

STUDENT WORKS

CORPORATIONS UNITED: REASSESSING *CITIZENS UNITED v. FEDERAL ELECTION COMMISSION* TO PROPOSE THAT POLITICAL SPEECH REGULATIONS OF FOR-PROFIT CORPORATIONS SHOULD BE GIVEN THE SAME REDUCED JUDICIAL SCRUTINY AS COMMERCIAL SPEECH REGULATIONS

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*The citizens of the United States must effectively control the mighty commercial forces which they have themselves called into being. There can be no effective control of corporations while their political activity remains. . . . It is necessary that laws should be passed to prohibit the use of corporate funds directly or indirectly for political purposes; it is still more necessary that such laws should be thoroughly enforced. Corporate expenditures for political purposes . . . have supplied one of the principal sources of corruption in our political affairs.*¹

—President Theodore Roosevelt

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1. Theodore Roosevelt, Speech, *The New Nationalism* (Osawatomie, Kan., Aug. 31, 1910) (available at <http://www.theodore-roosevelt.com/images/research/speeches/trnationalismspeech.pdf>).

I. INTRODUCTION: A CENTURY'S OLD ISSUE REVISITED

Nearly a hundred years after Theodore Roosevelt delivered his New Nationalism Address, the issue of corporate political influence has been thrust back into the national consciousness by the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*.² In the week after the Supreme Court handed down this opinion, President Barack Obama delivered his first State of the Union Address.³ In his speech, President Obama channeled the enthusiasm that Theodore Roosevelt espoused a century ago by focusing national attention on the Court's holding:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I do[not] think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people.⁴

By bringing immediate attention to the decision, President Obama seized the opportunity to articulate his concerns about the dangers to the democratic process that could arise from unfettered corporate influence in elections.⁵ One such foreseeable danger is the emergence of candidates from both political parties who will heed only the interests of corporations rather than the interests of their human constituents.⁶ Polling shortly after the *Citizens United* decision suggests that regardless of political

2. 130 S. Ct. 876 (2010).

3. Barack Obama, Speech, *State of the Union Address* (D.C., Jan. 27, 2010) (available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>) (applause omitted from speech).

4. *Id.*

5. For a discussion that stresses these dangers, see the *Citizens United* dissent, *infra* Part III(B).

6. *Cf. The Simpsons*, TV Series, "Treehouse of Horror VII" (Fox Oct. 27, 1996) (available at <http://sclipo.com/videos/view/kang-and-kodos>) (depicting aliens Kang and Kodos, who kidnapped then-presidential candidates Bill Clinton and Bob Dole, and then impersonated the candidates so that American voters were forced to choose between the two aliens running because those were the only choices the two-party system gave them).

affiliation, the public at large opposed the decision⁷—ostensibly due to the danger to democracy.⁸

At its core, *Citizens United* signals a departure from the Supreme Court's decision two decades earlier to uphold campaign finance restrictions on corporations.⁹ Further, the decision ignores Theodore Roosevelt's century-old call for Congress to muzzle the powerful corporate powers that thrust themselves into the political sphere.¹⁰ In an age in which the Constitution's free-speech guarantee is the last refuge of society's outcasts—the pornographer,¹¹ the flag burner,¹² and the crush videographer¹³—it is interesting that corporations, entities that already enjoy many benefits,¹⁴ seek further protection from the First Amendment.

Citizens United's immediate significance became evident from the role it played in the Senate confirmation hearings for then-Supreme Court nominee—now Supreme Court Justice—Elena Kagan.¹⁵ Of the nineteen members of the Senate Judiciary Committee that questioned then-Solicitor General Kagan during her

7. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> (posted Feb. 17, 2010, 4:38 p.m.) (noting that “[e]ight in [ten] poll respondents say they oppose the high court’s Jan[uary] 21 decision to allow unfettered corporate political spending, with . . . little difference of opinion on the issue among Democrats ([eighty-five] percent opposed to the ruling), Republicans ([seventy-six] percent)[,] and [I]ndependents ([eighty-one] percent)”).

8. See Lawrence Lessig, *Institutional Integrity: Citizens United and the Path to a Better Democracy*, http://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c_b_433394.html (posted Jan. 22, 2010, 3:15 p.m.) (observing that “[t]he vast majority of Americans already believe that money buys results in Congress” and *Citizens United* “will only make that worse”).

9. See *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 654–655 (1990) (upholding the constitutionality of campaign finance regulation specifically targeted at corporations). For an in-depth discussion of *Austin*, see *infra* Part II(A)(2).

10. For an excerpt of the speech, see this Article’s epigraph.

11. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

12. *Tex. v. Johnson*, 491 U.S. 397, 399 (1989).

13. *United States v. Stevens*, 130 S. Ct. 1577, 1583 (2010). Crush videos show “the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters.” *Id.*

14. “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.” *Austin*, 494 U.S. at 658–659.

15. Sen. Jud. Comm., *Kagan Confirmation Hearing Transcript*, 111th Cong. (June 28–30, 2010) (available at http://www.marylandindependentparty.org/for_discussion/Kagan_confirmation_hearings_transcript.html).

confirmation hearing, twelve mentioned the *Citizens United* decision¹⁶—including at-length discussions of the case by Senators Richard Durbin, Charles Schumer, Al Franken, Ted Kaufman, and Orrin Hatch.¹⁷ In fact, Senator Orrin Hatch dedicated almost an entire hearing session to questioning Justice Kagan about *Citizens United*.¹⁸ This demonstrates that contrary to removing the issue of corporate political speech from debate, the Court's decision in *Citizens United* placed the issue at the center of electoral politics, where it will only grow in importance.¹⁹

This Article argues that political speech of for-profit corporations should be treated more like commercial speech than pure political speech because the legal duty of for-profit corporations to maximize profits results in a legally imposed profit motive when for-profit corporations engage in political speech. This profit motive is problematic because it does not necessarily correlate with popular support for the ideas espoused by such speech. Due to this conflict, regulations of political speech by for-profit corporations should be treated with less exacting scrutiny when the democratically elected branches of government have determined that limiting such speech serves an important government interest.

Part II of this Article discusses the history of corporate speech regulations, cataloguing Congress' statutory enactments as well as the limitations that the Supreme Court placed on Congress. Part III of this Article presents a detailed summary of the *Citizens United* majority and dissenting opinions and the significant issues relevant to corporate political speech that permeate the case as a whole. Finally, Part IV examines the relationship

16. *Id.* The twelve Senators who questioned Justice Kagan about *Citizens United* were Patrick Leahy, Dianne Feinstein, Russ Feingold, Charles Schumer, Richard Durbin, Sheldon Whitehouse, Benjamin Cardin, Edward "Ted" Kaufman, Arlen Specter, Al Franken, Orrin Hatch, and John Cornyn. *Id.*

17. *Id.* While some discussion of the case was warranted, given that Justice Kagan argued the case as Solicitor General and because she lacked a judicial record, the depth of discussion and amount of time attributed to *Citizens United* went far beyond her role in arguing the case.

18. *Id.* at subsec. 2.

19. More than a year after the decision, the fallout from *Citizens United* continues. See e.g. *Citizens United's Outrageous Offspring*, N.Y. Times A26 (June 9, 2011) (available at <http://www.nytimes.com/2011/06/09/opinion/09thu3.html>) (criticizing Judge James Cacheris for "extend[ing] the substantive holding of *Citizens United*, [and] even more dangerously . . . mimic[ing] its model of extreme judicial activism").

among money, politics, and the First Amendment in the context of for-profit corporations and proposes that regulations that govern political expenditures of for-profit corporations be given intermediate rather than strict judicial scrutiny.

II. THE PENDULUM SWINGS: THE HISTORY OF CORPORATE SPEECH REGULATIONS

Congress has been engaging in efforts to curtail corporate influence in elections for over a century.²⁰ Congress first aimed at preventing quid pro quo corruption,²¹ and as corporations continued to expand their political influence, independent expenditure restrictions followed.²² The result has been to embrace the notion that corporations share with people an absolute First Amendment right to free speech.²³

This section catalogs the history of corporate speech regulations, beginning with corporate political speech in Part II(A). Part II(B) discusses the development of the commercial-speech doctrine, an alternative form of corporate speech, and its implications on government regulations. Finally, Part II(C) examines the intersection of corporate political speech and commercial speech as it reached the Supreme Court for the first time in *Nike, Inc. v. Kasky*.²⁴

A. Corporate Political Speech

The history of corporate political speech can be separated into three distinct eras. Part II(A)(1) explores the first era, during which Congress enacted a series of campaign finance regulations aimed at corporations. Part II(A)(2) summarizes the Supreme

20. See The Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (2006)).

21. See *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (stating that the Tillman Act “banned corporate contributions of ‘money . . . in connection with’ any federal election”) (quoting The Tillman Act, 34 Stat. 864, ch. 420).

22. See The Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–160 (1947) (banning all expenditures by corporations and unions in connection with any federal election).

23. See *Citizens United*, 130 S. Ct. at 899 (finding “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers” whether those speakers are corporate entities or flesh-and-blood people).

24. 539 U.S. 654 (2003).

Court's treatment of Congress' efforts to curb corporate political expenditures. Finally, Part II(A)(3) explains the significance and subsequent treatment by the Supreme Court of the Bipartisan Campaign Reform Act (BCRA),²⁵ the same statute that the Court revisited to decide *Citizens United*.²⁶

1. Early Legislative Enactments

In the early part of the twentieth century, corporations began a trend of active political involvement by directly contributing money to candidates favorable to their interests.²⁷ Theodore Roosevelt reacted to this growing corporate political influence in his sixth annual State of the Union Address in 1906, calling for Congress to pass "a law prohibiting all corporations from contributing to the campaign expenses of any party."²⁸ Congress swiftly responded to the President's call to action by passing the Tillman Act²⁹ in 1907, which banned all corporate donations to political candidates.³⁰ With the enactment of the Tillman Act, campaign finance law remained unchanged for the better part of three decades.³¹ But much as corporations had effected undeniable influence on elections throughout the early twentieth century, a shift during the New Deal Era saw labor organizations adopt a similarly powerful role in elections.³² To address this new concern,

25. 2 U.S.C. § 441b (2006). BCRA has also been named the McCain-Feingold law in recognition of Senators John McCain and Russ Feingold, who cosponsored the legislation. Associated Press, *McCain Says Campaign Finance Reform Is Dead*, http://cleveland.com/nation/index.ssf/2010/01/mccain_says_campaign_finance_r.html (updated Jan. 24, 2010, 2:27 p.m.).

26. See *Citizens United*, 130 S. Ct. at 888 (describing the various arguments against BCRA brought in the lower courts).

27. See *United States v. Int'l Union United Automobile, Aircraft, and Agric. Implement Workers of Am.*, 352 U.S. 567, 572 (1957) (recounting the significant role that corporate contributions played in the 1904 presidential campaign, including "one insurance company [that] alone . . . contributed almost \$50,000 to a national campaign committee").

28. Theodore Roosevelt, Speech, *State of the Union Address*, (D.C., Dec. 3, 1906) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29547>) (accessed Jul. 7, 2011).

29. Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

30. *Id.* at 864–865.

31. See *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 510 (2007) (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (explaining the history of the Tillman Act and noting that "[t]hirty years later, new questions about the electoral influence of accumulated wealth surfaced as organized labor expanded during the New Deal").

32. *Id.* at 511.

Congress extended the prohibition of corporate political contributions to labor organizations with the War Labor Disputes Act (WLDA)³³ of 1943, made permanent in 1947³⁴ with the Labor Management Relations Act (Taft-Hartley).³⁵ In sum, Taft-Hartley rewrote campaign finance law to ban “any ‘contribution or expenditure’ by a corporation or a union ‘in connection with’ a federal election.”³⁶ Taft-Hartley did, however, leave unrestricted unions’ ability to spend money in elections out of a segregated fund drawn from members—the equivalent of a Political Action Committee (PAC).³⁷

In 1971, the Federal Election Campaign Act (FECA)³⁸ closed the loophole left open by Taft-Hartley, excluding from its restrictions all political contributions and expenditures made from the segregated fund of any corporation or labor union.³⁹ Congress amended FECA in 1974 to place limits on individual campaign contributions and expenditures.⁴⁰ The 1974 amendments to FECA also created the Federal Election Commission (FEC), which Congress charged with the “responsibility for administering and enforcing” FECA.⁴¹ Yet, these amendments soon received criticism from the Supreme Court.

2. *The Supreme Court Responds*

It was nearly seventy years after Theodore Roosevelt signed the Tillman Act before the Supreme Court first considered the constitutionality of restrictions on political contributions and expenditures, when *Buckley v. Valeo*⁴² came before the Court in 1976. At issue in *Buckley* were constitutional challenges to FECA

33. Pub. L. No. 78-89, § 9, 57 Stat. 163, 167–168 (1943).

34. *Wisc. Right to Life, Inc.*, 551 U.S. at 510 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

35. Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–160.

36. *Wisc. Right to Life, Inc.*, 551 U.S. at 511 (quoting 61 Stat. 159).

37. *Id.* at 511–512.

38. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (2006) and scattered sections of 18 U.S.C. and 47 U.S.C.).

39. *Wisc. Right to Life, Inc.*, 551 U.S. at 512.

40. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976). The individual limits prescribed by Congress were “\$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor . . .” *Id.*

41. *Id.* at 109.

42. 424 U.S. 1.

and its 1974 amendments.⁴³ While upholding FECA's direct-contribution limitations,⁴⁴ the Court invalidated the limitation on independent expenditures.⁴⁵ The Court's rationale was that although the government had a substantial interest in preventing any possibility of quid pro quo corruption that could result from limitless direct contributions to a candidate,⁴⁶ it had no such interest in limiting political expression.⁴⁷ The result was that for the first time in its history, the Supreme Court equated money with speech in the context of corporate political expenditures.⁴⁸

Two years later, in *First National Bank of Boston v. Bellotti*,⁴⁹ the Supreme Court considered the specific issue of corporate political speech, a novel issue before the Court.⁵⁰ In *Bellotti*, the Court reinforced *Buckley*, this time invalidating restrictions imposed by states on corporate expenditures intended to influence certain political referenda that did not materially affect the corporation.⁵¹ In so holding, the Court disregarded the corporate identity of the speaker, instead interpreting the First Amendment to protect all political speech,⁵² "regardless of its source."⁵³ The Court reasoned that restrictions on expenditures to influence ballot measures are distinguishable from those concerning candidate elections because they are not motivated by the goal of preventing corruption.⁵⁴ Dissenting in *Bellotti*, then-Justice Rehnquist rejected the notion championed by the majority that corporations

43. *Id.* at 6.

44. *Id.* at 29. "[T]he weighty interests served by restricting the size of financial contributions . . . are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling." *Id.*

45. *Id.* at 51.

46. *Id.* at 26.

47. *Id.* at 23.

48. *Id.* at 19 (explaining that "virtually every means of communicating ideas in today's mass society requires the expenditure of money").

49. 435 U.S. 765 (1978).

50. *Id.* at 767.

51. 1975 Mass. Acts 120–121 (current version at Mass. Gen. Laws ch. 55, § 8 (2010)).

52. *Bellotti*, 435 U.S. at 784.

53. Prescott M. Lassman, *Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce*, 78 Va. L. Rev. 759, 769 (1992).

54. *Bellotti*, 435 U.S. at 790. Curiously, this same rationale supporting the invalidation of speech restrictions involving ballot measures was extrapolated by the *Citizens United* Court to apply to candidate elections. See *Citizens United*, 130 S. Ct. at 903 ("*Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.>").

have a First Amendment right “to engage in political activity with regard to matters having no material effect on [their] business.”⁵⁵ Then-Justice Rehnquist buttressed his conclusion by positing that the statutory form of corporations provides them with certain benefits not enjoyed by natural persons, and he further alluded to the danger that commercial corporations could use their economic power to garner extra benefits.⁵⁶ The Supreme Court’s decisions in *Buckley* and *Bellotti* combine to suggest that by the time *Bellotti* was decided, the First Amendment provided corporations the same level of protection as people to engage in political speech by way of independent expenditures.⁵⁷

The Supreme Court returned to the issue of corporate independent expenditures nearly a decade after *Bellotti* when it decided *Federal Election Commission v. Massachusetts Citizens For Life, Inc. (MCFL)*.⁵⁸ The Court addressed a challenge to the FECA ban on corporate independent expenditures from their general treasury funds, this time in connection with candidate elections.⁵⁹ The government interest asserted by the FEC was the protection of the democratic political system from the “corrosive influence of concentrated corporate wealth.”⁶⁰ While upholding the general treasury expenditure ban, the Court found restrictions on independent expenditures to be unconstitutional as applied to nonprofit corporations that exhibited three characteristics: (1) the corporation was formed for the sole purpose of promoting political ideas; (2) the corporation did not engage in business activities; and (3) the corporation did not accept contributions from for-profit corporations.⁶¹ The Court reasoned that such ideological corporations (*MCFL* Corporations) were unlikely to corrupt the political process because their motivations were unconnected to profits.⁶² Instead, the Court described the unfair political advantage of business corporations:

55. 435 U.S. at 828 (Rehnquist, J., dissenting).

56. *Id.* at 825–827. The benefits granted to corporations by their state of incorporation are limited liability and perpetual existence. *Id.* at 825.

57. *Id.* at 771; *but see infra* pt. IV(A) (discussing the origins of the First Amendment as proposed by James Madison, which identified “people” as the source of protected speech).

58. 479 U.S. 238, 263–264 (1986).

59. *Id.* at 241.

60. *Id.* at 257. The Court explained “that it is important to protect the integrity of the marketplace of political ideas.” *Id.*

61. *Id.* at 263–264.

62. *Id.* at 259. “MCFL was formed to disseminate political ideas, not to amass capital.”

The 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.⁶³

Because *MCFL* applied only to nonprofit corporations, its narrow holding does not comport with the traditional business-corporation paradigm.⁶⁴

In 1990, the Supreme Court reversed course from the position it developed in *Buckley* and *Bellotti* when it decided *Austin v. Michigan Chamber of Commerce*.⁶⁵ At issue in *Austin* was whether the Michigan Campaign Finance Act (MCFA),⁶⁶ which prohibited corporations from making independent expenditures from their general treasuries, violated the First Amendment.⁶⁷ MCFA required corporations to make such independent expenditures from a separate, segregated fund instead.⁶⁸ The Michigan State Chamber of Commerce sought to subsidize a political advertisement with funds from its general treasury in violation of MCFA.⁶⁹ The Court in *Austin* upheld MCFA because it was "justified by a compelling state interest"⁷⁰ and narrowly tailored to meet that interest,⁷¹ thus granting to state legislatures the ability to regulate corporate political expenditures.⁷² Although the Court

Id.

63. *Id.* at 258.

64. The relevant factor that distinguishes business corporations from nonprofit corporations is the obligation to secure profits. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (explaining that the for-profit corporate form necessarily binds a corporation's directors to act to increase the corporation's value to benefit its stockholders). For further discussion of the duty of for-profit corporations to maximize profits, consult *infra* Part IV(D).

65. 494 U.S. 652 (1990), *overruled*, *Citizens United*, 130 S. Ct. at 913.

66. Mich. Comp. Laws § 169.254(1) (1979) (WL current through P.A. 2011, No. 64, of 2011 Reg. Sess.).

67. *Austin*, 494 U.S. at 654.

68. *Id.* at 655. One form of such separate, segregated funds is a Political Action Committee (PAC). *Id.* at 669 (Brennan, J., concurring).

69. *Id.* at 656 (majority).

70. *Id.* at 658.

71. *Id.* at 660. "[T]he Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Id.*

72. *Id.* at 666.

avoided the issue of whether quid pro quo corruption may result from corporate independent expenditures, the Court justified its holding as a measure to prevent “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.”⁷³ Due to the statutory nature of the corporate form, corporations are effectively legally created entities, and therefore the Court determined that state regulation of political expenditures by such legally created corporate entities does not run afoul of the First Amendment.⁷⁴ In particular, the Court recognized that corporations have “state-created advantages [that] . . . permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”⁷⁵

Although MCFA neglected to regulate the political activity of unions,⁷⁶ the Court found no constitutional violation because the statute made no distinction in how it treated all corporations, no matter how much potential the corporation had to distort the political process through independent expenditures funded from its amassed wealth.⁷⁷ According to the Court, unions, unlike corporations, derive no benefit from laws increasing their ability to accumulate capital.⁷⁸ The Court also distinguished the Michigan State Chamber of Commerce from *MCFL* Corporations, to which MCFA did not apply.⁷⁹ Perhaps most significantly of all, *Austin* “marks the first time the Court ha[d] sustained any law, state or federal, that imposes a heavy burden on corporate political speech.”⁸⁰

In *Austin*, Justice Kennedy dissented from the majority’s groundbreaking decision to uphold such restrictions on corporate political speech.⁸¹ The two aspects of the majority’s decision with

73. *Id.* at 660. The Court explained that MCFA “ensures that expenditures reflect actual public support for the political ideas espoused by corporations.” *Id.*

74. *Id.* at 659, 666.

75. *Id.* at 659 (quoting *MCFL*, 479 U.S. at 257).

76. *Id.* at 665.

77. *Id.* at 661.

78. *Id.* at 665.

79. *Id.* at 661–662. The Court went on to explain that the Chamber did not have the three “crucial features” and was therefore not “exempted from the generally applicable provisions of § 54(1)” of MCFA. *Id.*

80. Lassman, *supra* n. 53 at 779.

81. 494 U.S. at 695 (Kennedy, Scalia & O’Connor, JJ., dissenting).

which Justice Kennedy took issue were its censorship of corporate speech on the particular subject of electing a candidate and its suppression of speech based on the corporate identity of the speaker.⁸² Justice Kennedy rejected the assumption that a legitimate government interest is served by restricting corporate independent expenditures in elections, and instead, he characterized the regulation upheld by the Court as a suppression of political speech that will hinder the public discourse on vital issues.⁸³ Significantly, these points raised by Justice Kennedy's dissent in *Austin* form the basis for his majority opinion in *Citizens United*, which reversed the *Austin* holding.⁸⁴

3. The Bipartisan Campaign Reform Act

Congress passed BCRA in 2002 to curtail the increasing corporate influence in elections by “clos[ing] loopholes in campaign finance regulation by amending previous legislative efforts.”⁸⁵ Like many previous campaign finance laws, BCRA was born of a corporate scandal: Enron.⁸⁶ The Enron scandal was the impetus for the largest overhaul to campaign finance law since the Watergate Era.⁸⁷ The principal provision of BCRA prohibited “corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections.”⁸⁸ Specifically, BCRA limited corporate- and union-financed electioneering communications, defined as “any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for [f]ederal office’ and is made within [thirty] days of a primary or [sixty] days of a general election.”⁸⁹ BCRA also placed strict dis-

82. *Id.* at 699.

83. *Id.* at 699–700, 705.

84. See *Citizens United*, 130 S. Ct. at 942 (Stevens, Ginsberg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (characterizing the *Citizens United* “majority opinion [a]s essentially an amalgamation of resuscitated dissents”).

85. Robert L. Kerr, *Considering the Meaning of Wisconsin Right to Life for the Corporate Free-Speech Movement*, 14 *Commun. L. & Policy* 105, 123 (2009).

86. David Stevenson, Student Author, *A Presumption Against Regulation: Why Political Blogs Should be (Mostly) Left Alone*, 13 *B.U. J. Sci. & Tech. L.* 74, 77 (2007).

87. Alison Mitchell, *Enron's Woes Revive Debate on Campaigns*, *N.Y. Times* A16 (Jan. 22, 2002) (available at <http://www.nytimes.com/2002/01/22/us/enron-s-woes-revive-debate-on-campaigns.html>).

88. *McConnell v. FEC*, 540 U.S. 93, 132 (2003).

89. *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A)).

closure requirements on those funding electioneering communications.⁹⁰ Within a year of its enactment, BCRA was met with a swift First Amendment challenge in *McConnell v. Federal Election Commission*.⁹¹ At issue in *McConnell* was the constitutionality of BCRA's prohibition of independent expenditures by corporations and unions designated as "electioneering communications."⁹² Upholding the constitutionality of BCRA,⁹³ the Court emphasized Congress' longstanding effort over the last century to rein in corporate political influence, beginning with the Tillman Act in 1907.⁹⁴

During the intervening years, the death of Chief Justice Rehnquist and the retirement of Justice O'Connor altered the composition of the Court.⁹⁵ Filling those respective vacancies, Chief Justice Roberts and Justice Alito created an aura of doubt surrounding BCRA's constitutionality.⁹⁶ In 2007, the Supreme Court, led by its new Chief and Associate Justices, had an opportunity to reexamine BCRA in *Federal Election Commission v. Wisconsin Right to Life, Inc.*⁹⁷ Wisconsin Right to Life (WRTL), a nonprofit organization, challenged BCRA as an overbroad limitation on advocacy advertising directed toward specific political

90. *McConnell*, 540 U.S. at 190.

91. 540 U.S. 93.

92. *Id.* at 190.

93. *Id.* at 224. For more information about the Tillman Act, consult *supra* Part II(A)(1).

94. *McConnell*, 540 U.S. at 115–120.

95. *See id.* at 224 (including Chief Justice Rehnquist as author of the portion of the decision that upheld bans on the use of corporate and union treasury funds in political advertisements, which Justice O'Connor joined); *Austin*, 494 U.S. at 654 (including Chief Justice Rehnquist among the Justices who joined the *Austin* majority, which *Citizens United* overruled); *see also* Adam Liptak, *Court under Roberts Is Most Conservative in Decades*, N.Y. Times A1 (July 25, 2010) (available at <http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all>) (characterizing the replacement on the Court of Justice O'Connor with Justice Alito as significant to the Court's shift in position regarding decisions in the area of campaign finance regulation).

96. *See* Nathaniel Persily, *The Floodgates Were Already Open: What Will the Supreme Court's Campaign Finance Ruling Really Change?* <http://www.slate.com/id/2242558/> (Jan. 25, 2010, 2:30 p.m. ET) (cataloguing the series of decisions after Chief Justice Roberts and Justice Alito joined the Court, each of which struck down aspects of campaign finance regulations); *see also* Russell L. Weaver, *The Roberts Court and Campaign Finance: "Umpire" or "Pro-Business Activism?"* 40 *Stetson L. Rev.* 840, 848 (2011) (speculating that as a result of the divergent views of Chief Justice Roberts and Justice Alito from their respective predecessors, "the stage was set for overruling all or part of the *McConnell* decision").

97. 551 U.S. 449.

issues, but having nothing to do with the election of specific candidates.⁹⁸ The narrow exemption for nonprofit organizations engaged in issue advocacy did not apply in this case because WRTL accepted contributions from for-profit corporations.⁹⁹ Nevertheless, the Court invalidated BCRA as applied to the specific issue-advocacy advertisements made by WRTL in this case,¹⁰⁰ though a majority could not agree on whether those advertisements were the functional equivalent of express campaign speech.¹⁰¹

B. The Commercial-Speech Doctrine

The same year that *Buckley* was decided—1976—*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Pharmacy)*¹⁰² also arrived before the Supreme Court. Virginia had been preventing pharmacists from advertising prescription-drug prices to preserve the professionalism of pharmacists.¹⁰³ The Court invalidated the regulation, holding that commercial speech should be protected by the First Amendment because it provides the public with important information; the Court emphasized that free commercial speech is vital to a predominantly free-enterprise economy.¹⁰⁴ The significance of *Virginia Pharmacy* is that for the first time, commercial speech was defined as speech that “does ‘no more than propose a commercial transaction.’”¹⁰⁵ In then-Justice Rehnquist’s dissent, he distinguished commercial speech in which the speaker has an interest from “the day’s most urgent political debate.”¹⁰⁶ While illuminating the difficulties in drawing a line between commercial speech and protected speech, then-Justice Rehnquist rejected the notion that such difficulties meant that no line could be drawn.¹⁰⁷

98. *Id.* at 458, 460–461.

99. *Id.* at 481.

100. *Id.*

101. *Id.* at 464–476, 482. Chief Justice Roberts and Justice Alito believed that the advertisements were not the functional equivalent of express campaign speech. *Id.* at 476.

102. 425 U.S. 748 (1976).

103. *Id.* at 749–751.

104. *Id.* at 765 (explaining that “the free flow of commercial information is indispensable”).

105. *Id.* at 762 (quoting *Pitt. Press Co. v. Hum. Rel. Comm’n*, 413 U.S. 376, 385 (1973)).

106. *Id.* at 782 (quoting the majority opinion at 763).

107. *Id.* at 787. Then-Justice Rehnquist believed that “the Court [would] do [] better to

Based on the fact that commercial speech is driven exclusively by the motive to procure profits, then-Justice Rehnquist concluded that commercial speech does not deserve the same constitutional protection as other protected forms of speech.¹⁰⁸

The Supreme Court revisited the issue of whether commercial speech deserves First Amendment protection in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁰⁹ The Commission had promulgated a regulation banning all public utility companies that operated in the state from promotional advertising.¹¹⁰ In *Central Hudson*, the Supreme Court redefined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”¹¹¹ To determine when commercial speech is and is not protected, the Court developed the four-pronged *Central Hudson* test.¹¹² The criteria for commercial speech to be protected under the *Central Hudson* test are: (1) the speech must not be misleading or involve illegal activity (excluding from protection commercial messages that are false, illegal, or deceptive, which have no informational value in them); (2) the government interest advanced by the regulation must be substantial (affording speech that does not fall under the first prong less latitude for restriction); (3) the regulation must directly advance the asserted government interest; and (4) the suppression of speech must not be more extensive than is necessary to serve the government interest at stake.¹¹³

In applying this test to the speech at issue in *Central Hudson*, the Court found that the speech was not misleading and did not concern illegal activity.¹¹⁴ The Court further determined that the state’s interest in maintaining fair and efficient energy rates was substantial and was directly advanced by the regulation.¹¹⁵

face up to these difficulties than to attempt to hide them under labels.” *Id.*

108. *Id.* at 787–788.

109. 447 U.S. 557 (1980).

110. *Id.* at 558–559. Specifically, the utility companies could not use any advertising that promoted electricity use. *Id.* at 558. The Commission based the order on a finding that the utility system did not have enough resources to meet customer demands for that winter. *Id.* at 559.

111. *Id.* at 561.

112. *Id.* at 566.

113. *Id.*

114. *Id.*

115. *Id.* at 569. The Court explained that “[t]here is an immediate connection between advertising and demand for electricity.” *Id.*

The Court ultimately determined, however, that the suppression of speech by the regulation was more extensive than necessary to advance the asserted interest of the state.¹¹⁶ The Supreme Court overturned the judgment by the Court of Appeals of New York in favor of the Commission,¹¹⁷ holding that the regulation violated the First Amendment.¹¹⁸ Integral to the Court's reasoning in *Central Hudson* is the reduced scrutiny afforded to commercial speech regulations—while political speech enjoys strict-scrutiny protection,¹¹⁹ commercial speech relies on the lesser standard of intermediate scrutiny.¹²⁰ As in *Virginia Pharmacy*, then-Justice Rehnquist dissented in *Central Hudson*, maintaining that commercial speech, such as advertising, does not deserve First Amendment protection.¹²¹ He further criticized the majority for muddling commercial and political speech by appealing to the “marketplace of ideas” in the commercial-speech context.¹²² According to then-Justice Rehnquist, the “marketplace of ideas” should be strictly reserved for political speech because the free flow of information is “essential to our system of self-government.”¹²³ Moreover, then-Justice Rehnquist emphasized that the government has a “substantial interest in attaining ‘order’ in the economic sphere.”¹²⁴

C. A Missed Opportunity at the Nexus of Corporate Political Speech and Commercial Speech

The intersection of corporate political speech and commercial speech first reached the Supreme Court in the 2003 case *Nike, Inc. v. Kasky*.¹²⁵ At issue in *Nike* was whether a corporation's

116. *Id.* at 570.

117. See *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 390 N.E.2d 749, 751 (1979) (discussing the Court of Appeals of New York's opinion “that the Public Service Commission was within its authority in imposing the restrictions”).

118. *C. Hudson*, 447 U.S. at 570.

119. See *Citizens United*, 130 S. Ct. at 898 (stating that “[l]aws that burden political speech are ‘subject to strict scrutiny’” (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 464)).

120. See *C. Hudson*, 447 U.S. at 573 (Blackmun & Brennan, JJ., concurring in judgment) (explaining that “intermediate scrutiny is appropriate for a restraint on commercial speech”).

121. *Id.* at 598 (Rehnquist, C.J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* at 595.

125. 539 U.S. 654. The Court dismissed the writ of certiorari because certiorari had

allegedly false and misleading statements about labor practices and working conditions in factories in which the corporation's products were made could be considered commercial speech.¹²⁶ Before arriving in the United States Supreme Court, the Supreme Court of California heard the case, holding that such statements were in fact commercial speech.¹²⁷ To decide *Kasky v. Nike, Inc.*,¹²⁸ the California Supreme Court employed a revised version of the three-part test used by the United States Supreme Court in *Bolger v. Youngs Drug Products Corporation*.¹²⁹ The Court in *Bolger* articulated three characteristics that distinguish commercial from noncommercial speech: (1) the communication is an advertisement; (2) the communication concerns a product; and (3) the speaker has an economic motivation for the communication.¹³⁰ The presence of all three characteristics provides strong support for determining that the speech is commercial speech.¹³¹ In *Kasky*, the California Supreme Court decided that Nike's speech was commercial, rather than constitutionally protected political speech, based on three similar factors: (1) Nike was a commercial speaker communicating a commercial message; (2) the intended audience was composed largely of actual and potential purchasers of Nike products; and (3) the content of the speech consisted of "representations of fact of a commercial nature" that were intended to maintain and increase sales of Nike products.¹³² Further, the fact that speech concerns public issues does not necessitate removing such speech from the realm of commercial speech.¹³³

On writ of certiorari, the United States Supreme Court ultimately dismissed the case without deciding the issue due to jurisdictional problems.¹³⁴ Soon after, the parties settled, leaving

been improvidently granted. *Id.* at 655.

126. *Id.* at 656–657 (Stevens & Ginsburg, JJ., concurring).

127. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

128. *Id.* at 256.

129. 463 U.S. 60 (1983).

130. *Id.* at 66–67.

131. *Id.* at 67. The *Bolger* Court found that the combination of the three characteristics supported "the District Court's conclusion that the informational pamphlets [were] properly characterized as commercial speech." *Id.*

132. 45 P.3d at 247, 256–258.

133. *Id.* at 254.

134. *Nike*, 539 U.S. at 657. The Court outlined three jurisdictional problems supporting its decision: "[T]he judgment entered by the California Supreme Court was not final . . . ;

the issue unresolved for the foreseeable future.¹³⁵ Despite the Court's dismissal of *Nike*, Justice Breyer wrote a dissenting opinion arguing that the case was properly before the Court and should have been decided on the merits.¹³⁶ Specifically, Justice Breyer focused on evaluating the type of speech involved in the case and the level of scrutiny that most appropriately corresponds.¹³⁷ Justice Breyer determined that the speech at issue could not be characterized as purely commercial because it "involv[ed] a mixture of commercial and noncommercial (public-issue-oriented) elements."¹³⁸ Despite finding that Nike's speech was not purely commercial, Justice Breyer emphasized the "pre-dominant noncommercial characteristics with which the commercial characteristics [were] 'inextricably intertwined.'"¹³⁹ Essential to this conclusion was the reduced level of scrutiny that Justice Breyer would have employed to assess the constitutionality of the speech regulations at issue in *Nike*.¹⁴⁰ Justice Breyer thus provided some beneficial guidance in determining how to properly classify speech possessing both commercial and non-commercial elements, and more significantly, what level of scrutiny to apply to such speech.¹⁴¹

D. Scrutinizing Scrutiny

As Justice Breyer's discussion aptly demonstrates, judicial scrutiny is the principal factor that decides whether the Court will uphold or invalidate a speech regulation. Judicial scrutiny is so important because the level of scrutiny the Court assigns to a given category of speech will dictate how the Court analyzes the

neither party has standing to invoke the jurisdiction of a federal court; and . . . the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case." *Id.* at 657–658.

135. Adam Liptak, *Nike Move Ends Case Over Firms' Free Speech*, N.Y. Times A8 (Sept. 13, 2003) (available at <http://www.nytimes.com/2003/09/13/national/13NIKE.html>).

136. *See Nike*, 539 U.S. at 667, 676–681 (Breyer, J., dissenting) (analyzing the merits of the case using the three-part test employed by the California Supreme Court).

137. *Id.* at 676.

138. *Id.*

139. *Id.* at 677 (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

140. *Id.* at 676. Justice Breyer "would [have] appl[ied] a form of heightened scrutiny to the speech regulations in question, and [he] believe[d] that those regulations [could not] survive that scrutiny." *Id.*

141. *See id.* (describing the type of scrutiny Justice Breyer would have applied).

regulation. The Court applies two levels of scrutiny to speech regulations: strict scrutiny and intermediate scrutiny.¹⁴² In addition, regulations have been separated into two types: content based and content neutral.¹⁴³ Examples of content-based regulations are political speech and commercial speech, while time, place, or manner restrictions are examples of content-neutral regulations.¹⁴⁴ As demonstrated in *Buckley* and its progeny, political-speech regulations are met with strict scrutiny.¹⁴⁵ Conversely, similar to content-neutral regulations, commercial speech regulations are given less stringent intermediate scrutiny, which the Court made clear in *Central Hudson*.¹⁴⁶ Judicial scrutiny will be indispensable to determining the appropriate level of scrutiny that should be applied to corporate political-speech regulations throughout the remainder of this Article.

III. A STARK DIVIDE ON THE HIGH COURT: THE CITIZENS UNITED DECISION, ITS RAMIFICATIONS, AND ONE JUSTICE'S BLISTERING DISSENT

Part III(A) of this Article examines in detail the Court's majority opinion from *Citizens United*. Part III(B) counterbalances the majority's opinion with an explanation of Justice Stevens' expansive dissenting opinion. Part III(C)(1) conducts an analysis that compares direct contributions to independent expenditures. Part III(C)(2) contrasts for-profit corporations with nonprofit corporations and labor unions in the context of the majority's holding. Part III(D) concludes by discussing the decision's implications for expenditures by foreign corporations and corporations with foreign shareholders.

142. See e.g. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–642 (1994) (showing how strict and intermediate scrutiny affect regulations differently).

143. See *id.* at 643 (explaining the differences between content-based and content-neutral speech regulations).

144. See *C. Hudson*, 447 U.S. 562, 564 n. 6 (stating that content-based regulation of commercial speech is permissible under the First Amendment); see *id.* at 580–581 (explaining that the government regulation at issue was content based because it prohibited expression of political viewpoints on the production and consumption of electricity); see e.g. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 804 (1989) (upholding the constitutionality of a city regulation that required the use of sound-control equipment at an outdoor amphitheater).

145. See *supra* pt. II(A)(2) (detailing the Supreme Court's decisions that that developed the body of corporate political-speech jurisprudence).

146. See *supra* Part II(B) for a discussion of *Central Hudson*.

A. *Citizens United* Arrives

Citizens United first arrived at the Supreme Court in June 2009 on appeal from the United States District Court for the District of Columbia.¹⁴⁷ The issue originally before the Court was a statutory challenge to the validity of BCRA Section 203 as applied to the speech in question.¹⁴⁸ The Court did not decide the case on the narrow issue before it during this first argument.¹⁴⁹ Instead, the Court scheduled the case for re-argument in September to consider the broader constitutional question of whether *Austin*, *McConnell*, or both should be overruled.¹⁵⁰

Citizens United had produced a documentary film about then-Presidential Candidate Hillary Clinton, titled *Hillary: The Movie*.¹⁵¹ *Citizens United* wished to broadcast the film on a video-on-demand service during the run-up to the primary election, as well as to advertise to promote the film.¹⁵² The nature of the documentary, however, brought it within the provisions of BCRA—the film can be summed up as a plea to vote against Hillary Clinton.¹⁵³ The issue before the Court, after re-argument, was whether BCRA's restrictions unconstitutionally violated *Citizens United*'s First Amendment right to engage in political speech within thirty days of a primary election.¹⁵⁴

By a 5-4 majority, the Court overruled *Austin* and portions of *McConnell*, invalidating BCRA's ban on independent expenditures by corporations and unions.¹⁵⁵ Because the Court was interpreting the Constitution, this decision also had the result of overturning similar state campaign finance statutes.¹⁵⁶ The Court

147. *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008).

148. *Citizens United*, 130 S. Ct. at 931–932 (Stevens, Ginsberg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

149. *Citizens United v. FEC*, 129 S. Ct. 2893 (2009).

150. *Id.*

151. *Citizens United*, 130 S. Ct. at 887.

152. *Id.*

153. *See id.* at 888 (characterizing *Hillary: The Movie* as being “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her” (quoting *Citizens United*, 530 F. Supp. 2d at 279)).

154. *Id.* at 887–888.

155. *Id.* at 913.

156. *Id.* at 933 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (stating that “[t]he Court . . . implicitly strik[es] down a great many state laws as well”).

further explained “that the [g]overnment may not suppress political speech [solely] on the basis of the speaker’s corporate identity.”¹⁵⁷ The Court additionally emphasized that for *any* regulation of corporate political speech to stand, it must survive strict scrutiny.¹⁵⁸ While effectively gutting most of BCRA’s provisions, the Court upheld the disclosure and disclaimer provisions.¹⁵⁹ Significantly, the Court made no distinction between for-profit corporations, nonprofit corporations, and labor unions, bestowing on each the unlimited ability to make independent expenditures from their general treasuries to influence elections.¹⁶⁰

B. The Dissent Heard Round the World

In a lengthy and blistering dissent, Justice Stevens berated the majority for seeking out the issue it wished to decide, rather than adhering to the one brought before the Court, by ordering re-argument on the broader question of BCRA’s constitutionality.¹⁶¹ For that reason alone, he argued, the question of whether *Austin* and *McConnell* should be overruled should have never come before the Court in the first place.¹⁶² Justice Stevens further criticized the majority for its unnecessarily extensive ruling that invalidated BCRA as applied to for-profit corporations and labor unions because the majority went far beyond the provisions concerning the nonprofit corporation at issue, *Citizens United*.¹⁶³

Justice Stevens, the only remaining Justice on the Court from the *Austin* majority, described the majority opinion from *Citizens United* as an “amalgamation of resuscitated dissents[,]” highlighting the shift in the Court’s composition and the newly comprised Court’s distaste for *Austin* as the only relevant factors that had changed that could explain overruling *Austin*.¹⁶⁴ In defending the

157. *Id.* at 913 (majority).

158. *Id.* at 898.

159. *See id.* at 914–916 (finding the disclaimer and disclosure requirements valid as applied to the movie and the movie advertisements).

160. *Id.* at 904.

161. *Id.* at 931 (Stevens, Ginsberg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (proposing that the majority’s “suggestion that ‘we are asked to reconsider *Austin* and, in effect, *McConnell* []’ . . . would be more accurate if rephrased to state that ‘we have asked ourselves’ to reconsider those cases”).

162. *Id.* at 932.

163. *Id.* at 929–930.

164. *Id.* at 941–942.

viability of *Austin*, Justice Stevens pointed out that “no one has argued to us that *Austin*’s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it.”¹⁶⁵ Justice Stevens would have found BCRA to be a constitutionally valid time, place, or manner restriction on corporate political speech on the basis of the temporal limitations it set for such speech in the proximity of an election.¹⁶⁶ Justice Stevens concluded by characterizing

the Court’s opinion [as] . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.¹⁶⁷

C. False Equivalency

In Theodore Roosevelt’s sixth annual State of the Union Address to Congress, he stated: “Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.”¹⁶⁸ Independent expenditures epitomize such indirect corporate political contributions, which Congress is powerless to regulate in the wake of *Citizens United*.¹⁶⁹ Once the Court determined that strict scrutiny applied to corporate political expenditures, it found only one compelling interest—preventing quid pro quo corruption.¹⁷⁰ Although the Court upheld direct contribution limits because they resonate more clearly as quid pro quo corruption, independent expenditures by corporations corrupt the political process by flooding the “marketplace of ideas”—something the *Citizens United* majority sought to preserve¹⁷¹—

165. *Id.* at 941.

166. *Id.* at 944. The time frame prohibited such speech within thirty days of a primary and within sixty days of a general election. *Id.*

167. *Id.* at 979.

168. Roosevelt, *supra* n. 28.

169. *Citizens United*, 130 S. Ct. at 969 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

170. *Id.* at 901–902, 909–910 (majority).

171. *Id.* at 906–907 (explaining that “*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment”) (quoting *N.Y. St. Bd. of Elections v. Lopez*

with issues concerning corporations, thus overshadowing issues that concern people. Despite the majority's unsupported conclusion to the contrary, evidence *does* exist of a two-pronged threat posed by unlimited corporate expenditures in elections.¹⁷²

1. Independent Expenditures: A Dual Threat of Corruption

The first example of how corporate expenditures could corrupt the political process is by pressuring a sitting elected official with the threat of attack advertisements to influence that official's stance on an issue or issues. In *North Carolina Right to Life, Inc. v. Leake*,¹⁷³ an independent group of farmers created attack advertisements aimed at incumbent legislators.¹⁷⁴ Instead of running these advertisements during election time, however, the group scheduled private meetings with the candidates to screen the advertisements.¹⁷⁵ The farmers then threatened to run the attack advertisements if the candidates did not support and adopt the group's positions.¹⁷⁶ The circumstances described in *Leake* demonstrate that the threat of attack advertisements can be enough to affect how political candidates govern. A concern one degree removed from that threat is that any distinction between the parties will be erased because only candidates with campaigns supported by corporations will have the resources to remain competitive.¹⁷⁷ Similar to a judge required to recuse himself or herself due to the appearance of impropriety,¹⁷⁸ the possibility of corruption resulting from independent expenditures casts a shadow of suspicion over the propriety of the electoral pro-

Torres, 552 U.S. 196, 208 (2008)).

172. See *infra* Part III(C)(1) for a discussion of the two-pronged threat.

173. 525 F.3d 274 (4th Cir. 2008).

174. *Id.* at 294.

175. *Id.* at 335 (Michael, J., dissenting).

176. *Id.*

177. In other contexts, this situation is referred to as the "race to the bottom." Cf. George Ritzer, *Globalization: A Basic Text* 224 (Wiley-Blackwell 2010) (describing the race to the bottom in terms of underdeveloped nations that "must undercut the competition . . . [by] offering lower wages, poorer working conditions, [and] longer hours" to compete in the global economy).

178. The Federal Recusal Statute provides that recusal is required where a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2006).

cess, and for that reason alone, Congress should have the ability to limit them.¹⁷⁹

The second way unlimited corporate expenditures threaten the political process is by unfairly influencing the outcomes of elections in favor of corporate-friendly candidates, thereby creating an insurmountable hardship for grassroots campaigns. In 2009—one year before *Citizens United*—the Supreme Court decided another election-related case, *Caperton v. A.T. Massey Coal Company*.¹⁸⁰ At a time when Massey had just lost a fifty-million-dollar jury verdict, Massey's Chief Executive Officer, Don Blankenship, knowing that an appeal to the Supreme Court of Appeals of West Virginia was imminent, spent nearly three million dollars in independent expenditures to defeat an incumbent member of the Supreme Court of Appeals of West Virginia by supporting another candidate's campaign.¹⁸¹ The winning candidate, whose campaign Blankenship supported, then declined to recuse himself from the case and instead cast the deciding vote that reversed the judgment in support of Massey.¹⁸² Justice Kennedy wrote for the 5-4 majority that reversed the West Virginia Supreme Court's decision, acknowledging that such extraordinary expenditures have a potentially distortive impact on elections.¹⁸³

Leake and *Caperton* provide two examples of the real possibility that independent expenditures can improperly influence elections and result in corruption, a possibility that was improperly dismissed by the *Citizens United* Court. Once it has been established that independent expenditures do in fact have the potential to distort elections and the behavior of elected officials, the valuation of political speech reverts to monetary terms rather than the quality of the ideas espoused by such speech.¹⁸⁴ Under

179. See Lawrence Lessig, *Democracy after Citizens United*, Bos. Rev. 11, 11, 13 (Sept./Oct. 2010) (available at <http://bostonreview.net/BR35.5/lessig.php>) (“[S]o long as Justices are prepared to let their own factual speculations trump legislative fact-finding, and so long as judicial intuitions about the impact of disclosure requirements are permitted to decide the issue, Congress will be unable to address institutional corruption directly by limiting expenditures that create a reality or appearance of unacceptable dependency.”).

180. 129 S. Ct. 2252 (2009).

181. *Id.* at 2257.

182. *Id.* at 2258.

183. *Id.* at 2264.

184. See *Austin*, 494 U.S. at 660 (maintaining that restrictions on corporate independent expenditures have a valid goal of “ensur[ing] that expenditures reflect actual public support for the political ideas espoused by corporations”).

these terms, the corporations with the largest treasury funds have a decisive advantage over smaller businesses, and especially over individuals. Interestingly, Justice Kennedy decided *Caperton* before authoring the landmark *Citizens United* decision.¹⁸⁵ Despite his willingness in *Caperton* to acknowledge the possibility that extraordinary expenditures pose the risk of causing “a significant and disproportionate influence on the electoral outcome[,]”¹⁸⁶ he was not swayed from invalidating BCRA’s restrictions on such expenditures in *Citizens United*. Justice Kennedy’s majority opinion in *Citizens United* considered independent expenditures exclusively in terms of corruption, without taking pause to acknowledge the anti-distortion rationale that justified the *Austin* holding.¹⁸⁷ Perhaps this should not be surprising considering that Justice Kennedy dissented from the *Austin* majority,¹⁸⁸ but this discrepancy cannot be reconciled with the reasoning that he provided in *Caperton*.

2. *For-Profit Corporations v. Nonprofit Corporations v. Unions*

Justice Stevens pointed out in his *Citizens United* dissent that the Court extended the scope of the case to include for-profit corporations and labor unions, even though the question originally brought before the Court applied narrowly to the advertisement of a single nonprofit corporation.¹⁸⁹ Justice Kennedy’s majority opinion curiously lumped all three of these groups— for-profit corporations, nonprofit corporations, and unions—together, designating them all as “associations of individuals.”¹⁹⁰ The Court seemed to suggest that the thin strand that

185. The Court decided *Caperton*, 129 S. Ct. 2252 on June 8, 2009 and *Citizens United*, 130 S. Ct. 876 on January 21, 2010.

186. 129 S. Ct. at 2264.

187. Compare *Citizens United*, 130 S. Ct. at 908–909 (discussing “the [g]overnment’s interest in preventing *quid pro quo* corruption”) with *Austin*, 494 U.S. at 660 (explaining how “aggregations of wealth that are accumulated with the help of the corporate form” may not necessarily correlate with “the public’s support for the corporation’s political ideas”).

188. For a brief discussion of Justice Kennedy’s dissenting opinion in *Austin*, see *supra* Part II(A)(2). This discrepancy is also not the only inconsistency presented by Justice Kennedy in *Citizens United*. See e.g. *Citizens United*, 130 S. Ct. at 929 (stating that for-profit corporations, nonprofit corporations, and unions should be treated in the same fashion).

189. *Id.* at 936–937 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

190. *Id.* at 929 (majority).

unites these three entities—each being an organized association of individuals—is far more relevant than the important characteristic that separates nonprofit corporations and unions from for-profit corporations: the sole reason for the existence of for-profit corporations is to procure profits.¹⁹¹ Due to this factor, BCRA's blanket ban on the use of general treasury funds by for-profit corporations and labor unions in association with elections should not have been removed for two reasons: motivations and fairness. First, for-profit corporations have the sole motivation of securing and increasing profits,¹⁹² and neither labor unions nor nonprofit organizations share this motivation. In this respect, nonprofit corporations have much more in common with unions than with for-profit corporations. For example, the nonprofit corporations that were exempted from corporate campaign finance regulations by *MCFL* dealt strictly with issue advocacy rather than profits.¹⁹³

Moreover, despite the history of politically active, powerful labor unions during the post-New Deal Era,¹⁹⁴ that period has long since passed. Labor unions now represent a much smaller segment of the population than they did during the 1940s and 1950s,¹⁹⁵ and their ability to spend money is far outmatched by corporations.¹⁹⁶ Writing for the majority in *Austin*, Justice Mar-

191. For further discussion on the legally imposed obligation of for-profit corporations to seek profits, see *infra* Part IV(D).

192. See *eBay*, 16 A.3d at 9 (explaining that “eBay is a for-profit concern that operates its business with an eye to maximizing revenues, profits, and market share[]”); accord *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (holding that a corporation's board of directors' sole fiduciary duty is the procurement of profits for its shareholders to the exclusion of all external concerns).

193. *McConnell*, 540 U.S. at 209–210. *MCFL* nonprofit organizations: (1) must be created for a political purpose; (2) must not have shareholders; and (3) must not be “established by a business corporation or labor union.” *Id.* at 210–211.

194. For a discussion of the political activity of unions following the New Deal and the resulting political-speech regulations imposed on unions, see the text accompanying notes 32–37, at *supra* Part II(A)(1).

195. Compare Reference for Business, Encyclopedia of Business, *Labor Unions* (2d ed. 2006) (available at <http://www.referenceforbusiness.com/small/Inc-Mail/Labor-Unions.html>) (documenting the growth of United States labor unions, which comprised approximately one-third of the work force in the mid-1950s) with Phyllis Korkki, *A Long Slide in Union Membership*, N.Y. Times BU2 (Feb. 14, 2010) (available at <http://www.nytimes.com/2010/02/14/business/14count.html?scp=1&sq=a%20long%20slide%20in%20union%20membership&st=cse>) (reporting a declining trend in union membership that reached 12.3 % of the work force in 2009).

196. Common Cause, *Corporate Democracy: Potential Fallout from a Supreme Court Decision on Citizens United*, [http://www.commoncause.org/atf/cf/\(fb3c17e2-cdd1-4df6-92be-bd4429893665\)/CORPORATEDEMOCRACY.PDF](http://www.commoncause.org/atf/cf/(fb3c17e2-cdd1-4df6-92be-bd4429893665)/CORPORATEDEMOCRACY.PDF) (Oct. 29, 2009).

shall summarized the principal difference between corporations and unions: “[w]hereas unincorporated unions . . . may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure . . . [that] ‘enhanc[e] their ability to accumulate wealth.’”¹⁹⁷ The 2008 election cycle saw corporations outspend labor unions four-to-one on Political Action Committee (PAC) contributions (\$270 million by corporations compared to \$66.4 million by labor unions) and sixty-one-to-one on lobbying (\$5.2 billion by corporations compared to \$84.4 million by labor unions).¹⁹⁸ This distinction helps to illustrate the disproportionate financial might that for-profit corporations wield over their labor-union counterparts, largely due to the benefits granted by the corporate form. While the *Citizens United* majority denied the existence of a government interest in safeguarding against this disparity,¹⁹⁹ taking such an interest into account would not be the first time that fairness has been a consideration made by the Supreme Court.²⁰⁰ At the very least, the Court should not have deemed each of these groups equal without substantiating such a conclusion with evidence.

D. Foreign Prospects

One particular aspect of *Citizens United* that the majority declined to consider was how the ruling would affect the influence of foreign corporations and corporations with foreign shareholders.²⁰¹ While the Court did not affirmatively grant such corporations open access to influence American elections, it also did not foreclose the same.²⁰² Presumably, as President Obama alluded to in his State of the Union Address—“I do[not] think American elections should be bankrolled by . . . foreign enti-

197. *Austin*, 494 U.S. at 665 (quoting *MCFL*, 479 U.S. at 258 n. 11).

198. Common Cause, *supra* n. 196.

199. *Citizens United*, 130 S. Ct. at 904.

200. *Cf. Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494–495 (1954) (overruling the “separate but equal” standard established in *Plessy v. Ferguson*, 163 U.S. 537 (1896) out of concern for fundamental fairness regarding the ability of African Americans to have an equal opportunity for access to a public education).

201. 130 S. Ct. at 911. Though a short discussion is warranted given President Obama’s comments, as discussed at *supra* note 3 and accompanying text, the impact of *Citizens United* on political expenditures by foreign corporations and foreign nationals is beyond the scope of this Article.

202. 130 S. Ct. at 911.

ties”²⁰³—*Citizens United* may have indirectly opened the electoral process to expenditures by foreign corporations with a stake in the United States’ economic and political futures²⁰⁴—at least without further action from Congress.²⁰⁵ Despite the real possibility of opening American elections to foreign influence, the Court declined to answer whether “the [g]overnment has a compelling interest in limiting foreign influence over our political process.”²⁰⁶ The *Citizens United* majority’s abstention from a dispositive decision regarding foreign corporations implies that foreign corporations could not be prevented from engaging in political speech in the United States as a result of the Court’s holding. Therefore, American corporations whose stock is owned in significant amounts by foreign nationals would also be immune from such political-speech regulations.

For example, Saudi Prince Alwaleed bin Talal²⁰⁷ owns large stakes in numerous corporations²⁰⁸ that now can buy political advertisements and, ostensibly, have a say in who is elected to office in the United States. Further, during the run-up to the 2010 midterm elections, evidence surfaced of contributions by foreign corporations to the United States Chamber of Commerce to run attack advertisements that targeted specific candidates.²⁰⁹ Though the Chamber of Commerce is a nonprofit corporation, its expenditures would still have been barred by BCRA before *Citizens United* because it received contributions from for-profit corporations and thus did not meet *MCFL*’s criteria for exemption.²¹⁰ But after *Citizens United*, such restrictions were removed.

203. Obama, *supra* n. 3.

204. *But see Citizens United*, 130 S. Ct. at 911 (analogizing expenditures by foreign corporations to independent expenditures by foreign nationals, which are prohibited under Section 441(e) of BCRA).

205. For a discussion of the DISCLOSE Act, see *infra* Part IV(B).

206. *Citizens United*, 130 S. Ct. at 911.

207. See generally Riz Khan, *Alwaleed: Businessman, Billionaire, Prince* (William Morrow 2005) (giving the biographical account of the business dealings that have provided Alwaleed with a vast fortune of investments in American corporations).

208. *Id.* at 73–74, 122–125 (detailing the Prince’s significant multi-million dollar investments in Citibank, AOL, Apple, and News Corporation).

209. See Lee Fang, *Exclusive: Foreign-Funded ‘U.S.’ Chamber of Commerce Running Partisan Attack Ads*, <http://thinkprogress.org/2010/10/05/foreign-chamber-commerce/> (posted Oct. 5, 2010, 10:22 a.m.) (divulging the Chamber of Commerce’s pledge to spend seventy-five million dollars to defeat select congressional candidates during the 2010 midterm election cycle).

210. Compare *MCFL*, 479 U.S. at 264 (explaining that one of the exemption criteria

From a historical perspective, it is inconceivable to imagine that the signatories to the Constitution would have envisioned a First Amendment that protected the British East India Company's right to spend unlimited amounts of money to influence the elections of candidates sympathetic to those foreign economic interests.²¹¹ Yet through *Citizens United*, multinationals comparable to the British East India Company in size and political influence have been welcomed into the fray. Absent a new approach for dealing with the treatment of corporate political speech, the federal government's political branches have no way of responding to the Court's far-reaching decision in *Citizens United*.²¹²

IV. MONEY, POLITICS, AND THE FIRST AMENDMENT: WHY POLITICAL SPEECH OF FOR-PROFIT CORPORATIONS SHOULD BE TREATED LIKE COMMERCIAL SPEECH

Part IV(A) of this Article compares the original drafting of the First Amendment with the version ultimately included in the Bill of Rights. Part IV(B) discusses the Democracy is Strengthened by Casting Light on Spending in Elections Act (the DISCLOSE Act) and the repercussions for democracy when money is permitted to flow into the political marketplace. Part IV(C) assembles the approach toward campaign finance restrictions that Chief Justice Rehnquist consistently articulated during his thirty-five-year tenure on the Court. Part IV(D) concludes by weaving together the elements common to corporate political speech and commercial speech that form the basis for treating each form of speech with equivalent intermediate judicial scrutiny.

requires that the corporation not accept contributions from business corporations) *with Wisc. Right to Life, Inc.*, 551 U.S. at 533 (Souter, J., dissenting) (suggesting that WRTL could have funded advertisements with money from its corporate treasury as long as it did not accept money from other corporations).

211. The Constitution was enacted on the eve of the American Revolution with the still-recent memory of the British East India Company and the role it played in inciting the Boston Tea Party. Ted Nace, *Gangs of America: The Rise of Corporate Power in America and the Disabling of Democracy* 40–45 (Berrett-Koehler 2005).

212. See 130 S. Ct. at 933 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (criticizing the majority as “operat[ing] with a sledge hammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics”).

A. An Unfortunate Misunderstanding

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech”²¹³ Conversely, the Bill of Rights originally proposed by James Madison to the House of Representatives included a freedom of speech provision worded quite differently from the First Amendment found in the existing Bill of Rights: “[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments”²¹⁴ While Madison’s version of the First Amendment was never adopted, his substantial influence at the Constitutional Convention that earned him the title the “Father of the Constitution”²¹⁵ lends substantial authority to how the Freedom of Speech Clause of the First Amendment should be interpreted. The First Amendment proposed by Madison described protection of the people’s right to “speak,”²¹⁶ rather than mere “speech” divorced from its speaker. Despite the *Citizens United* majority’s insistence to the contrary, a speaker’s identity is a relevant consideration to the historical underpinnings of the Constitution. Adopting Madison’s view necessarily follows from the premise that the First Amendment was meant to empower *people* in the political system and to give voice to dissent,²¹⁷ not to empower for-profit corporations to support elected officials who will best serve them in their quest for profits. The First Amendment thus stands for the proposition that the freedom of all people to air grievances and engage in vibrant debate without threat of reprisal is the cornerstone of the United States’ democratic system.²¹⁸

213. U.S. Const. amend. I.

214. 1 Annals of Cong. 451 (1789) (citing a speech made by James Madison on the house floor June 8, 1789).

215. Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. Rev. 267, 270–271 (1997).

216. 1 Annals of Cong. at 451.

217. See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (declaring that “[t]he First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)) (emphasis added)).

218. See *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating “that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies”).

B. The Best Democracy Money Can Buy

The holding in *Citizens United* takes a dagger to the democratic process by leaving Congress helpless to address the concerns of its constituents regarding corporate campaign expenditures. BCRA was a bipartisan agreement aimed at preventing corporate treasury funds from influencing elections,²¹⁹ which this decision unceremoniously gutted. This statute did nothing to impinge on the individual rights of people, instead placing restrictions on corporations and labor unions.²²⁰ Unlike *Brown*, which overruled a discriminatory standard that previously denied rights to a class of *people*,²²¹ the unelected body on the Supreme Court in *Citizens United* overturned a statute that elected representatives enacted to protect the public at large from the actions of *corporations*. The only portion of BCRA that remains unscathed is Section 441(d), which allows Congress to mandate disclosure requirements for the identities of corporate-funded campaign advertisements.²²² Determined to mitigate the decision's impact on corporate campaign advertisements in an election year, Congress attempted to operate within this exception carved out by the Court to enact the DISCLOSE Act.²²³ The DISCLOSE Act would have required corporations to disclose their identity during any political advertisements in which they spent money but could not garner enough support in the Senate to break a filibuster.²²⁴

Even if the DISCLOSE Act could have escaped the Senate to be signed into law, it would have only attached a corporate name

219. Kerr, *supra* n. 85, at 123–124.

220. *McConnell*, 540 U.S. at 132.

221. 347 U.S. at 494–495.

222. 2 U.S.C. § 441(d) (2006).

223. H.R. 5175, 111th Cong. (Apr. 29, 2010) (as introduced). Other responses to mitigate the perceived negative impact of *Citizens United* include a motion to amend the Constitution and public financing of elections. See Common Cause, *Clean Elections for the United States Congress: Taking Big Money out of Politics with the Fair Elections Now Act*, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4104607> (accessed June 15, 2011) (proposing the Fair Elections Now Act that would finance political campaigns through public funds rather than money solicited from private donors); Move to Amend, *Motion to Amend*, <http://movetoamend.org/motion-amend> (accessed June 15, 2011) (calling for a constitutional amendment declaring that corporations are not entitled to the same constitutional rights as people).

224. Meredith Shiner, *Campaign Bill Still a Few Votes Shy*, <http://www.politico.com/news/stories/0710/40233.html> (updated July 27, 2010, 8:46 a.m. EDT).

to any corporate-funded political advertisements,²²⁵ while doing nothing to address the underlying problem—the potential influx of corporate money into elections. The majority defended its holding as protecting the idiomatic “marketplace of ideas,” a proposition that *Austin* had previously rejected.²²⁶ While the majority’s point may be sound in theory, its decision takes this “marketplace of ideas” literally by resurrecting and expounding upon the proposition that money is synonymous with speech—an idea that was first codified in *Buckley*.²²⁷ By logical extension, then, the “marketplace of ideas” should be regulated, as is every other marketplace that does business in the United States.²²⁸ The result of *Citizens United* is thus to make elections more about money and less about the ideas the opinion purports to defend.²²⁹ This raises an important question: is this how elections should work in a *democracy*? Taking it one step further, the more money a corporation spends on advertising, the more advertisements that corporation will have the means to air. This decision will likely have less of an effect on large national elections, such as for the President and for seats in Congress, due to the enormous amount of money already spent on such races,²³⁰ however, its possible impact on state and local races, which tend to involve far

225. H.R. 5175, 111th Cong.

226. *Citizens United*, 130 S. Ct. at 896 (quoting *Va. v. Hicks*, 539 U.S. 113, 119 (2003)); see generally *Austin*, 494 U.S. 652 (discussed *supra* Part II(A)(2)).

227. See 424 U.S. at 19 (explaining that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money”). For a discussion of *Buckley*, see *supra* Part II(A)(2).

228. See e.g. The U.S. Commodity Futures Trading Comm’n, *Mission & Responsibilities*, <http://www.cftc.gov/About/MissionResponsibilities/index.htm> (detailing how the CFTC regulates the commodity futures markets); the U.S. Food & Drug Administration, *About FDA: Centers and Offices*, <http://www.fda.gov/AboutFDA/CentersOffices/default.htm> (updated Feb. 15, 2011) (explaining that the FDA regulates the nation’s food supply, human and veterinary drugs, medical supplies, cosmetics, and tobacco products to protect the public health); the U.S. Sec. & Exch. Comm’n, *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (updated June 20, 2011) (describing how the SEC regulates the securities exchange markets).

229. See *Austin*, 494 U.S. at 660 (acknowledging the disconnect regarding “immense aggregations of wealth that are accumulated with the help of the corporate form[, but] that have little or no correlation to the public’s support for the corporation’s political ideas”).

230. The total amount of money spent by both parties on the 2008 election was \$5.3 billion. Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, <http://www.politico.com/news/stories/1108/15283.html> (posted Nov. 5, 2008, 5:28 a.m. EDT).

less money than national elections, could be greater should corporations take the invitation to get involved.²³¹

The vast majority of individuals do not have the ability to match corporate political expenditures because they lack the financial means to do so. Perhaps, as an unintended consequence of *Citizens United*, the Court carved out a right presumably exclusive to corporations and unions—and multi-millionaires.²³² The foreseeable result is to convert one logical fallacy—*argumentum ad nauseum*²³³—into another—*argumentum ad populum*.²³⁴ In essence, the “marketplace of ideas” is relegated to an oligopoly²³⁵ of ideas, in which only those few who can afford to compete in the marketplace have even the ability to prevail.²³⁶ Such a marketplace that regulates entry upon financial prowess with no regard to merit or popular support goes against the spirit of the First Amendment.

C. An Unlikely Ally

Throughout Chief Justice Rehnquist’s tenure on the Court, he rejected the premise that corporations should play any role in the marketplace of ideas.²³⁷ It was then-Justice Rehnquist’s view that the “marketplace of ideas” should be strictly reserved for political speech because “[t]he free flow of information . . . is essential to

231. See e.g. Shushannah Walshe, *\$30 Million Pouring In to Influence Wisconsin Recall Elections*, <http://abcnews.go.com/Politics/30-million-pouring-influence-wisconsin-recall-elections/story?id=14235471> (posted Aug. 4, 2011) (describing the “unprecedented amount of money . . . being poured into [Wisconsin] from outside groups” from both political parties to influence the recall elections of eight Wisconsin state senators).

232. See e.g. Ed Hornick, *Who Is Florida’s Rick Scott?* <http://www.cnn.com/2010/POLITICS/08/25/rick.scott.republicans/index.html> (posted Aug. 25, 2010, 6:48 p.m. EDT) (telling the story of little-known gubernatorial candidate and millionaire Rick Scott, who spent a record fifty million dollars of his own money in Florida’s Republican governor primary to defeat Florida Attorney General and establishment candidate Bill McCollum).

233. *Argumentum ad nauseum* is the logical fallacy that an argument is true because it has been repeated so many times. Malcom Green, *Book of Lies* 35 (Andrews McMeel 2005).

234. *Argumentum ad populum* is the logical fallacy that an argument is true because so many people believe it to be true. Christopher W. Tindale, *Fallacies and Argument Appraisal* 105 (Cambridge U. Press 2007).

235. “An *oligopoly* is a market having few firms (but more than one firm) on the supply side and a very large number of buyers on the demand side” James W. Freidman, *Oligopoly Theory* 1 (Cambridge U. Press 1983).

236. See *supra* n. 177 and accompanying text (explaining how corporate political expenditures are akin to the phenomenon of the “race to the bottom”).

237. See e.g. *C. Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting); *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting).

our system of self-government.”²³⁸ Further, he believed that as state-created artificial entities, corporations should not play a role in our democratic form of self-government.²³⁹ Normally associated with the conservative wing of the Court, Chief Justice Rehnquist’s position in favor of corporate political-speech regulations was probably a significant contributing factor to *Austin*’s remaining in place for nearly two decades.²⁴⁰ It was only once Chief Justice Roberts filled the vacancy left after Chief Justice Rehnquist’s death that *Austin*’s viability came into question, followed by the addition of Justice Alito to replace Justice O’Connor. During Chief Justice Rehnquist’s tenure on the Court, he consistently opposed the view, later supported by the *Citizens United* majority, that corporations have the same stake in elections as do people.²⁴¹

Before becoming Chief Justice, then-Justice Rehnquist’s dissents in *Virginia Pharmacy* and *Central Hudson* decried providing corporations with a constitutional right to commercial speech.²⁴² He articulated that “commercial speech is more durable than other types of speech, since it is ‘the offspring of economic self-interest.’”²⁴³ In that same vein, he recognized that corporations that engage in political speech are also motivated by economic self-interest.²⁴⁴ For instance, then-Justice Rehnquist acknowledged that the properties of perpetual existence and limited liability that are “so beneficial in the economic sphere[] pose special dangers in the political sphere.”²⁴⁵ Principal among those dangers is the ability of corporations to use their economic pro-

238. *C. Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting). Then-Justice Rehnquist believed “that the Court unlocked a Pandora’s Box when it ‘elevated’ commercial speech to the level of traditional political speech” *Id.*

239. *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting).

240. The Oyez Project, *William H. Rehnquist*, http://www.oyez.org/justices/william_h_rehnquist (accessed July 5, 2011).

241. See e.g. *Bellotti*, 435 U.S. at 828 (Rehnquist, J., dissenting).

242. For then-Justice Rehnquist’s dissents, see *Central Hudson*, 447 U.S. at 583–606 (Rehnquist, J., dissenting) and *Virginia Pharmacy*, 425 U.S. at 781–790 (Rehnquist, J., dissenting). *Central Hudson* and *Virginia Pharmacy* are discussed *supra* Part II(B).

243. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 439 (1993) (Rehnquist, C.J., White & Thomas, JJ., dissenting) (citing *C. Hudson*, 447 U.S. at 564 n. 6).

244. *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting). Then-Justice Rehnquist explained that the judicial branches—both state and federal—can protect corporations’ property interests and that corporations should not need additional protection from the political branches. *Id.*

245. *Id.* at 825–826.

ess as a means to gain further economic benefit, while polluting the political system in the process.²⁴⁶

In then-Justice Rehnquist's *Central Hudson* dissent, he explained that "in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."²⁴⁷ After *Citizens United*, these words ring truer than ever—the prospect of corporations invading the political sphere that Chief Justice Rehnquist stood against for over three decades has materialized, erasing any meaningful divide between the political and economic systems of our democracy. Then-Justice Rehnquist announced similar reasoning for his dissenting opinions in *Bellotti* (in the corporate political-speech realm) and *Virginia Pharmacy* and *Central Hudson* (in the commercial-speech realm), and he formed the enduring principal that corporations do not enjoy the absolute right of free speech enjoyed by people.²⁴⁸ Without the safeguard of corporate political speech regulations in place, nothing prevents corporations from using their collective treasuries to transform the democratic electoral process into a corporate-friendly economic regime.

D. Reducing the Scrutiny of Corporate Political-Speech Regulations

Whether a congressionally enacted statute will survive a facial constitutional challenge is determined by the level of judicial scrutiny applied.²⁴⁹ In addition to classifications of speech, varying levels of judicial scrutiny also apply to classifications prohibited under the Equal Protection Clause of the Fourteenth Amendment.²⁵⁰ For example, in the context of racial classifications, the critical importance of the judicial scrutiny applied to

246. *Id.* at 826.

247. *C. Hudson*, 447 U.S. at 599 (Rehnquist, J., dissenting).

248. For a discussion of *Bellotti*, *Virginia Pharmacy*, and *Central Hudson*, see *supra* Parts II(A)–(B).

249. Compare *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 817 (2000) (holding that content-based regulations of speech are subject to strict scrutiny, and thus presumptively invalid) with *Ward*, 491 U.S. at 796 (upholding the validity of a speech regulation after applying intermediate scrutiny).

250. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989) (applying strict scrutiny to racial classifications); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender classifications).

the validity of a given regulation is exemplified by the fact that only one case in history has upheld a regulation of a racial classification under strict scrutiny.²⁵¹ *Korematsu v. United States*.²⁵² Most significantly, extenuating circumstances in a time of war were provided as a justification for upholding this regulation.²⁵³ Similarly, speech classifications that are faced with strict scrutiny are presumptively invalid, while reducing the scrutiny applied to speech regulations allows Congress more leeway to regulate such speech with a lesser risk of running afoul of the First Amendment.

The aspects of corporate political speech that liken it to commercial speech are the identity of the speaker as a profit-maximizing business corporation and the speech's form as an advertisement involving a financial transaction. Critics may respond that treating corporate political speech with the same judicial scrutiny as commercial speech is improper because commerce, in the most literal sense, is not taking place. This retort is misplaced, however, as history demonstrates that the definition of "commerce" has historically been expanded to serve an important government interest.²⁵⁴ For example, in *Wickard v. Filburn*, the Supreme Court expanded the definition of commerce as used in the Interstate Commerce Clause to allow Congress to regulate local activity that although not regarded as commerce in the strictest sense, has a substantial economic effect on interstate commerce.²⁵⁵

By supporting political candidates through expenditures of money, business corporations are engaging in a form of commerce by ostensibly selling a product that they calculate will be profitable. Under the definition of commercial speech espoused by *Virginia Pharmacy* as speech proposing a commercial transac-

251. See Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?* 15 Alaska L. Rev. 209, 223 (1998).

252. 323 U.S. 214, 216, 219 (1944) (upholding the validity of a racial classification that applied exclusively to "persons of Japanese ancestry").

253. *Id.* at 219, 223. The majority justified the racial classification by explaining that the United States was at war with Japan and that the military authorities feared an invasion could occur. *Id.* at 223.

254. See e.g. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (noting that Congress could regulate activities that have a "substantial economic effect on interstate commerce," regardless of whether the effect is direct or indirect).

255. *Id.*

tion,²⁵⁶ corporate political speech would not meet this definition. But under the definition of commercial speech that has evolved—first in *Central Hudson*, then further in *Bolger*—the expanded view of commercial speech applies to any economically motivated advertisements by a corporation that concern a product.²⁵⁷ Though in the most literal sense a political candidate is not a product for sale by a corporation, a more nuanced approach, which takes into account the corporate duty of profit maximization, identifies any such expenditure to that end as the functional equivalent of commercial speech. This rationale comports well with Justice Breyer’s dissent in *Nike*, wherein he supported the application of reduced judicial scrutiny to commercial speech that contains public-issue-oriented elements²⁵⁸—an apt description of the essence of corporate political speech.

As explained by the Delaware Court of Chancery, the nature of the corporate form requires all expenditures made by a corporation to advance that corporation’s economic interests, a central tenet of the fiduciary duty owed by directors of for-profit corporations to their shareholders:

The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . [D]irectors are bound by the fiduciary duties and standards that accompany [the for-profit corporation] form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.²⁵⁹

Furthermore, under Delaware’s corporate law, which governs over fifty percent of United States publicly traded corporations,²⁶⁰ a corporation may only consider the interests of constituencies external to the corporation when “some rationally related benefit accrue[s] to the stockholders”²⁶¹ or if doing so “bears some reason-

256. For a discussion of *Virginia Pharmacy*, see *supra* Part II(B).

257. For a discussion of *Central Hudson*, see *supra* Part II(B), and to read more about *Bolger*, see *supra* Part II(C).

258. 539 U.S. at 676.

259. *eBay*, 16 A.3d at 34.

260. State of Delaware: The Official Website of the First State, *Delaware Department of State: Division of Corporations, About Agency*, <http://www.corp.delaware.gov/aboutagency.shtml> (updated Jan. 19, 2011, 08:17:40 EDT).

261. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986).

able relationship to general shareholder interests”²⁶² Such external constituencies intrinsically include using the corporation’s treasury funds to support the campaign of a political candidate. Therefore, a board of directors that directs a for-profit corporation to make independent expenditures to influence an election for any reason other than profit maximization is breaching the fiduciary duty it owes to the corporation’s shareholders.²⁶³

A for-profit corporation’s political speech is more properly defined as commercial speech that happens to take place in the political forum. Any speech engaged in by a for-profit corporation to endorse a political candidate that will afford the corporation favorable treatment (i.e., less regulation or lower tax rates) will have been made with every intention of bettering that corporation economically.²⁶⁴ After all, the motivation to increase profits is the only permissible reason that a corporation may be permitted to engage in such speech. Because the only means available to corporations to convey their economically motivated political message is through advertising expenditures, corporate political speech transcends the traditional political-speech paradigm to become commercial speech, thus affording any regulation of such speech intermediate judicial scrutiny.

V. CONCLUSION: SPEAK UP FOR THE FIRST AMENDMENT

At the conclusion of Theodore Roosevelt’s New Nationalism Address, he stated “[t]hose who oppose all reform will do well to remember that ruin in its worst form is inevitable if our national life brings us nothing better than swollen fortunes for the few and the triumph in both politics and business of a sordid and selfish

262. *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1282 (Del. 1989).

263. If shareholders were to challenge a board’s decision to contribute to a candidate’s political campaign, the board would enjoy the benefit of the business judgment rule, which assumes “that in making a business decision the directors of a corporation acted on an informed basis, in good faith[,] and in the honest belief that the action taken was in the best interests of the company.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

264. See Mark Matthews, *Schwarzenegger Blasts Big Oil over Prop 23* (article and video available at <http://abclocal.go.com/kgo/story?section=news/state&id=7691890>) (Sept. 27, 2010) (discussing then-Governor Arnold Schwarzenegger’s speech, in which he rhetorically asked those who were uncertain of the motivation for the corporate-sponsored initiative to suspend indefinitely a law that would reduce greenhouse emissions, “Does anyone really believe that these companies, out of the goodness of their black oil hearts, are spending millions and millions of dollars to protect jobs?”).

materialism.”²⁶⁵ Within two decades of this address, the country had descended into the Great Depression²⁶⁶—painful vindication for President Roosevelt’s concerted warning. A century later, with the Great Recession²⁶⁷ upon us, how will *Citizens United* play out? Will for-profit corporations use their amassed wealth to influence political discourse, or will they remain politically neutral? There is no guarantee that corporations will in fact change their behavior to become more politically involved as a result of *Citizens United*—only the possibility.²⁶⁸ Yet that mere possibility bodes ominously, for with corporations united, what fate remains for “*We the People?*”²⁶⁹

The ultimate goal of reducing the judicial scrutiny applied to the regulation of political speech by for-profit corporations is to give regulators the tools necessary to protect the political process from the distorting influence of wealth—a phenomenon that has been well documented by the Supreme Court.²⁷⁰ Stifling speech is one thing, but responding to pragmatic concerns for the health of the democratic system is quite another. Throughout history, the Constitution has proven that it can be the great equalizer—just as *Dred Scott v. Sandford*²⁷¹ and *Plessy v. Ferguson*²⁷² were vilified

265. Roosevelt, *supra* n. 1.

266. See Pierre Berton, *The Great Depression: 1929–1939*, 19 (Anchor Canada 2001) (describing October 29, 1929—infamously known as “Black Tuesday”—as the day on which the Great Depression began).

267. See Robert J. Samuelson, *The Great Recession’s Stranglehold*, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103038.html> (July 12, 2010) (summarizing the negative consequences of “The Great Recession (as it is widely called)”).

268. *But see* Michael Luo, *Money Talks Louder than Ever in Midterms*, N.Y. Times A13 (Oct. 7, 2010) (available at http://www.nytimes.com/2010/10/08/us/politics/08donate.html?_r=2&ref=us&pagewanted=all) (crediting *Citizens United* with being “more important for the psychological impact it had on the biggest donors” than for the subtle changes the case actually made to the law).

269. U.S. Const. preamble (emphasis added).

270. See *Wisc. Right to Life, Inc.*, 551 U.S. at 520 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting) (highlighting the need to curtail the corrosive influence of corporations in the political process); *McConnell* 540 U.S. at 115 (illuminating the perceived evils at the root of political contributions by corporations); *Austin* 494 U.S. at 660 (recognizing the ability of corporations to influence elections based on “the unique state-conferred corporate structure that facilitates the amassing of large treasuries”); *MCFL*, 479 U.S. at 257 (accentuating the need “to protect the integrity of the marketplace of political ideas” from “the corrosive influence of concentrated corporate wealth”); *Int’l Union United Automobile*, 352 U.S. at 571–575 (recounting the enormous political influence wielded by corporations in the early twentieth century).

271. 60 U.S. 393 (1857).

272. 163 U.S. 537 (1896).

as contrary to the Constitution, so too must *Citizens United*.²⁷³ Properly positing corporate political speech alongside commercial speech in the province of intermediate scrutiny is the key to restoring the First Amendment to the ownership of the many, rather than of the few. Such a result will ensure the preservation of our democratic form of self-government—“government of the people, by the people, [and] for the people”²⁷⁴

273. This is not a comparison between *Citizens United* and either *Dred Scott* or *Plessy*. Rather, this is meant to point out that these two cases, which were wrongly decided by the Supreme Court, were later vindicated by a Constitutional Amendment and a subsequent Supreme Court decision, respectively.

274. Abraham Lincoln, *Gettysburg Address* (Gettysburg, Pa. Nov. 19, 1963) (transcript available at <http://www.ourdocuments.gov/doc.php?flash=old&doc=36&page=transcript>) (emphasis added).