MUZZLING THE MOUTHLESS SPEAKER: THE REFORM COMMUNITY'S PRESCRIPTION FOR "CORPORATE DOMINATION" IN STATE ISSUE CAMPAIGNS

CHARLES T. MCCONVILLE*

What is the necessity, what is the propriety, of picking out a corporation, which is an artificial person, which has not any conscience, is not capable of understanding the morals of the Democratic utterances that we have just heard, and forbid them to contribute to the corrupting of the populace of the country while you let the rich men put their money into the campaign?

Therefore you ought to go further and provide that no man shall be a candidate for office unless he can prove to a nonpartisan committee that he has not got a cent on God's earth and that he will not corrupt anybody. [Laughter.]¹

Introduction

A majority of American states provide voters with the opportunity to decide the fate of issue questions placed on statewide ballots.² Twenty-seven states give citizens the opportunity to propose new laws, amend state constitutions, strike down laws enacted by the legislature, or some combination of these powers.³ The initiative and referendum⁴ process

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^{*} J.D. Candidate, 2007. Prior to attending law school, the author served for nine years as political director of the Ohio Chamber of Commerce. The author wishes to thank his wife, Kimberly, for her tireless support, and Professor Bradley A. Smith for his valuable insights on this article.

¹ 41 CONG. REC. 1454 (Jan. 21, 1907) (Rep. Charles H. Grosvenor (R-OH) addressing the House on legislation banning corporate contributions in federal election campaigns).

² Initiative and Referendum Inst., Univ. S. Cal., States with Direct and Indirect Initiative Amendments; Direct and Indirect Initiative Statutes and Popular Referendum, http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Sept. 18, 2006).

 $^{^3}$ Id

⁴ For the purposes of this Comment, initiative and referendum will be referred to collectively, although they are different and may occur in a variety of ways. For definitions of "initiative" and "referendum," see Initiative and Referendum Inst., Univ. S. Cal., What Is (continued)

represents one of the major legacies of the Progressive movement, whose leaders reacted to what they saw as the dominance of corporate interests (especially railroads and oil companies) at the end of the nineteenth century and into the early twentieth century.⁵ Another major legacy of the Progressive movement is laws limiting the ability of corporations to participate in candidate elections.⁶ For many years, these inventions existed on separate footings, and separate bodies of law developed concerning corporate speech rights and campaign financing. In 1978 and 1981, the Supreme Court prevented the application of candidate-style campaign finance restrictions to corporate and business participation in statewide and local ballot issues. However, recent decisions, along with the continued pressure of the reform community, point toward a collision of corporate speech rights and campaign finance reforms aimed at ballot issues. In fact, based on changes in the direction of the Supreme Court, one respected campaign finance commentator believes that restrictions on corporate speech in ballot issue campaigns could pass constitutional muster if decided today. 10

In Part I, this Comment examines the early development of campaign finance law promoted by progressives, and the Supreme Court's treatment of corporate speech rights and campaign finance laws. In particular, Part I analyzes the rise of the "corporate domination" argument in the Court's jurisprudence.

the Initiative and Referendum Process?, http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm (last visited Sept. 18, 2006). Generally speaking, the initiative process allows state voters to place proposals for new statutes on the ballot after collecting a threshold amount of voter signatures. *Id.* The referendum process allows voters to strike down laws passed by the legislature, also done by collecting a certain number of voter signatures. *Id.* The Initiative and Referendum Institute website maintains information on the different types of initiative processes available (or not available) to voters in each state, as well as the ballot access requirements. *See id.*

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⁵ See Joseph F. Zimmerman, The Initiative: Citizen Law-Making 4–6 (1999).

⁶ See, e.g., Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907) (current version at 2 U.S.C. § 441b(a) (2005)).

⁷ See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767–68, 795 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 292, 300 (1981).

⁸ See, e.g., McConnell v. FEC, 540 U.S. 93 (2003).

⁹ See discussion infra Part II.

¹⁰ Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 886 (2005).

Part II highlights the current challenge to corporate speech rights in the ballot issue context. The heirs of the Progressive movement, still wary of corporate power, are working to bridge the gap between corporate speech and campaign finance laws. The corporate domination argument serves as their rallying cry in attempting to ban corporate speech in a ballot issue context.

Part III looks at the legal standards used in *Montana Chamber of Commerce v. Argenbright*¹¹ to establish whether corporate interests had dominated state ballot issue campaigns in Montana. The criteria used by the Montana District Court provide useful tools for evaluating the corporate domination argument as applied to a wider universe of ballot issues

Finally, Part IV tests the corporate domination argument in three principal ballot issue contexts: (1) business versus labor, (2) citizen groups versus corporations (i.e., David v. Goliath), and (3) corporations versus citizen groups (i.e., Goliath v. David). In short, proponents of a ban on corporate participation in state ballot issues cannot show that corporations have dominated issue and referendum politics.

Even though the corporate domination argument is intuitively attractive, it is really an excuse to muzzle corporate speakers because of their identities, and to pick winners and losers in issue battles. If called upon to settle this dispute again, courts should carefully examine the evidence related to corporate participation in ballot issue campaigns, and uphold the rights of corporations to participate.

I. BACKGROUND

A. The Progressives v. The Industrialists

For many years, the relationship between business and government in the United States has caused a tension that goes to the very core of our society. Ironically, Americans enjoy an unparalleled standard of living because of the wealth-producing corporate forms of American business; 12 yet, the American people and the press regularly deplore business conduct with respect to government and politics. 13 In one description of America's

¹² See Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green, 50 WASH. & LEE L. REV. 1423, 1446 (1993).

¹¹ 28 F. Supp. 2d 593 (D. Mont. 1998).

¹³ See, e.g., ProgressiveLiving.org, The Progressive Living Guide to Alternative Media, http://www.progressiveliving.org/media/media_frameset.htm (last visited Sept. 18, 2006); (continued)

Gilded Age, historian Robert Caro described the relationship of business tycoons and politicians: "The great industrialists of the post-Civil War era... needed government, needed it for franchises and land grants for their railroads, for legislative sanctions that would allow them to loot the new nation's oil and iron, for subsidies for the monopolies they were creating." The excesses of the industrialists and their corporate contributions to political campaigns provoked America's first restriction on corporate political participation—the Tillman Act. Fueled by "popular feeling" that corporate capital had "unduly influenced politics," particularly in early twentieth century elections, the Tillman Act prohibited corporations and national banks from making monetary contributions "in connection with any election to any political office."

A review of the House debate on the Tillman Act shows that the essential features of the campaign finance debate have remained unchanged over the last one hundred years. The record reflects a mixture of outrage with corporate activity, balanced with concerns about

Common Cause, Money in Politics, The Legal Battle for Limits on Campaign Spending, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=710775 (last visited Sept. 18, 2006).

[D]uring the last Presidential campaign they [Republicans] took several hundred thousand dollars from the widows and orphans of this country whose ancestors had contributed in the way of premiums to insurance companies and misused them in illegitimate political expenditure Mr. Speaker, it is an undisputed fact to-day that some of the great corporations of this country, in order to corrupt the electorates of this Republic, took from their treasuries in the last national campaign many thousands of dollars.

Id.

 $^{^{14}}$ Robert A. Caro, The Years of Lyndon Johnson: Master of the Senate 28–29 (2002).

¹⁵ See Anthony Corrdo, *Money and Politics: A History of Campaign Finance Law, in* Campaign Finance Reform: A Sourcebook 27, 27–28 (Anthony Corrdo et al. eds., 1997).

¹⁶ FEC v. Beaumont, 539 U.S. 146, 152 (2003).

¹⁷ Tillman Act, ch. 420, 34 Stat. 864, 864 (1907) (current version at 2 U.S.C. § 441b(a) (2005)).

¹⁸ See 41 Cong. Rec. 1451–55 (1907) (noting that restrictions on campaign contributions may violate the Constitution).

¹⁹ *Id.* at 1452. Congressman Joseph T. Robinson (D-AR), to applause in the House chamber, said:

constitutionality²⁰ and unintended consequences of the legislation.²¹ It also refers to concerns about corporate contributions ensuring access to elected officials and administration employees.²² The Tillman Act served as a starting point for additional federal legislation designed to keep corporate (and labor union) funds out of candidate elections, including the Federal Corrupt Practices Act of 1925,²³ the Labor Management Act of 1947,²⁴ and the Federal Election Campaign Act (FECA) of 1971.²⁵

B. The 1970s: Zenith of Corporate Speech Rights?

When Congress passed FECA, the Supreme Court was about to begin developing a body of decisions with wide reaching effects on the scope of corporate speech rights. These decisions, generally speaking, provided considerable First Amendment protection for corporate speech rights, with

²⁰ *Id.* at 1453. Congressman Joseph W. Keifer (R-OH) noted, "Substantially all of us, I think, are going to vote for this bill, although it has elements in it that suggest that it may be unconstitutional." *Id.*

²¹ *Id.* at 1452. Congressman James R. Mann (R-IL) stated, "This, properly labeled, would be labeled 'a bill to prevent a poor man from holding office in the United States." *Id*

²² *Id.* at 1454. Congressman John S. Williams (D-MS) remarked, "[E]ven Democrats, when identified with great corporations, are compelled to contribute Democratic money to Republican campaign funds in order to expect justice from a Republican Administration."

²³ Federal Corrupt Practices Act, ch. 368, § 313, 43 Stat. 1070, 1074 (1925) (current version at 2 U.S.C. § 441(b) (2005)) (widening the scope of prohibited corporate contributions).

²⁴ Labor Management Relations Act, ch. 120, § 304, 61 Stat. 136, 159–60 (1947) (current version at 2 U.S.C. § 441(b) (2005)) (adding labor unions to the group of prohibited contributors).

²⁵ Federal Election Campaign Act of 1971, Pub. L. No. 92–225, § 205, 86 Stat. 3, 10 (1971) (allowing the creation of separate segregated funds by corporations and unions for political contributions).

²⁶ See, e.g., Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

the only exception being restrictions on corporate speech in candidate campaigns.²⁷

In 1976, the Supreme Court recognized First Amendment protection for commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²⁸ The Court reasoned that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement . . ."²⁹ Even assuming that advertisers have a purely economic motive, the Court recognized, "[t]hat hardly disqualifies [them] from protection under the First Amendment."³⁰

In *Bigelow v. Virginia*,³¹ the Court implied that a difference exists between mere commercial speech and political discussion: "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." In *Virginia State Board of Pharmacy*, the Court later reasoned that a free flow of information through advertising serves the First Amendment goal of enlightening public decisionmaking in a democratic society, even if its general purpose is to make a sale. Although the Court later adopted a standard for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court had granted corporate speech considerable First Amendment protection in non-political contexts through *Bigelow* and *Virginia State Board of Pharmacy*.

The Supreme Court considers political speech to be at the "core" of the First Amendment and, therefore, political speech is afforded the highest

²⁷ See Buckley, 424 U.S. at 28 & n.31 (discussing the potentially corrupting influence of large contributions to candidates and the exceptions to FECA's restriction, such as the use of separate segregated funds composed of voluntary contributions).

²⁸ 425 U.S. 748 (1976). The Court loosely defined commercial speech as that which does "no more than propose a commercial transaction." *Id.* at 762.

²⁹ *Id.* at 761.

³⁰ *Id.* at 762.

³¹ 421 U.S. 809 (1975).

³² *Id.* at 826.

³³ Va. State Bd. of Pharmacy, 425 U.S. at 765.

³⁴ 447 U.S. 557 (1980). Under the test, advertising of illegal activities and misleading or false commercial speech is outside the protection of the First Amendment. *Id.* at 566. The test also requires regulations of commercial speech to withstand intermediate scrutiny: the government must demonstrate a substantial interest and show that the regulation is not wider than necessary to advance that interest. *Id.*

protection.³⁵ Corporate speech in the political context, however, seems to inhabit a netherworld—somewhere between commercial speech covered under *Central Hudson* and the most protected areas of "core" political speech. In *Bolger v. Youngs Drugs Products Corp.*,³⁶ the Court's reasoning shows that corporate speech in the political context enjoys more protection as it becomes more issue oriented and less commercial:

We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.³⁷

In the ballot issue context, three major decisions have been very protective of the rights of all speakers, including corporations, to spend unlimited funds to support or defeat an issue. ³⁸ The primary decision enshrining corporate speech rights in ballot issue campaigns is *First National Bank of Boston v. Bellotti*. ³⁹ *Bellotti* dealt with the central issue examined in this comment: an attempt to ban corporate contributions to a ballot issue committee. ⁴⁰ The case involved the repeated attempts of the Massachusetts legislature to silence banks and other corporations on a ballot issue that would authorize the legislature to enact an income tax. ⁴¹

³⁵ See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 251 (1986); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985); Buckley v. Valeo, 424 U.S. at 1, 39 (1976).

³⁶ 463 U.S. 60 (1983).

³⁷ *Id.* at 68 (citations omitted) (emphasis added).

³⁸ Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (striking down contribution limits on city ballot issues); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978) (striking down a statute prohibiting corporations from making contributions or expenditures in an attempt to influence voting on any issue other than one materially affecting the corporation's property or business); *Buckley*, 424 U.S. at 22 (stating that independent expenditure limits transgress upon constitutionally-protected associational freedoms).

³⁹ 435 U.S. 765 (1978).

⁴⁰ *Id.* at 767–68.

⁴¹ *Id.* at 767–70.

The Court noted, "The statute's legislative and judicial history [had] been a troubled one." A prior statute, which was challenged in 1962, stated that corporations could not spend money on ballot issues unless the issues "materially" affect the property or assets of the corporation. Under the prior statute, the Massachusetts Supreme Court held that corporations could spend money to urge voters to reject the income tax. Under the voters concerning the statute to state: "No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." It is difficult to imagine a law more tailored to silence a group of speakers based on their identities and collective viewpoint, and the Court noted this, stating, "[H]ere, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people"

The Court further stated, "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." The Court also stated that the risk of corruption perceived in cases involving candidate elections was not present in ballot issue campaigns. 48

In *Citizens Against Rent Control v. City of Berkeley*, ⁴⁹ the Court made certain that ballot issue speech was also without limit, striking down contribution limits in the ballot issue context.⁵⁰ In this case, the city council attempted to limit contributions to municipal ballot issue committees, regardless of source, to \$250.⁵¹ Chief Justice Burger wrote, "[T]here is no significant state or public interest in curtailing debate and

⁴² Id. at 769 n.3.

⁴³ See id.

⁴⁴ Id.

⁴⁵ *Id.* at 769–70 n.3.

⁴⁶ *Id.* at 785.

⁴⁷ *Id.* at 777.

⁴⁸ See id. at 790.

⁴⁹ 454 U.S. 290 (1981).

⁵⁰ See id. at 300.

⁵¹ See id. at 292.

discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."⁵²

Both Bellotti and Citizens Against Rent Control were decided after Buckley v. Valeo, the Supreme Court's landmark campaign finance decision.⁵³ Even though *Buckley* concerned regulations of candidate rather than issue campaigns, it struck down spending limits on independent expenditures.⁵⁴ a holding that helped supply the rationale for the later cases. The Buckley Court also held that the scope of campaign speech regulation under federal law was limited to "express terms [of] advoca[cv] [of] the election or defeat of a clearly identified candidate."55 This decision eventually prompted corporate and union contributions to the political parties and to outside organizations to run "issue ads" to discuss candidates for office.⁵⁶ These ads typically gave very positive or negative opinions of candidates' positions and actions without "expressly advocating" their election or defeat.⁵⁷ These issue ads became a focal point of the Bipartisan Campaign Reform Act of 2002 (BCRA),⁵⁸ and the permissibility of prohibiting corporate funding of these ads in periods close to federal elections was a key holding in McConnell v. FEC.⁵⁹

The invalidation of independent expenditure limits and the limitation of campaign speech to express advocacy furthered First Amendment freedoms. On the other hand, *Buckley* also established the only "compelling" justification that allowed regulation of campaign spending to pass a strict scrutiny analysis: "the actuality and appearance of

⁵² *Id.* at 299.

⁵³ 424 U.S. 1 (1976).

⁵⁴ *Id.* at 58.

⁵⁵ *Id.* at 44.

⁵⁶ See McConnell v. FEC, 540 U.S. 93, 193–94 (2003).

⁵⁷ Id.

⁵⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (2002). BCRA's provisions prohibited corporate and labor union funding for "electioneering communications," also known as issue ads, in which a candidate's record is discussed without expressly advocating the candidate's election or defeat. *Id.* at 91 (codified at 2 U.S.C. § 441b(b)(2)). BCRA also included a ban on "soft money," or contributions from corporations and labor unions to political parties to perform get-out-the vote and party building activities that did not expressly advocate the election or defeat of candidates. *Id.* at 82–87 (codified at 2 U.S.C. § 441b(b)(2)).

⁵⁹ See McConnell, 540 U.S. at 194.

corruption." In *Buckley*, the fear was quid pro quo corruption in which campaign contributions translated into access to politicians or legislative action, 61 but the corruption rationale articulated by the Court was a seed that later grew into the corporate domination argument.

C. The Corporate Domination Argument Takes Root

The words of Professor Jamin Raskin neatly sum up the corporate domination argument: "Political corruption in America today does not consist simply of quid pro quo relationships between special interests and elected officials. It involves a massive structural bias in government favoring the parochial interests of corporate and personal wealth over the interests of those citizens lacking access to such wealth." Raskin argues that economic elites, like corporations, only invoke the First Amendment in campaign finance contexts to "stifle political competition with money." As the following examination of campaign finance decisions indicates, even though the Court has yet to wholeheartedly subscribe to Raskin's theory, it has moved in his general direction in the years since *Buckley*.

In *Bellotti*, the state of Massachusetts made an argument similar to Raskin's: "[C]orporations are wealthy and powerful[,]... [so] their views may drown out other points of view." The Court not only found that there was no evidence that corporations had a significant influence on Massachusetts ballot issues, ⁶⁵ but stated that it would not level the playing field based on the source. For several years thereafter, the Court was careful to distinguish candidate elections from ballot issues when upholding restrictions against corporate involvement in candidate elections. ⁶⁷

⁶⁰ Buckley, 424 U.S. at 26.

⁶¹ See id. at 26–27.

⁶² Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1163 (1994).

⁶³ *Id.* at 1165

⁶⁴ First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978).

⁶⁵ Id. at 790 n.28.

⁶⁶ See id. at 790-92.

⁶⁷ See FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 n.7 (1982) (upholding regulations against corporate political action committees soliciting funds outside their restricted class as "entirely consistent" with *Bellotti* because the decision in *Bellotti* did not involve "candidate elections"); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259 n.12 (continued)

The corporate domination argument, however, made its way to more fertile ground in 1990, when the Court decided *Austin v. Michigan Chamber of Commerce*. 68 The Court took the government's compelling interest in preventing corruption of elections beyond its previously understood scope of guid pro guo situations: "[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." Although Austin involved proposed corporate-funded independent expenditures on behalf of a candidate, ⁷⁰ the Court did not limit itself to the candidate context: "We...have recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." By a six to three margin, the Court upheld the Michigan legislature's efforts, which were "aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁷² Justice Stevens attempted to distinguish the circumstances of *Austin* from *Bellotti* in his concurrence.⁷³

(1986) ("The regulation [prohibiting corporate treasury funds from being used in connection with any federal election] imposed [here] is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [Bellotti].").

^{68 494} U.S. 652 (1990).

⁶⁹ Austin, 494 U.S. at 660.

⁷⁰ See id. at 656.

⁷¹ *Id.* at 659 (citing *Mass. Citizens for Life*, 479 U.S. at 257; FEC v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 500–01 (1985)).

⁷² *Id.* at 654, 659–60.

⁷³ See id. at 678 (Stevens, J., concurring) ("[A]s we recognized in *First National Bank of Boston v. 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." (citation omitted)).

In the 1990s, many lower courts recognized the tension between *Austin* and *Bellotti*, and applied *Bellotti* in a somewhat reluctant manner. For example, in invalidating a ban on corporate contributions and expenditures for ballot issues in Rhode Island, one district court stated, "The *Bellotti* holding may be subject to question. It is still the law of the land, however, and must control this Court's decision with respect to [the statute's] blanket prohibition on corporate contributions and expenditures with respect to ballot questions." Similarly, in rejecting the state of Montana's argument for a ban on corporate participation in ballot issues, the Ninth Circuit wrote, "Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say." Yet another district court wrote, "Reconciling these two opinions is difficult."

Given the Supreme Court's pronouncements in more recent campaign finance cases, the potential for a reversal of *Bellotti* based on the corporate domination argument is not far fetched. In *Nixon v. Shrink Missouri Government PAC*, the Court struck a much more deferential tone toward legislation aimed not just at corruption, but at its appearance: "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent." Not only did the Court welcome a wider definition of corruption, but it simultaneously lowered the bar for the evidence that would be required to prove the existence of corrupting influences.

(continued)

⁷⁴ See Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1057 (9th Cir. 2000); Vote Choice, Inc. v. DiStefano, 814 F. Supp. 186, 190–91 (D. R.I. 1992); Colo. Taxpayers Union v. Romer, 750 F. Supp. 1041, 1045 (D. Colo. 1990).

⁷⁵ Vote Choice, 814 F. Supp. at 190–91 (D. R.I. 1992) (citations omitted).

⁷⁶ Mont. Chamber of Commerce, 226 F.3d at 1057 (9th Cir. 2000).

⁷⁷ Colo. Taxpavers Union, 750 F. Supp. at 1045 (D. Colo. 1990).

⁷⁸ See Hasen, supra note 10, at 887–94. Hasen focuses on the Court's trend toward allowing more campaign finance regulation in four cases, which he calls the "New Deference Quartet," consisting of Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); FEC v. Beaumont, 539 U.S. 146 (2003); and McConnell v. FEC, 540 U.S. 93 (2003). Id. at 891–93.

⁷⁹ 528 U.S. 377 (2000).

 $^{^{80}}$ Id. at 388–89 (quoting Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)).

⁸¹ Id. at 391.

Using its wider corruption rationale, the Court focused its attention on the corporate form in *FEC v. Beaumont*. For the first time, *Beaumont* called into question *Bellotti's* statement that the corporate form of the speaker is irrelevant in determining the degree of First Amendment protection. Finally, the Court took its most deferential look yet at campaign finance reforms in *McConnell v. FEC*, which upheld the most significant portions of BCRA. In examining BCRA, the Court seemingly abdicates the proper interpretation of the First Amendment to Congress in the context of campaign contribution limits:

The less rigorous standard of review we have applied to contribution limits (*Buckley's* "closely drawn" scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.⁸⁵

Former FEC Chairman Bradley Smith characterized the ruling as an abdication of the process of constitutional review: "We are told, categorically, that, 'contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation

The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Id.

⁸² See Beaumont, 539 U.S. at 152–55. The Court explained the rationale of expenditure limitations for corporations: "Barring corporate earnings from conversion into 'political war chests' . . . is intended to 'prevent corruption or the appearance of corruption." *Id.* at 154 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

⁸³ Hasen, *supra* note 10, at 893.

⁸⁴ See McConnell v. FEC, 540 U.S. 93, 188, 223 (2003) (rejecting challenges to BCRA's ban on soft money, and the prohibition of corporate and union funding of electioneering communications.).

⁸⁵ *Id.* at 137.

in political debate.'... One might sum up the Court's position as follows: 'Because we're certain that contribution limits are good things, we shouldn't think too much about this case....'" Smith asserts that *McConnell* "will simply further degrade elections by encouraging the use of the law to silence political opposition." That is exactly the nature of the issue examined in this Comment, as anti-corporate activists try to use *McConnell* and other decisions as a basis to muzzle corporate speech in the ballot issue context.

II. THE CURRENT CHALLENGE

In the years after *Bellotti*, academics began to envision constitutionally permissible restrictions of corporate speech in ballot issue campaigns. One example is a system proposed by Professor Edward Foley that "would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States." Corporations and labor unions would be forbidden to make contributions under this scheme. 90

After *Austin*, however, the academic community began to forecast the demise of corporate ballot issue participation. For example, Gerald Ashdown wrote, "The conclusion is inescapable that legislatures are now free to restrict corporations... in ballot measures as well as candidate elections." Taking up the new concept of corruption discussed by the Court in *Austin*, one commentator remarked, "[C]orruption is no less

⁸⁶ Bradley A. Smith, McConnell v. Federal Election Commission: *Ideology Trumps Reality, Pragmatism*, 3 Election L.J. 345, 350 (2004).

⁸⁷ *Id.* at 351.

⁸⁸ See, e.g., Allen K. Easley, Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns, 17 GA. L. REV. 675, 678 (1983). Easley lamented the substantial "burden of sustaining the constitutionality of ballot issue campaign spending restrictions...." Id. at 724. Easley's article, however, was written only five years after the decision in Bellotti, which factored prominently in his reasoning.

⁸⁹ Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994).

⁹⁰ *Id.* at 1207.

⁹¹ Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 780 (1991).

troubling in referenda than in candidate elections. Thus, this distinction also seems destined to fall \dots "92"

While legal commentators have discerned the possibility of a reversal of *Bellotti*, states have the power to set their own campaign finance laws for state campaigns. Thus, a state law forbidding corporate ballot issue participation and a well-funded legal effort are prerequisites to challenge the *Bellotti* holding. Obviously, determined activity by grassroots activists will be at the heart of any change to state campaign finance laws. Like one hundred years ago, progressive activists have been galvanized into action: the violent 1999 protests against the World Trade Organization in Seattle were a coming-out party for an anti-corporate movement organized through the internet. 94

Stifling corporate political involvement is a favorite rallying cry for these groups. For instance, the Alliance for Democracy, a Massachusetts based populist organization, 95 "believes the development of a full public funding system is the crucial domestic reform of our age and that . . . [its] achievement . . . will dramatically improve the health of our democracy—a democracy that is being smothered under the weight of large corporations and the private interests they embody." Common Cause states, "The dominating influence of wealthy special interests in the funding of campaigns has eroded public trust in our political system . . . On a whole range of issues—environment, healthcare, taxes—we see corporations and wealthy individuals benefiting at the expense of all Americans." Even religious-based organizations are calling for more restrictions on corporate political participation.

⁹² David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 YALE L. & POL'Y REV. 236, 252 (1991).

⁹³ See McConnell v. FEC, 540 U.S. 93, 186 (2003).

⁹⁴ Naomi Klein, Rebels in Search of Rules, N.Y. TIMES, Dec. 2, 1999, at A35.

⁹⁵ See The Alliance for Democracy, http://thealliancefordemocracy.org/index.html (last visited Sept. 18, 2006).

⁹⁶ The Alliance for Democracy, Honest and Clean Elections Campaign, http://www.thealliancefordemocracy.org/html/eng/1132-AA.shtml (last visited Sept. 6, 2006).

⁹⁷ *Money in Politics*, COMMON CAUSE, http://www.commoncause.org/site/pp.asp? c=dkLNK1MQIwG&b=%20191979 (last visited Sept. 18, 2006).

⁹⁸ See Greg Coleridge, Director, Economic Justice & Empowerment Program, Corporate Personhood and Democracy, Remarks to the First Unitarian-Universalist Church, Columbus, Ohio 5–6 (July 13, 2003) (transcript available at http://www.afsc.net/ (continued)

While some of these organizations inveigh generally against corporate influence on politics, some have been much more direct in their opposition to corporate speech in the ballot issue context. An article posted on ReclaimDemocracy.org calls corporate participation in ballot issues a "perversion of democracy," and states, "Until we return corporate activity to 'strictly business' and revoke their ill-gotten political power, the power of a Wal-Mart typically will trump even the most committed citizen efforts.",100 In An Agenda for Meaningful Election Reform, ReclaimDemocracy.org declares, "We view as a fundamental requirement that an individual's political influence must be a direct result of the quality of ideas and the energy put into promoting them—independent of one's wealth to the greatest degree possible." 101 This group, based in Montana, 102 is rooted in Montana's battle over restricting corporate spending on ballot issues. 103

In 1996, Montana voters passed Initiative 125 (I-125), which forbade corporations from using their general treasury dollars to influence a ballot question. ¹⁰⁴ Instrumental in the passage of this initiative and in the subsequent litigation surrounding its constitutionality was the League of Women Voters of Montana, Montana Common Cause, Montana Public Interest Research Group, and Citizens for I-125. ¹⁰⁵ Montana I-125 and its

PDFFiles/071303CorpPersonhood&Dem.pdf). Coleridge declared, "We have to come together . . . in ways which challenge corporate claims to constitutional authority" *Id.* at 6. He called for group resolutions, local initiatives, ordinances to outlaw direct or indirect corporate political investments, and the stripping corporations of all personhood rights. *Id.* "I'm delighted that the Unitarian Universalists have come to see this problem not only as a political issue but a religious one . . . and are taking leadership." *Id.*

⁹⁹ Jeff Milchen, *Judicial Activism for Corporations Is Subverting Democracy*, RECLAIMDEMOCRACY.ORG, Aug. 25, 2005, http://reclaimdemocracy.org/corporate_speech/referendum_utah.php.

 $^{^{100}}$ Id

¹⁰¹ What Would Democratic Elections Look Like?: An Agenda for Meaningful Election Reform, RECLAIMDEMOCRACY.ORG, 2003, http://reclaimdemocracy.org/pdf/primers/democratic elections.pdf.

¹⁰² See ReclaimDemocracy.org, About Us, http://reclaimdemocracy.org/about_us.html (last visited Sept. 18, 2006).

¹⁰³ See id.

¹⁰⁴ Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1052–53 (9th Cir. 2000).

¹⁰⁵ See Brief of Defendant-Intervenor-Appellant at 2, Mont. Chamber of Commerce v. Argenbright, No. 98-36256 (9th Cir. May 14, 1999).

invalidation will be given further treatment below, but it was the first deliberate attempt since *Bellotti* to silence corporate speakers in a ballot issue context.¹⁰⁶ The passage and litigation of this initiative indicates that the groups seeking to abridge corporate speech on ballot issues are legally sophisticated, sufficiently funded, and organized to achieve electoral success.

Given the political and legal climate following *McConnell*, it is reasonable to believe that further attempts to limit corporate speech on ballot issues may soon be made. ¹⁰⁷ As a result, the U.S. Supreme Court may be called upon to resolve the tension between *Austin* and *Bellotti*. In doing so, the legal debate present in Montana over participation in ballot issues provides a useful example for the inquiry.

III. SETTING THE LEGAL STANDARD: MONTANA CHAMBER OF COMMERCE V. ARGENBRIGHT

The state of Montana has been at the center of legal battles over corporate participation in ballot issues twice in the last thirty years. Basing its decision on the principles articulated in *Bellotti*, the Ninth Circuit Court rejected the first ban on corporate spending in Montana ballot campaigns in *C & C Plywood Corp. v. Hanson.* Twenty years later, a collaboration of citizen groups won passage of I-125, which banned contributions from corporations in ballot issue campaigns. Wanting to directly challenge *Bellotti*, the sponsors of the initiative made exceptions for small advocacy organizations that did not accept corporate funding patterned after those

Daniel Smith, Campaign Financing of Ballot Initiatives in the American States, in DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 71, 88 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001). In 1992, the Rhode Island legislature passed a campaign reform bill that banned corporate contributions to ballot issue campaigns. See Vote Choice, Inc. v. Di Stefano, 814 F. Supp. 186, 187–88 (D. R.I. 1992). The Rhode Island Board of Elections decided not to defend a challenge on that part of law due to the holding of Bellotti. Id. at 189. Even though it was not a party to the suit, Common Cause of Rhode Island considered intervening in the action. Id. app. A. The director of Common Cause called the Bellotti holding "fairly narrow," and stated, "to argue that any corporation is free to (spend) as much as it wants is a long reach by analogy." Id.

¹⁰⁷ See Hasen, supra note 10, at 885–86.

¹⁰⁸ See C & C Plywood v. Hanson, 583 F.2d 421, 423–25 (9th Cir. 1978).

¹⁰⁹ See Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1052–53 (9th Cir. 2000).

discussed in *Massachusetts Citizens for Life*. The sponsors also exempted corporations supporting or opposing ballot issues through a separate segregated fund, parallel with the Supreme Court's holding in *Austin*. Once passed, a variety of organizations, including the Montana Chamber of Commerce, Montana Hospital Association, Montana Farm Bureau Federation, Montana Mining Association, Montana Education Association, ¹¹² and individual corporations challenged I-125. A bench trial took place, with the court employing a standard of proof based on the Supreme Court's decision in *Austin*:

To accomplish the necessary showing, the State must demonstrate the existence or appearance of corruption, which the court defines to include real harm to the integrity of Montana's ballot initiative process.... [I]t may be conceivable that corporations could overwhelm the political speech of individual citizens in a particular case to such a degree that the integrity of the ballot initiative process itself is damaged.... 114

At trial, both sides presented evidence and expert testimony on the effects of corporate spending on ballot initiatives in Montana. Officers of the corporate entities testified that their personal political participation had been chilled because they were afraid that others would mistake their views for that of their employer and that they would be guilty of an impermissible in-kind corporate contribution to a ballot issue committee. One expert, a University of Montana political science professor, testified that "money is not the principal determinant of ballot issue campaigns." Even though Montana's Secretary of State testified that he believed

¹¹² See Mont. Chamber of Commerce v. Argenbright, 28 F. Supp. 2d 593 (D. Mont. 1998). The Montana Education Association, a teacher's union, and the only non-business member of the coalition opposing I-125, was dismissed for lack of standing after it "disincorporated to avoid the restrictions imposed by Initiative 125." *Id.* at 594.

¹¹⁰ 479 U.S. 238 (1986); see Smith, supra note 106, at 88.

¹¹¹ Id

¹¹³ *Id.* at 593.

 $^{^{114}}$ Id. at 600 (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 661 (1990)).

¹¹⁵ See id. at 595–98.

¹¹⁶ See id. at 595-96.

¹¹⁷ *Id.* at 597.

corporate dollars were causing voters to "walk away from that political process," the court found no evidence that corporate spending on ballot issues reduced voter turnout. "Instead, the ballot issues in which the most money has been expended generally have had the highest voter participation." The court also found that "when all ballot initiatives are considered wherein one side outspent the other side by a 2/3 margin, the side outspending won ten times and lost nine times." 121

With a record like this, it is not surprising that the district court held that the State failed to prove its case by a preponderance of the evidence. ¹²² Judge Lovell summed up the evidence with a statement that may apply to reform advocates even beyond the borders of the Montana:

Some of these witnesses appear to have had unfortunate experiences by being involved in issue campaigns in which their sides lost and the other side had a disproportionate amount of funds. Apparently these witnesses have made the leap in logic that they lost solely because of the opposing side's funds, which the court considers to be an unwarranted but all too human conclusion. 123

Viewing the evidence through the lens of *Austin* and concluding that I-125 was "certainly" unconstitutional as applied, the district court also acknowledged the potential application of *Bellotti* to invalidate the initiative on its face. ¹²⁴ According to the court, I-125's requirement that corporations perform ballot issue activity through PACs silences the corporate voice: "Initiative 125 precludes corporations from directly resisting potential laws that could put them out of business. . . . Perhaps almost as important, Initiative 125 prevents the electorate from being exposed to diverse viewpoints on public policy issues." Finally, the court stated that at the end of the day, "[i]t is up to the voters to determine

¹¹⁸ *Id.* at 598.

¹¹⁹ *Id.* at 597.

¹²⁰ *Id*.

¹²¹ Id. at 598.

¹²² Id. at 599.

¹²³ *Id*.

¹²⁴ *Id*.

¹²⁵ *Id*.

whether they approve or disapprove of a corporation's point of view.' In 2000, a divided Ninth Circuit Court of Appeals upheld the district court's judgment, basing its decision on *Bellotti*. 127

The decision in *Argenbright* is useful in providing appropriate yardsticks for a court to approach arguments about corporate domination as described by *Austin*. There are two important tools that are easy to apply: (1) whether corporate money is "the principal determinant of ballot issue campaigns," and (2) whether corporate money is dominating citizen voices to the detriment of the process. Is In assessing the corporate domination argument in Part IV, one additional yardstick, directly from *Austin*, is appropriate: whether "expenditures reflect actual public support for the political ideas espoused" by their corporate (or citizen) sponsors. These are the three criteria that will be used to measure the corporate domination argument below.

IV. DEBUNKING THE CORPORATE DOMINATION ARGUMENT

A powerful tool in depicting how the corporate domination argument fails to reflect reality is a longitudinal study of initiative and referendum issues since 1898.¹³¹ Based on subject matter, the study divided ballot issues into four groups: (1) those with "narrow-material interests" (generally corporations and labor) represented on the yes and no sides; (2) those in which narrow-material interests sought the issue for some benefit; (3) those in which narrow-material interests; and (4) those in which narrow-material interests were not represented.¹³² The scope of this study is

¹²⁶ Id. at 600.

¹²⁷ See Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1052 (9th Cir. 2000)

¹²⁸ Mont. Chamber of Commerce, 28 F. Supp. 2d at 597.

¹²⁹ See id.

¹³⁰ Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

¹³¹ See Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics, in* DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 1, 8–26 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001). The categories in this study roughly delineate the subparts of Part IV of this Comment. Business v. labor is a subgroup of the narrow-material v. narrow-material category; David v. Goliath is an interpretation of Ernst's public seeking to regulate narrow-material category; and Goliath v. David is narrow-material interests seeking some benefit. *See id.*

¹³² Id. at 9.

significant in both the number of issues examined and in its longitude because it includes 1,540 state ballot issues between 1898 and 1995. Of these, 632 (or 41%) did not implicate corporate interests at all. The significance is shown through an examination of the remaining issues that did implicate such interests.

A. Business v. Labor

When corporations square off against labor unions over a ballot issue, the premise of corporate dominance fails utterly. These types of battles also account for a large number of ballot issues: in Ernst's study, 38% of the total pitted narrow-material interests against each other. First, corporate spending cannot be shown to be the determinative factor in the outcome of the initiatives. The quintessential example of a ballot issue pitting corporations against labor unions is the Right-to-Work initiative. Between 1947 and 1954, seven states voted on Right-to-Work ballot issues: businesses won three votes, unions won five. In 1958, Ohio corporations pushing a Right-to-Work issue suffered a crushing defeat, receiving only a 37% yes vote. Similarly, a 1997 Ohio referendum of a

¹³³ *Id.* at 15–23.

¹³⁴ *Id*.

¹³⁵ *Id*.

NEWSLETTER (NRTWC, Springfield, Va.), Feb. 2006, at 1, available at http://www.nrtwc.org/nl/nl200602p1.pdf. Right-to-Work initiatives revolve around whether employees may be required to join a union as a condition of employment. *Id.* Many corporations base plant location decisions on the Right-to-Work status of the state where a plant is proposed. *See, e.g., Companies 'Want to be in a Right to Work State,*' NAT'L RIGHT TO WORK NEWSLETTER (NRTWC, Springfield, Va.), Jan. 2006, at 8, available at http://www.nrtwc.org/nl/nl200601p8.pdf. Naturally, labor unions see Right-to-Work proposals as threats to their existence and associational freedoms. *See, e.g.*, Indiana AFL-CIO, The Misunderstanding of Right to Work, http://www.inaflcio.org/documents/leg2000-p21.htm (last visited Nov. 13, 2006).

¹³⁷ Ernst, *supra* note 131, at 7.

¹³⁸ See Arthur A. Schwartz & Bob Taft, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors 14 (1997), available at http://www.sos.state.oh.us/sos/ElectionsVoter/issueHist.pdf.

business-backed workers' compensation law¹³⁹ resulted in a defeat of business interests by a fourteen point margin.¹⁴⁰

Second, even in some cases where spending set new records, it does not mean that corporate spending dominated over other voices. For instance, Oklahoma voters decided State Question 695, a Right-to-Work initiative, at a September 2001 special election. ¹⁴¹ Even though corporate interests backing the proposal¹⁴² won by a margin of 54% to 46%, ¹⁴³ this was an electoral reversal from 1978, when unions defeated a similar proposal in Missouri by a margin of three to two.¹⁴⁴ The Oklahoma campaign set a new record for spending on a ballot question in the state, with both sides pouring approximately \$11.5 million into the campaign. 145 While the corporate-backed Right-to-Work groups raised \$6.1 million, anti Right-to-Work forces raised \$5.3 million. Including estimates of nonreportable grassroots activity, organized labor and its allies spent more than \$8 million on radio and television campaigns alone. 147 Reports stated that organized labor placed "the largest per capita media buy in rating points in history Even assuming that labor forces were outspent by corporations in this instance, any party that spends more than \$5 million on a campaign virtually guarantees that its side will be heard by voters.

¹³⁹ See James Bradshaw, *Issue 2 Loses Decisively*, COLUMBUS DISPATCH, Nov. 5, 1997, at A1. Issue 2 pitted Ohio's labor unions against Ohio employers and employer organizations, including the Ohio Chamber of Commerce, in a battle over Ohio Senate Bill 45, a comprehensive workers' compensation reform bill. *Id.*

¹⁴⁰ SCHWARTZ AND TAFT, *supra* note 138, at 32.

¹⁴¹ See Oklahoma State Election Board, State Question 695, Legislative Referendum 322, Special Election — September 25, 2001 (2001), available at http://www.elections.state.ok.us/02sq.pdf.

¹⁴² Randy Krehbiel, *SQ 695 Sets Record for Political Spending*, TULSA WORLD, Oct. 17, 2001, at 11.

¹⁴³ See OKLAHOMA STATE ELECTION BOARD, supra note 141, at 3.

¹⁴⁴ Helen Dewar, *Ballot-Box Issues: Gay Rights to Dueling*, WASHINGTON POST, Nov. 9, 1978, at A7.

¹⁴⁵ Krehbiel, *supra* note 142, at 11.

¹⁴⁶ *Id*.

¹⁴⁷ Press Release, Nat'l Right to Work Comm., Statement by Reed Larson, President of the Nat'l Right to Work Comm., on Passage of Okla.'s Right to Work Law (Sept. 26, 2001) (http://www.nrtwc.org/newsroom/28.htm).

Connie Marshner, *Lessons from Victory*, CNSNEWS.COM, Dec. 14, 2001, http://www.cnsnews.com/Commentary/Archive/200112/COM20011214b.html.

In another instance of record-setting spending. 149 Ohio corporations outspent the labor-backed opposition by a factor of three to one on Issue Two in 1997;¹⁵⁰ nevertheless, corporate interests were handily defeated.¹⁵¹ An examination of online campaign finance records on file with the Ohio Secretary of State indicates the remarkable extent of corporate dollars used by Keep Ohio Working: even though the committee received more than \$7.99 million in 1997, only \$56,215 came from individual contributors. 152 On the opposing side, the Committee to Stop Corporate Attacks on Injured Workers received more than \$1.73 million from union organizations, and the remainder of its funds came from a confederation of workers' compensation plaintiffs' attorney firms, health care providers, individuals, and the Ohio Democratic Party. 153 Individual contributions to the committee totaled \$214,300.97, almost four times the amount of individual contributions to the business side. 154 Yet, in spite of the volume of corporate funds, the business-backed side did not prevail.

In view of the spending and results of the Oklahoma Right-to-Work and Ohio workers' compensation issues, the use of *Austin*'s criterion of whether spending reflects "actual public support" may be inappropriate in the business v. labor ballot issue context. The collected resources of a corporate treasury, which can be committed to ballot issues by corporate management, represent "the economically motivated decisions of investors and customers." Likewise, union members have joined together in an enterprise that is primarily economic in nature to receive the benefits of exclusive representation on compensation and other workplace issues. 157

¹⁴⁹ Alan Johnson, *Foes, Friends of Issue 2 Broke Bank*, COLUMBUS DISPATCH, Dec. 13, 1997, at E6. "Business and labor combined to spend a record \$10.2 million" *Id*.

¹⁵⁰ *Id.* Keep Ohio Working, the business-backed committee supporting Issue Two, spent \$7.8 million, while the Committee to Stop Corporate Attacks on Injured Workers spent less than \$2.5 million. *Id.*

¹⁵¹ See SCHWARTZ AND TAFT, supra note 138, at 32. Of 3,035,542 votes cast, 1,730,502 Ohioans voted to reject the law, which comprised 57% of the total vote. *Id.*

¹⁵² See J. Kenneth Blackwell, Ohio Secretary of State, Campaign Finance Search, http://www1.sos.state.oh.us/pls/portal/PORTAL_CF.CF_QRY_PAC_CONT.SHOW_PAR MS (last visited Sept. 18, 2006) (spreadsheets on file with author).

¹⁵³ *Id*.

¹⁵⁴ *Id*

¹⁵⁵ Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

¹⁵⁶ FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1990).

¹⁵⁷ See Austin, 494 U.S. at 665–66.

In *Austin*, the Court cited decisions providing some protections to workers who disagree with the political stances of unions who represent them, distinguishing union members from corporate shareholders. The actual protection provided by these decisions may be illusory in practice: a survey of one thousand Michigan union members revealed that 78% of them were unaware that they could request a refund of union dues used for political purposes they find objectionable. Furthermore,

One out of five union members surveyed said that, given the chance, they would "definitely" request a dues refund rather than be coerced into contributing to the AFL-CIO's \$35 million 1996 political campaign. And 84 percent of those surveyed said their union leadership should be required to disclose "exactly how they spend" union dues. 160

From a management standpoint, both corporations and unions, which each seek to advance the economic interests of those they represent, are able to deploy their vast resources with the benefits of top-down decisionmaking structures. In a ballot issue context pitting business against labor, the ballot committees serve as surrogates for the underlying economic interests

In other labor-management contexts, the Court has recognized First Amendment rights in economic disputes: "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome." ¹⁶¹

Even by the set of standards articulated in *Austin* and *Argenbright*, the evidence does not indicate that the initiative process is overwhelmed by corporate dollars in the business versus labor context. There is no clear

¹⁵⁸ See id. at 652 (citing Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 745 (1988) and Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

ROBERT P. HUNTER, THE MACKINAC CENTER FOR PUB. POL'Y, PAYCHECK PROTECTION IN MICHIGAN 4 (1998), *available at* http://www.mackinac.org/archives/1998/s1998-05.pdf.

¹⁶⁰ *Id*.

¹⁶¹ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617–18 (1969)).

pattern of corporate victories, either in the longitudinal study¹⁶² or in viewing recent high spending contests. Because both sides of these issues had the resources to present their arguments, banning corporate contributions to ballot issues in the labor-management context would be a virtual determination that corporate business interests would lose these issues, and would be questionable in light of the Court's jurisprudence treating corporate and labor union campaign spending similarly.¹⁶³

B. David v. Goliath (Corporations on Defense)

1. Aggregate Data

According to Ernst's longitudinal study of state ballot issues, only 11% pit an economically disinterested citizen group against a narrow-material interest. 164 However, this small fraction of issues bears responsibility for the fury of some progressive advocates: "[T]he most damning of all my findings, from the Progressive reform perspective, is the obvious success of the well-financed media campaigns in defeating so many proposals initiated by ad hoc groupings of concerned citizens." Professor Daniel Lowenstein remarked, "[T]he power of some groups to raise enormous sums of money to oppose ballot propositions, without regard to any breadth or depth of popular feeling, seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose."166 But what exactly is this "intended purpose"? Sen. Robert LaFollette (R-WI), a prominent turn-of-the-century Progressive, wrote, "For years the American people have been engaged in a terrific struggle with the allied forces of organized wealth and political corruption. . . . Through the initiative, referendum, and recall the people in any emergency

¹⁶² See Ernst, supra note 131, at 8–26.

¹⁶³ See, e.g., McConnell v. FEC, 540 U.S. 93, 204–09 (upholding ban on corporate and labor funding of electioneering communications); United States v. Congress of Indus. Orgs., 335 U.S. 106, 123–24 (1948) (construing the Taft-Hartley Act to permit certain political communications between unions and their members on the same basis as between corporations and shareholders).

¹⁶⁴ See Ernst, supra note 131, at 8–26.

 $^{^{165}}$ Betty H. Zisk, Money, Media and the Grass Roots: State Ballot Issues and the Electoral Process 251 (1987).

Daniel H. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. REV. 505, 608 (1982).

can absolutely control." This gives the impression that one hundred years ago, as now, citizen participation was used to justify different outcomes. The real prerequisite to different outcomes, however, is for citizens to agree that the policies advanced by ballot issue supporters are, in fact, good ideas.

2. Corporate Dollar Dominance Questionable

Again, using the yardsticks employed in *Austin* and *Argenbright*, the empirical data does not show that corporate dollars have consistently beaten citizen initiative proponents. Shortly after the *Bellotti* decision, Professor Lowenstein looked at twenty-five California ballot propositions between 1968 and 1980 characterized by one-sided spending. He began his examination stating, "Most observers have expressed the view that money has dominated ballot measure campaigns, deceiving the voters and diverting the initiative from its intended function as an instrument to be used by the public at large. For the most part, these assertions have been undocumented." In the instances he examined, the side that spent more won sixteen of the twenty-five ballot issue elections. Lowenstein concluded, "There can be no certain answer to the question of whether big spending 'bought' a victory for or against any particular ballot proposition."

Zimmerman cited two different studies involving contested ballot issues affecting business and industry.¹⁷² The first, conducted by the Council of Economic Priorities, looked at the one-sided nature of eighteen ballot issue campaigns involving corporations.¹⁷³ Corporations made contributions on both sides of the issue in only one ballot issue campaign.¹⁷⁴ In fourteen of these campaigns, when corporate funds dominated, the side with business backing won eleven times.¹⁷⁵ Zimmerman also referenced a study by *The Initiative News Report*, which

¹⁶⁷ Zimmerman, *supra* note 5, at 5.

Lowenstein, *supra* note 166, at 511. Lowenstein defines "one-sided" as one side's spending exceeding \$250,000 and being at least twice as much as the opposing side. *Id.*

¹⁶⁹ *Id.* at 510.

¹⁷⁰ *Id.* at 518 tbl.1.

¹⁷¹ *Id.* at 513.

¹⁷² Zimmerman, *supra* note 5, at 79.

¹⁷³ *Id*.

¹⁷⁴ *Id*.

¹⁷⁵ *Id*.

examined ballot issue spending in the period from 1976 to 1983.¹⁷⁶ According to the report, 80% of the propositions were defeated when the opponents outspent the proponents.¹⁷⁷ This compares to a passage rate for all ballot issues nationwide of approximately 44% between 1976 and 1992.¹⁷⁸

Viewed in the aggregate, the data from Ernst's longitudinal study shows that the passage rate for issues where unaffiliated groups proposed initiatives threatening narrow-material interests was almost 30%. Even though this is not the highest rate of passage, it is still higher than the rate of passage for initiatives sponsored by business or labor groups. ¹⁸⁰

3. Externalities: The "No" Factor

Even though the studies discussed above could support a conclusion that corporations are well positioned to stop ballot issues, there are certain externalities that call into question whether corporate cash is the determinative factor in David versus Goliath situations. One such externality is the natural propensity of voters to vote "no." Ron Faucheux, former editor of *Campaigns & Elections* and longtime political consultant, ¹⁸¹ stated the rule this way:

One rule of thumb widely known among initiative consultants is that ballot issues are generally easier to kill than to pass. To pass a proposition, you have to offer a compelling reason why the change is both needed and desired. To defeat one, usually all you have to do is raise doubt.¹⁸²

¹⁷⁷ *Id*.

¹⁷⁶ *Id*.

¹⁷⁸ *Id.* at 98–99.

¹⁷⁹ See Ernst, supra note 131, at 8–26.

¹⁸⁰ *Id*.

¹⁸¹ See Faucheux Goes to the Senate, CAMPAIGNS & ELECTIONS ONLINE, Jan. 3, 2006, http://www.campaignline.com/webedition/page.cfm?navid=51&pageid=784.

¹⁸² Ron Faucheux, *Observations of Initiative Elections, in* DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 139, 140 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001).

Perhaps this is why in 2000, voters rejected eight out of the ten most expensive ballot issue propositions around the country even though their proponents spent amounts ranging from \$6.15 to \$65.78 per vote. 183

Critics attempt to use polling numbers to support arguments that corporate dollars change the results of ballot issue contests. 184 instance, the fight over a 1976 forced deposit initiative in Colorado began with polling six months before the election that showed deposit proponents had a three to one lead; but, on election day, after corporate opponents spent more than \$500,000, the issue lost two to one. 185 proponents of a planned growth initiative in Washington enjoyed a 55% to 30% edge in early polling; however, on election day, after a businessbacked marketing plan was implemented to fight the issue, the initiative lost by a three to one margin. 186

Faucheux compares a ballot issue to a jury trial in which the voters are the jury. 187 Even though jurors may hold an initial opinion, it can change during the course of the trial, and "[w]hat matters is the vote at the end. . . . Because of this, it is easy for both political novices and experienced hands to misread polls." 188 According to Faucheux, any ballot initiative that faces organized opposition and begins with a support margin of less than two to one may be in trouble from the beginning. 189

In the November 2005 Ohio general election, proponents of constitutional amendments to modify partisan redistricting and change Ohio campaign finance laws (Issues Two-Five) faced stiff opposition from corporate interests. 190 The Columbus Dispatch reported that Ohio First, a fund backed by Republicans and business interests, spent more than \$5 million in opposing the four ballot issues. 191 Two proponent groups,

¹⁸³ See Cody Hoesly, Reforming Direct Democracy: Lessons from Oregon, 93 CAL. L. REV. 1191, 1204-05 (2005).

¹⁸⁴ See, e.g., Robyn R. Polashuk, Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections, 41 UCLA L. REV. 391, 409-11 (1993); Easley, supra note 88, at 675.

¹⁸⁵ Easly, *supra* note 88, at 675.

¹⁸⁶ Polashuk, *supra* note 184, at 409–10.

¹⁸⁷ Faucheux, supra note 182, at 140.

¹⁸⁸ *Id*.

¹⁸⁹ Id. at 140.

¹⁹⁰ See Joe Hallett & Jim Siegel, Battle Over Issues Cost Millions, COLUMBUS DISPATCH, Dec. 17, 2005, at B1.

¹⁹¹ *Id*.

Reform Ohio Now and Citizens to End Corruption, spent \$2.5 million and \$1.9 million respectively, for a total of \$4.4 million. Even though they were outspent, the proponents certainly had the resources to run a credible campaign. In the end, all four of the issues were defeated by an average margin of two to one. Ohio voters had an opportunity to evaluate both sides, and arrived at the same conclusion shared by most of Ohio's daily newspaper editorial writers.

Although corporate-funded opposition has shown the power to move polling numbers against ballot measures, proponents overstate their case by looking at data collected before the voting public had time to digest more information about the proposals. After all, "[t]he Constitution 'protects expression which is eloquent no less than that which is unconvincing." If, as Justice Holmes said, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," then it is proper that issue proponents have the burden of showing the laws they wish to make still seem like a good idea to voters after intense questions have been asked. At the end of the day, corporations may have an easier time playing defense against citizen groups simply because voters reject more ballot proposals than they accept, meaning corporate-funded opposition is not necessarily determinative.

4. Externalities: Failure to Reach Critical Mass

In applying the third factor from *Austin*—whether spending bears a relationship to public support—a complex argument appears in the context of citizen organizations pushing for changes that threaten corporate interests. Based on the foregoing discussion, corporate spending may convince a majority that the corporate point of view is correct. The only

¹⁹² Id.

¹⁹³ J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE, 2005 OFFICIAL ELECTION RESULTS, http://www.sos.state.oh.us/sos/ElectionsVoter/results2005.aspx?Section=1225.

¹⁹⁴ See, e.g., Editorial, Bully for Voters' Smart Choices, CINCINNATI ENQUIRER, Nov. 10, 2005, at C10 (arguing that the proposals lacked common sense); Editorial, No on State Issues 2–5, COLUMBUS DISPATCH, Oct. 30, 2005, at B6 (arguing that voters should reject all four issues); Editorial, Mixed Bag of Reforms, CLEVELAND PLAIN DEALER, Oct. 23, 2005, at H2 (opposing all issues except Issue 2 and arguing that the proposals were not the best solutions to the problems facing Ohio).

 $^{^{195}}$ First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).

¹⁹⁶ Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

way that this can be determined is through the election process. The other side of this equation, however, may play a greater role in explaining why citizen groups experience difficulty in passing ballot issues against corporate opposition: failure to reach critical mass. If, in fact, the amounts raised by citizen groups are proportional to the public support of their positions, then many of their initiatives are doomed ab initio.

In the early 1900s, Progressives campaigned for initiatives with volunteers "and small amounts of money used primarily to print and distribute copies of the proposition and explanatory materials." Unfortunately, many modern descendants still nurse a quaint notion of campaign finance that has not evolved much since the horse and buggy era: "Within the reform movement lies a deep-rooted assumption that political campaigns in a democracy, if not financed by the government, should be financed by small contributions. This assumption often flows from the belief that large contributions corrupt either or both the electoral and legislative systems." Since "sponsors of initiatives must spend large sums" to run effective issue campaigns in the modern era, progressive sponsors who rely on small contributions may be structurally unable to put together a winning campaign, even without opposition.

In a 1976 Colorado ballot issue, proponents of forced deposit legislation spent \$19,000, but the opponents spent \$511,000.²⁰⁰ Similarly, in Massachusetts, bottle bill proponents spent \$40,000, but were countered by opponents spending \$1.4 million.²⁰¹ According to the U.S. Census, the voting age population in Colorado in 1970 was 1,433,248, and in Massachusetts it was 3,813,406.²⁰² In 1975, the postage rates were ten cents for a letter and seven cents for a postcard.²⁰³ Assuming that only half of the eligible voting age population was registered to vote, the cost of

¹⁹⁷ Zimmerman, *supra* note 5, at 91.

¹⁹⁸ Bradley A. Smith, Unfree Speech: The Folly of Campaign Finance Reform 45 (2001).

¹⁹⁹ Zimmerman, *supra* note 5, at 79.

²⁰⁰ Easley, *supra* note 88, at 675.

²⁰¹ *Id.* at 687.

²⁰² U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1970 POPULATION OF VOTING AGE FOR STATES 3 (1971), *available at* http://www2.census.gov/prod2/decennial/documents/31679801n1-40ch01.pdf.

²⁰³ United States Postal Service, History of the United States Postal Service, 1775-1993: Domestic Rates for Letters and Postcards, http://www.usps.com/history/history/his4_5.htm (last visited Sept. 18, 2006).

sending even a single postcard to registered voters urging them to support bottle deposits would have exceeded \$50,000 in Colorado and \$130,000 in Massachusetts. While proponents were far outspent, they simply did not have sufficient resources to mount a credible campaign, even at a time when widespread television advertising was not a necessary campaign ingredient. Had proponents in these campaigns mounted even a minimal campaign, the results might have been different.

Now, the necessity of television and radio ads has greatly increased the cost of running statewide issue campaigns: "Statewide initiative and referendum campaigns are especially expensive because of the difficulties of obtaining the requisite number of certifiable signatures on petitions and persuading voters to support or reject ballot propositions." Yet, in modern elections, ballot issue proponents continue to advance campaigns that have so little funding they might not succeed even without organized opposition. In 2002, Oregonians defeated a universal health care ballot issue when backers spent \$37,000 in support. In that same election, Oregonians rejected an initiative to require labeling of genetically altered food after the proponents spent only \$131,000 on their message. The proponents of these measures, while working hard to qualify them for the ballot, may not have been able to realistically assess their chances of success.

A recent article by the Ohio Chamber of Commerce examined the success of citizen-initiated issues in Ohio and reached a similar conclusion. Since 1912, Ohioans have considered fifty-eight ballot initiatives originated by citizens via initiative petition, but only about one-quarter of these initiatives were successful. One major difference between initiative ballot issues and ones placed on the ballot by the General Assembly is the level of popular support. Constitutional amendments proposed by the legislature need support from three-fifths of the members of both the House and the Senate before they can go on the

²⁰⁴ Zimmerman, *supra* note 5, at 79.

²⁰⁵ Hoesly, *supra* note 183, at 1205.

²⁰⁶ Id.

²⁰⁷ Is a "No" Vote on Ballot Issues the Default Position?, POLITICAL EDGE (Ohio Chamber of Commerce, Columbus, Ohio), Oct. 12, 2005, http://www.ohiochamber.com/governmental/edge 101205.asp [hereinafter "No" Vote].

²⁰⁸ Id.

²⁰⁹ Id.

ballot.²¹⁰ Therefore, issues proposed by the General Assembly must have some bi-partisan support to be placed on the ballot.²¹¹ Initiative petition amendments, however, frequently have their origins in "the most ideological elements of the electorate."²¹² "They are ideas that appeal strongly to their proponents, horrify their detractors, and can make the middle-of-the-road voters uncomfortable – not the ideal roadmap for success."²¹³ What backers of the corporate domination argument fail to recognize is that often it is not the overwhelming nature of corporate opposition that guarantees the defeat of these issues, but a narrow popular appeal combined with the skepticism of the average voter.

5. Proportionality of Spending to Economic Interests

The final attribute of proportionality of spending to examine, which is as relevant as popular opinion, is the relative economic value of the corporate interests being advanced. In *Virginia Board of Pharmacy*, the Court compared product advertising to free discussion of labor practices:

It was observed in *Thornhill* that "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." Since the fate of such a "single factory" could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.²¹⁴

In cases where corporations spend millions of dollars to defend an economic interest, corporate decisionmaking models generally ensure that spending is proportional to the interest being defended. For example, proponents of a repeal of Ohio's pop tax, ²¹⁵ generally soft drink bottlers, raised about \$9 million in corporate funds to pass the issue after having determined that the tax would cost \$67 million per year. ²¹⁶

²¹⁰ Ohio Const. art. XVI, § 1.

²¹¹ See "No" Vote, supra note 207.

²¹² *Id*.

²¹³ *Id*.

²¹⁴ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976) (citing Thornhill v. Alabama, 310 U.S. 88, 103 (1940)).

²¹⁵ See SCHWARTZ & TAFT, supra note 138, at 28.

²¹⁶ See Alan Johnson, Taxes on Gas, Soft Drinks May Be Issues: Governor Expects Next Four Years to be Productive, COLUMBUS DISPATCH, Dec. 25, 1994, at A1.

C. Goliath v. David (Corporations on Offense)

Persons or groups concerned about the corporate domination of ballot issue campaigns probably have few worries in the context of issues initiated by corporate interests against no organized economic constituency, because these are the rarest type of ballot issue. ²¹⁷ In the period from 1898 to 1995, only 9.5% of ballot issues fell into this category. ²¹⁸ Historically, this type of issue also has the lowest rate of passage of any type in the study at 26.5%. ²¹⁹

Even though these statistics alone defeat the notion of corporate domination of this ballot issue context, it is worthwhile to examine some of the reasons that corporate interests fare poorly when bringing issues to the ballot. The first is the common sense of the voting public. If an issue has no clear benefit to the public at large, "[e]xperience has shown . . . that the voters can distinguish self-serving special interest legislation and almost uniformly reject it."220 One example of critical assessment by voters occurred in Ohio in 2003 with the proposal of State Issue One, which Governor Bob Taft styled the "Third Frontier." The proposal would have allowed the state to issue \$500 million in bonds to fund hightechnology research programs, which were designed to bring jobs to the state. 222 The committee supporting the issue raised about \$3.1 million and spent approximately \$2.9 million, including a statewide television buy.²²³ The Ohio Farm Bureau Federation and the Ohio Farmers Union, who were opposed to the issue, did no television advertising. 224 Perhaps in fear of retaliation, "Issue 1 opponents did little to counter the governor publicly."²²⁵ Nonetheless, Issue One was rejected by a bare majority— 52%—on election day. 226 Zimmerman suggests that such results vindicate

²¹⁷ See Ernst, supra note 131, at 8–26.

²¹⁸ *Id*.

 $^{^{219}}$ *Id*

²²⁰ Gilbert Hahn, III & Stephen C. Morton, *Initiative and Referendum* — *Do They Encourage or Impair Better State Government*?, 5 FLA. ST. U. L. REV. 925, 948 (1977).

²²¹ See Spencer Hunt, Taft's Stimulus Proposal Rejected, CINCINNATI ENQUIRER, Nov. 5, 2003, at A1.

²²² Id.

²²³ William Hershey, *Dayton, Cleveland Areas Bucked Issue 1 Trend: Rest of State United in Opposition to \$500M Bond Issue*, DAYTON DAILY NEWS, Nov. 6, 2003, at A1.

²²⁴ Id.

²²⁵ Hunt, *supra* note 221.

²²⁶ Id.

the legacy of turn-of-the century progressives, who "espouse[d] faith in the average voter . . ." One of the underlying assumptions of the initiative and referendum process is that "the electorate probably should be credited with being able to recognize and reject unintelligent proposals consistently."

CONCLUSION

Even though reform groups continue to press for limitations on corporate participation in ballot issue campaigns, their principal argument—corporate domination—simply does not hold true when examined in the context of actual practice. There is no justification for interfering with ballot issues that pit corporations against labor because corporate funding usually does not dominate, and these issues generally serve as surrogates for important economic interests. In the case of citizen proposals, or David v. Goliath, passage rates are low and citizen groups are often outspent by corporate interests, but these do not necessarily indicate corporate domination. Instead, citizen groups frequently fail to generate the level of support necessary to run any meaningful campaign, and face the uphill battle of all issue proponents to get voters to vote yes. Finally, the data does not support the conclusion that corporate interests have any success in passing issues in their favor. These issues are the rarest type of ballot initiatives and have the lowest rate of passage. In 1992, Professor Lowenstein wrote, "Bellotti has been criticized for its failure to provide empirical justification for rejecting the 'drowning out' theory by critics who themselves fail to provide empirical justification for accepting the theory."229 Reviewing the evidence years later and using the yardsticks of Argenbright, reformers still cannot show that there is empirical justification to accept the corporate domination principle.

The basic decision to be made by the Court, should this issue return for consideration, is whether to apply the leveling approach of *Austin* in order "to ensur[e] that expenditures reflect actual public support for the political ideas espoused by corporations." The preferred alternative, from a First Amendment perspective, is to reaffirm the logic of *Bellotti*: "Referenda are held on issues, not candidates for public office. The risk of corruption

²²⁷ Zimmerman, *supra* note 5, at 156.

²²⁸ Hahn & Morton, *supra* note 220, at 946.

²²⁹ Daniel Hays Lowenstein, A Patternless Mosaic: Campaign Finance and the First Amendment After Austin, 21 CAP. U. L. REV. 381, 410 n.113 (1992).

²³⁰ Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."²³¹ *Bellotti* stood for the proposition that the First Amendment protection accorded to campaign speech did not depend on the source of its funding.²³² *Bellotti* was justified on sweeping First Amendment principles, not upon study of discrete evidence. Arguably, part of the reason that the reform community wants the evidentiary drawbridge let down is that the height of the evidence is insufficient to scale the First Amendment wall that protects corporate speech in the ballot issue context.

For one hundred years, the initiative and referendum movement has listed checking corporate power as one of its goals. The principal reason reformers want to muzzle the mouthless corporate speaker is to change outcomes they cannot achieve when their proposals are contested. Justice Frankfurter captured the essential power of the initiative and referendum when he wrote:

It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.²³³

A change in the Court's stance on corporate participation in ballot issues would not only offend the First Amendment, but it would create a seismic shift in influence unrelated to the merits of the issues themselves.

²³¹ First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) (citations omitted).

²³² Lowenstein, *supra* note 229, at 405.

²³³ Baker v. Carr, 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting).