"[W]e must ascertain whether [Michigan's restriction on corporate political expenditures] burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest."—Justice MARSHALL

"I doubt that those who framed and adopted the First Amendment would agree."—Justice SCALIA

"The State cannot demonstrate that a compelling interest supports its speech restriction, nor can it show that its law is narrowly tailored to the purported statutory end."—Justice KENNEDY

Austin v. Michigan Chamber of Commerce

494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

Section 54(1) of the Michigan Campaign Finance Act prohibits corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. Corporations are permitted, however, to make such expenditures from segregated funds used solely for political purposes. Section 54(1) was modeled on a provision of the Federal Election Campaign Act of 1971, as amended, that requires corporations and labor unions to use segregated funds to finance independent expenditures made in federal elections.

The Michigan State Chamber of Commerce (the Chamber), a non-profit state corporation, comprises more than 8,000 members, three-quarters of whom are for-profit corporations. The Chamber's general treasury is funded through annual dues required of all members. In June 1985, when Michigan scheduled a special election to fill a vacancy in the state House of Representatives, the Chamber tried to use not its separate political fund but its general funds to buy an advertisement supporting a specific candidate. The Chamber also brought suit in federal district court for injunctive relief against enforcement of the Act, arguing that the restriction on expenditures violated the First and the Fourteenth Amendments. The trial court upheld the statute, but the court of appeals reversed. The state appealed to the U.S. Supreme Court. We reprint only those portions of the opinions dealing with interpretation of the First Amendment.

Justice **MARSHALL** delivered the opinion of the Court.

... Although we agree that expressive rights are implicated in this case, we hold that application of § 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest. Accordingly, we reverse the judgment of the Court of Appeals. ...

II

... [W]e must ascertain whether [Michigan's restriction on corporate political expenditures] burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest. Buckley v. Valeo (1976). Certainly, the use of funds to support a political candidate is "speech"; independent campaign expenditures constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms.' " *Id.* The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment. See, e.g., First Nat'l Bank of Boston v. Bellotti (1978).

A

This Court concluded in FEC v. Mass. Citizens for Life, Inc. (1986) (*MCFL*), that a federal statute requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression. The Court reasoned that the small nonprofit corporation in that case would face certain organizational and financial hurdles in establishing and administering a segregated political fund. ... These hurdles "impose[d] administrative costs that many small entities [might] be unable to bear" and "create[d] a disincentive for such organizations to engage in political speech."

Despite the Chamber's success in administering its separate political fund, Michigan's segregated fund requirement still burdens the Chamber's exercise of expression because "the corporation is not free to use its general funds for campaign advocacy purposes." *MCFL*. The Act imposes requirements similar to those in the federal statute involved in *MCFL*: a segregated fund must have a treasurer; and its administrators must keep detailed accounts of contributions, and file with state officials a statement of organization. In addition, a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons. Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. Thus they must be justified by a compelling state interest.

B

The State contends that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption. See FEC v. Nat'l Conservative PAC (1985) (*NCPAC*). State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *MCFL*. As the Court explained in *MCFL*, the political advantage of corporations is unfair because

> [t]he resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even

> though the power of the corporation may be no reflection of the power of its ideas.

We therefore 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." *NCPAC*; see also *MCFL*.

... [T]his Court has ... recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections, *Bellotti*. ... Michigan's regulation aims 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. The Act does not attempt "to equalize the relative influence of speakers on elections"; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. ... 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. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.

C

We next turn to the question whether the Act is sufficiently narrowly tailored. ... We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. Contrary to the dissents' critical assumptions, the Act does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views. See *MCFL*.

III

The Chamber contends that even if the Act is constitutional with respect to for-profit corporations, it nonetheless cannot be applied to a nonprofit ideological corporation like a chamber of commerce. In *MCFL*, we held that the nonprofit organization there had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status." In reaching that conclusion, we enumerated three characteristics of the corporation that were "essential" to our holding. Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted from the generally applicable provisions of § 54(1).

The first characteristic of Mass. Citizens for Life, Inc., that distinguished it from ordinary business corporations was that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." MCFL's narrow political focus thus "ensure[d] that [its] political resources reflect[ed] political support." In contrast, the

Chamber's bylaws set forth more varied purposes, several of which are not inherently political. ... Unlike MCFL's, the Chamber's educational activities are not expressly tied to political goals; many of its seminars, conventions, and publications are politically neutral and focus on business and economic issues. ...

We described the second feature of MCFL as the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter. ... Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL in this respect.[1]

The final characteristic upon which we relied in *MCFL* was the organization's independence from the influence of business corporations. On this score, the Chamber differs most greatly. ... MCFL was not established by, and had a policy of not accepting contributions from, business corporations. Thus it could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." *MCFL*. In striking contrast, more than three-quarters of the Chamber's members are business corporations, whose political contributions and expenditures can constitutionally be regulated by the State. As we read the Act, a corporation's payments into the Chamber's general treasury would not be considered payments to influence an election, so they would not be "contributions" or "expenditures," and would not be subject to the Act's limitations. Business corporations therefore could circumvent the Act's restriction by funneling money through the Chamber's general treasury. Because the Chamber accepts money from for-profit corporations, it could, absent application of § 54(1), serve as a conduit for corporate political spending. ...

IV

The Chamber also attacks § 54(1) as underinclusive because it does not regulate the independent expenditures of unincorporated labor unions. Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure. ... Moreover, labor unions differ from corporations in that union members who disagree with a union's political activities need not give

[1]A requirement that the Chamber disclose the nature and extent of its political activities (Kennedy, J., dissenting) would not eliminate the possible distortion of the political process inherent in independent expenditures from general corporate funds. Given the significant incentive for members to continue their financial support for the Chamber in spite of their disagreement with its political agenda, disclosure will not ensure that the funds in the Chamber's treasury correspond to members' support for its ideas. [Footnote by the Court.]

up full membership in the organization to avoid supporting its political activities. ... As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury. Michigan's decision to exclude unincorporated labor unions from the scope of § 54(1) is therefore justified by the crucial differences between unions and corporations. ...

[*Reversed.*]

Justice **BRENNAN**, concurring.

... As one of the "Orwellian" "censor[s]" derided by the dissents, and as the author of our recent decision in *MCFL*, I write separately to explain my views in this case.

The Michigan law ... is not an across-the-board prohibition on political participation by corporations or even a complete ban on corporate political expenditures. Rather, the statute merely requires those corporations wishing to make independent expenditures in support of candidates to do so through segregated funds or political action committees (PAC's) rather than directly from their corporate treasuries. ... [T]he dissents significantly overstate their case in several important respects and ... the Court's decision today is faithful to our prior opinions ... particularly *MCFL*. ...

The PAC requirement may be unconstitutional as applied to some corporations because they do not present the dangers at which expenditure limitations are aimed. Indeed, we determined that Massachusetts Citizens for Life ... fell into this category.[1] ...

... Justice Kennedy, by repeatedly using the qualifier "nonprofit" ... appears to concede that the Michigan law legitimately may be applied to for-profit business corporations, or at least that the Court's rationale might "suffice to justify restricting political speech by for-profit corporations." If that is so, Justice Kennedy's failure to sustain the statute as applied in this case is perplexing, because the Chamber, unlike other nonprofits such as MCFL, is clearly a conduit for corporations barred from making independent expenditures directly.[2] ...

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[1]Justice Kennedy is mistaken when he suggests that by upholding the as-applied challenge in *MCFL* and rejecting it here, we are embarking on "value-laden, content-based speech suppression that permits some non-profit corporate groups but not others to engage in political speech." ... Whether an organization presents the threat at which the campaign finance laws are aimed has to do with the particular characteristics of the organization at issue and not with the content of its speech. Of course, if a correlation between the two factors could be shown to exist, a group would be free to mount a First Amendment challenge on that basis. Cf. *Buckley*. Neither respondent nor Justice Kennedy's dissent has provided any reason to believe that such a relationship exists here. [Footnote by Justice Brennan.]

[2]According to Justice Kennedy's dissent, the majority holds that "it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union" to make independent expenditures. This characterization is inaccurate. Not only are those groups not part of the proceeding before us, but the dissent has overlooked the central lesson of *MCFL* that the First

Justice **STEVENS**, concurring. ...

Justice **SCALIA**, dissenting.

"Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: _____." In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.

The Court's opinion says that political speech of corporations can be regulated because "[s]tate law grants [them] special advantages," and because this "unique state-conferred corporate structure ... facilitates the amassing of large treasuries." This analysis seeks to create one good argument by combining two bad ones. Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages. ... But so are other associations and private individuals ..., ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. See Pickering v. Bd. of Ed. (1968). The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need. See *Buckley*. That is why the Court puts forward its second bad argument, the fact that corporations "amas[s] large treasuries." But that alone is also not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates. Neither of these two flawed arguments is improved by combining them. ...

... We held in *Buckley* ... that independent expenditures to express the political views of individuals and associations do not raise a sufficient threat of corruption to justify prohibition. Neither the Court's opinion nor either of the concurrences makes any effort to distinguish that case—except, perhaps, by misdescribing the case as involving "federal laws regulating individual donors" [rather than corporations]. ... *Buckley* should not be overruled, because it is entirely correct. The contention that prohibiting overt advocacy for or against a political candidate satisfies a "compelling need" to avoid "corruption" is easily dismissed. [*Buckley*.]

The Court does not try to defend the proposition that independent advocacy poses a

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Amendment may require exemptions, on an as-applied basis, from expenditure restrictions. If a nonprofit corporation is formed with the express purpose of promoting political ideas, is not composed of members who face an economic incentive for disassociating with it, and does not accept contributions from business corporations or labor unions, then it would be governed by our *MCFL* holding. [Footnote by Justice Brennan.]

substantial risk of political "corruption". ... Rather, it asserts that that concept (which it defines as " 'financial quid pro quo' corruption") is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. "Michigan's regulation," we are told, "aims 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 corporations's political ideas." Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.

The Court's opinion ultimately rests upon that proposition whose violation constitutes the "New Corruption": expenditures must "reflect actual public support for the political ideas espoused." This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in *Buckley*: "... the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. ..." ...

I would not do justice to the significance of today's decision to discuss only its lapses from case precedent and logic. Infinitely more important ... is its departure from long-accepted premises of our political system regarding the benevolence that can be expected of government in managing the arena of public debate, and the danger that is to be anticipated from powerful private institutions that compete with government, and with one another, within that arena.

Perhaps the Michigan law before us here has an unqualifiedly noble objective—to "equalize" the political debate by preventing disproportionate expression of corporations' points of view. But governmental abridgement of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our Bill of Rights, however, is that there are some things—even some seemingly desirable things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure "fair" political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. ... The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech "for fairness' sake" simply out of bounds.

I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a *desirable* objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular. For the latter purpose, the calibration that the Court today endorses is precisely backwards: To the extent a valid proposition has scant public support, it should have wider rather than narrower circulation. I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did they would have turned them in

the opposite direction.

Ah, but then there is the special element of corporate wealth: What would the Founders have thought of that? They would have endorsed, I think what Tocqueville wrote in 1835:

> When the members of an aristocratic community adopt a new opinion ... they give it a station ... upon the lofty platform where they stand; and opinions and sentiments so conspicuous to the eyes of the multitude are easily introduced into the hearts and minds of all around. In the democratic countries the governing power alone is naturally in a condition to act in this manner; but it is easy to see that its action is always inadequate, and often dangerous. ... No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises, even unintentionally, an insupportable tyranny. ... Worse still will be the case if the government really believes itself interested in preventing all circulation of ideas. ... Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of condition has swept away. 2 A. de Tocqueville. *Democracy in America* 109 (P. Bradley ed. 1948). ...

Despite all the talk about "corruption and the appearance of corruption" ... it is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow. ... The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff. ...

Justice **KENNEDY**, with whom Justice **O'CONNOR** and Justice **SCALIA** join, dissenting.

The majority opinion validates not one censorship of speech but two. One is Michigan's content-based law which decrees it a crime for a nonprofit corporate speaker to endorse or oppose candidates for Michigan public office. ... The other censorship scheme ... is of our own creation. It is value-laden, content-based speech suppression that permits some nonprofit corporate groups, but not others, to engage in political speech. After failing to disguise its animosity and distrust for the particular kind of political speech here at issue ... the Court adopts a rule that allows Michigan to stifle the voices of some of the most respected groups in public life on subjects central to the integrity of our democratic system. Each of these schemes is repugnant to the First Amendment and contradicts its central guarantee, the freedom to speak in the electoral process. ...

The State has conceded that among those communications prohibited by its statute are the publication by a nonprofit corporation of its own assessment of a candidate's voting record. With the imprimatur of this Court, it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union, or the Michigan Chamber of Commerce, to advise the public how a candidate voted on issues of urgent concern to its members. In both practice and theory, the prohibition aims at the heart of political debate. ...

First, the Act prohibits corporations from speaking on ... the subject of candidate elections. It is a basic precept that the State may not confine speech to certain subjects. Content-based restrictions are the essence of censorial power. *Bellotti*. ... 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. Our precedents condemn this censorship. See *Bellotti*; Police Dept. of Chicago v. Mosley (1972); Carey v. Brown (1980). ...

By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for election. ... The Act does not meet our standards for laws that burden fundamental rights. The State cannot demonstrate that a compelling interest supports its speech restriction, nor can it show that its law is narrowly tailored to the purported statutory end. See *Bellotti*. ...

Our cases acknowledge the danger that corruption poses for the electoral process, but draw a line in permissible regulation between payments to candidates ("contributions") and payments or expenditures to express one's own views ("independent expenditures"). Today's decision abandons this distinction and threatens once-protected political speech. The Michigan statute prohibits independent expenditures by a nonprofit corporate speaker to express its own views about candidate qualifications. Independent expenditures are entitled to greater protection than campaign contributions. *MCFL*. See also *Buckley*. ...

The majority almost admits that ... the danger of a political quid pro quo is insufficient to justify a restriction of this kind. Since the specter of corruption ... is missing ... the majority invents a new interest: combating the "corrosive and distorting effects of immense aggregations of wealth" accumulated in corporate form. ... The majority styles this novel interest as simply a different kind of corruption, but has no support for its assertion. While it is questionable whether such imprecision would suffice to justify restricting political speech by for-profit corporations, it is certain that it does not apply to nonprofit entities. ...

In *Buckley* and *Bellotti*, ... we rejected the argument that the expenditure of money to increase the quantity of political speech somehow fosters corruption. The key to the majority's reasoning appears to be that because some corporate speakers are well supported and can buy press space or broadcast time to express their ideas, government may ban all corporate speech to ensure that it will not dominate political debate. The argument is flawed in at least two respects. First, the statute is overinclusive because it covers all groups which use the corporate form, including all nonprofit corporations. Second, it assumes that the government has a legitimate interest in equalizing the relative influence of speakers. ... An argument similar to that made by the majority was rejected in *Bellotti*. ...

The Court purports to distinguish *MCFL* on the ground that the nonprofit corporation permitted to speak in that case received no funds from profit-making corporations. It is undisputed that the Chamber is itself a nonprofit corporation. The crucial difference, it is said, is

that the Chamber receives corporate contributions. But this distinction rests on the fallacy that the source of the speaker's funds is somehow relevant to the speaker's right of expression or society's interest in hearing what the speaker has to say. ... The more narrow alternative of recordkeeping and funding disclosure is available. See *MCFL*. A wooden rule prohibiting independent expenditures by nonprofit corporations that receive funds from business corporations invites discriminatory distinctions. The principled approach is to acknowledge that where political speech is concerned, freedom to speak extends to all nonprofit corporations, not the special favorites of a majority of this Court.

... To create second-class speakers that can be stifled on the subject of candidate qualifications is to silence some of the most significant participants in the American public dialogue, as evidenced by the amici briefs filed on behalf of the Chamber of Commerce by the American Civil Liberties Union, the Center for Public Interest Law, the American Medical Association, the National Association of Realtors, the American Insurance Association, the National Organization for Women, Greenpeace Action, the National Abortion Rights Action League, the National Right to Work Committee, the Planned Parenthood Federation of America, the Fund for the Feminist Majority, the Washington Legal Foundation, and the Allied Educational Foundation. ...

Editors' Notes

(1) **Query:** "[T]he use of funds to support a political candidate," Marshall said for the Court, "is 'speech.' " None of the justices challenged this equation, but can a *textualist approach* equate "speech" with using money? What theory of speech, and of the political system, is Marshall presupposing?

(2) **Query:** To what extent did Marshall's opinion argue—or assume—that the Court has a special obligation to assure the integrity of the political process? In short, was Marshall following an approach of *reinforcing representative democracy*? What about the opinions of Scalia and Kennedy? To what extent did the controversy here center on a question of WHO?: Which institution, if any, can constitutionally diagnose and correct distortions in the political process? And WHO makes that determination of which institution?

(3) **Query:** The opinions in *Bellotti* (available at www.princeton.edu/aci) claim that the First Amendment's protection of freedom of communication has three objectives: (a) The public's right to hear or receive information so it can make wise political choices (Powell (majority opinion), White (dissenting), and Rehnquist (dissenting)); (b) individual "self-expression, self-realization, and self-fulfillment" (White); and, (c) implicit in all three opinions, the personal right to influence the political processes (perhaps "self-government" rather than "self-realization" or self-fulfillment). How does each of these objectives apply to corporate expression as distinguished from individual expression?

(4) **Query:** Were Scalia and Kennedy correct in suggesting that *Austin* undermined *Buckley* and *Bellotti*?

(5) **Query:** Scalia and Kennedy joined the majority in Rust v. Sullivan (1991; reprinted

above, p. ___) to sustain the so-called "gag-rule." How could they reconcile their opposition here and in *R.A.V.* (1992; reprinted above, p. ___) to "content-based" bans on speech?

(6) **Query:** Scalia wrote: "I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption ... is even a desirable objective, much less one that is important enough to qualify as a compelling state interest." He cited no historical evidence to support his doubts, beyond offering a long quotation from Alexis de Tocqueville, *Democracy in America* (P. Bradley ed. 1948), II, 109 and saying that he thought the Founders would have agreed, though again without citing any evidence to support his belief about endorsement. Why would anyone *assume* that the Founders would have agreed with what a very perceptive French aristocrat wrote a half century after ratification? Why would anyone *assume* that he or she knew how the Founders would have responded to phenomena, such as large, rich corporations, about which they knew very little? What sort of evidence would Scalia need to support his "originalism"? Indeed, to what extent was Scalia using an *originalist approach*? To what extent was he instead making recourse to a more abstract conception of the purposes of the First Amendment?

(7) **Query:** Kennedy emphasized the importance of group identity and association in American character and democracy. Yet in Adarand Constructors v. Pena (1995; reprinted below, p. ___), involving affirmative action, he joined O'Connor's opinion of the court, in which she stressed that the Constitution protects persons, not groups. Can Kennedy's two positions be reconciled?

(8) Since 1907, federal law has banned direct contributions by corporations to candidates in federal elections. **Query:** Should that ban be applied to nonprofit advocacy organizations that happen to be organized as corporations, such as the North Carolina Right to Life Inc.? The Fourth Circuit Court of Appeals, stating that such groups "have a strong First Amendment interest in expressing their ideas and associating with others who share the same views" and that restricting the ability of such organizations to participate in politics "drains life-force from democracy," held that the ban was unconstitutional as applied to them. In Federal Election Commission v. Beaumont (2003), the Supreme Court reversed that ruling, refusing to create an exception permitting unlimited contributions by corporations organized for the purpose of ideological advocacy. Furthermore, Justice Souter's opinion for the 7–2 majority stated: "Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members." Justice Thomas, joined by Justice Scalia, dissented, reiterating their longstanding view that contributions as well as expenditures are subject to the strictest constitutional scrutiny and arguing that the challenged ban could not survive such scrutiny.