.

Question 2 – Which Arguments Control the Corporate Speech Debate?

Arguments in Favor of Corporate Speech

Listeners Have Rights to Hear the Speech

Although the word "listener" does not appear in *Bellotti*, the case has been read by many commentators to establish a listener's right to hear corporate speech.^[54] This notion that the First Amendment applies to listeners has some historical precedent.^[55] In the years since *Bellotti*, this argument has been implicit in a number of corporate speech opinions, but has never really been an animating force behind a decision. It is perhaps most apparent in Scalia's *Austin* dissent where he discusses how voters would benefit from knowing which candidates corporate employers think would most help the economy. However, this argument has been primarily employed (and with great success at that) in the context of commercial speech, where laws

prohibiting advertisements are invalidated because they are thought to harm consumers.^[56] It has also surfaced in other places, such as child pornography litigation:

[W]e have often protected expression valued by listeners, whether or not the source of the communication was fully entitled to the safeguards of the First Amendment. See, e.g., *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) (plurality opinion); *Consolidated Edison Co. of New York v. Public Service Comm'n of New York*, 447 U.S. 530, 533-534, and n. 1 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, and n. 13 (1978); *Lamont v. Postmaster General*, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring). Just as the right of a listener to receive information does not rest on the right of the producer to disseminate it, so the power to ban the production and distribution of child pornography does not imply a concomitant authority to proscribe mere possession.^[57]

The Speech Itself is Valuable

More than any other argument, the claim that speech which is valuable should not lose its protection because the speaker is a corporation, has inspired jurisprudence extending speech rights to corporations.^[58] Justice Powell framed the inquiry in *Bellotti* in these terms and this logic has consistently carried great weight. Even the *Austin* majority felt the need to resort to strict scrutiny analysis in order to justify the limitation permitted there since “expressive rights” were implicated because “[t]he mere fact that the Chamber is a Corporation does not remove its speech from the ambit of the First Amendment.”^[59] This argument can be read into almost every opinion in *McConnell*, as even the majority partially defended its holding on the grounds that corporate messages could still be shared via segregated funds. Most recently, this argument can be seen in the *Nike* concurrence. Yet, this argument has not been explicitly affirmed in a majority opinion since *Pacific Gas* in 1986.

Corporations Are Natural Entities Entitled to Rights

The suggestion that corporations are naturally entitled to rights is a subtext running through a number of the Court’s opinions. It is perhaps most obvious in *Pacific Gas* because no other rationale really adequately explains why corporations would have a right against being compelled to speak. While the plurality in that case attempted to justify the extension on the grounds that compelled speech might undermine the efficacy of the corporation’s other speech, Justice Burger forthrightly acknowledged that he was making his decision solely on compelled speech grounds, and Justice Rehnquist took the plurality to task for extending a compelled speech right to a state created entity.

Justice Kennedy’s *Austin* dissent seems sympathetic to this argument: “Second, the Act discriminates on the basis of the speaker’s identity. Under the Michigan law, any person or group other than a corporation may engage in political debate over candidate elections; but corporations, even nonprofit corporations that have unique views of vital importance to the electorate, must remain mute.”^[60] This equation of corporate rights with individual rights is extremely characteristic of the natural entity theory. Likewise, Stevens’s concurrence from *Nike* refers to Nike as a “knowledgeable person” who should be entitled to speak on a matter of public concern free from any adverse chilling effects.

“Powellism” and the Belief the Corporations Have a Special Role in Society

In a 1972 brief to the United States Chamber of Commerce, soon-to-be Justice Powell articulated the belief that it is “essential ... for businessmen to confront [intellectual attacks on corporations and the free market system] as a primary responsibility of corporate management.” This belief can be seen implicit within his *Bellotti* opinion. Yet no member of the current Court has embraced this perspective with Powell’s vigor.

The closest variant of this argument that can be seen in recent corporate speech cases is Scalia’s dissent in *Austin* where he opines that PACs are not an adequate substitute for corporate speech because “[i]t is

important to the message that it represents the views of Michigan's leading corporations *as corporations*, occupying the 'lofty platform' that they do within the economic life of the State...."^[61] While this statement is framed within the broader context of what most resembles a listeners' rights argument, it suggests that corporations must have speech rights because they "own[] and operat[e] a vast percentage of the industry" and therefore have a uniquely valuable perspective to offer. He reiterated this perspective in *McConnell* where he referred to corporations as the institutions that represent "the most significant segment of the economy."^[62]

A variant on this argument can be seen in Stevens's *Nike* concurrence where he explains that "knowledgeable persons should be free to participate in such debate...."^[63] While neither of these arguments suggests that corporations *should* play a dominant role in the economy, they both suggest that as long as this role exists, corporations must have at least some speech rights.

Arguments Against Corporate Speech

Rights of Dissenting Shareholders

One of the most consistently presented arguments is that the government has an interest in limiting corporate speech to protect shareholders who do not support the corporation's position. Although this argument was rejected in *Bellotti* (though Justice White's dissent credited it), it was discussed in *MCFL* and fully reemerged in *Austin*. Furthermore, since its potential to have dissenting members is perhaps the single most significant difference between the Michigan Chamber of Commerce and an organization like MCFL, there is good reason to believe that the Court has found this interest to be a significant one. This argument has also been implicitly endorsed in the segregated fund cases such as *McConnell*, because one of the justifications for segregated funds is that they prevent dissenting shareholder's assets from being used for purpose of which they do not approve. Brennan's *Austin* concurrence stresses this point.

Distortion of the Speech Market

Defenders of restrictions on corporate speech have infallibly argued that corporate speech can be limited because state conferred economic advantages allow corporations to acquire speech power disproportionate to the actual popularity of their ideas. This argument was expressly rejected by the *Bellotti* Court. Yet *NRWC* introduced the concept of the distorting effects of corporate war chests, and *Austin* referred to preventing the exploitation of these economic advantages, which it characterized as a form of corruption, as a compelling state interest. The viability of this argument was reaffirmed a decade later in *Beaumont* and *McConnell*, which both quote extensively from the pertinent section of *Austin*. Since there is nothing about the logic of this argument that is particularly unique to electoral politics, more than anything else, this argument has the potential to upset *Bellotti*.^[64]

Corrupting Effect of Money

The Court has recognized money as having the ability to corrupt individual officeholders through the creation of "political debts." The distortion of the speech market discussed above has also been classified as a form of corruption. Money as a corrupting force has not been extended beyond the electoral context, however. Nor does it seem likely that the Court would allow it to reach that far.

To take up the proffered example of Exxon spending money to "inform" the public about global warming, I suspect that a majority of the Court would view it not as the "world's ability to handle global environmental problems [being] held hostage to the free speech rights of US corporations," but rather as Exxon "winning in the marketplace of ideas."^[65] There is some hope in that Justice Thomas was writing for only himself and Justice Scalia when he wrote those words in *McConnell* (as opposed to a majority of the Court endorsing an

equivalent sentiment in 1981's *Berkeley* case), but it is very speculative to extend any aspect of the McConnell majority's decision outside of the electoral context. The Court has been loathe to limit speech only because it is persuasive.

On the other hand, Exxon's spending would seem to be a paradigmatic example of the corruption recognized in *Austin* that occurs when wealth accumulated for reasons other than the popularity of that corporation's ideas are used to influence policy. *Austin* has not yet been taken remotely that far, though. To date, the Court has limited its corruption holdings to situations where there is someone (a candidate) to be corrupted.

Corporations as Creatures of the State

Justice Rehnquist was, starting with *Bellotti*, (at least until *McConnell*) the most ardent enunciator of the viewpoint that since corporations are artificial entities created by the state, they can be created with whichever features or rights the state selects. While there has been some support for this view in the academic literature, it has not had much of a following with the Court (this is probably due in part to the fact that corporations have been recognized to have Due Process rights since 1886,^[66] and this principle has never really been questioned). This argument also potentially runs afoul of freedom of association (in addition to freedom of speech) as evidenced by cases such as *Berkeley* and *MCFL*.

The limits of this argument are best seen in *Browning-Ferris Indus. v. Kelco Disposal*.^[67] This 1989 case has nothing to do with speech, but is useful because it provides a very clear insight into how two sitting justices conceive of corporate rights (seemingly in a way that contemplates them as having inherent rights despite being artificial beings). In a partial dissent by Justice O'Connor, joined by Justice Stevens, she argues that the excessive fines clause of the Eighth Amendment should apply to corporations (the full Court resolved the case on other grounds and explicitly reserved this question):

"In the words of Chief Justice Marshall, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." As such, it is not entitled to "'purely personal' guarantees" whose "'historic function' . . . has been limited to the protection of individuals." [*First National Bank of Boston v. Bellotti*](#). Thus, a corporation has no Fifth Amendment privilege against self-incrimination, or right to privacy. On the other hand, a corporation has a First Amendment right to freedom of speech, and cannot have its property taken without just compensation. A corporation is also protected from unreasonable searches and seizures, and can plead former jeopardy as a bar to a prosecution. Furthermore, a corporation is entitled to due process, and equal protection of law.

Whether a particular constitutional guarantee applies to corporations "depends on the nature, history, and purpose" of the guarantee. [*First National Bank of Boston*](#). The payment of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity, and the Court has reviewed fines and monetary penalties imposed on corporations under the Fourteenth Amendment at a time when the Eighth Amendment did not apply to the States. If a corporation is protected by the Due Process Clause from overbearing and oppressive monetary sanctions, it is also protected from such penalties by the Excessive Fines Clause."^[68]

Question 3 – What Do the Current Justices Think, and How Can We Persuade Them?

A. Table of Justices^[69] and Justice by Justice Analysis

Justice	Signed an Opinion Citing <i>Bellotti</i> as Authority	Has Ever Recognized <i>Austin</i> -type Corruption	Dissented From a Case with <i>Austin</i> -type Corruption	Refused to Apply Contribution Rules to MCFL-type Corps.	Upheld Limits on Spending by PACs
Scalia	Yes (<i>McConnell</i>)	No	Yes (<i>McConnell</i>)	Yes (<i>Beaumont</i>)	No
Thomas	Yes (<i>McConnell</i>)	No	Yes (<i>McConnell</i>)	Yes (<i>Beaumont</i>)	No
Kennedy	Yes (<i>McConnell</i>)	No	Yes (<i>McConnell</i>)	No	No
Rehnquist	Yes (<i>McConnell</i>)	Yes (<i>Austin</i>)	Yes (<i>McConnell</i>)	No	No
Breyer	Yes (<i>Nike</i>)	Yes (<i>McConnell</i>)	No	No	No
O'Connor	Yes (<i>Nike</i>)	Yes (<i>McConnell</i>)	Yes (<i>Austin</i>)	No	No
Stevens	Yes (<i>Beaumont</i>) ^[70]	Yes (<i>McConnell</i>)	No	No	No
Ginsburg	Yes (<i>Beaumont</i>)	Yes (<i>McConnell</i>)	No	No	No
Souter	Yes (<i>Beaumont</i>)	Yes (<i>McConnell</i>)	No	No	No

Scalia – Scalia is absolutely opposed to limitations on corporate speech. His *Austin* dissent suggested this, and his *McConnell* dissent removed all doubt by explicitly reaffirming *Bellotti*. He wrote, in an opinion joined by no other member of the Court, “Nor is there any basis in reason why First Amendment rights should not attach to corporate associations-- and we have said so [i]n *First Nat. Bank of Boston v. Bellotti*...”^[71] He also has argued that the fact that that a corporation is the speaker is a crucial part of the speech itself, and that merely having others voice the corporation’s position is inadequate for First Amendment purposes. He joined Thomas’s dissent from *Beaumont*, clearly setting himself apart as one of

the two most ardent opponents of campaign finance reform (and by extension, all attempts to cabin political expression).

Thomas – Thomas also seems intractable on the notion that corporations have robust speech rights. In *McConnell*, he wrote:

“In other words, the ‘corrosive and distorting effects’ described in *Austin* are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that ‘the ultimate good’ has been ‘reached by free trade in ideas,’ or that the speaker has survived ‘the best test of truth’ by having ‘the thought ... get itself accepted in the competition of the market.’ [Abrams , 250 U.S., at 630, 40 S.Ct. 17](#) (Holmes, J., dissenting). It is now evidence of ‘corruption.’ This conclusion is antithetical to everything for which the First Amendment stands. See, e.g., *First Nat. Bank of Boston v. Bellotti*

Because *Austin's* definition of ‘corruption’ is incompatible with the First Amendment, I would overturn *Austin* and hold that the potential for corporations and unions to influence voters, via independent expenditures aimed at convincing these voters to adopt particular views, is not a form of corruption justifying any state regulation or suppression.”^[72]

The dissent he authored in *Beaumont* calling for the application of strict scrutiny also sets him apart as an opponent of political speech limitations.

Kennedy – Kennedy, along with Thomas and Scalia, seems to be one of the three most ardent opponents of restrictions on corporate speech. He vigorously dissented in *Austin*, and in *McConnell* opined, “This overreaching contradicts important precedents that recognize the need to protect political speech for campaigns related to ballot measures. See generally *Citizens Against Rent Control ...*; *First Nat. Bank of Boston v. Bellotti*....”^[73] Even more strikingly, he followed by saying:

To abide by *Austin's* repudiation of [Bellotti](#) on the ground that [Bellotti](#) did not involve express advocacy is to adopt a fiction. Far from providing a rationale for expanding [Austin](#), the evidence in these consolidated cases calls for its reexamination. Just as arguments about immense aggregations of corporate wealth and concerns about protecting shareholders and union members do not justify a ban on issue ads, they cannot sustain a ban on independent expenditures for express ads.^[74]

Yet it is noteworthy that he authored his own opinions in both *Austin* and *McConnell*, and declined to join Scalia’s more strongly worded opinions in both, despite the fact that Scalia joined both of his opinions. Moreover, in both *Austin* and *McConnell*, Kennedy stressed the fact that the provisions at issue applied to non-profit corporations and were overbroad. He seems especially offended by the attempt to distinguish MCFL corporations from other non-profits, arguing that the Court engages in impermissible discrimination in seeking to isolate ideological advocacy organizations from other non-profits. While he has argued that, “ready willingness to equate corruption with all organizations adopting the corporate form is a grave insult to nonprofit and for-profit corporations alike, entities that have long enriched our civic dialogue,”^[75] it is hard to read his opinions without noticing the emphasis he places on the burdens on non-profit corporations. If he believes the statutes in those two cases were “too blunt an instrument,” it suggests that a sufficiently precise statute might win his vote.

Rehnquist – The Chief Justice is a little puzzling because he dissented in *Bellotti* and was throughout the 1980s the most consistent vote in favor of upholding corporate speech restrictions, authoring many of the opinions himself. He voted with the majority in *Austin*. Yet he joined Kennedy’s opinion in *McConnell* (sharply criticizing *Austin*) without reservation (BCRA Title II, the one most relevant to corporate speech, is the only one on which Rehnquist did not write).^[76] This change of heart was somewhat surprising, and it is

an open question how much of his previous jurisprudence he now disavows. Given the somewhat limited nature of Kennedy's opinion, it could conceivably be just *Austin*, or might include the entirety of his jurisprudence in the area.

Stevens – Stevens joined the majority in *Bellotti*, and though he joined the *Austin* majority, he wrote in a separate concurrence that, "as we recognized in [*Bellotti*], 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."^[77] In authoring the section of *McConnell* upholding the limits on corporate electioneering communications, he effectively just invoked *Austin*. Yet he also authored the *Nike* concurrence which refers to corporations as "persons" who should be free to participate in discussions of issues like globalization, and favorably cites an ExxonMobil amicus brief that calls for a broad interpretation of corporate speech rights. More than any other justice, he has hewn to the distinction between electoral speech and speech without candidates, as is best illustrated by contrasting his opinion in *MCFL* (where he would have upheld a restriction in the electoral context) with his decision in *Bellotti*.

Breyer – Breyer joined the majority that upheld the restrictions on corporate electioneering expenditures in *McConnell*. He also joined the *Beaumont* majority. However, he also authored a dissent in *Nike* which favorably cited *Bellotti* and implied that Nike's speech is so valuable it should be shielded, notwithstanding the intertwinement with commercial speech, because regulation might chill speech on matters of public concern. While Breyer may just not have chosen to reconsider *Bellotti*, his desire to grant summary judgment for the corporation suggests that he felt that real First Amendment concerns were implicated by the possible chilling of corporate speech. There is an alternative reading, however, that he was more concerned about an overbroad statute chilling all speakers (including unincorporated ones), and argued in favor of applying heightened scrutiny because he believed restrictions tailored just to corporate speech could survive heightened scrutiny (as they did in *Austin*).

O'Connor – O'Connor seems to have undergone a change of heart over the past few years. She dissented in *Austin*, but joined the *Beaumont* majority which relied heavily on that case, and then co-authored the section of *McConnell* that upheld the corporate limitations (and favorably cited *Austin*). This conversion may be limited to electoral politics, however; she also joined Breyer's *Nike* dissent.

Ginsburg – Ginsburg voted with the *McConnell* majority, but cosigned the *Nike* opinion which referred to a corporation as a "person" entitled to speak on public issues. Without more, it is hard to tell how she would respond to a frontal assault on *Bellotti*.

Souter – Souter was with the *McConnell* majority and joined Stevens's *Nike* concurrence. Interestingly, he joined only the part of the *Nike* concurrence discussed here (Ginsburg and Stevens had two other rationales for dismissing certiorari), possibly suggesting that he more ardently adheres to the views expressed there.

B. Reasons to Reverse *Bellotti*

All the above seems to show that *Bellotti* is still the law of the land, but that its foundation has been significantly eroded. It is clear that as long as it is not repudiated, all nine justices are comfortable to cite to it for support when it is convenient to do so. This does not answer the question, however, of how these same justices would react if they were actually called upon to determine its ongoing viability. The following is designed to describe a few alternatives as to how *Bellotti* might be overturned, if the current justices were so inclined.

1. A number of commentators have seized on footnote 26 of the *Bellotti* decision as a possible loophole.^[78] The footnote serves to distinguish *Bellotti*'s holding from laws whose purpose is to defeat "the problem of corruption of elected representatives through the creation of political debts."^[79] It goes on to stress that

“Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.” This passage takes on a radically new meaning, however, in light of the broadened definition of “corruption” that the Court employed in *Austin* and *McConnell*. Since the *Bellotti* Court acknowledged that corporate speech may be limited by corruption, *Austin* suggests that corporate speech is limitable in at least the referendum context. As Professor Victor Brudney has explained, “the *Austin* decision implements the logic and import of footnote 26 in *Bellotti* in terms that imply that footnote 26 of the *Bellotti* opinion offers a loose thread which might be pulled hard enough to unravel the whole decision.”^[80] While it is an open question whether any of justices who signed *Austin*, *Beaumont*, and *McConnell* would choose to carry the broadened definition of corruption outside of elections with candidates, it is certainly a possible line of attack.

2. Rather than merely employ a technicality from *Bellotti* to sidestep that holding (and presumably only now limit corporate speech in the referendum context), the Court could read *Austin* as grounds for limiting corporate speech more broadly. As one commentator has observed:

“If, as the Court reaffirmed in *McConnell*, the state's compelling interest in regulating electoral corporate speech is to protect against distortions of the political process that result from corporations' ‘aggregations of wealth’ that have ‘little or no correlation to the public's support for the corporation's political ideas,’ why should this reasoning not also apply to political speech by corporations outside of elections? Certainly, an election is a unique certification of the public's persuasion, but under the compelling interest the Court has embraced, why should corporations be entitled to leverage their status in order to influence the public on other political issues? The Court's reasoning in the electoral cases leaves open the possibility that they should not.”^[81]

Nike does suggest that the justices that might have seemed most amenable to such a broad reading of *Austin* and its descendents are not willing to go that far. Yet it is hard to construct a principled reason for limiting the logic of *Austin* to the electoral context.

3. A somewhat far fetched, though intriguing, possibility is that a state might attempt to limit corporate speech through its corporations law (rather than its election law). For example, it is interesting to speculate about what might occur if Delaware were to change its law such that Delaware corporations could not use shareholder assets for non-commercial speech purposes. This law could theoretically be justified by both a need to protect dissenting shareholders and to deter corporate malfeasance. Such a possibility was contemplated by Justice Brennan in his *Austin* concurrence,^[82] and has received fairly extensive discussion in academic circles.^[83] The primary distinction between such legislation and the legislation in previous cases like *Bellotti* and *Austin* is that it would apply to all corporations chartered in a given state, not those participating in an election in a given state^[84] (i.e. Massachusetts could prevent Massachusetts corporations from speaking in referenda in any state of the union, but could not prevent Delaware corporations from speaking in Massachusetts referenda). What is so interesting about this possibility is that in such an instance, a State would be at its most credible in claiming that it was acting to protect dissenting shareholders, rather than merely acting to distort the speech market. Since such a law would more closely resemble an economic regulation (which are typically given great deference) than a speech regulation (which are traditionally very suspect), it would turn the tables on *Bellotti*, because to strike down that law, the Court would now have to find an affirmative reason to create a First Amendment enclave in corporate law, rather than merely choose not to recognize a corporate exception for free speech. The power of reframing the issue is such that the Court might be far more willing to sustain a regulation clearly cabined to corporate law, without having to worry about setting dangerous precedents in the First Amendment arena. Theoretically, this approach could be used to limit corporations to only speech that materially affects its assets (the law can go no further than that without infringing upon corporate Due Process rights).

Conclusion

In the 27 years since *First National Bank of Boston v. Bellotti* was decided, that decision has been significantly undermined. The twin compelling state interests rebuffed there (protecting dissenting shareholders and protecting individual speakers) have been found much more persuasive to later courts. Yet *Bellotti* continues to live. Whether it will survive a direct challenge, however, is very much an open question.

Endnotes

^[1]Media corporations are excluded from this analysis because they introduce a multitude of complexities.

^[2]While the “materially affecting” qualifier is one that exists in the case law, it is arguably a very problematic simplifying assumption. Since state corporation law would prohibit a corporate director from wasting corporate assets by spending them on his preferred political agenda if it did not benefit the corporation, it is unclear precisely what category of speech would be targeted by such legislation. See Jill E. Fisch, *Frankenstein’s Monster Hits the Campaign Trail: An Approach to Regulations of Corporate Political Expenditures*, 32 Wm and Mary L. Rev. 587, 618 (1991).

^[3]435 U.S. 765 (1978) (striking down on First Amendment grounds a law prohibiting a corporation from spending money to advocate a position on a referendum whose outcome did not materially affect the assets of the corporation).

^[4]As a convenience, I use the term “electoral” speech to refer only to elections involving candidates. When referenda are also included, this fact will be explicitly highlighted.

^[5]See Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 Iowa L. Rev. 995, 1005 (1998) (“First Amendment doctrine treats corporations indistinguishably from citizens: with the sole exception of expenditures in connection with campaign for political office, corporations have the same speech rights as citizens.”). My research has not uncovered any case since 1998 that breaks this trend.

^[6]See Fisch, *supra* note 2, at 613 (“Even superficial scrutiny of the opinion in *Austin* reveals that it stands in absolute contradiction to the principles set out in *Bellotti*. Indeed, reviewing the Court’s findings in *Austin* leaves the reader with the conclusion that a state may limit, or indeed ban, virtually all corporate speech, whether or not political in nature and whether connected with an election contest, a referendum, or simple lobbying.”).

^[7]See *Buckley v. Valeo*, 424 U.S. 1, 196 (1976) (describing the provisions of FECA § 610).

^[8]*Id.*

^[9]435 U.S. 765 (1978).

^[10]Justices Burger, Stewart, Blackmun, and Stevens joined the opinion of the Court.

^[11]*Bellotti* at 785.

^[12]*Id.*

^[13]*Id.* at 787.

^[14]*Id.* at 790 – 91.

^[15]Justice Burger wrote a concurring opinion to discuss the implications for media conglomerates of restrictions on corporate speech.

^[16]Justices Brennan and Marshall joined this opinion.

^[17]447 U.S. 530 (1980).

^[18]Justice Powell wrote for Burger, Brennan, Stewart, White, and Marshall.

^[19]Marshall wrote a concurrence to clarify that he had not considered another line of argumentation because it was procedurally barred, and that his opinion should not be read as rejecting that argument. Stevens concurred on grounds slightly from the Court. Blackmun, joined by Rehnquist, dissented on grounds not directly relevant to corporate speech.

^[20]454 U.S. 290 (1981).

^[21]Justice Burger wrote for Brennan, Powell, Stevens, and Rehnquist.

^[22]*Id.* at 298 (quoting *Bellotti*).

^[23]Justices Blackmun and O'Connor co-wrote a concurrence, and Justice Marshall wrote one as well. Justice White dissented. None of these opinions is strictly relevant to this analysis.

^[24]459 U.S. 197 (1982).

^[25]*Id.* at 207.

^[26]470 U.S. 480 (1985).

^[27]Justices Burger, Blackmun, Powell, O'Connor, Brennan and Stevens joined the majority in the relevant portions of the opinion.

^[28]*Id.* at 495.

^[29]475 U.S. 1 (1986).

^[30]Justice Powell wrote for Burger, Brennan, and O'Connor.

^[31]*Id.* at 8.

^[32]475 U.S. 1, 26 (1986) (Rehnquist, J., dissenting).

^[33]479 U.S. 238 (1986).

^[34]Brennan authored the opinion of the Court in which Marshall, Powell, and Scalia joined in full, and O'Connor joined in all relevant part.

^[35]*Id.* at 259 (citations and footnotes omitted).

^[36]Justices White, Blackmun and Stevens joined Rehnquist.

^[37]FEC v. MCFL, 479 U.S. 238, 267 (1986) (Rehnquist, J., dissenting).

^[38]494 U.S. 652 (1990).

^[39]Justice Marshall wrote for the Court, joined by Rehnquist, Brennan, White, Blackmun and Stevens. Brennan wrote a separate concurrence to emphasize that the law was not "an across the board prohibition of political participation by corporations" and stressed that the Michigan law had no impact on segregated funds. He also effectively reaffirmed *Bellotti* and *MCFL*. Justice Stevens wrote a concurrence in order to register his disagreement with the general principle that expenditures and contributions should be treated differently. He felt that the issue turned on the fact that this was a candidate election (as opposed to a referendum).

^[40]*Id.* at 655.

^[41]*Id.* at 659.

^[42]*Id.*

^[43] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684 (Scalia, J., dissenting).

^[44] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 707 (Kennedy, J., dissenting).

^[45] *Id.* at 652.

^[46] 539 U.S. 146 (2003).

^[47] Justices Rehnquist, Stevens, O'Connor, Ginsburg, and Breyer joined Souter.

^[48] 123 S. Ct. 2554 (2003).

^[49] Stevens and Guinsberg had two other grounds for denying certiorari, both concerning the procedural rules governing federal courts.

^[50] 123 S. Ct. at 2559 (Stevens, J., concurring) (citations omitted).

^[51] Justice Kennedy dissented separately without writing an opinion.

^[52] 123 S. Ct. at 2567 (Breyer, J., dissenting).

^[53] 124 S. Ct. 619 (2003).

^[54] See, e.g., Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities and the State*, 79 Cal. L.R. 1229, 1245 (1991) (characterizing *Bellotti* as creating a derivative speech right for corporations based on the listener's interest in the speech).

^[55] See, e.g., *Lamont v. Post Master General*, 381 U.S. 301 (1965) (finding a First Amendment right to receive Communist propaganda).

^[56] See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down some restrictions on tobacco advertisements); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating a law that prohibited the advertising of alcohol prices).

^[57] *Osborne v. Ohio*, 495 U.S. 103, 141 n.15 (1990) (Brennan, J., dissenting).

^[58] It could be argued that this is really just an extension of the "listener's rights" argument since it is obviously the value to the **listener** which animates this argument. This explains how Justice Brennan could read *Bellotti*, *Consolidated Edison*, and *Pacific Gas* as listener's rights cases. See *supra* text accompanying note 57. Since the Court generally has tended to characterize the argument in terms of the value of the speech, I address it separately.

^[59] *Austin*, 494 U.S. at 657.

^[60] *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting).

^[61] *Austin*, 494 U.S. at 694 (Scalia, J., dissenting).

^[62] *McConnell*, 124 S. Ct. at 257 – 58 (Scalia, J., dissenting).

^[63] *Nike*, 123 S. Ct. at 2559 (Stevens, J., concurring).

^[64] See *Developments in the Law – Corporations and Society, Free Speech Protections for Corporations: Competing in Markets for Commerce and Ideas*, 117 Harv. L. Rev. 2272, 2290 (2004) (observing that the logic of this argument makes as much sense in the context of referenda or speech on matters of public concern as it does in the context of electoral speech).

^[65] *McConnell*, 124 S. Ct. at 735 (Thomas, J., dissenting).

^[66] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

^[67] 492 U.S. 257 (1989)

^[68] *Id.* at 284 (all citations to cases other than *Bellotti* were omitted).

^[69] Most recent case explaining a “yes” is in parentheses.

^[70] *Beaumont* cites *Bellotti* without really affirming any significant aspect of its holding – this goes to establishing that all the justices still see *Bellotti* as good law, regardless of whether they themselves would reaffirm it.

^[71] *McConnell v. FEC*, 124 S. Ct. 619, 725 (Scalia, J., dissenting).

^[72] *McConnell v. FEC*, 124 S. Ct. 619, 735 (Thomas, J., dissenting).

^[73] *McConnell v. FEC*, 124 S. Ct. 619, 758 (Opinion of Kennedy, J., dissenting).

^[74] *Id.* at 764 - 65.

^[75] *Id.* at 764.

^[76] This might perhaps be an expression of “regret” over his *Bellotti* decision. See Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 *Comm. L. Pol’y* 63, 65 (2005) (describing Rehnquist’s vote in *McConnell* as a significant departure from his earlier jurisprudence); Richard H. Pildes, *Supreme Court Foreword—2003 Term: The Constitutionalization of Democratic Politics*, 118 *Harv. L. Rev.* 38, 148 (2004) (same).

^[77] *Austin*, 494 U.S. at 678 (Stevens, J., concurring).

^[78] Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 *Capital Univ. L.R.* 381, 405 (1992).

^[79] *Bellotti*, 435 U.S. at 788 n.26.

^[80] Victor Brudeney, *Association, Advocacy and the First Amendment*, 4 *Wm & Mary Bill Rts. J.* 1, 69 n.174 (1995).

^[81] *Developments in the Law -- Corporations and Society, Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 *Harv. L. Rev.* 2272, 2290 (2004).

^[82] *Austin*, 494 U.S. at 657 (Brennan, J., concurring) (“We have long recognized the importance of state corporate law in protecting the shareholders of corporations chartered within the State.” (internal quotation marks and citations omitted)).

^[83] See, e.g., Victor C. Brudeney, *Business Corporations and Stockholders Rights Under the First Amendment*, 91 *Yale L.J.* 235, 242 (1981) (“[U]ntil *First National Bank of Boston v. Bellotti*, nothing in the Constitution was thought to restrict the state’s power to forbid management from wasting corporate assets.”); Alan J. Meese, *Limitations on Corporate Speech: Protection of Shareholders or Abridgement of Expression?*, 2 *Wm & Mary Bill of Rts. J.* 305 (1993) (describing, and then arguing against, the perspective that restrictions on corporate speech are just an extension of corporate law’s traditional role of protecting shareholder assets).

^[84] See *Fisch*, *supra* note 2, at 598 (drawing this distinction).