

We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After *Citizens United*

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[Corporations] are not themselves members of “We the People” by whom and for whom our Constitution was established.¹

Introduction

CORPORATIONS ARE NOT, IN FACT, living, breathing human beings, and therefore should not be treated as such in the campaign finance context.² While this may seem like an obvious statement and conclusion, a majority of the United States Supreme Court does not agree. In its much-maligned January 2010 decision in *Citizens United v.*

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1. *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part).

2. It is settled that corporations are “persons” under the Fourteenth Amendment. *Cnty. of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394 (1886). This, of course, does not mean that corporations must be treated as identical to individuals in the campaign finance context. As Justice White correctly noted in dissent in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting), “an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.” Similarly, Professor Ribstein has explained that “even if the corporation is a constitutional ‘person,’ it does not necessarily follow that its speech is accorded the same protection as individuals’ speech.” Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 124 (1992).

Federal Election Commission,³ the Court held—in sweeping and conclusory language—that when it comes to spending money for or against political candidates, corporations should be treated identical to human beings.⁴ That conclusion is not only wrong, but is also ill-conceived.

This Article uses *Citizens United* as a vehicle to provide an initial look at the relationship between the theories of the First Amendment and the conceptions of the corporate form, studied through the lens of electoral speech. This Article broadly explores the interplay between the speech interests of corporations and their members⁵ in engaging in electoral speech and the different theories of the corporate personality. Against that backdrop, this Article discusses a number of reasons why—contrary to what the majority said in *Citizens United*—the government has a compelling interest in limiting corporate electoral speech.

In the campaign finance context, the Court should be concerned with the interests of distinct but overlapping groups—spenders' interests in speaking, the government's interest in curbing corruption and promoting speech rights, and non-spending speakers' and listeners' interests in speaking and hearing political speech. The interests of each of these groups are furthered by restrictions on for-profit⁶ corporate electoral spending.

When analyzing campaign finance restrictions, the Court should first determine whether a campaign finance law impermissibly bur-

3. 130 S. Ct. 876.

4. This Article focuses on corporate electoral speech concerning candidates for political office and leaves for another day a full discussion of corporate lobbying and corporate speech concerning other issues, such as ballot measures. In addition, this Article does not address the propriety of restrictions on media corporations, who are dedicated to disseminating information.

5. As used in this Article, “members” refers to those closely affiliated with corporations, including directors, and officers. In the case of for-profit corporations, the term “members” includes shareholders. In the case of non-profit corporations, the term “members” is used in this Article to refer to individuals who choose to associate themselves with those organizations, such as by donating time or money.

6. In arguing that corporations must be treated as distinct from individuals in the campaign finance context, this Article draws a distinction between speech by for-profit and certain non-profit corporations. Non-profit corporations, unlike for-profit corporations, do not have shareholders who receive residual earnings and are specifically prohibited from receiving any of the assets or property of the corporation. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 502–07 (1981); Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 843–45 (1980). As discussed *infra*, members of for-profit corporations lack the free speech rights of members of some non-profit corporations, and there are various concerns raised by for-profit electoral speech which do not arise from the same speech by many non-profit corporations.

dens the rights of the speaker. In the context of electoral speech, a speaker is equivalent to a spender.⁷ Neither the First Amendment rights of a for-profit corporation itself, nor those of the individual members of a for-profit corporation, are furthered by unrestricted electoral speech.

The Court should next analyze the government's interest in implementing the restriction. In the past the Court has correctly embraced a broad understanding of the compelling governmental interests furthered by campaign finance restrictions;⁸ since *Citizens United*, however, the Court has found that the prevention of corruption or the appearance of corruption—narrowly defined as *quid pro quo* corruption—is the only interest sufficient to uphold campaign finance restrictions.⁹ Under a broader, common sense definition of corruption—which embraces undue influence and preferential access—the government is able to address the serious threats to the integrity of the electoral system. In addition, when a corporation is the speaker, the government is concerned with the rights of shareholders raised by unrestricted for-profit corporate electoral speech.

Finally, when analyzing campaign finance restrictions, the Court should focus on the First Amendment rights of the rest of society, both to listen *and to speak*. Currently the Court focuses solely on listeners' rights and erroneously finds that those rights are furthered by unrestricted corporate electoral speech. However, the rights of listeners are not promoted by such speech, which can distort the political marketplace. In addition, the Court must depart from its current jurisprudential model and take into consideration not only the First Amendment rights of the person or entity spending money (the speaker), the government's interest in preventing corruption or the appearance of corruption, and the listeners' interests in hearing electoral speech, but also the First Amendment rights of those members of the public who speak, but not through the use of funds.¹⁰ Those non-spending speakers could be crowded out of the political discourse without limits on for-profit corporate electoral speech. It is

7. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court found that in the political context, money is essentially the equivalent to speech.

8. See *infra* Part I.

9. *Citizens United v. FEC*, 130 S. Ct. 876, 909–11. As a result, the number of campaign finance restrictions that can withstand constitutional scrutiny has been severely limited.

10. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting) (acknowledging the “competing First Amendment interests” at play when restrictions on corporate electoral speech are at issue).

therefore vital for the Court to consider the First Amendment rights of those who are speaking, but not spending money. When it comes to the ability of for-profit corporations to spend unlimited sums to produce electoral speech, the interest of each of these three groups weighs in favor of restrictions.¹¹

In arguing that for-profit corporations should not be treated as identical to individuals and some non-profit corporations, this Article focuses on one type of speech by corporations—the ability of corporations to spend unlimited general treasury funds on advertisements advocating the election or defeat of candidates. The provision of federal law overturned by the Supreme Court in *Citizens United* addressed only this issue, but the Court made sweeping conclusions about the purported impermissibility of speaker-based identity restrictions.¹²

Specifically, the *Citizens United* Court struck down a portion of the Bipartisan Campaign Reform Act (“BCRA”), commonly known as the McCain-Feingold Act.¹³ The provision at issue prohibited corporations from using general treasury funds on so-called “electioneering communications.”¹⁴ Corporations could, however, speak in the political marketplace by creating separate segregated funds, commonly known as political action committees (“PACs”).¹⁵ This Article, in explaining why for-profit corporate electoral speech must be treated as distinct from most non-profit and individual electoral speech, puts forth a number of reasons why *Citizens United* was wrongly decided.¹⁶

11. *Citizens United*, 130 S. Ct. at 947 (Stevens, J., concurring in part and dissenting in part) (“Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the ‘speakers’ are not natural persons, much less members of our political community, and the governmental interests are of the highest order.”).

12. Relying on the Court’s language concerning the impermissibility of speaker-based identity restrictions, at least one court has concluded that restrictions prohibiting corporations from giving direct contributions to candidates are invalid under the First Amendment. *United States v. Danielczyk*, 788 F. Supp. 2d 472 (E.D. Va. 2011).

13. *Citizens United*, 130 S. Ct. at 917.

14. 2 U.S.C. § 441b (2006). An electioneering communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” made within thirty days of a primary or sixty days of a general election. *Id.* § 434(f)(3)(A).

15. *Id.* § 441b(b)(2). Donations to PACs can be received only from employees of the corporation and stockholders. *Id.* § 441b(b)(4)(A)–(B). Corporations can control the operations of their PACs because they appoint the board of the PAC. Frances R. Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 N.Y.L. SCH. L. REV. 881, 908 (1997); see *FEC v. Nat’l Right to Work Comm. (NRWC)*, 459 U.S. 197, 200 n.4 (1982).

16. While there are numerous reasons why the majority’s opinion in *Citizens United* is ill-reasoned, this Article does not endeavor to provide a comprehensive list of those reasons.

Part I briefly summarizes federal laws that treat corporations as distinguishable from individuals in the campaign finance context and examines Supreme Court case law addressing that difference. Part II discusses a number of theories behind the purpose of the First Amendment and of the theoretical conception of the corporate personality. Part III focuses on a corporate speaker's interest in using general treasury funds to make electioneering communications and explains why the speech rights of for-profit corporations and their members are low when the speech at issue is electoral speech. Part III also explains why, far from promoting the interests of listeners, for-profit corporate electoral speech actually harms the interests of listeners and non-spending speakers. Part IV outlines the compelling governmental interests that demonstrate the propriety of restrictions on for-profit corporate electoral spending, namely concerns of corruption and shareholder protection. This Article concludes by reiterating the need to treat for-profit corporations as distinct from most non-profit corporations and natural persons in the political marketplace. This section of the Article explains which electoral speech made by certain non-profit corporations must be protected under the First Amendment.

I. Congress and the Courts Have Recognized the Need to Treat Corporations as Distinct from Individuals in the Campaign Finance Context

For more than a century, Congress and the Court have recognized the undisputable and unremarkable fact that corporations are not natural persons. Beginning at the turn of the twentieth century, Congress acknowledged the need to restrict the flow of corporate money into the political system.

The Court has, until recently, long-respected this legislative judgment and has in many instances recognized the doctrinal and practical need to treat corporations¹⁷ as distinct from individuals. The following provides a brief history of federal laws that treat corporations as distinct from individuals and summarizes Supreme Court cases that address that distinction.

17. Some of the laws and rulings discussed *infra* address the distinction between individuals and corporations generally and do not focus specifically on the difference between individuals and for-profit corporations.

A. For Over One Hundred Years Congress Has Treated Corporate Electoral Speech as Different from Individual Electoral Speech

The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.¹⁸

Congress has long recognized that corporations lack the same First Amendment rights as individuals and that corporate electoral spending poses unique threats to the integrity of the electoral and political systems. Therefore, since 1907, Congress has treated corporations as different from individuals in the campaign finance context. In that year, Congress passed the Tillman Act, banning corporations from giving direct contributions to federal candidates.¹⁹ Congress passed the Tillman Act for two primary reasons, and these remain the two primary governmental interests that are used to justify, and should be sufficient to uphold, restrictions on corporate electoral speech. First, Congress wished to address concerns of actual or apparent corruption due to the explosion of corporate wealth and the subsequent increase in corporate electoral spending throughout the country.²⁰ Second, Congress sought to protect shareholders from having their money used to support candidates with whom they disagreed.²¹

Four decades after the enactment of the Tillman Act, Congress passed the Taft-Hartley Act (also known as the Labor Management Relations Act).²² This 1947 law prohibited corporations and labor unions from making independent expenditures in support of, or in opposition to, federal candidates.²³ Taft-Hartley was the precursor to the

18. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

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

20. See EDWIN M. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE 12 (1968).

21. See *Citizens United*, 130 S. Ct. at 952 (Stevens, J., concurring in part and dissenting in part) (“[T]he [Tillman] Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed.” (citations omitted)).

22. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136.

23. *Id.* § 304, 61 Stat. at 159.

provision of McCain-Feingold struck down by the Court in *Citizens United*.

Almost twenty-five years later, in 1971, Congress passed the Federal Election Campaign Act (“FECA”).²⁴ In 1974 and 1976, Congress passed significant amendments to that Act.²⁵ The FECA, among other things, maintained the corporate restrictions contained in the Tillman Act and the Taft-Hartley Act and codified the ability of corporations and labor unions to use PACs to make independent expenditures.²⁶ Congress enacted the FECA and subsequent amendments to that act for the same two reasons it enacted the Tillman Act—to guard against corruption that may arise from corporate political spending and to protect the shareholders of corporations that sought to spend money in the political marketplace.²⁷

Congress’ next major overhaul of the campaign finance system came in 2002 with the passage of the BCRA.²⁸ The BCRA strengthened the FECA’s prohibition on corporate spending on advertisements advocating the election or defeat of federal candidates by closing certain loopholes in the law.²⁹

24. Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3.

25. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1263; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

26. See 2 U.S.C. § 441b (2006). In 1972, the Court cited a member of Congress who proclaimed that the use of PACs allowed for “the proper balance in regulating corporate and union political activity required by sound policy and the Constitution.” *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 431 (1972) (interpreting the Taft-Hartley Act, which had created the PAC option); see also Adam Winkler, *Other People’s Money*, 92 GEO. L.J. 871, 934 (2004) [hereinafter Winkler, *Other People’s Money*] (explaining the importance of the PAC option to shareholders’ rights); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1262 (1999) [hereinafter Winkler, *The Corporation in Election Law*] (discussing the creation and necessity of the PAC option).

27. The two primary purposes of section 441b of the FECA, which contained the prohibition against corporations from using general treasury funds on independent expenditures, were to: (1) “ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions”; and (2) “protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.” NRWC, 459 U.S. 197, 207–08 (1982).

28. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

29. Section 203 of the BCRA, which prohibited corporations from using general treasury funds on electioneering communications, was drafted as a response to a loophole created by the *Buckley* Court. See Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 26 NEXUS CHAP. J.L. & PUB. POL’Y 59, 66–67 (2011). The *Buckley*

As this brief legislative history demonstrates, for more than a century Congress has demonstrated a consistent, unwavering commitment to treating corporations as different from individuals in the campaign finance context.³⁰ Prior to *Citizens United*, the Court had accepted that Congress could subject corporations to more restrictions than could validly apply to individuals when the speech concerned candidate elections.³¹

B. For Decades, the Supreme Court Has Recognized the Need to Treat Corporate Electoral Speech Concerning Candidates as Distinct from the Same Speech by Individuals

The Court has long respected legislative judgments concerning the need to treat corporate electoral speech concerning candidates as distinct from individual electoral speech advocating the election or defeat of candidates.³²

In 1976, in *Buckley v. Valeo*—the Supreme Court’s seminal case in the area of campaign finance law—the Court reviewed the constitu-

Court read the FECA as prohibiting speakers from making independent expenditures only where the communication contained the so-called “magic words” of express advocacy, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.” *Buckley*, 424 U.S. at 44 n.52. Hence, as long as a spender avoided use of the magic words, she could spend unlimited funds on communications that in essence advocated for the election or defeat of federal candidates. Richard L. Hansen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1074 (2008). Those communications, unlimited under *Buckley*’s reading of the FECA, were called “sham issue advertisements.” See *id.* Section 203 of the BCRA substantially closed that loophole by clarifying the meaning of “electioneering communications.” See *McConnell v. FEC*, 540 U.S. 93, 103 (2003); see also Winkler, *Other People’s Money*, *supra* note 26, at 935 (“The BCRA’s new limitations on corporate and union electoral activity further restrict executives’ ability to misuse ‘other people’s money’ by prohibiting expenditure of general treasury funds on parties or sham issue advertising campaigns.”).

30. See *Citizens United v. FEC*, 130 S. Ct. 876, 946 n.46 (Stevens, J., concurring in part and dissenting in part) (“Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.”); see also C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s the Value of Free Speech*, 130 U. PA. L. REV. 646, 648–49 (1982) (“Passage of these laws was thus the product of a people’s attempts to exercise some control over their destiny, and the object of the laws, moreover, was to create a political process that would better enable people to exercise such control.”).

31. See, e.g., *NRWC*, 459 U.S. at 209–10.

32. The one exception to this statement is *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) discussed *infra*, where the Court carved out a small exception to the general prohibition against a corporation’s use of general treasury funds on independent expenditures for small non-profit, ideological corporations.

tionality of many portions of the FECA.³³ Most significantly for this Article, the parties did not even challenge the FECA's prohibition on a corporation's use of general treasury funds for independent expenditures because it was an accepted part of campaign finance law.³⁴

The Court first addressed the constitutionality of limits on corporate spending in the political marketplace two years later in *First National Bank of Boston v. Bellotti*.³⁵ *Bellotti*, however, addressed a question fundamentally different from the one discussed in this Article. *Bellotti* therefore provides little support for the *Citizens United* Court's newfound aversion to speaker-based identity restrictions on electioneering communications.

First, in *Bellotti*, the Court addressed the constitutionality of a law that restricted the ability of corporations to make independent expenditures concerning ballot measures, not candidates.³⁶ While spending concerning candidates can give rise to corruption or its appearance, spending regarding ballot measures raises no similar concerns.³⁷ The Court emphasized that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence *candidate* elections."³⁸ The *Citizens United* majority recklessly ignored this distinc-

33. *Buckley*, 424 U.S. at 6. The *Buckley* Court, for instance, upheld contribution limits, disclosure provisions, and presidential public financing provisions. It struck down restrictions on individual expenditures limits, including a restriction on the ability of individuals to make independent expenditures in support of, or in opposition to, federal candidates. *Id.* at 143.

34. *Citizens United*, 130 S. Ct. at 954 (Stevens, J., concurring in part and dissenting in part).

35. 435 U.S. 765 (1978).

36. *Id.* at 766. As discussed *infra*, the Court focused not on the rights of the speaker, but on the rights of the listener, and found that "direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* at 792 n.29 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

37. *Id.* at 790 ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citation omitted)); Susan Ross, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 451 ("Unlike candidates, referenda are not as susceptible to corruption because issues do not create political 'debts.' Corporations' contributions regarding referenda do not create a political debt because all voters make the decision, not one individual."); *see also Citizens United*, 130 S. Ct. at 959 (Stevens, J., concurring in part and dissenting in part) ("A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation.").

38. *Bellotti*, 435 U.S. at 788 n.26 (emphasis added).

tion, essentially flouting *Bellotti's* precedential value by saying the Court did not mean what it said.³⁹

Second, *Bellotti* addressed a law that differentiated between two types of corporations—those whose business was materially affected by proposed ballot measures and those whose business was not.⁴⁰ Specifically, the law in *Bellotti* prohibited corporations from making independent expenditures about ballot measures unless that measure materially affected the corporation's business.⁴¹

Third, the law at issue in *Bellotti* did not provide corporations with the option of creating and spending money through a PAC.⁴² Unlike the restriction addressed in *Citizens United*, corporations in *Bellotti* were completely prohibited from making independent expenditures. Hence, despite sweeping language in *Citizens United* disclaiming speaker-based identity restrictions,⁴³ there is little in *Bellotti* to dictate that corporations must be treated as identical to candidates with respect to corporate electioneering communications.⁴⁴

In 1986, in *Federal Election Committee v. Massachusetts Citizens For Life* (“*MCFL*”), the Court carved an exception to the general prohibition on a corporation's use of general treasury funds on independent expenditures.⁴⁵ The exception articulated by the Court applied to a

39. See *Citizens United*, 130 S. Ct. at 903.

40. *Id.* at 959 (Stevens, J., concurring in part and dissenting in part) (“*Bellotti* thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome.”).

41. The statute at issue provided that:

[N]o business corporation incorporated under the laws of or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Bellotti, 435 U.S. at 768 n.2 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

42. *Id.* at 775 (“Meanwhile, § 8 remains on the books as a complete prohibition of corporate expenditures related to individual tax referenda, and as a restraining influence on corporate expenditures concerning other ballot questions.”).

43. *Citizens United*, 130 S. Ct. at 898–904.

44. *Id.* at 960 (Stevens, J., concurring in part and dissenting in part) (“The difference [between *Citizens United* and *Bellotti*] . . . is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their position to the people, not to the corporations with the deepest pockets.”).

45. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 239 (1986).

small class of ideological, non-profit corporations.⁴⁶ In that case a small, non-profit corporation, Massachusetts Citizens for Life (“MCFL”), used general treasury funds to distribute a newsletter that essentially endorsed certain federal candidates.⁴⁷ The Court found that MCFL’s expenditure violated the federal prohibition, but that the restriction could not be constitutionally applied to that non-profit corporation.⁴⁸

The *MCFL* Court adopted a three-pronged test to determine when a corporation fits within the Court’s exception to the general prohibition on a corporation’s use of general treasury funds for independent expenditures.⁴⁹ First, MCFL “[w]as formed for the express purpose of promoting political ideas, and [could not] engage in business activities.”⁵⁰ Put another way, MCFL was an ideological, non-profit corporation and could not be confused with a business corporation. Second, MCFL had no shareholders, and those affiliated with the organization had no economic reason to remain affiliated if they disagreed with its political activity.⁵¹ In fact, the Court found that people who contributed to MCFL did so precisely because they supported its political activities.⁵² Hence, MCFL’s speech was directly traceable to the beliefs of its members, and there were no concerns about the need to protect dissenting shareholders. Third, MCFL could not act as a conduit for for-profit corporate electoral spending as it was not established by a business corporation and had a policy of not accepting contributions from such corporations.⁵³ Therefore, electoral speech by MCFL was protected because it was more akin to speech by a political organization than a for-profit corporation.⁵⁴

Four years later, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan State statute modeled after the federal prohibition on a corporation’s use of general treasury funds on independent expenditures.⁵⁵ In that case, the Chamber of Commerce (“the

46. *Id.* at 263–64. The statute at issue in *MCFL*, 2 U.S.C. § 441b (2006) of the FECA, prohibited corporations from using treasury funds to make an independent expenditure “in connection” with a federal election.

47. *MCFL*, 479 U.S. at 243.

48. *Id.* at 251, 263.

49. *Id.* at 263–64.

50. *Id.* at 264.

51. *Id.*

52. *Id.* at 260–61.

53. *Id.* at 264.

54. *Id.* at 263. Additionally, in its Conclusion, this Article argues that the Court should follow the lead of lower courts and create a de minimis exception to *MCFL*.

55. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990).

Chamber”) did not fall within the exception elucidated in *MCFL* because: (1) it was formed for a variety of purposes, including, but not limited to, promoting political ideas; (2) it had members who would be reluctant to leave the corporation even if they disagreed with the corporation’s electoral speech because they economically benefitted from being a member of the Chamber; and (3) more than seventy-five percent of the Chamber’s members were business corporations who could use the Chamber to circumvent the restriction on a corporation’s use of general treasury funds for independent expenditures.⁵⁶ Therefore, unlike in *MCFL*, the corporation’s speech in *Austin* could not be traced to its members, and the corporation had members who might object to the speech but would feel compelled to remain affiliated with the corporation.

The Court’s next major decision in this arena came in 2003 in *Federal Election Commission v. McConnell* when the Court reviewed the constitutionality of the BCRA. The *McConnell* Court upheld the BCRA’s prohibition on corporations’ use of general treasury funds for electioneering communications.⁵⁷ The Court found that the prohibition served compelling governmental interests and was neither overbroad nor underinclusive.⁵⁸

In 2010, in *Citizens United*, the Court summarily struck down the same law reviewed by the *McConnell* Court.⁵⁹ Plaintiffs, Citizens United, a non-profit corporation that accepted a small portion of its funds from for-profit corporations, challenged the federal law as it applied to its ability to make and distribute a feature-length movie and accompanying advertisements that were critical of then-presidential candidate Hilary Clinton. The movie was funded through Citizens United’s general treasury funds and was considered to be an electioneering communication.⁶⁰ The Court transformed the as-applied challenge into a facial challenge and invalidated the statute.⁶¹ Justice Kennedy’s majority opinion focused on the impermissibility of identity-based speech restrictions and the purported need for the listeners’

56. *Id.* at 662–65.

57. *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003).

58. *Id.* at 208.

59. *Citizens United v. FEC*, 130 S. Ct. 876, 882 (2010).

60. *Id.* at 889.

61. *See id.* at 892–93.

rights—the public’s right to receive corporate electioneering communications.⁶²

II. The Theories of the First Amendment and of the Corporate Personality Help to Demonstrate the Validity of Restrictions on For-Profit Corporations

The First Amendment electoral speech rights of for-profit corporations and their individual members are significantly weaker than those of individuals and non-profit corporations and their individual members. To demonstrate why this is so, it is important to first examine the theories and purposes behind the First Amendment and the theories of the corporate personality.

A. Theories of the Freedom of Speech

There are a few prevalent theories of free speech. Under one theory, free speech allows individuals to seek self-fulfillment, self-realization, or self-actualization.⁶³ Under another theory, free speech promotes a marketplace of ideas where the truth will emerge.⁶⁴ Finally, under a third theory, speech facilitates a political debate in which citizens form views of public officials, which in turn enables democratic self-government.⁶⁵ Under each of these theories, restric-

62. See *id.* at 899 (“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”).

63. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[T]hose who won our independence believed that the final end of the state was to make men free to develop their faculties”); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47–69 (1989); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4–7 (1966); Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 993–94 (2011); Adam Winkler, *Beyond Bellotti*, 32 *LOY. L.A. L. REV.* 133, 197–98 (1998). For a slightly different view of self-realization, which includes the right to receive information, see Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 *U. PA. L. REV.* 678 (1982).

64. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN STUART MILL, *ON LIBERTY* 19–22 (Alburey Castell ed., Harlan Davidson, Inc. 1947) (1859); Bhagwat, *supra* note 63, at 993; see also Randall P. Bezanson, *Institutional Speech*, 80 *IOWA L. REV.* 735, 762 (1995) (“Beginning, perhaps, with the Holmes metaphor of a ‘marketplace of ideas,’ the speech guarantees have been viewed as not only reflecting a central individual liberty of thought and belief manifested through speech, but also as serving social and structural purposes in a free democratic society.”).

65. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (1948); Bhagwat, *supra* note 63, at 994; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 255; Ribstein, *supra* note 2, at 128 (“[F]ree speech is important to help people make decisions in a democratic society.”); see also Owen M. Fiss,

tions on for-profit corporate electioneering communications should be upheld because unlimited for-profit corporate electoral speech does not serve the goals of free speech.⁶⁶

One can broadly frame those three theories under a different paradigm such that the First Amendment is either an individual liberty right focused on the speaker's interest in self-realization,⁶⁷ or an instrumental, structural right focused on the listener and the utility of speech to society.⁶⁸ This distinction recognizes that "the First Amendment contains within it two theoretical elements: one concerning individual liberty and freedom of thought, and the other concerning the value of free information and opinion in a democratic and free soci-

Free Speech and Social Structure, 71 IOWA L. REV. 1405, 1410 (1986) ("We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."); cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (noting that free speech is important to advance the rights of association). See generally Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1232-54 (1991) (analyzing corporate speech in the broader context of collective speech).

66. Susan W. Dana, *Restrictions on Corporate Spending on State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*, 27 HASTINGS CONST. L.Q. 309, 339 (2000) ("[T]he value assigned to corporate political speech, as opposed to speech by a natural person, depends on a large extent upon which theory of free speech is applied.")

67. See Dan-Cohen, *supra* note 65, at 1233 ("The . . . right to speak is linked to the ideas of self-expression and self-realization, both perceived as constituents of, or preconditions for, flourishing personhood."); *id.* at 1232 ("[One] point of view considers the law as primarily committed to the ideal of individual autonomy [under which] . . . the chief purpose of the law is to provide adequate protection to individual rights, understood as expression and safeguards of the individual's autonomy, irrespective of the general societal consequences of such protection.")

68. See also *id.* at 1232 ("[Seen] from the utilitarian perspective, the law is primarily concerned with the promotion of social welfare."); *id.* at 1233 (stating that listeners' rights are focused on the availability of, and access to, information and ideas); Bezanson, *supra* note 64, at 739 ("The First Amendment should be understood as principally, and specifically, a protection for individual speech, or speech that reflects an individual's liberty to engage in the voluntary and intentional act of expressing his or her own beliefs."). But see Fiss, *supra* note 65, at 1409-10 ("The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."); Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 873 (2002) (discussing Justice White's dissent in *Bellotti* and arguing that corporate political speech could be regulated because it is not "an integral part in the development of ideas, of mental exploration and of the affirmation of self" (internal quotation marks omitted)).

ety.”⁶⁹ It is well recognized that the First Amendment protects not only the right to speak, but also the right to hear.⁷⁰

Similar to the distinction between the theories that treat the First Amendment either as a speaker-based right or as a listener-based right, another argument suggests that there are two reasons why the freedom of speech is fundamental.⁷¹ The first reason is that it is “essential to human respect and dignity,” which means it is a “natural” right.⁷² Hence, if speech is a natural right, the focus is on the speaker to say what she wishes, and the significance of the right lies with its ability to further an individual’s self-actualization, regardless of its utility to anyone else. The second reason that the freedom of speech is fundamental is that its existence “is necessary to the functioning of an ordered society.”⁷³ Under this second rationale, the freedom of speech is a “policy-based” right, and the focus is on the listener and the utility of the speech for society.⁷⁴

While the freedom of speech is a fundamental right under both theories, the reasons for protecting that right are different.⁷⁵ Natural rights “are not subject to traditional cost-benefit analysis” while policy-based rights are.⁷⁶ Put another way, it is much easier to restrict the

69. Bezanson, *supra* note 64 at 761; *id.* at 763–64 (“Today we see a First Amendment guarantee premised on two quite distinct theoretical foundations: The first foundation is based on the freedom of the individual to formulate and express beliefs, and thus rests on the rights of the *speaker*, the second is based on the utilitarian value of the *speech* to society at large, as a political, functioning entity, and thus rests on the speech and its audience.”).

70. First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) (“The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas.”); Dan-Cohen, *supra* note 65, at 1233 (explaining that the freedom of speech is supported by two sets of interests, those of the speaker and those of the listener); Dana, *supra* note 66, at 340 (contrasting the self-actualization theory of freedom of speech with the “theory [which] states that the public must be able not only to speak, but also to hear other points of view in order to be able to participate in the democratic process.”).

71. See, e.g., Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 80–81 (2010).

72. *Id.* at 80.

73. *Id.* at 81.

74. *Id.*; see also Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 663 (2011) (“The central distinction is between collective speech that can be traced to individuals’ intentions and that which cannot, between speech protected as [a] function of the individual speaker’s liberty and speech that cannot be justified in the name of liberty.”).

75. Melone, *supra* note 71, at 81.

76. *Id.*

freedom of speech if it is a policy-based right, as opposed to a natural right.

Regardless of the theory of the First Amendment that one espouses, unlimited for-profit corporate electoral speech does not promote either speakers' or listeners' First Amendment rights. As discussed in depth in Part III, the individual rights view of the First Amendment is inapplicable to corporate speech.⁷⁷ Corporate speech simply does not foster self-actualization of the corporate entity itself.⁷⁸ When the freedom of speech is categorized as a speaker-based natural right, the focus of the right must therefore be on the free speech rights of the individual members of a corporation and not a corporation itself. Put another way, courts must look behind the corporate form to determine if the speech interests of any natural persons associated with the corporation are promoted by corporate speech. However, as demonstrated *infra*,⁷⁹ for-profit corporate electoral speech does not promote the self-realization or associational rights of the individual members of the corporation, because for-profit corporate electoral speech cannot be traced to the speech of its members.

Having determined that for-profit corporate electoral speech does not promote speakers' interests, one must next determine whether such speech promotes listeners' interests under a view of the First Amendment that focuses on the rights of listeners and understands the importance of the freedom of speech in its promotion of a marketplace of ideas and its fostering of democratic self-government.⁸⁰ The answer is again "no." Even under this view, restrictions on for-profit electoral speech stand on firm ground. Restrictions on for-profit electoral speech actually promote the rights of listeners by allowing for a greater diversity of voices to be heard. Restrictions, therefore, serve to prevent for-profit corporations from drowning or crowding out other voices with speech that does not further the First Amendment rights of the speaker.

77. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Baker*, *supra* note 30, at 652.

78. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting); see also *Baker*, *supra* note 30, at 652 ("Political speech by a corporation, as in *Bellotti*, should not be protected, because these communications do not derive from the values or political commitments of any individuals.").

79. See *infra* Part III.A.2. and note 121.

80. See, e.g., *Bezanson*, *supra* note 64, at 761 (arguing that institutional speech "can lay no legitimate claim to protection under the heading of individual liberty, and thus must be assessed only in terms of the second element relating to the functional value of speech in a democratic and free society").

B. Conceptions of the Corporate Personality

Over the past decades, much scholarly ink⁸¹ has been spilled on the three main theories of the corporate personality: (1) the artificial theory, (2) the aggregate theory, and (3) the real entity theory.⁸² Determining one's theoretical conception of the corporate personality dictates, at least in part, the amount of First Amendment protection that should be accorded to a corporate speaker. However, members of the Court have consistently done a dismal job of explaining to which theory they are adhering. Some Justices have at times followed more than one theory in the course of a single opinion.

The artificial theory—also known as the grant theory (because the state grants powers and rights to the corporation) or the fictional entity theory—provides that a corporation is a state-creation and possesses only those rights granted to it by the state and which are neces-

81. See, e.g., Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1001; Linda L. Berger, *On Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 960–61 (2007); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1000 (1998); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 95–96 (1995); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1455 (1992); Charles D. Watts Jr., *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. MIAMI L. REV. 317, 325–30 (1991).

82. A fourth theory, entitled the nexus of contracts theory, the contract theory, or contractarian model, “strips away the corporation’s personification and exposes the network of underlying contracts, thus eliminating any fundamental distinction between a corporation and other types of long-term contracts.” Ribstein, *supra* note 81, at 96. See generally William M. Bratton, *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989). The corporation as a separate entity disappears, and when analyzing the constitutionality of speech restrictions, the speech is attributed to the person responsible for it, typically a manager or director. Ribstein, *supra* note 81, at 133. Government regulations that limit constitutional rights are analyzed the same way that regulations on other types of contracts would. The state’s power is limited to its ability to enforce any other type of private contract. *Id.* at 109. If a corporation is viewed as a nexus of contracts, it is difficult to permit regulations on corporate electoral speech. *Id.* at 136. However, this theory, whatever its merits, is arguably not easily applicable to ideological non-profit corporations. Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Healthcare Enterprise*, 5 YALE J. HEALTH POL’Y L. & ETHICS 1, 34 n.130 (2005) (“Applying strict contractarian analyses to nonprofit organizations faces intractable problems given the absence of meaningful bargaining between patrons and agents and the lack of market for mechanisms to monitor their behavior.”); see, e.g., Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1454–55, n.247 (1998) (discussing the structure of a non-profit corporation). It is an economic model under which a corporation is a web of contracts entered into “among the parties to the firm—shareholders, employees, creditors and others” for labor, services, capital, and materials. Ribstein, *supra* note 81, at 113. Hence this theory may simply be unhelpful to any conception of ideological non-profit corporations.

sary to effectuate the purpose of the entity.⁸³ Under this theory, corporations are artificial entities endowed with state-created benefits and, in exchange for those benefits, are subject to numerous regulations by the state.⁸⁴ Corporations, for instance, are given perpetual life, favorable tax treatment, limited liability, and separation of ownership and control.⁸⁵

Under the artificial theory, the corporation is not entitled to heightened First Amendment protection, and restrictions on corporate speech “would be merely one of the many ways in which the law sets the parameters of the corporation’s permissible business conduct.”⁸⁶ This theory provides that the value of corporate speech is restricted to the public’s interest in receiving that speech.⁸⁷ The importance of corporate speech, therefore, lies with the listener, not the speaker.⁸⁸

A number of Justices have, at various times, espoused this theory. Perhaps the most famous judicial statement embracing the artificial theory was written in 1819 by Chief Justice John Marshall: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it”⁸⁹

Justice Rehnquist adhered to the artificial entity theory in his dissent in *Bellotti*, explaining that “the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons”⁹⁰ Justice Rehnquist found that corporations possess only

83. Winkler, *The Corporation in Election Law*, *supra* note 26, at 1244; *see also* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863–64 (2007) [hereinafter Winkler, *Corporate Personhood and the Rights of Corporate Speech*] (“[I]n the early decades of the U.S., the states exercised considerable control over corporations that made them unlikely holders of so-called rights against the government. Corporations could only be formed by an affirmative grant by the legislature and were required to have a ‘public purpose.’”).

84. Bezanson, *supra* note 74, at 660 (Corporations are “pervasively regulated at the state and federal level,” and “[r]equirements pertaining to limited purposes, the structure of governance, and the rights of shareholders and other officers and boards, all serve to shape and limit the expressive activity of the organization.” (footnote omitted)); *see also* Ross, *supra* note 37, at 461 (“The corporation receives special privileges from the state, not available to natural persons, in exchange for regulation.”).

85. *See, e.g.*, Dan-Cohen, *supra* note 65, at 1242.

86. Baker, *supra* note 30, at 655.

87. Berger, *supra* note 81, at 960.

88. *See id.*

89. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

90. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting). Rehnquist noted that “the liberty protected by [the Fourteenth] Amendment ‘is the

those rights granted by the state and rights that are “incidental to its very existence.”⁹¹ Justice Rehnquist argued that the right of political expression was not necessary in order for commercial corporations to carry out the purposes for which states allowed them to exist.⁹² Cases that uphold restrictions on corporate speech tend to rely, in part, on the artificial entity theory of the corporate personality, which provides that corporations are not identical to individuals.⁹³

Courts striking down restrictions on corporate speech typically rely on the second and third theories, which treat corporations as similar to individuals. The aggregate theory provides that a corporation is a collective, or group, of members and shareholders.⁹⁴ Under this theory, therefore, the corporation gleans its First Amendment rights from the individual members of the group.⁹⁵ The best example of this theory comes in the majority opinion of *MCFL*.⁹⁶ There, the Court treated a small non-profit ideological corporation as akin to a political association, not a for-profit corporation.⁹⁷ In that case, the theory was

liberty of natural, not artificial persons.” *Id.* at 822 (quoting *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906)); *see also* Ribstein, *supra* note 2, at 120–21 (“Justice Rehnquist argued in his *Bellotti* dissent that corporate political speech is not protected simply because this is not one of the privileges states have chosen to confer on their legal creations.”); Watts, *supra* note 81, at 363 (“One who views the corporation as purely a creature of state statute, as does Chief Justice Rehnquist, limits First Amendment values to the public interest in a free exchange of ideas. Values of self-expression and self-defense via advocacy would be inapplicable.”).

91. *Bellotti*, 435 U.S. at 824 (Rehnquist, J., dissenting) (quoting *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636); *see also* Winkler, *The Corporation in Election Law*, *supra* note 26, at 1259 (explaining that in contrast to those who espouse the natural entity view, those who adhere to the artificial entity view, like Rehnquist, “would accept electoral regulation limiting corporate political speech as a condition of doing business”).

92. *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting). In sum, it was Justice Rehnquist’s view that “any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.” *Id.* at 826–27.

93. *See* Berger, *supra* note 81, at 960.

94. *See, e.g.*, Greenwood, *supra* note 81, at 1009 (explaining that under the aggregate theory, a corporation is “‘really’ just its ‘members’ and, accordingly, entitled to the same protection the ‘members’ would have”).

95. Berger, *supra* note 81, at 961; *see also* Watts, *supra* note 81, at 365 (“[A]n aggregate vision anticipates that the end results of the atomistic transactions within the corporate structure derive from choices made by shareholders.”).

96. *See* *MCFL*, 479 U.S. 238, 261 (1986). In addition, Justice Brennan appeared to espouse this view in his concurrence in *Austin*, where he stated that corporate general treasury funds are a shareholder’s money. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 670 (1990) (Brennan, J., concurring).

97. *See* *MCFL*, 479 U.S. at 261; *see also* Bezanson, *supra* note 74, at 656 (“It was not the Constitution’s purpose to protect corporations, as opposed to political organizations of like-minded people, from the government.”).

applicable because the corporation's speech was directly traceable to its members who associated with the corporation specifically to support a set of political ideas.

Justice Scalia at times relies on the aggregate conception of the corporation.⁹⁸ The rationale behind Justice Scalia's opinions often rests on the expressive nature of corporations as merely aggregations of individuals.⁹⁹ For instance, Justice Scalia rightly declared in a separate opinion in *McConnell* that "[t]he freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for *expressive purposes*—is part of the freedom of speech."¹⁰⁰ But of course, as discussed in depth *infra*, shareholders of for-profit corporations do not join together for expressive purposes.¹⁰¹ Similarly, in his concurrence in *Citizens United*, Justice Scalia compared corporate speech to speech by political parties, saying that the latter is the speech "of many individual Americans, who have associated in a common cause"¹⁰² Justice Scalia's point, while inapplicable to for-profit corporate electoral speech, supports the speech rights of certain ideological non-profit corporations under the aggregate entity theory.

The aggregate theory simply cannot be used to protect for-profit corporate electoral speech. Protecting speech rights under this theory would necessitate erroneously treating a for-profit corporation like a group of likeminded individuals joined together to further political or ideological objectives, rather than an array of shareholders joined together for the economic purpose of maximizing their wealth. As discussed in Part III.A.2, the rights of for-profit shareholders are not promoted by for-profit corporate electoral speech, and for-profit political speech cannot be traced to the views of its shareholders.

98. See, e.g., Watts, *supra* note 81, at 362.

99. Professor Bezanson argues that Justice Scalia's:

[P]oint seems to be that corporations, like other expressive groups, *can* be fully protected First Amendment speakers, at least as long as their speech qualifies as speaking because of the representativeness of the speech to the views and intentions of the owners or members. If not, we might surmise, their inanimate (artificial) "speech" might be protected, but in a different fashion.

Bezanson, *supra* note 74, at 665.

100. *McConnell v. FEC*, 540 U.S. 93, 255 (2003) (Scalia, J., concurring in part and dissenting in part) (emphasis added); see also Gary M. Bishop, *Corporate Speech and the Right of Response in the Commercial Free Zone*, 54 WAYNE L. REV. 1149, 1189 (2008) (discussing Justice Scalia's dissent in *McConnell*).

101. See *infra* Part III.A.2.

102. *Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring); Melone, *supra* note 71, at 84.

The real or natural entity view provides that a corporation is “akin to a natural individual with inherent rights, such as freedom of speech”¹⁰³ This view, therefore, dictates that corporate “speech is attributed to the corporate entity rather than to individuals.”¹⁰⁴ Under this theory, a corporation is a discrete entity controlled by its managers and is separate from the state and from the individual members of the corporation.¹⁰⁵ The Court has at times adopted the real entity theory. Justice Powell, writing for the majority in *Bellotti*, implicitly adhered to the natural entity view by imbuing corporations with political speech rights.¹⁰⁶

This Article specifically rejects the natural or real entity conception of corporations in the context of for-profit corporate electoral speech. As discussed in Part III.A, corporations lack natural rights. This is in part why this Article rejects the real entity view of the corporation in this context and argues that corporate speech is entitled to less protection than individual speech. Corporate speech is, by definition, derivative speech, or speech-by-proxy.¹⁰⁷ Quite obviously, a corporate entity cannot speak for itself. A corporation speaks when someone is hired to communicate for it. There will always be an individual or group of individuals deciding when and how to speak on behalf of the corporation in the political marketplace.¹⁰⁸ However, the human who is speaking is acting as an agent, not for that person’s

103. Winkler, *The Corporation in Election Law*, *supra* note 26, at 1244. Under this view, “corporations enjoy full First Amendment speech protections and it would be unconstitutional for a state to require a corporation to forfeit those rights to gain the state-conferred benefits that come with incorporation.” *Id.* at 1259.

104. Ribstein, *supra* note 81, at 129.

105. See Greenwood, *supra* note 81, at 1010 (explaining that under this theory, “the corporate person [is] a rights-bearing individual with its own interests and goals”); see also Ribstein, *supra* note 81, at 129 (explaining that this theory is also known as the corporate person theory); Berger, *supra* note 81, at 961; Watts, *supra* note 81, at 327–28 (“The natural entity model reflected the general attitude that neither states nor shareholders could effectively check management’s power over these massive entities.”).

106. Winkler, *The Corporation in Election Law*, *supra* note 26, at 1258 (stating that Justice Powell’s opinion “granted the corporation broad speech protection as if it were a natural rights holder, but carefully avoided giving explicit recognition of the natural entity view”); see also Avi-Yonah, *supra* note 81, at 1032.

107. Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin* Right to Life, 27 ST. LOUIS U. PUB. L. REV. 267, 295 (2008) (explaining that “[i]f the corporate entity’s rights are derivative, then the rights of the members or contributors within the corporate entity are central issues for a political speech framework”); see also *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part).

108. See, e.g., Greenwood, *supra* note 81, at 1014 (“[A] corporation is not obviously the sort of thing that can speak: some human must speak on its behalf”).

own self-actualization.¹⁰⁹ Hence, corporate speech is one step removed from the speech of a living, breathing human and is likely unrelated to the liberty interests of the individual behind the speech.

Of course, no single conception of the corporation is complete or exclusive, and corporations, to some extent, fall within each of these theories.¹¹⁰ Indeed, the Justices have alternatively and inconsistently applied each of these theories in various opinions dealing with the constitutionality of restrictions on corporate electoral speech. Simply put, this Article argues that for-profit corporate electoral speech should not be protected.¹¹¹

In sum, the artificial entity theory lends support to the argument that for-profit electoral speech should be restricted because the government may subject corporations to numerous regulations in exchange for endowing those entities with benefits, and such speech is not necessary to effectuate the purposes for which the business corporations were created. The aggregate theory similarly supports the restriction of for-profit electoral speech because such speech is not traceable to its members. This theory also lends support for the protection of certain non-profit electoral speech where the corporation functions like a political association, and its speech is traceable to that of its members. This Article rejects the artificial entity theory in the context of corporate electoral speech. Such speech is by definition derivative speech, which may not represent the views of the individuals speaking through the corporate form.

109. See, e.g., *id.* at 1056 (“In the corporate context, it should be uncontroversial that ordinarily corporate spokespeople speak on behalf of the corporation, rather than themselves, and accordingly that the autonomy at issue is the corporation’s, not their own.”).

110. Hill, *supra* note 107, at 295 (explaining that these three theories of corporations follow the “three broad patterns for analyzing the relationship between an organization and its members, or, if one prefers, between members of their organization: (I) [sic] both the members and the corporate entity might be treated as having independent rights under the First Amendment; (ii) corporate entities might be treated as deriving First Amendment rights from their members; or (iii) members might be treated as having waived certain of their First Amendment rights once they join or transfer funds to a corporate entity”).

111. As Justice Stevens explained in his dissent in *Citizens United*, “[i]t is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern.” *Citizens United*, 130 S. Ct. at 972 n.72 (Stevens, J., concurring in part and dissenting in part).

III. Unrestricted For-Profit Corporate Electoral Speech Does Not Promote the First Amendment Interests of Speakers and Listeners

The following explains that, quite obviously, a corporation itself lacks natural speech rights, and that the speech and associational rights of members of a for-profit corporation are not promoted by unrestricted for-profit corporate electoral speech. In addition, the rights of listeners and non-spending speakers are similarly not promoted by unrestricted for-profit corporate electoral speech. Quite the opposite: restrictions on such speech actually promote the rights of listeners and non-spending speakers.

A. Corporations Lack Self-Expressive Rights, and the Self-Expressive Rights of Individual Members of For-Profit Corporations Are Not Furthered by Corporate Electoral Speech

There are two self-realization interests at issue regarding restrictions on corporate electioneering communications. First, there are the rights of the corporation itself. Second, there are the rights of the individual members of the corporation. In both cases, restrictions on for-profit corporate political spending do not burden self-expressive rights. Hence, restrictions on for-profit corporate speech do not burden the associational rights of members of for-profit corporations.

1. Corporate Electoral Speech Does Not Further a Corporation's Self-Expressive Rights Because Corporations Themselves Lack Self-Realization Rights

[A] corporation cannot have “natural rights.” . . . [A] corporation is neither spawned by a creator or deity nor entitled to rights by virtue of its humanity.¹¹²

Corporations lack natural rights and “have no dignity interest to preserve and no character to develop. Nor do corporations participate in political debate to sharpen their ‘faculties for thought.’”¹¹³ Corporations themselves lack self-actualization or self-expressive rights, as

112. Melone, *supra* note 71, at 82.

113. Winkler, *supra* note 63, at 198. Professor Winkler has noted that “the constitutive conception seems to be particularly dependent upon the human characteristics of speakers: their dignity and rational faculties.” *Id.* at 198; *see also Citizens United*, 130 S. Ct. at 950, 972 (Stevens, J., concurring in part and dissenting in part) (explaining that corporations have “no consciences, no beliefs, no feelings, no thoughts, no desires” and that when “[the Framers] constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind”).

they have no capacity for self-realization.¹¹⁴ The freedom of speech, which flows directly from the freedom of thought, is “the quintessential *human* characteristic.”¹¹⁵

As discussed *infra*, corporate electoral speech rights are derivative rights based on the rights of the individual members of the corporation to speak and associate, and of the public to hear that speech.¹¹⁶ However, as this Article explains, neither the rights of individual members of for-profit corporations nor the rights of listeners are furthered by for-profit corporate electoral speech. Corporate speech is therefore “furthest from the core of political expression”¹¹⁷ Thus, corporate speech can be “subject to restrictions to which individual expression is not.”¹¹⁸ While the First Amendment may protect both the speaker and the listener, when for-profit corporations engage in political speech, the corporate entity is not a speaker entitled to full First Amendment protection.¹¹⁹

114. Corporate electoral speech does not further “the use of communication as a means of self-expression, self-realization, and self-fulfillment.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804, 806 (1978) (White, J., dissenting) (“In the case of corporate political activities, we are not at all concerned with the self-expression of the communicator.”); *see also* Dan-Cohen, *supra* note 65, at 1244 (explaining that corporate speech—which the author describes as utilitarian organizational speech—does not implicate “[t]he values of self-expression and self-realization that normally underlie the speaker’s original first amendment right”); Dana, *supra* note 66, at 339–40 (“[T]he ‘self-realization’ theory that the First Amendment’s purpose is to enhance an individual’s ability to develop her own personal powers and abilities, tends not to value corporate speech highly because the corporation does not exist as an entity that can be ‘self-realized.’” (footnote omitted)); Ross, *supra* note 37, at 460.

115. Melone, *supra* note 71, at 81 (emphasis added).

116. *See infra* Part III.A.2.

117. *Citizens United*, 130 S. Ct. 876, 947 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003)). This same idea explains why contributions are entitled to less First Amendment protection than expenditures. Contributions only become speech when spent by the person or entity to whom the contribution is given. An analogy can be made to corporate electoral speech, which is similarly one step removed from a speaker. *See* Bezanson, *supra* note 64, at 746.

118. *Bellotti*, 435 U.S. at 804 (White, J., dissenting); *see also* Baker, *supra* note 30, at 654 (“[T]hat first amendment protection results when the individual chooses this speech as an aspect of self-realization does not imply that the government may not regulate or ban the enterprise’s identical message.”).

119. *See* Bezanson, *supra* note 64, at 756 (“[I]nstitutions cannot speak for purposes of the First Amendment. They may produce speech that is relevant to First Amendment policies, but its constitutional protection would rest on considerations *other than liberty or individual freedom.*”).

2. For-Profit Corporate Electoral Speech Does Not Further the Self-Expressive or Associational Rights of Individual Members of the Corporation

Corporate speech serves to promote and amplify the First Amendment rights of shareholders, directors, and management only when that speech can be traced to the liberty interests of those individuals.¹²⁰ This Article draws a distinction between for-profit and non-profit corporations, arguing that for-profit corporate electoral speech does not promote the First Amendment rights of individuals associated with those corporations,¹²¹ and that such speech poses threats to electoral and political systems.¹²² The opposite is often true of non-profit corporate speech, which can promote the speech rights of those associated with the organization, and which does not pose similar threats to the integrity of the electoral and political systems.

The concept of traceability—which determines whether corporate speech can be traced to its individual members—is key to demonstrating why restrictions on for-profit corporate electioneering communications should be permissible, while restrictions on the same speech by many non-profit corporations should not be acceptable. If a corporation’s speech can be traced to its individual members, then the speech and associational rights of those members are furthered by the corporation’s speech—or phrased in the negative, are burdened by restrictions on the corporation’s speech.¹²³ In determining traceability, it is therefore important to look at the reason why individuals chose to associate with a corporation.

120. Bezanson, *supra* note 74, at 662–63.

121. In analyzing cases dealing with the right of associations to choose whom they selected as members, Justice O’Connor suggested distinguishing between commercial associations (which should be entitled to limited First Amendment protection) and expressive associations (which would be entitled to far more protection). *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); N.Y. State Club Ass’n v. City of New York, 487 U.S. 1 (1988). This logic applies with equal force to corporate electoral speech. *See* Hill, *supra* note 107, at 295 (“[B]usiness corporations might be treated differently than membership organizations established for purposes of policy advocacy or political committees organized for explicit purposes of contesting candidate elections.”).

122. James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1064 (2002) (stating that the Court’s cases demonstrate a consistent theme: “[I]t is not the corporate form that matters but the dangers to the political process presented by business corporations given special privileges by state law to amass wealth, dangers that are not presented by voluntary non-profit corporations organized for political purposes.”).

123. Melone, *supra* note 71, at 85; *see also* Bezanson, *supra* note 64, at 777–81 (discussing the importance of traceability to the protection of speech, particularly with respect to the Supreme Court’s decisions in *Austin* and *MCFL*).

The common cause of shareholders in for-profit corporations is to create wealth, not to disseminate political ideas.¹²⁴ Shareholders buy an ownership interest in corporations for commercial, not expressive purposes.¹²⁵ Shareholders “do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion.”¹²⁶ A for-profit corporation is not akin to other expressive or political associations like political parties or interest groups that allow likeminded individuals to join together for a common ideological purpose. Rather, it is “a pot of money driven to grow, by good means or bad.”¹²⁷

When for-profit corporations make electioneering communications, they do so not to promote the views of an ideologically unified group, but to increase the value of shares regardless of the political, ideological, or social views of its shareholders.¹²⁸ A corporation’s electoral speech might actually conflict with the political and ideological views of its shareholders and the individuals causing the message to be disseminated.¹²⁹ The fact that the issue of shareholder protection exists “belies the notion that corporate political speech is a manifesta-

124. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting).

125. Melone, *supra* note 71, at 84; *see Greenwood, supra* note 81, at 1033 (“[Corporations] are legally required to represent not a group of people but a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation.”).

126. *Bellotti*, 435 U.S. at 805 (White, J., dissenting).

127. Greenwood, *supra* note 81, at 1054.

128. This is particularly true regarding corporations with thousands of shareholders or publicly traded corporations. First, the identities of shareholders of such corporations changes by the second. Second, many individuals are removed from ownership because they own stock through a mutual fund or pension program. *See Citizens United v. FEC*, 130 S. Ct. 876, 974 (2010) (Stevens, J., concurring in part and dissenting in part) (“The structure of a business corporation . . . draws a line between the corporation’s economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim ‘to enhance the profitability of the company, no matter how persuasive the arguments for a broader of conflicting set of priorities’” (citations omitted)).

129. Greenwood, *supra* note 81, at 1051–52 (explaining that corporations “are required to use the money available to them to promote share values, even when the interests of society, or the owners of shares, are to the contrary”); *see also Baker, supra* note 30, at 653 (“[T]he market mechanism, by forcing the enterprise to make the most efficient (profit-maximizing) decisions, dictates the content of the enterprise’s speech, and thus separates the decision concerning speech content from the value decisions of either the employees or the owners of the enterprise.”).

tion of the views of various individuals joined together in a common cause.”¹³⁰

Hence, for-profit corporate speech cannot be traced to shareholders in a corporation.¹³¹ When for-profit corporations engage in electoral speech, it is not even entirely clear who the individual behind a corporate message is.¹³² It is not the customers or shareholders, who have little say in the daily operations of a corporation, and who seek only to maximize their profits.¹³³ It is more likely the officers or directors who have a fiduciary duty not to use corporate funds for

130. Melone, *supra* note 71, at 86; *see also Citizens United*, 130 S. Ct. at 979 (Stevens, J., concurring in part and dissenting in part) (“[T]he problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others.”).

131. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 807 (1978) (White, J., dissenting) (“Ideas which are not a product of individual choice are entitled to less First Amendment protection.”); Baker, *supra* note 30, at 654; Bezanson, *supra* note 74, at 666; *see* Karl J. Sandstrom & Janis Crum, *Is the Internet a Safe Haven for Corporate Political Speech?: Austin v. Michigan Chamber of Commerce in the Shadow of Reno v. ACLU*, 8 COMM.LAW CONSPICUOUS 193, 198 (2000) (“[G]overnment may be justified in regulating speech intermediaries when they depart from the function of reflecting and transmitting norms ultimately chosen by individuals.”).

132. *See generally Greenwood*, *supra* note 81, at 1004 (“[I]n the publicly traded corporation, none of the human actors involved is in a position to control the speech. None of them is likely to view it as his or her own speech. As a result, the speech is not properly understood as made on behalf of any one of them. Instead, corporate speech is better understood as the expenditure of money in accordance with dictates of the law and the market on behalf of the imaginary interests of a legal fiction”); *see also Ribstein*, *supra* note 2, at 125 (“[C]orporate speech should be constitutionally protected only to the extent necessary to protect the rights of individuals connected with the corporation In publicly held corporations, however, there is some question as to who the speakers are, and therefore who, if anyone, should be protected by the First Amendment.”).

133. Adam Winkler has explained that “[w]hen a ‘corporation’ speaks, it is not the owners of the corporation (shareholders) who do so, it is those who exercise control of the corporation’s assets (management).” Winkler, *supra* note 63, at 165. Winkler further stated that:

[S]hareholders have little control over the use of their money once it is invested. Corporate managers make decisions on what political issues to support, functionally immunized from shareholder scrutiny by the business judgment rule and the structure of corporate democracy. The consequence is that corporate political speech reflects the judgments of corporate officers, and not necessarily the people whose money funds the speech.

Id. at 199–200; *see also Greenwood*, *supra* note 81, at 1003, 1007–08 (stating that “the views of the individuals who own [a corporation’s] securities, the human beings behind the shares, are largely irrelevant to the positions a properly run corporation takes” and that “modern corporate law, by locating the center of corporate authority in a board of directors bound to act in the best interests of the corporation, makes clear that the shareholders . . . have no right to run the corporation or determine its goals”).

personal benefit.¹³⁴ Hence, while it is not clear who speaks when a for-profit corporation makes electioneering communications, it is clear that speaking through the corporate form does not foster the self-expressive rights of whoever is actually behind a corporation's message.¹³⁵ Indeed, a corporation's electoral message could actually conflict with an individual's personal beliefs.

Because of this lack of traceability, for-profit corporate electoral speech—in addition to failing to promote the speech rights of individual members of corporations—fails to bolster the associational rights of those members.¹³⁶ “While individuals might join together to exercise their speech rights, business corporations . . . [do] not . . . facilitat[e] such associational or expressive ends.”¹³⁷ For-profit corporations “are not catalysts for self-realization, they are vehicles for profit maximization”¹³⁸ because shareholders and directors or managers do not become affiliated with a for-profit corporation in order to advance ideological, social, or political beliefs.¹³⁹

In contrast to for-profit corporate electoral speech, when certain non-profit corporations make electioneering communications, it is

134. Daniel Greenwood has argued that “corporate positions are determined by fiduciaries who are obligated both to set aside their own views and to ignore the actual views and interests of the other people involved in the corporation.” See Greenwood, *supra* note 81, at 1033. Greenwood has also explained that “[t]he actual speakers—the lobbyists, advertising copy writers, lawyers, executives, and publicists who speak on behalf of the corporation—speak as agents, not on their own behalf.” *Id.* at 1038. Therefore, Greenwood has averred that “[b]ecause the people behind the shares have no practical authority to vary the single goal on behalf of which corporate managers must act, corporate speakers are agents answerable to a principle, not a principal.” *Id.* at 1042.

135. *Id.* at 1002 (stating that corporate speech “does not reflect the views of shareholders, nor, if management is acting in good faith, those of managers or other corporate agents”).

136. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .”).

137. *Citizens United v. FEC*, 130 S. Ct. 876, 950 (2010) (Stevens, J., concurring in part and dissenting in part).

138. Winkler, *supra* note 63, at 199 (“It is hardly clear that corporate political speech serves any self-realization goals of the individuals who have chosen to associate with the corporate entity. Shareholders invest in business corporations to garner a profit and grow their portfolio.”); see also *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part) (“Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.”); Greenwood, *supra* note 81, at 1056 (“This individualist First Amendment value is simply inapplicable to corporate speech on behalf of the interest of the corporation itself or of its fictional shareholders: no individual’s sphere of action is protected when corporate management is directed to spend corporate funds on behalf of a singular corporate goal [of profit-maximization] that ignores all competing considerations.”).

139. Melone, *supra* note 71, at 85.

often fair to link the corporation's speech to the individual members of the corporate entity. Some non-profit corporations are "formed for the express purpose of advancing certain ideological causes shared by all their members Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression."¹⁴⁰ Individuals choose to become affiliated with these expressive non-profit organizations not for economic motives, but because they believe in the corporation's ideological, political, or social message.¹⁴¹ Therefore, speech by these non-profit corporations should be protected "based on a concern for the individual members' original expressive rights and on the recognition that such organizations aid the exercise of those individual expressive rights."¹⁴²

Indeed, as Professor Bezanson explains,¹⁴³ there is a line of cases in which:

[T]he Court treated organizational and corporate campaign and political expression identically to individual speech because the specific organizations were ideological in ways that permitted tracing their expression to the members rather than the organization; business corporations would generally not enjoy *full* First Amendment protection, but instead are subject to a lower standard of protection based on the value and accuracy of the speech¹⁴⁴

Some have argued that for-profit corporate electoral speech *does* generally reflect the views of shareholders. Specifically, the argument is that if shareholders want nothing but to maximize their profits, and management is under a fiduciary duty to serve the interests of share-

140. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting) (noting the need to differentiate corporations formed for ideological reasons shared by its members from for-profit corporations); *see also* Ige Omotayo Bolodeoku, *Corporate Speech in a Democracy: What Can Nigeria Learn from Abroad?*, 13 *CARDOZO J. INT'L & COMP. L.* 61, 95–96 (2005) (discussing Justice White's skepticism about whether for-profit communications "were an integral part of the development of ideas, of mental exploration, and of affirmation of self, protected by the First Amendment" and agreeing that ideological corporations could serve as "vehicles for achieving self-expression").

141. Winkler, *supra* note 63, at 163.

142. Dan-Cohen, *supra* note 65, at 1248 (emphasis omitted).

143. *MCFL*, 479 U.S. 238 (1986); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Court's decision in *MCFL* rested, at least in part, on the fact that the speech could be traced to the individual members of the corporation, who used the corporation to disseminate their speech. *See Bezanson, supra* note 64, at 748.

144. Bezanson, *supra* note 74, at 656 (emphasis added); *see also* Dan-Cohen, *supra* note 65, at 1248 ("Many organizations, unlike business corporations, are established for the specific purpose of engaging in speech, which figures prominently among their organizational goals. By joining such organizations, the individual members delegate their active speech rights respecting specific issues to the organization and acquiesce to having their views represented by the organization.").

holders, then electoral spending promotes at least the economic interests of shareholders, and corporate speech can be traced to individual shareholders. However, the existence of dissenting shareholders contradicts this argument. Additionally, a shareholder's generalized desire to maximize share values is not akin to a non-profit corporation member's specific desire to advocate and promote a particular political or ideological perspective. Those two interests, one commercial and economic, and one political and ideological (premised on an individual liberty interest in self-realization), should not be entitled to the same level of First Amendment protection when the individuals funding the speech are speaking through the corporate form.

As Justice White explained in his dissent in *Bellotti*:

Although it is arguable that corporations make . . . expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment.¹⁴⁵

Because a corporation itself lacks self-expressive rights, restrictions on the speech of a corporation become problematic under the First Amendment only if they hinder or restrict an individual's self-expressive or associational rights.¹⁴⁶ Restrictions on for-profit corporate electoral speech do neither, while restrictions on non-profit corporate electoral speech can do both. This is because for-profit electoral speech, in contrast to some non-profit electoral speech, cannot be traced to individual members of a corporation.

B. Restrictions on For-Profit Corporate Electoral Speech Promote First Amendment Rights

Corporate political speech under campaign law is protected only to the extent that it is useful or valuable to the voters. Corporate political speech protection is more limited than that accorded individual speech because it can't rely on democratic liberty and free will for its production.¹⁴⁷

As discussed *supra*, corporations cannot themselves speak. Therefore, one must look to the individual members of corporations to see whether a speaker's liberty rights are implicated by corporate speech. When for-profit corporations fund electoral speech, that speech is not

145. *Bellotti*, 435 U.S. at 806 (White, J., dissenting).

146. Melone, *supra* note 71, at 85.

147. See Bezanson, *supra* note 74, at 659.

traceable to individual members of the corporations. There is not an individual whose liberty interest is at issue, except the liberty interest of dissenting shareholders, who are compelled to speak.

But the forgoing discussion does not end the analysis. It has long been accepted that the First Amendment protects both the right to speak and the right to listen.¹⁴⁸ When a corporation's speech does not represent the views of an ideologically unified group of members—as is the case with for-profit corporate electoral speech—the level of protection accorded to the speech depends solely on the speech's utility to society at large.¹⁴⁹ The forgoing focuses on for-profit corporate electoral speech, the protection of which hinges only on the rights of listeners, not speakers.

1. The Supreme Court has Erroneously Focused on the Rights of Listeners to Hear Corporate Speech

The Court has slung the weight of its reasoning in cases protecting corporate electoral speech on the right to hear.¹⁵⁰ In *Bellotti*, the first case to address and strike down restrictions on corporate political spending, the Court quickly acknowledged that self-expressive rights were not implicated in that case,¹⁵¹ and the majority hung its hat

148. See, e.g., Dan-Cohen, *supra* note 65, at 1233.

149. See, e.g., Baker, *supra* note 30, at 657 (explaining that because the Court accepts that corporate speech “has little relation to the sponsor’s self-realization or liberty or individual choice,” the Court focuses on the listener and justifies protecting corporate speech “on classic marketplace-of-ideas reasoning”); see also Bezanson, *supra* note 64, at 740 (explaining that the protection of what the author terms “institutional speech” “depends on the value of the speech itself as communicated to various audiences, and relates to the broader interests of the system of expression in our free and democratic society, not to the freedom of the institution that created and disseminated the speech”); Bezanson, *supra* note 74, at 663 (noting that the level of protection accorded to corporate electoral speech depends on: “(1) the speech’s need for protection in the system of expression (i.e., is it a view or information that will otherwise not be expressed in public discussion?); (2) its value; and (3) its consequences for public debate and discussion in the polity”); Ribstein, *supra* note 2, at 128–29 (explaining that the “nonspeaker-based theories of First Amendment protection would support constitutional protection for corporate speech apart from protection of self-expression by individuals connected with the corporation”); Winkler, *Corporate Personhood and the Rights of Corporate Speech*, *supra* note 83, at 867 (“[T]o the extent the Court has recognized First Amendment rights of corporations, corporate personhood was not central to those decisions. The Court was more inclined to rest the argument for corporate speech on the rights of listeners, for whom the underlying information would be useful.”).

150. This is sometimes referred to as “the right to listen.” See Fletcher N. Baldwin, Jr. & Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. §441b and the Superior Rights of Natural Persons*, 14 Pac. L. J. 209, 223 (1983).

151. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (emphasizing that “speech concerning public affairs is more than self-expression; it is the essence of self-

solely on listeners' rights.¹⁵² The *Bellotti* Court famously stated “[t]he inherent worth of the speech in terms of its capacity for *informing the public* does not depend upon the identity of its source, whether corporation, association, union, or individual.”¹⁵³

Justice Kennedy, whose dissent in *Austin* formed the basis of his majority opinion in *Citizens United*, similarly found that the listeners' interest dictated the protection of corporate electoral speech. In *Austin*, Justice Kennedy argued that the issue before the Court involved “society's interest in free and informed discussion on political issues, a discourse vital to the capacity for self-government.”¹⁵⁴ In *Citizens United*, now writing for the majority, Justice Kennedy found that the public has the right to hear corporate electoral speech because “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”¹⁵⁵

government” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964))). And with that the Court elevated the rights of listeners over the rights of speakers.

152. The *Bellotti* majority began its analysis of the First Amendment issue by citing *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940), where the Court held: “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” A few paragraphs later, the majority cited *Mills v. Alabama*, 384 U.S. 214 (1966), for support. There the Court held that “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” *Id.* at 218. Winkler explained that *Bellotti* “rests on a First Amendment theory of hearers' rights, rather than speakers' rights.” Winkler, *supra* note 63 at 196. Winkler has called the self-realization theory of the First Amendment “the main theoretical competitor to *Bellotti*.” *Id.*; see also *id.* at 134–35 (explaining that *Bellotti* “focused on the informational needs of recipients of corporate speech and extended corporate speech rights accordingly”); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 *YALE L.J.* 622, 655 (2010) (“[T]he purpose of allowing corporations to speak, under *Bellotti*'s rationale, is to benefit the listeners rather than to preserve a liberty intrinsic to the corporations themselves.”).

153. *Bellotti*, 435 U.S. at 777 (emphasis added). The Court stated that commercial speech cases merely demonstrate that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *Id.* at 783. The Court misses the central point, however, which is that corporate electoral speech is not commercial speech.

154. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 698 (1990) (Kennedy, J., dissenting). Kennedy argued that the fact that the speech at issue came from the Michigan Chamber of Commerce, and not an individual, “detracts not a scintilla from its validity, its persuasiveness, or its contribution to political dialogue.” *Id.* at 706.

155. *Citizens United*, 130 S. Ct. at 898. Justice Kennedy continued that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Id.* Justice Kennedy averred that the government cannot “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.” *Id.* at 899.

Justice Kennedy's focus on the importance of unrestricted corporate electoral speech to self-government hinges on his belief that such communications provide important information for voters. Justice Kennedy found that "voters must be free to obtain information from diverse sources in order to determine how to cast their votes,"¹⁵⁶ and that restrictions on corporate electoral speech "prevent[] [corporation's] voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."¹⁵⁷

As Justice Stevens wrote in dissent, Justice Kennedy's majority opinion in *Citizens United* "place[d] primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say."¹⁵⁸ Justice Kennedy has been the most powerful and consistent voice on the Court advocating for protection of corporate electoral speech hinged upon a listener-based theory of the First Amendment. Under Justice Kennedy's view, corporate electoral speech promotes an open marketplace of ideas and democratic self-government.¹⁵⁹

The majorities in *Bellotti* and *Citizens United* (and dissent in *Austin*) simply got it wrong when they hooked their dubious rationales to the listeners' interest. The instrumental, policy-based interests of promoting the marketplace of ideas and democratic self-government is not facilitated by unrestricted corporate electoral speech. Unrestricted corporate electoral speech not falling within the *MCFL* exception actually harms those interests.

2. Restrictions on For-Profit Corporate Electoral Speech Promote the Rights of Listeners and Non-Spending Speakers

While a number of justices—most prominently Justice Powell in *Bellotti* and Justice Kennedy in *Austin* and *Citizens United*—have argued in favor of unrestricted corporate electoral speech based on an instrumental notion of the First Amendment, their rationale is unpersua-

156. *Id.*

157. *Id.* at 906. Justice Kennedy made similar statements, all focused on the listeners' rights, throughout the *Citizens United* opinion: "The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public." *Id.* "[I]nformative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Id.* at 912. If the restriction were allowed to stand, "[s]peech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election." *Id.* at 917.

158. *Citizens United*, 130 S. Ct. at 973 (Stevens, J., concurring in part and dissenting in part).

159. *Id.* at 906 (majority opinion).

sive. When the speakers are corporations and when the Court's rationale rests entirely on the rights of listeners, one must determine if listeners' rights are actually harmed by restrictions.¹⁶⁰ Listeners will not be injured if for-profit corporate electoral speech is limited—far from it, restrictions promote the rights of listeners and non-spending speakers.

a. Restrictions on Corporate Speech Do Not Harm Listeners' Rights

When corporate electoral speech is restricted, the listener is not deprived of speech because all that is reduced is the volume, not the content, of speech.¹⁶¹ This is true for two reasons. First, each individual member of a corporation, whether that corporation is a Fortune 500 or a small closed corporation, is free to speak as much as she wants without the use of the corporate form.¹⁶² Electioneering communications by individuals are unlimited.¹⁶³ A restriction on corporate electoral speech “may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.”¹⁶⁴

160. *Id.* at 977 (Stevens, J., concurring in part and dissenting in part).

161. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 807 (1978) (White, J., dissenting) (“[T]he restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech.”); *id.* at 821 (noting that restrictions on corporate electoral speech “are sufficient to justify any incremental curtailment in the *volume* of expression” (emphasis added)); *id.* at 828 (Rehnquist, J., dissenting) (“The free flow of information is in no way diminished by the [State’s] decision to permit the operation of business corporations with limited rights of political expression.”).

162. *Citizens United*, 130 S. Ct. at 943 (Stevens, J., concurring in part and dissenting in part) (“Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form.”); *Bellotti*, 435 U.S. at 807 (White, J., dissenting) (arguing that when for-profit corporate spending is restricted, “it is unlikely that any significant communication would be lost by such a prohibition. [Shareholders, employees, and customers] would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form.”); *id.* at 828 (Rehnquist, J., dissenting) (“All natural persons, who owe their existence to a higher sovereign than the [State], remain as free as before to engage in political activity.”); *see also Greenwood*, *supra* note 81, at 1062, 1065 (explaining that if corporate electoral speech is restricted “all the legitimate participants in the political debate remain able to speak freely” and “[t]o the extent that the corporation is promoting ideas held by anyone, those ideas are fully protected when they emerge from protected speakers”).

163. In addition, spending by MCFL corporations were similarly unlimited under *Citizens United*. *Citizens United*, 130 S. Ct. at 882.

164. *Id.* at 972 (Stevens, J., concurring in part and dissenting in part).

Second, the corporate entity itself can speak through a PAC.¹⁶⁵ This option gives listeners ample opportunity to hear corporate electoral speech while protecting the rights of dissenting shareholders and non-spending speakers.¹⁶⁶ When corporate speech is limited listeners are still privy to corporate communications, just perhaps at a lower decibel level.

b. Restrictions on Corporate Electoral Spending Prevents Corporations from Flooding the Marketplace and Drowning Out Other Voices

Restrictions on corporate electoral speech, which do nothing but reduce the volume of speech, actually promote listeners' rights. Though an initially appealing thought, at least in the abstract, neither the ability to speak nor the ability to listen is infinite. When a speaker "adds something to the public debate, something is also taken away. What is said determines what is not said."¹⁶⁷ Indeed, "in politics, scarcity is the rule rather than the exception. The opportunities for speech tend to be limited, either by time or space available for communicating or by our capacity to digest or process information."¹⁶⁸

Unlimited corporate sums spent on electioneering communications can distort the political marketplace by flooding it. Corporate speech can therefore drown out non-spending voices—voices that could otherwise add to the diversity of views heard by listeners.¹⁶⁹ When corporations spend unlimited sums, members of the public, who have limited time and energy to listen to electoral messages, overwhelmingly hear from corporations who can crowd out the voices of

165. Indeed, can any of us contend that we did not hear enough from corporations prior to *Citizens United*? As Professor Randall Bezanson notes in discussing *Citizens United*, "there is no analysis of the doubtful premise that corporate and business interests are inadequately and incompletely represented in the current discourse on politics . . ." Bezanson, *supra* note 74, at 656.

166. Winkler, *supra* note 63, at 196–97 (arguing that even when corporations spoke through PACs, "political speech and influence [was] . . . skewed decidedly in favor of corporations and their interests").

167. Fiss, *supra* note 65, at 1411.

168. *Id.* at 1412.

169. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part) (arguing that corporate speech "distort[s] public debate in ways that undermine rather than advance the interests of listeners"); see Greenwood, *supra* note 81, at 1020 ("[S]peech rights given to business corporations are quite different from speech rights given to human beings and can be expected to distort the political process in ways that are antithetical to any theory of the First Amendment.").

others, particularly those who speak without spending money.¹⁷⁰ Unrestricted corporate speech can therefore contribute to “information overload, by supplying an ideologically unbalanced and distorted background, or by promoting simplistic thinking,”¹⁷¹ and “may often distort our ability to hear each other.”¹⁷² Such speech also gives “the impression that corporations dominate our democracy.”¹⁷³ Hence, there is a risk to the freedom of autonomy that occurs in the political marketplace when corporate speech is unregulated¹⁷⁴ because “the First Amendment protects interests other than those of corporate speakers who have availed themselves of the corporate ‘privilege.’”¹⁷⁵

The volume of certain speech may need to be reduced to protect the liberty interests of non-spending speakers and to ensure that a diversity of voices can be heard.¹⁷⁶ The ability to restrict a corporation’s speech increases individual freedom because “the self-realization value *requires* that people be permitted to act collectively to regulate” corporate electoral speech.¹⁷⁷ A number of justices have ac-

170. See, e.g., Dan-Cohen, *supra* note 65, at 1248 (explaining that “[t]he traffic in communication may call for a certain degree of regulation to avert congestion that would otherwise be detrimental to the listeners’ interests” and that “[r]egulation of this communications traffic may pass constitutional muster when it targets corporations even though it would fail if individual speech was the target” because corporations, unlike individuals, lack self-expressive free speech rights).

171. Baker, *supra* note 30, at 663.

172. Greenwood, *supra* note 81, at 1065. Greenwood stated:

[The Court’s tact has] trivialized the important issue at stake, which is not the neutral distribution of information but rather a political power struggle in which rhetorical volume is extremely important—and in which corporate agents will view their duty as requiring them to purchase the profit-maximizing volume using money with no clear owner

Id. at 1018.

173. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part) (“When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy.”) Justice Stevens also worried that if corporations could exert undue influence on political campaigns, the speech of officeholders who feared corporate retribution could be chilled. *Id.* at 940.

174. Fiss, *supra* note 65, at 1411–12; see Rivard, *supra* note 81, at 1508 (“But if corporate speech could ‘drown out’ other speech, then a societal interest actually may not be served; natural persons would derive no benefit from the speech and actually could suffer harm by being misinformed.”); Ross, *supra* note 37, at 462 (“Although the legislation prohibiting corporate speech on political issues appears repugnant to the first amendment, such legislation may allow individuals to remain a dominant force in the political process.”).

175. Ribstein, *supra* note 2, at 122.

176. Fiss, *supra* note 65, at 1415. See generally Bezanson, *supra* note 64, at 741 (“[B]roader regulation of institutional speech may better assure liberty and freedom.”).

177. Baker, *supra* note 30, at 654 (referring to *Bellotti*). Professor Baker concluded that “as long as attempts to regulate information flows occur in ways that do not abridge indi-

knowledged the need to promote the rights of listeners and non-speaking speakers by restricting corporate electoral speech. Justice Brennan, writing for the majority in *MCFL*, explained that limits on corporate electoral speech are “meant to ensure that competition among actors in the political arena is truly competition among ideas.”¹⁷⁸ Justice Stevens, dissenting in *Citizens United*, concluded that restrictions on corporate electoral speech “reflect[] a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas”¹⁷⁹

In addition to harming the rights of listeners and non-speaking speakers, unregulated corporate electoral speech can undermine the system of laws and regulations that allow corporations to exist. When corporations are permitted to spend money in the political marketplace, and therefore to influence the rules that govern corporations, corporations “will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for us”¹⁸⁰ Simply put, “[t]he State need not permit its own creation to consume it.”¹⁸¹ Corporations should not be treated like political entities that have a legitimate role in the political debate; they should be regulated.¹⁸²

In sum, a corporate entity does not itself possess a right to self-realization, and individual members of a for-profit corporation similarly cannot claim that corporations’ electoral speech promotes their self-realization or associational rights. In protecting corporate electoral speech by corporations falling outside the *MCFL* exception, the Court therefore necessarily focuses on the rights of listeners. Restrictions on corporate speech can actually promote First Amendment values by allowing for a greater diversity of speakers to be heard, which promotes the marketplace of ideas and democratic self-govern-

viduals’ self-expression, these attempts . . . are permissible—and may make important contributions to intelligent, informed, and active self-rule.” *Id.* at 664.

178. *MCFL*, 479 U.S. 238, 259 (1986).

179. *Citizens United v. FEC*, 130 S. Ct. 876, 976 (2010) (Stevens, J., concurring in part and dissenting in part); *see also* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting).

180. Greenwood, *supra* note 81, at 1054. Greenwood explained that corporate speech does not facilitate self-government, but instead can “pervert the political process” by allowing “corporations to influence the legal environment in which they operate [to] create[] a bureaucratic monster that determines its own feeding schedule. Our servant becomes our master.” *Id.* at 1054–55.

181. *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

182. Greenwood, *supra* note 81, at 1054.

ment.¹⁸³ Restrictions can be beneficial both to those who wish to speak without spending money and to those wishing to hear a greater diversity of voices.¹⁸⁴ The sad irony of the Court's current tact is that unrestricted for-profit corporate electoral speech actually infringes on the First Amendment rights of listeners and non-spending speakers.

IV. The Government Has a Strong Interest in Restricting Corporate Speech

The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.¹⁸⁵

The previous section has explained why unrestricted for-profit electoral spending can harm the rights of listeners and non-spending speakers. The following expands on those arguments,¹⁸⁶ details additional threats that for-profit corporate electoral speech pose to the

183. *Id.* at 1062 (“Were the government to suppress the speech of the fictional shareholder, democratic values would be vindicated, not reduced. This is because the fictional shareholder is not a citizen but rather a creation of the legal system itself. Permitting the fiction to manipulate the legal system reduces the likelihood that the citizenry will be able to self-govern.”); *Hill, supra* note 107, at 306 (“One of the many things that our history has taught us is that some rules are required if freedom is to be not only protected but also enlarged. Campaign finance is part of this larger effort.”).

184. The view expressed in this Article essentially comports with what Professor Frances Hill deems the “*McConnell* framework.” She contrasts the framework from *Wisconsin Right to Life* with the “*McConnell* framework”:

The [*Wisconsin Right to Life*] framework equates democracy with the marketplace of ideas and wants that marketplace freed of intrusive regulation. The threat to democracy is seen as interference with individual and corporate rights to speak about issues and candidates in a vigorous exchange of ideas. The government is the problem and should not be allowed to present regulation as a solution. The *McConnell* framework equates democracy with an active role in elections and equal access to the policy process. The threat to democracy is seen as a covert process accessed through hidden influence unrelated to the formal and ostensibly public policy process.

Hill, supra note 107, at 305.

185. *Bellotti*, 435 U.S. at 821 (White, J., dissenting); *id.* at 811 (“This Nation has for many years recognized the need for measures designed to prevent corporate domination of the political process.”).

186. While the *Citizens United* majority cleverly treats the distortion of the political marketplace as distinct from corruption, it is in reality merely a subset of corruption. *Citizens United v. FEC*, 130 S. Ct. 876, 970 (2010) (Stevens, J., concurring in part and dissenting in part) (“The majority fails to appreciate that *Austin’s* antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations.” (citation omitted)). For more on the anti-distortion rationale, see Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 28 GA. ST. U. L. REV. 989 (2011).

electoral and political systems, and explains why restrictions on such speech protect for-profit shareholders.

A. Corporate Spending Poses Unique Threats to Electoral and Political Systems

The evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.¹⁸⁷

As Part I details, Congress has implemented, and the Court has many times upheld, laws that recognize the dangers posed by corporations in the political marketplace. These dangers are separate and distinct from any threats that spending by natural persons and, in many cases, non-profit corporations may pose.

In the case of for-profit corporations, the government provides corporations with these state-created benefits in order to allow them to amass money in the economic marketplace.¹⁸⁸ The idea is that the more economically successful corporations can be, the more goods they can produce, the more services they can provide, and the more people they can employ.

However, the other consequence of providing corporations with state-created benefits is that they have enormous sums of money, amassed in the economic marketplace, which they can deploy in the political marketplace.¹⁸⁹ Individuals, while they can receive favorable treatment from the government and can amass fortunes having no relationship to the popularity of their views, are quite obviously not state-created entities and are not privy to the same state-created benefits as corporations, such as perpetual life, limited liability, and separation of ownership and control.¹⁹⁰ The day humans live forever is a

187. S. REP. NO. 59-3056, at 2 (1906).

188. Watts, *supra* note 81, at 320 (“[A]llowing the separate incorporation of business ventures clearly was intended to aid in the accumulation and allocation of resources for the achievement of desirable commercial goals.”).

189. Bishop, *supra* note 100, at 1185–86 (“The basis for regulating the political activity of corporations is primarily their ability to accumulate wealth and to use that wealth to influence the political process unfairly.”).

190. Justice Stevens noted in his dissent in *Citizens United*, and the majority noted in *Austin*, that the amount of money that a corporation can accumulate in the economic marketplace has no correlation to the popularity of that corporation’s political views. *Citizens United*, 130 S. Ct. at 923 (Stevens, J., concurring in part and dissenting in part); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). That seems somewhat beside the point, however, as a wealthy individual may have amassed large sums for reasons other

good day to take seriously the notion that corporations should be treated the same as individuals in the political marketplace.

Legislatures and, before *Citizens United*, a majority of the Court recognized that special advantages for corporations—state-created artificial entities—in the economic marketplace could translate into special advantages or benefits in the electoral and legislative processes.¹⁹¹ In *Bellotti*, Justice Rehnquist stated that “[i]t might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.”¹⁹² In *Federal Election Commission v. National Right to Work Committee* (“NRWC”), the Court found that “the special characteristics of the corporate structure require particularly careful regulation”¹⁹³ and noted the need to restrict the “substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.”¹⁹⁴ In *Federal Election Commission v. National Conservative Political Action Committee* (“NCPAC”), the Court described the need to limit “the influence of political war chests funneled through the corporate form.”¹⁹⁵ The *MCFL* Court similarly explained that corporate electoral speech “raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”¹⁹⁶

than the popularity of that person’s views. Hence the key is that a corporation is a state-created entity, which is endowed with many government-provided benefits. As such, corporations and members of for-profit corporations lack the First Amendment rights of individuals.

191. Prior to *Citizens United*, a majority of the Court recognized this danger with respect to corporate speech concerning candidates, but not ballot measures. See Bezanson, *supra* note 74, at 656 (“[T]he size and power of corporations would more likely lead to the conclusion that corporations are a sector in need of popular *control* rather than in need of actively participating in political discourse The theory of corporations and business organizations in the world of business ethics has for many years been premised on the principle that their business is business, not politics.”). See generally Avi-Yonah, *supra* note 81, at 1036; Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL’Y 63 (2005).

192. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting) (“States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.”).

193. NRWC, 459 U.S. 197, 209–10 (1982).

194. *Id.* at 207. The Court further explained that while section 441b of the FECA restricted corporations of all sizes, “we accept Congress’ judgment that it is the potential for such influence that demands regulation.” *Id.* at 210.

195. *FEC v. Nat’l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 500 (1985).

196. *MCFL*, 479 U.S. 238, 257 (1986). The *Austin* Court cited *NCPAC* and *MCFL* with approval for this proposition. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990).

Citizens United ignored and recklessly blew past prior precedents and opinions that acknowledged the problems of allowing artificial entities with special state-created advantages to spend sums amassed in the economic marketplace to influence electoral and legislative processes.

But what, exactly, is the special danger posed by unlimited for-profit corporate electoral spending? It is the potential for corruption or the appearance of corruption.¹⁹⁷ But this begs yet another question, what is corruption? Since the Court's decision in *Buckley* in 1976, the Court has expanded and contracted the definition of corruption. In *Buckley*, the Court embraced a narrow view of corruption, upholding contribution limits on a finding that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."¹⁹⁸ However, *Buckley* did not address corporate spending, and hence its formulation of corruption may simply be inapplicable to the present question.

Two years after *Buckley*, the *Bellotti* Court did address the issue of corporate electoral spending and spoke of the importance of the governmental interest in preventing "the problem of corruption of elected representatives through the creation of political debts."¹⁹⁹ In 1985, in *NCPAC*, the Supreme Court correctly described a broad conception of corruption, covering a variety of negative behavior:

197. *NRWC*, 459 U.S. at 210–11 (explaining that section 441b was aimed at preventing actual and apparent corruption and that "there is no reason why it may not be in this case accomplished by treating . . . corporations . . . differently from individuals"); *MCFI*, 479 U.S. at 267 (Rehnquist, J., dissenting) ("[Section] 441b and its predecessors were enacted to rid the political process of the corruption and appearance of corruption that accompany contributions to and expenditures for candidates from corporate funds."); *Citizens United v. FEC*, 130 S. Ct. 876, 945 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that the restriction contained in BCRA "target[s] a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it").

198. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

199. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (finding that corruption did not arise on the question of "a corporation's right to speak in issues of general public interest"); see also Winkler, *supra* note 63, at 135 (explaining that in *Bellotti*, the justices understood corruption to include "only financial *quid pro quo* deals between candidates and contributors"). The *Bellotti* Court also spoke about governmental "interests of the highest importance" beyond corruption, including "[p]reserving the integrity of the electoral process, . . . 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,' [and preserving] the individual citizen's confidence in the government." *Bellotti*, 435 U.S. at 788–89 (quoting *United States v. UAW*, 352 U.S. 567, 575 (1957)).

“[C]orruption is a subversion of the political process” whereby “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain.”²⁰⁰ The next year, in *MCFL*, the Court seemed to expand the definition of corruption even further, at least with respect to corporate spending, and spoke about the “concern over the corrosive influence of concentrated corporate wealth [which] reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”²⁰¹

In 1990, in *Austin*, the Court identified what remains its broadest conception of corruption, again, in relation to corporate spending. This so-called “new corruption” was defined as “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.”²⁰² Similarly, the Court later spoke of “the significant possibility that corporate political expenditures will undermine the integrity of the political process”²⁰³ Justice Marshall, writing for the majority, explained that corporate spending presents “the potential for distorting the political process” not because corporations may accumulate vast sums of wealth, but because they receive state-created benefits.²⁰⁴ In 2003, the *McConnell* Court cited to *NRWC* and specifically relied on the *Austin* Court’s broad understanding of corruption to uphold the restriction in the BCRA.²⁰⁵

The majority in *Citizens United* abruptly departed from the Court’s prior course and embraced an unnecessarily narrow definition of corruption, finding that it means just *quid pro quo* (literally “this for

200. *NCPAC*, 470 U.S. at 497.

201. *MCFL*, 479 U.S. at 257.

202. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990). Justice Marshall, writing for the majority, explained that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures.” *Id.* at 660. Justice Scalia vociferously disagreed with the majority’s broad definition of corruption, arguing that “virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically ‘corrosive.’” *Id.* at 684 (Scalia, J., dissenting).

203. *Id.* at 668 (majority opinion).

204. *Id.* at 661. The majority again explained that “[w]hereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure.” *Id.* at 665.

205. *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (“We have repeatedly sustained legislation aimed at ‘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.’” (quoting *Austin*, 494 U.S. at 660)).

that”).²⁰⁶ Justice Kennedy, writing for the majority in *Citizens United*, read *Buckley* as limiting the definition of corruption to *quid pro quo* corruption.²⁰⁷ Even if that is true, one could easily argue that *Buckley* did not address the specific threat that for-profit corporate electoral spending poses, and that one must therefore rely on cases analyzing corporate electoral speech, which all embrace a broader definition of corruption. Justice Kennedy, however, cited his dissent in *McConnell* to argue that influence and access (or the appearance of influence or access) were not sufficient to raise the specter of corruption or its appearance, even though the majority of the Court specifically rejected his view in *McConnell*.²⁰⁸ The majority’s crabbed view of corruption in *Citizens United* means that the number of laws that can be upheld as serving a compelling governmental interest is severely restricted.²⁰⁹

A broader, more common sense view of corruption is necessary to embrace behavior which is problematic, but which cannot literally be defined as a *quid pro quo*.²¹⁰ For instance, in his dissent in *Citizens United*, Justice Stevens espoused a view of corruption that includes preferential access and the undue influence of an officeholder’s judgment: “[T]he difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum”²¹¹ Justice Stevens also spoke of the need “to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.”²¹² This is appropriate, as society should be most concerned about situations in which an officeholder makes or appears to make decisions based on the best interests of those spending money on that office holder’s behalf, and not their constituents. If the public feels that their repre-

206. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

207. *Id.*

208. Justice Kennedy declared by fiat that “[i]n gratiation and access . . . are not corruption.” *Id.* at 910.

209. *Id.* at 962 (Stevens, J., concurring in part and dissenting in part) (“[T]he majority’s understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.”).

210. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (“During debates on the earliest [campaign finance] reform acts, the terms ‘corruption’ and ‘undue influence’ were used nearly interchangeably.”).

211. *Citizens United*, 130 S. Ct. at 961 (Stevens, J., concurring in part and dissenting in part). Justice Stevens expressed concern about a situation in which “private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns.” *Id.* at 962.

212. *Id.* at 975.

sentatives are “in the pocket” of large donors, non-contributing constituents may feel disconnected from the democratic process and, eventually, could stop engaging in it. Ultimately, such a situation leads to the breakdown of a representative democracy.

For-profit corporations were, are, and will always be “artificial entities created by law for the purpose of furthering certain economic goals.”²¹³ The state provides these artificial entities with certain benefits—limited liability, perpetual life, separation of ownership and control, and favorable tax treatment—to increase their economic viability and thus strengthen the economy generally.²¹⁴ For-profit corporations were not created to be powerful political voices. The government therefore has a compelling interest in preventing corporations from using the state-provided benefits to obtain special benefits or advantages, such as access and influence, in the political process.²¹⁵ Under the Court’s misguided decision in *Citizens United*, however, corporations can deploy their resources to dominate both the economy and the electoral process.²¹⁶

If the government fails to regulate the ability of these state-created entities to make political expenditures, it could actually be seen as helping corporations to disseminate their views, such that the government is promoting corporate speech over electoral speech.²¹⁷ This could be viewed as a type of viewpoint discrimination.

B. Corporate Spending Can Infringe on the Rights of Shareholders

The shareholder protection rationale . . . bolsters the conclusion that restrictions on corporate electioneering can serve both speakers’ and listeners’ interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.²¹⁸

For-profit corporations, unlike individuals or non-profit corporations, have shareholders. As discussed *supra* Part III.A.2, shareholders, who by definition own the stock in corporations, buy stock for eco-

213. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting).

214. *Id.*

215. *Id.* at 809–10.

216. *Id.* at 809; *see also Baker, supra* note 30, at 647 (“Corporate resources are sufficient to dominate the financing of electoral as well as initiative and referendum campaigns.”).

217. *Id.* Indeed, without regulating for-profit corporate electoral speech, the government could be seen as promoting corporate speech over individual speech.

218. *Citizens United v. FEC*, 130 S. Ct. 876, 979 (2010) (Stevens, J., concurring in part and dissenting in part).

conomic reasons, not for ideological or political reasons.²¹⁹ The government has a compelling interest in ensuring that individuals are not forced to choose between forgoing investment opportunities and funding political speech with which they disagree.²²⁰ As the Court recognized in *Austin*, “[a] stockholder might oppose the use of corporate funds drawn from the general treasury—which represents, after all, *his* money—in support of a particular political candidate.”²²¹

The PAC option solves the problem of dissenting shareholders.²²² PACs allow corporations to participate in the political marketplace without using shareholder funds to advocate for the election of candidates whom shareholders may not support.²²³ PACs are funded only by voluntary donations from shareholders and employees who know that their money will be used for political purposes.²²⁴

Those who criticize the need to protect dissenting shareholders, like the majority opinions in *Bellotti*²²⁵ and *Citizens United*,²²⁶ and Justice Scalia’s dissent in *Austin*,²²⁷ suggest that shareholders’ rights will be sufficiently protected if the shareholders use tools of corporate democracy (meaning voting out the board of directors), wage a derivative suit, or sell their shares.²²⁸ Not so. First, ousting members of a

219. *Bellotti*, 435 U.S. at 805 (White, J., dissenting); Bezanson, *supra* note 74, at 666 (“Investors, generally, have no knowledge or intention that their contributions to a corporation (in the form of stock and partial ownership interests) may be used to fund political, and especially partisan, speech unrelated to its general business interests in the name of the corporation”); Winkler, *supra* note 63, at 163 (“[S]hareholders do not invest in business corporations to support corporate politics, but to pursue economic gain.”).

220. *Bellotti*, 435 U.S. at 818 (White, J., dissenting). Justice White reiterated that the government has an interest in protecting “the right to adhere to one’s own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose.” *Id.* at 816.

221. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 670 (1990) (Brennan, J., concurring); see also Brody, *supra* note 68, at 877 (noting that *Austin* recognized “economically compelled association as a reason to limit the organization’s campaign speech”).

222. *Austin*, 494 U.S. at 670 (Brennan, J., concurring).

223. *FEC v. Beaumont*, 539 U.S. 146, 163 (2003).

224. Winkler, *Other People’s Money*, *supra* note 26, at 928 (“PACs reduce the likelihood of misusing ‘other people’s money’ because funds are raised on a voluntary, knowing basis for specifically political purposes.”).

225. *Bellotti*, 435 U.S. at 795.

226. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

227. *Austin*, 494 U.S. at 687 (Scalia, J., dissenting).

228. For instance, the majority in *Bellotti* held that in addition to being able to sell an investment, “[a]cting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements.” *Bellotti*, 435 U.S. at 794–95.

board of directors or waging a successful derivative suit are all but impossible hills to climb.²²⁹ Second, many shareholders hold stocks through intermediaries, such as pension plans or mutual funds. Institutional investors have little control over their shares and would be forced to sell the shares of other stocks if they wished to sell the shares of only one corporation making electioneering communications with which they disagreed.²³⁰ Third, for any shareholder, whether she owns shares through an intermediary or not, that shareholder's expressive injury has already occurred by the time the shareholder sells her shares.²³¹ Fourth, there may be tax penalties associated with divesting shares.²³² Lastly, shareholders, particularly in large corporations, may find it difficult to monitor the electoral activities of the corporations in which they own stock.²³³

Each of these options—selling shares, using tools of corporate democracy, or waging a derivative suit—therefore presents insufficient protection for shareholders and presents shareholders with an untenable choice. Whether or not shareholders agree with the message, under *Citizens United*, corporations can use unlimited shareholder money on electioneering communications.²³⁴ The current situation is therefore problematic for shareholders.²³⁵

229. Winkler, *supra* note 63, at 164 (noting that “management exercises nearly unfettered control over the corporation’s assets”); *see also* Winkler, *The Corporation in Election Law*, *supra* note 26, at 1265–66 (detailing the broad discretion given to corporate managers under traditional corporate law and the business judgment rule).

230. Winkler, *supra* note 63, at 166–67.

231. *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting).

232. *Id.*

233. Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1117 (2009); *see, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 674 n.5 (1990).

234. *Citizen United*, 130 S. Ct. at 908.

235. As Adam Winkler has noted, “[t]here are two categories of association views manifested in election laws: one that sees corporate association as perilous to its members, and one that sees it as salutary to its members.” Winkler, *The Corporation in Election Law*, *supra* note 26, at 1260. Winkler explained that “[t]he perilous association view is reflected in election laws designed to protect members of the corporation to whom the political activity of the corporation may pose harm, such as stockholders who do not wish to finance corporate political activities.” *Id.* at 1261. In contrast, “the salutary view conceives of the corporate association as beneficial to its members.” *Id.* at 1266. For reasons discussed *supra*, for-profit corporate spending may fall under the former category, while non-profit corporate spending more likely falls within the latter.

Conclusion: What Type of Non-profit Corporations Should be Exempt from Restrictions on Corporate Electoral Speech?

By detailing the history of congressional regulation over corporate electoral speech, Supreme Court cases addressing those restrictions, the theories behind the importance of the First Amendment, and the conceptions of the corporate personality, this Article demonstrates that for-profit corporate electoral speech does not support the First Amendment interests of the corporation itself, the individual members of for-profit corporations, those listening to corporate speech, or those speaking without spending money. To the contrary, unrestricted for-profit corporate electoral speech can harm the rights of shareholders, listeners, and non-spending speakers. In addition, this Article elucidates the real and legitimate threats that for-profit corporate electoral speech pose to the integrity of the electoral and legislative systems. Simply put, the speech interests of a for-profit speaker are low and the government's interests in restricting that speech is high.

Many non-profit corporations, by contrast, do have a legitimate role to play in the political marketplace.²³⁶ When those non-profit corporations speak, the corporation's electoral speech can be traced to the speech of the members of the corporation, such that their First Amendment interests of both speech and association are fostered by the corporation's speech. In addition, the simple fact is that non-profit corporations are not formed to amass money in the economic marketplace, money that can be used to obtain special advantages in the political marketplace. Non-profit corporate electoral speech,

236. Professor Ashutosh Bhagwat suggests that a more helpful demarcation is between democratic associations and non-democratic associations. Bhagwat, *supra* note 63, at 981. Bhagwat argues that the key issue is not whether the speaker is a corporation, but whether the speaker "is an association that contributes to self-governance." *Id.* at 1024. Bhagwat draws a distinction based on the goals of the association, and would give more protection to associations whose main goals are "relevant to the democratic process," such as "political organization, value formation, and the cultivation of skills relevant to participation in the democratic process." *Id.* at 1000. Under Bhagwat's thesis, organizations whose primary goals are "immaterial to democracy," such as associations whose goal is to make money—for-profit corporations, and limited and professional partnerships—would not be entitled to the same level of First Amendment protection as "democratic associations." *Id.* Bhagwat argues that "[w]hen associations express the joint views of their members, they are engaging in conduct that stands at the intersection of the assembly, association, petition, and speech provisions of the First Amendment." *Id.* at 1022. Bhagwat's suggestion in many ways tracks the recommendations of this Article. However, Bhagwat's suggestion may present line-drawing problems. It could mean that non-profit corporate political speech would be subject to endless evidentiary hearings, and hence could chill protected speech. This Article instead advocates for the imposition of a *de minimis* exception to *MCFL*.

therefore, presents fewer dangers to the integrity of electoral and political processes.

All of this is true, however, only for certain non-profit corporations. Justice Kennedy noted in *Austin* that some organizations view “the nonprofit corporate form [a]s the only feasible way of organizing so that they can transmit important views to the public as a whole.”²³⁷ In such cases, non-profit corporations are the modern day equivalent of political associations.

MCFL is the quintessential example of such a corporation.²³⁸ The characteristics of MCFL made it more like a voluntary political association than a for-profit corporation, and hence its electoral speech was and should be protected regardless of whether or not it was an incorporated or unincorporated association.²³⁹ The relatively elevated speech and associational rights of the members of MCFL and low government interest in restricting MCFL’s political speech dictated that MCFL should not be subject to the law prohibiting corporate electoral speech.²⁴⁰

The proposal contained in this Article, to treat for-profit corporate electoral speech as subject to restrictions and non-profit electoral speech as protected, only works if the non-profit corporations are—like MCFL—formed for an ideological purpose, do not have members who are dis-incentivized from disassociating with the non-profit based on its electoral speech, and are not used as conduits for massive for-profit corporate spending. This Article suggests that the Court should follow the lead of many lower courts and apply a de minimis exception to the third prong of *MCFL*,²⁴¹ such that if a non-profit corporation does not have a specific policy against accepting for-profit corporate contributions and receives a certain percentage of its total

237. *Austin*, 494 U.S. at 711 (Kennedy, J., dissenting). Justice Kennedy further noted that “[b]ecause the unincorporated association structure carries with it a high risk of personal liability for members and operates in an uncertain legal climate, groups often prefer to organize in nonprofit corporate form.” *Id.* Justice Kennedy stated that, “[b]y deciding to operate as a nonprofit corporation rather than an unincorporated association, a group does not forfeit its First Amendment protection to participate in political discourse.” *Id.* at 712.

238. *MCFL*, 479 U.S. 238, 241–42 (1986).

239. *Id.* at 259–63. Justice Brennan concluded that “[w]hile MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise.” *Id.* at 259.

240. “Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form.” *Id.* at 263.

241. The third prong of *MCFL* provides that a non-profit corporation cannot act as a conduit for for-profit corporate electoral spending, and must have a policy of not accepting contributions from such corporations. *Id.* at 264.

assets—perhaps 10% or less²⁴²—from for-profit corporations, the corporation would still fall within the exception proscribed by *MCFL*.²⁴³

Each of the five circuits to address the question of whether there should be a de minimis exception to *MCFL* answered that question in the affirmative.²⁴⁴ These courts each focused on the third prong of *MCFL* and found that the fact that a non-profit lacked a specific policy against the acceptance of corporate contributions, and, in some cases, accepted a certain amount of such contributions, did not take a non-profit outside of the protection of *MCFL*. These courts found that the purpose of the third prong of *MCFL* was to prevent otherwise qualifying non-profit corporations from acting as conduits for for-profit corporate spending, which was not traceable to members of the corporation and could threaten the integrity of the political marketplace. This Article argues that the Court should follow suit and hold that certain non-profit corporations should be able to fund electoral speech through general treasury funds if the vast majority of those funds can be traced to individual donors. This solution is meant to strike the proper balance between the First Amendment and governmental interests at play.²⁴⁵

Most recently, in *Colorado Right to Life Committee, Inc. v. Coffman*, the Tenth Circuit concluded that “*MCFL* does not establish an immobile set of parameters,” but rather that the *MCFL* factors are merely used to determine whether a corporation is more like a business corporation or more like a political association.²⁴⁶ In 1994, in *Day v. Holahan*, the Eighth Circuit—the first circuit to explore this question—explained that the purpose of the third prong of the *MCFL* test was to “ensure[] that political resources reflect political support.”²⁴⁷ In

242. Setting a fixed percentage for the de minimis exception would avoid a case by case analysis of whether a corporation fit within the exception. *Id.* at 239 n.2.

243. *Citizens United v. FEC*, 130 S. Ct. 876, 937 (2010) (Stevens, J., concurring in part and dissenting in part) (“[T]he Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a de minimis amount of money from for-profit corporations Numerous Courts of Appeal have held that de minimis business support does not, in itself, remove an otherwise qualifying organization from the ambit of *MCFL*.”).

244. *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148 (10th Cir. 2007).

245. See *Baker*, *supra* note 30, at 647 (“Even if frequently evaded, legal restraints may limit the degree to which corporations become involved in the financing of electoral campaigns.”).

246. *Coffman*, 498 F.3d at 1148.

247. *Day v. Holahan*, 34 F.3d 1356, 1364 (8th Cir. 1994) (quoting *MCFL*, 479 U.S. 238, 264 (1986)) (internal quotation marks omitted). The *Day* court specifically found that with respect to accepting contributions from business corporations, “the key issue here is the amount of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts.” *Id.*

1995, in *Federal Election Commission v. Survival Education Fund, Inc.*, the Second Circuit held that the only reason the restriction should apply to a non-profit political advocacy corporation is if the business corporations used a non-profit corporation to “funnel their wealth, which derives from the commercial marketplace, into the political marketplace of ideas.”²⁴⁸

Continuing on the same trend, in 1999, in *North Carolina Right to Life, Inc. v. Bartlett*, the Fourth Circuit explained that the purpose of the third prong of *MCFL* was to ensure that a non-profit did not serve as “a conduit ‘for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace.’”²⁴⁹ In 2001, in *Federal Election Commission v. National Rifle Association*, the court held that the question of whether a non-profit advocacy corporation fell within the *MCFL* exception was whether the corporation’s “political activities threaten to distort the electoral process through the use of resources that . . . reflect the organization’s ‘success in the economic marketplace’ rather than ‘the power of its ideas.’”²⁵⁰ The court applied the *MCFL* exception to a non-profit that did accept some corporate contributions but did not serve as “a conduit for political spending by its corporate members.”²⁵¹

Hence, instituting a de minimis exception to *MCFL* would protect First Amendment rights and promote compelling governmental interests. The effect of this proposal is similar to that which would occur by implementing the Snowe-Jeffords Amendment contained in the BCRA.²⁵² The Snowe-Jeffords Amendment provided that certain non-

248. *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293 (2d Cir. 1995). The court further held that:

Under *MCFL*, a nonprofit political advocacy corporation having no shareholders or members with financial disincentives to disassociate from the corporation if they disagree with its views is exempt from § 441b as long as it is independent in fact from significant business or labor influence. The existence of a policy against accepting contributions from business corporations or unions is relevant to, but not dispositive of, the issue of independence.

Id.

249. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999) (alteration in original) (quoting *MCFL*, 479 U.S. at 265).

250. *FEC v. Nat’l Rifle Assoc. of Am.*, 254 F.3d 173, 191 (D.C. Cir. 2001) (quoting *MCFL*, 479 U.S. at 458–59).

251. *Id.*

252. That amendment was to take effect only if another amendment to the BCRA, the so-called “Wellstone Amendment,” was invalidated. The Wellstone Amendment applied the prohibition on corporations’ use of general treasury funds on electioneering communications to all non-profit corporations, but was read by the *McConnell* Court as maintaining an exception under *MCFL* for certain non-profit corporations. *McConnell v. FEC*, 540 U.S. 93, 771 (2003).

profit corporations, organized under section 501(c)(4)²⁵³ and 527(e)(1)²⁵⁴ of Title 26 of the Internal Revenue Code, which were funded only by individual donors and maintained money used for electoral speech in a segregated account, fell outside of the general prohibition contained in the BCRA.²⁵⁵

The proposal put forth in this Article, and in the Snowe-Jeffords Amendment, essentially treats speech by non-profit corporations that are akin to corporate PACs as protected. In *NCPAC*, the Court struck down limits on campaign expenditures by PACs, emphasizing that the speech interests of individuals joined together to express political viewpoints were protected—in contrast to the economic interests advanced directly by the “special advantages . . . on the corporate form.”²⁵⁶ The same is true of non-profit corporations falling within *MCFL*, or a de minimis exception to that case. In both instances, the organizations are formed for an ideological purpose and allow individuals to voluntarily pool their money for that purpose. Hence, the organization’s speech can be traced to its individual donors and members, and there are no fears of harming shareholders.²⁵⁷

In the First Amendment arena, the general rule must be the less government intrusion, the better. However, this Article addresses the need for government regulation only of its own creation—for-profit

253. 501(c)(4) non-profit corporations are:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4)(A) (2006). *Citizens United* is a 501(c)(4) organization.

254. A 527 non-profit corporation is “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” I.R.C. § 527(e)(1). Section 527 groups include segregated funds established by many 501(c) organizations.

255. 2 U.S.C. § 441b(c)(2) (providing that the prohibition on a corporation’s use of general treasury funds on electioneering communications did not apply to communications made by a 501(c)(4) organization or a 527(e)(1) political organization, if the communication was funded solely by individuals); *see also* *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (“The Snowe-Jeffords Amendment would exempt from § 441b’s expenditure ban the political speech of certain nonprofit corporations if the speech were funded ‘exclusively’ by individual donors and the funds were maintained in a segregated account.”). For an excellent discussion on the impact of *Citizens United* on certain non-charitable tax-exempt organizations, see Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011).

256. *NCPAC*, 470 U.S. 480, 494–95 (1985).

257. Winkler, *The Corporation in Election Law*, *supra* note 26, at 1269.

corporations. Regulation of these artificial entities will promote the First Amendment rights of individuals, whether they are members of corporations, non-speaking speakers, or listeners.