IS THE INTERNET A SAFE HAVEN FOR CORPORATE POLITICAL SPEECH? *AUSTIN V. MICHIGAN CHAMBER OF COMMERCE* IN THE SHADOW OF *RENO V. ACLU*

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The millennium's first elections will be marked by an electronic grassroots revolution. Use of the internet as a medium for political expression has exploded,[1] with more and more of the electorate engaged in interactive democracy. For voters, grassroots organizers, candidates and political consultants, today's internet has become the architectural embodiment of First Amendment free speech values—the World Wide Web, a virtual town square.

It is indeed the architecture of the internet that guarantees accessibility to and equality within the new media's democratic forum. Equally important to internet activists, however, is the absence of government regulation. Though the realization of political action is as close as one's home computer, some fear that the promise of the new media could be smothered by government regulation. In November 1999, the Federal Election Commission ("FEC") published a *Notice of Inquiry* that posed questions and solicited public comments regarding future regulation of internet political activity.[2] The public's response was overwhelming. More than 1,200 comments from individuals, internet service providers ("ISPs"), political fundraisers, political websites, political parties and grassroots advocacy organizations were submitted to the FEC.[3] Though the agency has not formally reviewed the comments, many counseled against FEC regulation of internet political speech.

This collective call for regulatory restraint comes in the wake of the Supreme Court's invalidation of the Communications Decency Act in *Reno v. American Civil Liberties Union*.[4] In this landmark decision, the Court announced its commitment to protect internet expression from government regulation by employing a "medium-specific" mode of analysis and the most rigorous standard of constitutional review.[5] By aggressively safeguarding the new media with the constitutional armor of strict scrutiny—rather than solely focusing on the type of speech in question—the Court's analysis raises provocative questions about the legitimacy of existing laws and regulations as they relate to speech made over the internet. *Reno* has the power to undermine earlier decisions upholding government restrictions on speech, casting a long shadow over much of its First Amendment jurisprudence.[6]

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1 *See* National Political Index (visited Feb. 7, 2000) <www.politicalindex.com> (listing 594 "Political Activist" sites; 123 "Political Party" sites; and 376 "Political Newsgroup" sites); Martha T. Moore, *Beginning Today, Clinton and Dole Clash on Internet*, USA TODAY, July 10, 1996, at 7A (reporting that more than 2000 political websites were active during that election year).

2 *See* Use of the Internet for Campaign Activity, *Notice of Inquiry and Request for Comments*, 64 Fed. Reg. 60360 (Nov. 1999).

3 *See Public Comments: Use of the Internet for Campaign Activity* (visited Feb. 7, 2000) <www.fec.gov/internet.html>.

4 521 U.S. 844 (1997).

5 *See id.* at 844, 863, 870, 885.

6 *See e.g.*, Kathleen Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1671 (1998) (arguing, *inter alia*, that the central tenets behind *Brandenburg v. Ohio* and *New York Times v. Sullivan* are undermined by the effects of the internet's architecture: "The instantaneous and decentralized global transmission of information arguably weakens a key premise of *Brandenburg's* imminence requirement."). *See also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 170 (1999). Lessig describes Floyd

This article explores the impact of the *Reno* analysis on an earlier Supreme Court opinion regarding corporate political speech. Specifically, we argue that the Court's reasoning in *Austin v. Michigan Chamber of Commerce*[7] loses its currency when applied to corporate political communications exchanged over the internet.

We begin with a brief overview of the Court's decision in *Reno*, focusing on the "medium-specific" analysis.[8] This is followed by a discussion of the Court's opinion in *Austin* upholding restrictions on political speech by corporations.[9] The final section describes the inherent conflict between the analyses employed in these two cases initiated by *Reno's* focus on the internet's architectural characteristics. Specifically, these characteristics include accessibility, interactivity (the necessity of "affirmative steps" by the user), and the ability to achieve "relative parity among speakers."[10] Considered individually or taken together, the new media's characteristics must reshape our understanding of the Court's First Amendment jurisprudence. We explore the effect of *Reno* on *Austin*, and argue that the analytical framework used in *Austin* to justify restrictions on corporate political speech loses its power when applied to speech transmitted over the internet.

I. *RENO V. ACLU*: ANALYSIS DRIVEN BY ARCHITECTURE[11]

In *Reno*,[12] the plaintiffs brought a First Amendment facial challenge to certain provisions of the Communications Decency Act ("CDA"), a federal statute prohibiting the transmission of obscene or indecent internet communications to individuals younger than eighteen years old.[13] Many commentators feared that the Court would impose a less scrutinizing standard of review for the internet, similar to that applied to "scarce" broadcast media; "invasive" radio communications; or time, place and manner zoning restrictions.[14] Fueling these fears, the government argued that cases such as *FCC v. Pacifica*[15] and *Renton v. Playtime Theatres*[16] were particularly relevant in evaluating the CDA.[17] The Court disagreed.

Instead, the Court focused on the internet's unique architecture, distinguishing this "new media" from traditional channels of mass communication.[18] The opinion immediately identified "four related characteristics of internet communication [that] have a transcendent importance," including (1) its "low barriers to entry," (2) identical barriers for both speakers and listeners, (3) "astoundingly diverse content," and (4) accessibility to "all who wish to speak . . . creat[ing] a relative parity among speakers."[19] As the "most participatory form of mass speech yet developed," the Court granted the internet the "highest protection from governmental intrusion."[20]

By highlighting these architectural factors, the Court anticipated its "medium-specific" analysis of the CDA's regulation of the internet—a mode of analysis that begins with an examination of why this medium's architecture should dictate the constitutional standard of review, rather than ini-

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Abrams' argument that the internet's architecture undermines the relevance of the *Pentagon Papers* case:

> Today there's a way to ensure that the government never has a compelling interest in . . . suppress[ing] a publication. If *The New York Times* wanted to publish the Pentagon Papers today, it could simply . . . leak them to a Usenet News group . . . The need for the constitutional protection would be erased because the architecture of the system gives anyone the power to publish, quickly and anonymously.

Id. Cf. Eugene Volokh, *Freedom of Speech, Shielding Children and Transcending Balancing*, 1997 S. Ct. Rev. 141, 157 (1997) (noting that *Reno* "will be of extremely limited precedential value").

7 494 U.S. 652 (1989).

8 *Reno*, 521 U.S. at 863.

9 *See Austin*, 494 U.S. at 652.

10 *Reno*, 521 U.S. at 863.

11 The authors note that the *Reno* analysis did not contemplate the rapid evolution of internet-related technologies and applications. The analysis here is similarly based on internet capabilities as we know them today. The authors recognize, however, that the architectural features of tomorrow's new media will be dramatically different than today's.

12 *Reno*, 521 U.S. at 859–62.

13 *See* 47 U.S.C. §§ 223 (a)(1), (d) (1994 & Supp. III 1997).

14 *See, e.g.*, Jerry Berman & Daniel Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 Yale L.J. 1619 (1995); Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C.L. Rev. 1067, 1075–82 (1994).

15 438 U.S. 726 (1978) (upholding an FCC order that radio stations could be fined for broadcasting George Carlin's monologue of "Filthy Words").

16 475 U.S. 41 (1986) (upholding a zoning ordinance to keep adult movie theaters out of residential neighborhoods).

17 *Reno*, 521 U.S. at 844 (citing Brief for the Appellants at 20–22).

18 *Id.* at 849–50.

19 *Id.* at 863.

20 *Id.*

tiating an inquiry into the category of speech that the government seeks to restrict.[21] In other words, the Court first decided that its obscenity and indecency cases "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium,"[22] thereby inviting intense constitutional scrutiny to restrictions on the medium itself.[23]

Looking to the architecture of the internet, the Court factually distinguished the "new media" from the "old" in three different ways. First, the Court noted that the "long history of extensive regulation" of broadcast media does not exist with the internet.[24] It therefore, rejected the government's claim that the Court's analysis should reflect that used in broadcast cases like *FCC v. Pacifica*.[25] Relying on the self-fulfilling argument that broadcast media has historically received "the most limited First Amendment protection" and that the Federal Communications Commission "had been regulating radio stations for decades," the Court easily distinguished the CDA. "Neither before nor after enactment of the CDA have the vast democratic fora of the internet been subject" to such heavy regulation.[26]

The second distinguishing factor was broadcast media's reliance on spectrum scarcity.[27] The scarcity argument loses its relevance in the internet context, the Court noted, because "the internet can hardly be considered a 'scarce' expressive commodity."[28] It provides "relatively unlimited, low-cost capacity for communication of all kinds."[29]

Finally, the Court distinguished the invasive character of other media.[30] In *Pacifica*, for example, government regulation was justified in part because of the government's compelling interest in protecting children, particularly those children who might turn on the radio in the afternoon and "be taken by surprise" by George Carlin's monologue of "Filthy Words."[31] Conversely, "[c]ommunications over the internet do not 'invade' an individual's home or appear on one's computer screen unbidden . . . Moreover, the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[32] Unlike radio and television, the internet allows users to select the material they want to see and to ignore the images they seek to avoid.[33]

To the Court, not only did the internet lack the regulatory history or inherent character that might justify regulation, but it also exhibited an architecture that argued against it.[34] The internet's speech-enabling character shifted the Court's focus from merely striking down an overly broad statute to liberating a new medium.[35] What easily could have been a narrow decision became an occasion for the Court to embrace a new technology by identifying distinct architectural features. Specifically, these include (1) accessibility; (2) interactivity and the need for users to take "affirmative steps" to receive communications, and (3) parity.[36] Each of these features guided the Court in its struggle to analyze and differentiate one medium from another, to determine how to regulate actors' behavior within this new medium, and to ascertain whether government regulations either promote or discourage free speech.[37]

The identification and differentiation of the in-

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21 *See id.* at 849–53.

22 *Id.* at 870.

23 *See* Volokh, *supra* note 6, at 144 ("If the CDA could have been seen as limited to 'low-value' speech, the Court could have let the government prevail while theoretically imposing little sacrifice of free speech, because the burdened speech would be (by hypothesis) not very valuable."). For the court's current obscenity standard, see *Miller v. California*, 413 U.S. 15, 24 (1973), which defines the modern obscenity test as follows: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *See id.*

24 *Reno*, 521 U.S. at 866–68.

25 438 U.S. at 749. In *Pacifica*, the Court upheld an administrative order that would have penalized a radio station for broadcasting comedian George Carlin's "Filthy Words" monologue during an afternoon time slot because the government had a strong interest in protecting children from hearing the broadcast. *See id.*

26 *Reno*, 521 U.S. at 866–68.

27 *See id.* at 868–69.

28 *Id.* at 870.

29 *Id.*

30 *See id.* at 868.

31 *Id.* at 844 (citing *FCC v. Pacifica*, 438 U.S. 726–30 (1978) and *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)).

32 *Reno*, 521 U.S. at 869.

33 *See id.* at 855.

34 *See id.* at 849–52.

35 *See id.* at 869–72.

36 *Id.* at 844, 849–53.

37 *See* LESSIG, *supra* note 6, at 183 ("[A]rchitectures could differ both in the values they embrace and in the regulability of behavior within their space. [Additionally], as the example of broadcasting shows, architectures differ in the justifica-

ternet's unique architecture persuaded the Court to construct a new legal regime that imposes a new obstacle for government restrictions on speech. By designing an analytical framework from the internet's architectural blueprint, *Reno* erected two constitutional hurdles that the government must overcome in order to prove that restrictions on internet speech are justified. The first hurdle is the medium-specific internet analysis, which guarantees the "highest protection from governmental intrusion."[38] Second, the government faces the Court's traditional First Amendment analysis, where the level of scrutiny is determined by the category of speech at issue. Just as *Reno* held that different communications media receive varying degrees of constitutional protection, certain forms of speech are entitled to more constitutional protection from government regulation than others. Obscenity receives no protection; indecency and commercial speech receive limited protection, while political expression is granted the strongest protection.[39]

While *Reno* does not directly alter the basic First Amendment analysis—where the category of speech dictates the level of scrutiny a government regulation receives—it constructs an almost bulletproof constitutional "shield" surrounding internet speech. The Court's delineation of the internet's unique architectural features was not merely "fact finding," but an articulation and illustration of how the new media should be considered the perfect purveyor of core First Amendment values.[40]

This is why the sweep of *Reno*'s protection appears to be so broad. The Court's analysis is premised on the notion that the internet's architecture is a model of constitutional values and First Amendment aspirations. Only as a secondary matter does it consider the category of speech at issue. The government's defense of the CDA was not problematic merely because of the statute's infringement on "valueless" speech, but some "fully protected speech based on its content, [within] a *fully protected medium.*"[41] Thus, "the conflict that might require hard trade-offs between a precious constitutional right and a compelling government interest was . . . in fact absent."[42]

These "hard trade-offs" certainly arise in the application of *Reno* to internet political speech. The right to engage in and exchange political dialogue in the conduct of a political campaign is entitled to the "fullest and most urgent application" of the constitution.[43] The most difficult case, therefore, is one in which political speech—the most highly protected category of speech recognized under the First Amendment—is exchanged within the most highly protected medium. This is precisely the point where *Reno* meets *Austin.*

As discussed below, the *Reno-Austin* conflict is exacerbated by the Court's underlying rationale in both cases, invalidating speech restrictions in *Reno,* but upholding restrictions on corporations' core political speech in *Austin.* We now turn to a discussion of how *Reno's* analysis subverts the rationale used in *Austin* in the context of a corporation's use of the internet to engage in political speech.

II. CORPORATE POLITICAL SPEECH IN THE SHADOW OF *RENO*: *AUSTIN* UNRAVELED

In its landmark decision *Buckley v. Valeo,*[44] the Supreme Court upheld the Federal Election Campaign Act's[45] contribution limits, but invalidated limits on independent and candidate expenditures.[46] Drawing a "line between expenditures and contributions, [the Court] treat[ed] expendi-

tions of regulation that they entail"); *see also* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 2D. ED. 1005–06 (1988) (noting that the court's "prevailing legal policy" for electronic media "has been one of fair and universal access to the facilities of the 'common carriers' ").

38 *Reno,* 521 U.S. at 863.

39 *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1976); TRIBE, *supra* note 37, at 940 n.80 (noting that the court has "treated differently the several media of expression" and "has at times tolerated differential treatment of entire classes or categories of protected expression such as the political and the commercial" (internal citations omitted)).

40 For a critique of the court's sweeping analysis, see Timothy Wu, *Application-Centered Internet Analysis,* 85 VA. L. REV. 1163 (1999). Wu argues that the court should refine its analysis in future internet communications cases by focusing discretely on the application. *See id.*

41 Volokh, *supra* note 6, at 146.

42 *Id.* at 148.

43 *Nixon v. Shrink Missouri PAC,* ___ U.S. ___, 120 S. Ct. 897, 903 (2000) (citing *Buckley,* 424 U.S. 1, 15 and *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971)).

44 424 U.S. 1 (1976).

45 2 U.S.C. § 431 *et. seq.*

46 *See Buckley,* 424 U.S. at 13. The 1974 FECA amendments included an aggregate limit on candidate expenditures, a ceiling of $1000 on independent expenditures (payments made by individuals or organizations on behalf of a clearly identified candidate), and capped expenditures made

ture restrictions as direct restraints on speech," but viewed contributions as a general expression of support for the candidate's views:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[47]

In short, while expenditure limits are subject to strict scrutiny, contribution limits require a "less compelling justification,"[48] and the only justification for upholding contribution limits in *Buckley* included preventing corruption or the appearance of corruption of elected officials.[49]

The analytical distinction between contributions and expenditures arises from the notion that expenditure limits directly suppress not only the quantity of speech, but also the diversity of speakers' viewpoints.[50] Because talk is not cheap within the electoral marketplace, the Court noted:

> [The expenditure restriction] necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached . . . *[C]ommunicating in today's mass society requires the expenditure of money . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.*[51]

Importantly, *Buckley* recognized that in 1976, the only effective modes of mass communication—specifically, broadcast—are expensive means of reaching viewers and listeners within the political marketplace.[52]

Fourteen years later, the Court took a major step away from the "*quid pro quo* corruption" rationale when it held that even under the "fatal in fact" strict scrutiny standard, Michigan's ban on corporate independent expenditures—using corporate treasury funds for communications that advocate the election or defeat of a clearly identified candidate without coordinating with the candidate—did not unconstitutionally infringe on a corporation's First Amendment rights.[53] Instead, the *Austin* Court held that, because of their status as state-chartered organizations that receive state-sponsored economic benefits, corporations threatened to use wealth obtained in the economic marketplace to influence the electorate.[54] If huge amounts of money could be spent on behalf of candidates, corporations could drown out the voices of individuals and "distort" the actual level of public support in favor of the corporation's view.[55] The Court wrote that:

> [S]tate-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.'. . . [T]he political advantage of corporations is unfair because 'the resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas . . . 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.'[56]

A few central points arise from *Austin*. First, in light of the Court's earlier decisions regarding corporate political advocacy, it is clear that a corporation's status as a state-created structure does not by itself determine the scope of its political speech rights under the First Amendment.[57] For example, in *First National Bank of Boston v. Bellotti*, the Court upheld a corporation's right to make

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by candidates from his or her personal funds. *See* former 18 U.S.C. § 608 *et. seq. Buckley* invalidated these expenditure limits, leaving only the expenditure limits for publicly funded presidential candidates in tact. *See Buckley*, 424 U.S. at 13–15; *see also* 26 U.S.C. § 9035(a).

47 *Buckley*, 424 U.S. at 19, 20–21.

48 *Id.* at 22.

49 *See Buckley*, 424 U.S. at 26–27 ("To the extent that large contributions are given to secure political *quid pro quo's* from current and potential office holders, the integrity of our system of representative democracy is undermined.").

50 *See id.* at 19.

51 *Id.* (emphasis added).

52 *See id.*

53 *Austin*, 494 U.S. at 666–67.

54 *See id.* at 658–59 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986) [hereinafter *MCFL*]); *but cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794–95 (1977), *reh'g denied*, 438 U.S. 907 (1978) (upholding the right of corporations to make political expenditures to influence the outcome of ballot questions).

55 Michigan's campaign finance statutes allow corporations to establish separate political committees that may solicit contributions from a restricted class of corporate employees. MICH. COMP. LAWS § 169.255(1), (2) (1976). In this way, individual employees who wished to speak "through" the corporation could do so by making a contribution to the corporation's political committee, which could in turn make independent expenditures.

56 *Austin*, 494 U.S. at 658–59 (citing *MCFL*, 479 U.S. at 257).

57 In *MCFL* the court invalidated a rule prohibiting nonprofit corporations from making political expenditures from treasury funds. *See MCFL*, 479 U.S. at 255–56. *See also* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 238 (1995) ("The tax system is filled with special benefits and incentives for various groups.").

direct expenditures in support of or in opposition to ballot measures and explicitly stated that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."[58] The Court has also distinguished ideological, nonprofit corporations (that may receive the benefit of tax exemptions) from business corporations, invalidating rules that prohibit direct treasury independent expenditures by the former and upholding the same restrictions against the latter.[59] In short, while business corporations may be prohibited from making direct independent expenditures from treasury funds, the state cannot constitutionally place the same restriction on certain types of ideological, nonprofit corporations.[60]

Austin focused on state-sponsored economic benefits that promote and encourage a corporation's aggregation of wealth, in conjunction with the *potential* for wealth transfers from the economic marketplace to the political marketplace.[61] Some scholars refer to this as the "market structuring theory," whereby the Court views "the use of a corporate treasury to make political expenditures [as] a form of tying—an anticompetitive practice by which a corporation used leverage acquired from expectations of its profitability in the financial markets to gain unearned leverage in the entirely separate market for political influence."[62]

Second, the Court implied that when a corporation wants to engage in independent express advocacy of a candidate, the value of that speech is not as significant as the speech of individuals.[63]

> On this highly individualist view . . . government may be justified in regulating speech intermediaries when they depart from the function of reflecting and transmitting norms ultimately chosen by individuals. If the Michigan Chamber of Commerce takes money for investment purposes and spends it for political purposes, there is no guarantee that each dollar spent will accurately reflect the normative preferences of its donor.[64]

Thus, when the Court engaged in its practice of constitutional balancing, it determined that the individual owners "are the ultimate repositories of speech interests," while corporations are simply speech intermediaries "with limited delegations or representational authority."[65]

It is important to note that the majority did not go so far as Justice Brennan, whose concurring opinion explicitly protected the rights of corporate shareholders or other individual "owners" by preventing the corporation from "stealing" their money to pay for political advocacy.[66] Brennan would have held that a corporation is merely a state-created structure composed of beneficial financial interests held by shareholders who have the right to control (or object to) corporate political advocacy.[67] "[T]he State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message."[68]

Third, the Court's holding in *Austin* did not require evidentiary findings that the Chamber (or its corporate members) did, in fact, amass great wealth that it planned to use to pay for independent expenditures.[69] Nor did it burden the State

58 *Bellotti*, 435 U.S. at 777.

59 *MCFL*, 479 U.S. at 246–48.

60 *See id.* at 258–61.

61 In his dissent, Justice Scalia characterized the majority's reasoning as an attempt to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections." *Austin*, 494 U.S. at 684–85 (Scalia, J., dissenting). In a confusing rebuttal, the majority stated that the Michigan law only "ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.* at 660. Although some corporations may not have accumulated significant amounts of wealth, the majority believed that its rationale was nonetheless valid because those corporations "receive from the State the special benefits conferred by the corporate structure *and present the potential for distorting the political process.*" *Id.* at 661 (emphasis added).

62 Sullivan, *supra* note 6, at 1659.

63 *See Austin*, 494 U.S. at 659–60.

64 Sullivan, *supra* note 6, at 1662.

65 *Id.* at 1657–63. Importantly, this analysis merges what Professor Sullivan considers three different theories of the court's rationale for restrictions on speech intermediaries: the "expressive versus nonexpressive" approach; the "content-based versus content-neutral" view; and the "norm-reflecting versus norm-creating" view. *See id.* at 1657–66. While we do not necessarily adopt her theory, her approach is constructive and relevant to this analysis.

66 *Austin*, 494 U.S. at 675 (Brennan, J., concurring) ("A's right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.") (quoting Victor Brudney, *Business Corporations and Stockholder's Rights Under the First Amendment*, 91 Yale L.J. 235–47 (1981)).

67 *See id.*

68 *Id.*; *see also* Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 148–54 (1998) (arguing an alternative justification for preventing this "New Corruption" based on the inappropriate use of shareholders' money in electoral politics by corporate managers).

69 *See Austin*, 494 U.S. at 658 (finding that the Chamber expected to have $140,000 in its separate political fund).

to prove that the expenditure in question—a newspaper advertisement—would or could "distort" the political dialogue in this particular election by drowning out the advocacy of other political players.[70]

As we discuss in detail below, the *Austin* Court's refusal to require any supporting evidence will likely be subsumed by the rule in *Reno*, which at a minimum, requires the State to prove that the underlying rationale for restrictions on corporate political speech remains constitutionally sound when applied to the internet.[71]

III. APPLICATION OF *RENO* TO *AUSTIN*

In our discussion of *Reno*, we noted that the Court's internet communications analysis begins with the recognition that free speech rights are contextual. Regulations permissibly imposed on individuals speaking through old media cannot be applied *ipso facto* to identical speech exchanged within new media.[72] In the context of print or broadcast, a state may be justified in banning a corporation's right to make independent expenditures to prevent its voice from flooding the political marketplace, but that rationale is seriously questioned in the context of the internet, where the "volume" or power of political speech does not depend on gross rating points or the readership of a full page newspaper ad in the *New York Times*.

Austin's greatest weakness is its reliance on the hypothetical effect of corporate wealth, which, when deployed, has the power to overwhelm the electorate.[73] Without requiring proof, the Court presumed that corporate spending on candidate advocacy could make it a "formidable political presence" with an "unfair advantage" in election contests.[74] Even in the era of *Austin*, when print and broadcast were practically the only modes of political communication, the factual evidence required to prove a direct correlation between increased expenditures and effective electoral influence "[was] a question whose answer turns upon formidable empirical problems and troubling conceptual questions about what constitutes real communication."[75] Proving that correlation becomes even more difficult in the new media context.

The *Reno* Court acknowledged that the practical realities of the internet would force it to adapt First Amendment doctrine to identical speech made over the internet.[76] Accordingly, the central question becomes can the *Austin* prohibition on corporate independent expenditures survive *Reno*? Arguably, *Reno*'s recognition of the three architectural features of accessibility, interactivity and parity undermine *Austin*'s basic tenet that corporate investments in candidate advocacy promise overwhelming electoral returns.

A. Access

We begin by assessing how access to the internet undermines the Court's reasoning in *Austin*. The Court's identification of this internet feature gives constitutional significance to the medium's architecture. In the context of corporate political speech over the internet, the significance is readily apparent.

The internet's unregulated, open access has driven down the cost of political speech through the process of disintermediation, the elimination of speech intermediaries such as broadcast licensees.[77] In the political marketplace, effective advocacy has historically depended on a speaker's ability to pay distribution costs, such as paper and postage for targeted persuasive mail or "buying time" for television and radio spots. Communicating through broadcast or mail means "hitting" un-

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70 *See id.* at 660.

71 The question of evidentiary proof required by the State to justify its interest in limiting contributions and expenditures has long been in question, but was somewhat refined in *Shrink PAC*. *See Shrink PAC*, 120 S. Ct. at 906–07 (rejecting the notion that *Buckley* required "governments enacting contribution limits [to] demonstrate that the recited harms are real, not merely conjectural," but distinguishing without enunciating the quantum of evidence required to justify expenditure limits). In *Shrink PAC*, the court accepted newspaper articles as evidence to support the state's claim.

72 *See, e.g.*, Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1753 (1995) ("What any review of the history of First Amendment law should suggest is the contingency of present First Amendment doctrine.").

73 It is important to note that the authors believe an alternative rationale, for example, Justice Brennan's concurring opinion in *Austin*, could withstand *Reno* because it avoids the majority's reliance on the effect of wealth spent on behalf of candidates in the political marketplace. *See Austin*, 494 U.S. at 669–78 (Brennan, J., concurring).

74 *Austin*, 494 U.S. at 659 (quoting *Shrink PAC*, 479 U.S. at 257–58).

75 TRIBE, *supra* note 37, at 1135 n.8.

76 *See Reno* at 866–70.

77 *See* Sullivan, *supra* note 6.

decided voters over and over again, until the message has saturated the targeted voter universe.

Disintermediation within the new media has broadened the universe of individuals and organizations that can afford to distribute political messages directly to the intended audience. Persuasion mail no longer requires postage; the transmission of audio and visual images does not require the purchase of "time." Today's internet enables political speakers to engage voters through interactive, real-time communication strategies like e-mail "action alerts" or "on-line petitions," which are virtually cost-free.[78] "The cost of transmitting 2000 bytes (about a page of uncompressed text), even using today's relatively primitive internet technology, is about one-sixth of a cent; and local phone calls are already free. As newer, faster delivery methods come online, the cost of transmission should fall even below that of the internet."[79]

The dramatic reduction of distribution costs attributable to disintermediation has a direct impact on *Austin*'s assumptions about the cost of political advocacy and the ability of any single entity to inundate this particular political marketplace of ideas.[80] The justification for *Austin*'s restrictions on corporate independent expenditures was built on the *Buckley* framework.[81] *Buckley* held that money (in the form of contributions and expenditures) should be viewed as a proxy for political speech; the more money spent, the more speech that may be purchased and distributed, with the "reach" and volume of speech amplified by increased political spending.[82] Moreover, because a corporation potentially has the ability to amplify its political voice to a volume that threatens to drown out other speakers, *Austin* held that the State could justifiably ban corporate treasury expenditures that promote the election or defeat of a particular candidate.[83]

Austin was correct in so far as it acknowledged that wealthy corporations could obtain an "unfair advantage" through traditional mass media because they can afford to produce and distribute political messages. That conclusion is questioned, however, in the context of new media, where broad access for all speakers has leveled the cost of distributing political speech, thereby reducing the ability of corporations to realize an "unfair advantage." If access to the internet denies corporations the "unfair advantage" present in the use of other media, the constitutional justification for a ban on speech is directly called into question.

Our focus on decreased distribution costs due to broad access is only the first strike against the *Austin* rationale. Traditional political advocacy communicated through broadcast or direct mail has only the unilateral ability to "push" voters with a persuasive political message. In contrast, influencing the "virtual" electorate is much more difficult because of an architecture that vests in the user the ability to "pull" political messages by searching and selecting issues and sites of interest. Distinguishing traditional media's "push" capabilities addresses only one side of political communication in today's world. *Reno* gives constitutional significance to another feature of the internet: its "interactivity," that is, the "pull" function that enables user discrimination and control.

B. "Affirmative Steps" and Interactivity

In the eyes of the *Austin* Court, the population of the traditional political marketplace is bifurcated. On one side there are political speakers who distribute information, including candidates, political parties, political committees, ideological groups and media organizations. The other is composed of "receivers," or individual voters who collectively make up the electorate.[84] When a corporation engages in political advocacy, it is acting as a distributor of information, targeting and influencing the electorate, a passive recipient of its political views. The specter of a dominating corporate political presence would manifest itself, it was believed, in the form of corporate-sponsored

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78 GRAEME BROWNING, ELECTRONIC DEMOCRACY: USING THE INTERNET TO INFLUENCE AMERICAN POLITICS 61 (1996); Cameron R. Graham & Matt Zinn, *Cable On-Line Services Update*, 578 P.L.I. 673, 692 (Oct. 1999).

79 Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1821 (1995).

80 *See id.*; *cf.* Wu, *supra* note 40, at 1179–80 ("[T]he idea that speech is cheap and that all speakers are equally heard increasingly depends on what application you are talking about . . . [A]s search engines inevitably begin to charge for priority listings . . . the impact of the stereotypical little person's site will likely continue to decrease. Add to this the increase in competition stemming from the great financial incentives of owning a high-traffic site, and the results look troubling for high-impact web-based cheap speech.").

81 *See Austin*, 494 U.S. at 657.

82 *See Buckley*, 424 U.S. at 92–93.

83 *See Austin*, 494 U.S. at 659.

84 *See id.* at 659.

candidate advocacy advertisements continuously repeated before glassy-eyed Americans watching the nightly news and "Must See TV."

Reno aptly recognized that a new medium has revolutionized the political marketplace, blurring the line between active political messengers and passive voters. The internet's architecture requires the user to take affirmative steps to access and receive information.[85] A second related characteristic is interactivity, allowing users to participate in "real-time dialogue."[86]

It is easy to see how the concepts of "affirmative steps" and interactivity diffuse *Austin*'s rationale. *Austin* conceptualized a corporation's domination of the political marketplace by its ability to transmit a substantial volume of invasive political messages that could communicate directly to the recipient without interference, effectively silencing other speakers' views.[87] But as the *Reno* Court stated, internet communications cannot be characterized generally as intrusive communications like radio or television; thus, the ability of a corporation (or any other single speaker) to overwhelm the electorate is almost impossible.[88] Where internet applications can be intrusive, such as junk and spam e-mail, interactive applications empower the user to block those incoming messages.[89] As for political speech in the shadow of *Reno*, the Court will likely recognize that the internet's interactive applications empower citizens by vesting in the electorate the tools to meaningfully participate in political discourse. The "passive" voter has become an active participant in finding and receiving political and candidate information by downloading polling results from media websites, taking part in opinion surveys hosted by a variety of political and nonprofit ideological organizations, contributing money to political candidates and developing home-spun websites.[90]

C. Parity

In conflict with some of *Austin*'s implicit tenets, *Reno* recognized that the internet's open access and user control enhances the relative parity among speakers and listeners.[91] If the internet's architecture can truly achieve relative parity, then in what sense, from the *Austin* perspective is the corporation's electoral marketplace advantage "unfair"?

Parity is an egalitarian construct, cast in constitutional terms as viewpoint or speaker diversity.[92] Professor Eule points out the tension between the values of diversity—the "critical demand that the public be exposed to the widest possible diversity of views"—and equality—the "precept that speech may not be suppressed because of the identity of the speaker," as elucidated in *Buckley*.[93] A steady balance of these two constitutional values does not necessitate exact government allocation of free speech rights to particular speakers; it does not mean "one-person, one-minute" of speech within the political marketplace.[94] Instead, the goal is "equalization of 'relative voices,' 'relative influence,' or the 'relative ability of all citizens to affect the outcome of elections.'"[95]

The *Reno* Court seemed to elevate parity to a constitutional value that strikes a careful equilibrium between diversity and equality. In short, *Reno* recognized that today's new media achieve naturally what the Court and legislatures have artificially attempted through legislation and interpretation. Although websites are hardly equal in terms of production quality, electronic distribution capabilities or the potential to influence visitors, today's internet architecture and its related applications prevent market domination by any

85 *See Reno*, 521 U.S. at 870.

86 *See id.*

87 *See Austin*, 494 U.S. at 659.

88 *See Reno*, 521 U.S. at 869.

89 For an insightful approach to internet regulation post-*Reno*, see Wu, *supra* note 40, at 1174 (arguing that the court's *Reno* analysis was unnecessarily broad, and should have been based instead on the specific function of the application).

90 *See* GARY SELNOW, ELECTRONIC WHISTLE STOPS, 95, 107, 124–30 (1998).

91 *See Reno*, 521 U.S. at 863 (*citing* Reno v. ACLU, 929 F. Supp. 824, 877 (E.D. Pa. 1996)).

92 *See* Julian Eule, *Promoting Speaker Diversity: Austin and Metro Broad.*, 1990 SUP. CT. REV. 105, 111–12 (1990) [hereinafter *Eule*]; *see also* OWEN FISS, THE IRONY OF FREE SPEECH 16 (1996); *Bellotti*, 435 U.S. at 803 ("the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business.") (White, J., dissenting).

93 Eule, *supra* note 92, at 112 ("It is perhaps the height of irony that in the very same sentence in which the *Buckley* Court rejects equalization, it endorses . . . diversity as a central goal of the First Amendment.") (citing *Buckley*, 424 U.S. at 48).

94 *Id.* at 110; *but cf.* FISS, *supra* note 92, at 100–01 (arguing in favor of active government intervention in the interest of speaker and viewpoint equalization).

95 *Eule, supra* note 92, at 110.

one individual host.[96] Generally, internet users reach other users only if they seek out a particular host or take other "affirmative steps."

As a political marketplace where "relative parity" naturally exists by virtue of its architecture, the new media's balance of viewpoints is upset not by the potential for excessive corporate treasury expenditures for candidate advocacy, but by government rules that absolutely foreclose any person's opportunity to speak or to hear another person's views. Moreover, the evil that the Michigan prohibition proposes to eradicate, "distorting the political process and undermining its integrity," constitutionally requires at least a modicum of evidence.[97] The medium notwithstanding, Cass Sunstein recognizes that "it is doubtful whether restrictions on speech often should be justifiable [on the marketplace domination theory], at least in light of the extreme difficulties posed by [the fact that] no government institution is well-suited to embark on this sort of inquiry."[98] Although its rationale differed from *Austin*, *Bellotti* similarly contemplated that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[99] But the *Austin* Court required absolutely no evidentiary showing of corporate domination or viewpoint distortion within the political marketplace. In light of *Reno*'s strong presumption that the internet achieves "relative parity among speakers,"[100] the Court's "new media" analysis might force the government to shoulder a more significant evidentiary burden.

IV. CONCLUSION

Attempting to apply traditional First Amendment legal standards to internet speech is, as one scholar has stated, like trying to fit the "stepsister's foot into Cinderella's glass slipper."[101] Nowhere is this more evident than in the regulation of political speech.

The internet challenges us to see the First Amendment not as an impediment to government, but as the embodiment of a particular vision of participatory democracy. Central to that vision is the engaged citizen. The current architecture of the internet frees individuals from historic, economic and social restraints on participation. It is that principle the Court appears to be endorsing in *Reno*. In so doing, the Court leaves little room for a robust reading of *Austin*.

The architecture of the internet is rapidly changing, so it is with some caution that we argue that corporate political speech over the internet will be fully protected, even in light of *Reno*. From the merging of the internet with traditional broadcasting, cable and telephone technologies, a new architecture will emerge. This new media will merit the extraordinary constitutional protection promised by *Reno*, but only to the degree it realizes its democratic promise.

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96 *See generally* Wu, *supra* note 40.
97 *Austin*, 424 U.S. at 668.
98 SUNSTEIN, *supra* note 57, at 239.
99 *Bellotti*, 435 U.S. at 788 n.26.
100 *Reno*, 521 U.S. 863 n.30.
101 SELNOW, *supra* note 90, at xxvi.