The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen

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The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene.1

INTRODUCTION

In 1612, England’s Chief Justice Coke declared that corporations have no souls.2 Nearly four hundred years later, in Citizens United v. Federal Election Commission (FEC),3 Justice Kennedy declared that corporations are disadvantaged persons because the government had intruded upon their freedom of speech.4 This article examines the legal status of the corporation in light of the U.S. Supreme Court’s decision in Citizens United that corporations have political free speech rights equivalent to natural persons.5

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1FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 63 (1937).


3130 S. Ct. 876 (2010).

4Id. at 899 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

5Id. at 900 (“[P]olitical speech does not lose First Amendment protection ‘simply because its source is a corporation.’” (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978))). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia and Alito joined; Justice Thomas joined as to all but Part IV; and Justices Stevens, Ginsburg, Breyer, and Sotomayor joined only as to Part IV. Except when specifically noted otherwise, references in this article to the Citizens United majority opinion, concurrences, and dissent do not address Part IV of the opinion.

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The *Citizens United* majority portrayed a misleading image of corporations. It is true most corporations are owned by small groups of individuals, managed by their owners, and limited in size and revenues. But what the *Citizens United* majority conveniently ignored is one particular attribute which has existed for at least one hundred years: that exceptionally large corporations, controlled by a handful of individuals, have amassed great quantities of wealth and power, which dwarf the resources of the individual electorate, as well as the corporations’ own minority shareholders, ultimately diluting individuals’ political voice.

To say that *Citizens United*’s holding is controversial is an understatement. While much has been said about *Citizens United*, particularly relating to its impact on campaign finance, this article focuses on the role of the corporation in American society in light of *Citizens United*’s determination that a corporation is a “person” with unfettered political speech rights. From its inception, the corporation—a legal fiction—has always been granted as a legal entity separate from its owners. And it has always been granted

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6 See id. at 907 (citing statistics from the U.S. Chamber of Commerce that ninety-six percent of its three million business members have fewer than one hundred employees and a Congressional Research Service report stating that more than seventy-five percent of corporations subject to federal income tax have less than one million dollars in receipts per year).

7 See infra notes 142–44 and accompanying text.


9 Westlaw alone listed, in early 2012, 750 law review articles that cite *Citizens United*. (Though, admittedly, some of the articles do not address the case in substance.)


11 See infra note 64 and accompanying text (listing legal attributes of corporations).
some of the same legal rights as those held by natural persons: it can own and sell property; it can sue or be sued. But corporations also possess supernatural powers, particularly perpetual existence.

To understand the role of the corporation in modern U.S. society, it is important to understand the development of corporations throughout the nation’s history. For most of their history, corporations were permitted to exist only in situations in which the reigning sovereign was either unable or unwilling to make substantial infrastructure improvements or support highly risky but socially beneficial investments. It is only since the end of the nineteenth century that corporations were perfunctorily formed for any lawful business. Granted, commercial growth demanded easier incorporation; but, as we later discuss, the resulting general incorporation laws had less to do with the needs of society and more to do with states loosening the controls over corporations in order to compete for domestic corporate charters and consequent revenues. The legal and constitutional rights that were initially granted to corporations arose organically to support their commercial functions and property rights.

In Part I, we explore the history and development of corporate political speech restrictions, both from statutory and Supreme Court jurisprudence perspectives. Part II examines the role of the corporation in American society at the time of founding to shed light on the question of whether the First Amendment was intended to fully protect corporate political speech. In Part III, we trace the evolution of the corporation in

\[12\text{See Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 667 (1819) (Story, J., concurring) ("Among other things it [a corporation] possesses the capacity . . . of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties.").}\\]

\[13\text{See id. at 667 ("Among other things it [a corporation] possesses the capacity of perpetual succession . . . ").}\\]

\[14\text{See infra notes 65, 73–74 and accompanying text.}\\]

\[15\text{See infra note 127 and accompanying text.}\\]

\[16\text{See infra notes 136–37 and accompanying text.}\\]

\[17\text{See, e.g., Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings L.J. 577, 590 (1990) ("Although business defended against government regulation by using fourteenth amendment property-oriented safeguards, Bill of Rights protections rarely were sought. When invoked, they were used to defend tangible property against economic regulation and operated much like due process property protections."); id. at 664–65 (providing an Appendix of Supreme Court jurisprudence that applies the Bill of Rights to corporations).}\\]
nineteenth-century America from a special- to general-purpose entity, along with associated constitutional developments. Justice Frankfurter wrote that the history of American constitutional law was a reflection of the impact of the corporation upon America; he was addressing the Supreme Court’s response to the rising economic power of corporations. Part III also includes an examination of the growing concentration of wealth and power of corporations in the late nineteenth and twentieth centuries, and provides reflections on commentators’ growing concerns over that concentration of wealth and power—exactly the concerns expressed by Congress in enacting the first legislation restricting corporate campaign expenditures in 1907. Part IV provides an analysis of the possible consequences of the Citizens United decision, including the risks of severely diminishing the political voice of individual corporate shareholders, intermingling commercial speech with corporate political speech, and creating an artificial corporate supercitizen. At the heart of Citizens United is the issue of corporate personhood, at least in terms of a constitutional right of political speech. As with Prometheus and possibly Dr. Frankenstein, the Supreme Court has breathed new life into an inanimate object. In Part V, we explore possible solutions to altering, if not reversing, the corporate personhood approach taken by the Citizens United majority. In the meantime, however, we conclude that with its newly acquired constitutional rights, the corporation is perhaps now ready to dominate not just commerce but the political system as well.

18 Frankfurter, supra note 1, at 63 (“We know that [Chief Justice] Taney was keenly alive to the concentration of economic power which the corporate form promoted, and greatly concerned over its threat to those more or less egalitarian hopes for American society which he shared with Jefferson and Jackson.”).

19 See infra notes 22–24 and accompanying text.


21 Mary Wollstonecraft Shelley, Frankenstein: or The Modern Prometheus 85 (1818) (“I became myself capable of bestowing animation upon lifeless matter.”); see also Louis K. Liggett Co. v. Lee, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting) (referring to corporations as Frankenstein monsters). We will leave it the reader to decide whether the Frankenstein references should be limited to creating life from inanimate materials or whether to extend the metaphor to also include monstrous ruin. See, e.g., Charles F. Adams, Jr. & Henry Adams, Chapters of Erie and Other Essays 95–96 (1886) (“Modern society has created a class of artificial beings who bid fair soon to be the masters of their creator.”).
I. REGULATING CORPORATE POLITICAL SPEECH

Congress has attempted to regulate corporate political speech for over a century, beginning with the 1907 Tillman Act, which contained an outright ban on corporate campaign expenditures for federal elections.\(^{22}\) Enactment of the Tillman Act was motivated by two concerns: “the necessity for destroying the influence over elections which corporations exercised through financial contribution”\(^{23}\) and “the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.”\(^{24}\) In 1921, the Supreme Court invalidated a statute regulating state primaries for the nominations of federal representatives and senators.\(^{25}\) Although the case did not directly address the Tillman Act, “it was widely construed to have invalidated all federal corrupt practices legislation relating to nominations.”\(^{26}\) As a result, the Federal Corrupt Practices Act of 1925 amended the Tillman Act.\(^{27}\) While the new legislation retained the prohibition against corporate contributions for political

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\(^{22}\) Pub. L. No. 59–36, 34 Stat. 864. The Act made it “unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.” Id. at Ch. 420. By 1928, thirty-six states had banned either all corporate contributions or contributions from a wide variety of corporations. Richard Briffault, Corporations, Corruption, and Complexity: Campaign Finance after Citizens United, 20 CORNELL J.L. & PUB. POL’Y 643, 646 (2011).


\(^{24}\) Id. (citing Hearings before the H. Comm. on the Election of the President, 59th Cong. 76 (1906); 40 Cong. Rec. 96); see also United States v. UAW-CIO, 352 U.S. 567, 570 (1957) (noting that towards the end of the nineteenth century, it was “popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption”).

\(^{25}\) Newberry v. United States, 256 U.S. 232, 258 (1921) (holding that Congress did not have this power).

\(^{26}\) CIO, 335 U.S. at 114.

purposes, it changed “money contributions” to just “contributions” and excluded primaries and conventions from the scope of the legislation.

The next major restriction on federal election campaign contributions was included in the Labor Management Relations Act of 1947, which amended the Federal Corrupt Practices Act to restrict contributions by labor unions. In an “effort to impede the rapidly rising costs of presidential and congressional elections and provide candidates with greater access to media,” Congress enacted the Federal Election Campaign Act (FECA) of 1971, which retained in § 441b the restrictions on corporate and labor union campaign contributions from general treasury funds. As an alternative, the FECA allows corporations and labor unions to establish voluntarily funded political action committees (PACs), which can make direct campaign contributions. For purposes more fully explained below, § 441b was amended by the Bipartisan Campaign

28CIO, 335 U.S. at 114 (citing 43 Stat. 1074 (1925)). “‘Contribution’ was defined to include ‘a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.’” Id. at 114 n.11 (quoting 43 Stat. 1071, 2 U.S.C. § 241(d) (1972)).

29Id. (citing 43 Stat. 1070 (1925)).


31Id. § 304 (originally codified at 2 U.S.C. § 251 (1948)); Matthew A. Melone, Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?, 60 DePaul L. Rev. 29, 36 (2010). One commentator suggested the provision was the result of a post-World War II Republican-controlled Congress that “wasted no time in going after the unions.” Melvin I. Urofsky, Campaign Finance Reform Before 1971, 1 ALB. Gov’t L. Rev. 1, 27 (2008).

32Melone, supra note 31, at 37.


342 U.S.C. § 441b (2006). Section 441b prohibits “corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.” Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

352 U.S.C. § 441b(b)(2)(C); accord Citizens United, 130 S. Ct. at 887–88 (noting that under § 441b(b)(2), corporations may establish a “separate segregated fund” known as a political action committee or PAC).

36See infra notes 53–55 and accompanying text.
Reform Act (BCRA) of 2002, which limited corporate campaign restrictions to “electioneering communications,” defined as any broadcast, cable, or satellite communication which

(I) refers to a clearly identified candidate for Federal office;

(II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

Throughout the history of corporate campaign finance restrictions, at least until Citizens United, the Supreme Court has recognized the congressional and constitutional legitimacy of corporate campaign finance restrictions. The foundation for this legitimacy begins with special corporate characteristics that lend themselves to stricter legislation: corporations “are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.” In particular, “State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.” The Supreme Court previously recognized that these state-granted special advantages that are designed to attract and deploy capital can lead to “[d]irect corporate spending on political activity[, which] raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”

The Supreme Court had therefore acknowledged that the “governmental interest in preventing both actual corruption and the appearance

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of corruption of elected representatives has long been recognized, and there is no reason why it may not . . . be accomplished by treating unions, corporations, and similar organizations differently from individuals.42 Entities with different structures and purposes require different forms of regulation in order to protect the integrity of the electoral process.43 Until Citizens United, the Supreme Court had deferred to Congress’s judgment on the matter of treating corporations differently for campaign finance purposes.44 The Citizens United majority ultimately decided to defer to Congress no longer, concluding corporate free speech rights outweigh any anticorruption measures provided through § 441b.45

Since the initial restrictions on corporate campaign expenditures in 1907, corporations have not been completely denied a political voice. As Richard Briffault succinctly summarized, corporations have enjoyed mul-

44FEC v. Beaumont, 539 U.S. 146, 155 (2003) (“In sum, our cases on campaign finance regulation represent respect for the ‘legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.’ And we have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages.” (quoting Nat’l Right to Work Comm., 459 U.S. at 209–10)).
45Citizens United v. FEC, 130 S. Ct. 876, 908–09 (2010) (“The anticorruption interest is not sufficient to displace the speech here in question. . . . [W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”). But see id. at 961 (Stevens, J., dissenting) (stating that the majority’s anticorruption conclusion “certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs—and which amply supported Congress’ determination to target a limited set of especially destructive practices”). Ironically, less than one year earlier, Justice Kennedy delivered the majority opinion in Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S. Ct. 2252 (2009), reversing a West Virginia Supreme Court of Appeals decision because one of the three judges in the majority had received $3 million dollars in campaign donations from a party in interest in the case but had refused to recuse himself. Id. at 2264–65. Justice Kennedy wrote:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. Id. at 2263–64. In Citizens United, Justice Kennedy distinguished Caperton by finding that it was “limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.” Citizens United, 130 S. Ct. at 910.
multiple legal channels that enable them “to deploy considerable amounts of money in elections.” Section 441b does not restrict communications by a corporation to its stockholders, executive or administrative personnel, or their families. In addition, there are no limitations on corporations’ expenditures for nonpartisan “get-out-the-vote” campaigns. Corporations are also free to spend corporate resources to establish and pay for the administrative expenses of PACs. Finally, corporate campaign finance restrictions apply only to express advocacy, not issue advocacy. This latter delineation arises from *Buckley v. Valeo*, which limited the definition of campaign expenditure for all groups other than candidates and political parties to communications that expressly advocate the election or defeat of a clearly identified candidate for federal office. *Buckley* gave rise to “magic words” that distinguished express advocacy from issue advocacy, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.” However, the express advocacy standard arising from *Buckley* proved extremely easy for corporations and other campaign participants to evade, and in 2003, the Supreme Court acknowledged that “Buckley’s magic-words requirement [was] functionally meaningless” and that, as to later political advertising, “although the resulting advertisements [did] not urge the viewer to vote for or against a candidate in so many words, they [were] no less clearly intended to

46 Briffault, *supra* note 22, at 647.


49 Briffault, *supra* note 22, at 647 (citing 2 U.S.C. § 441b(b)(2)(C)). Section 441b(b)(2)(C) permits corporations and unions to establish, administer, and solicit contributions to a separate segregated fund to be utilized for political purposes. See Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).


51 *Id.* at 39–44; see Briffault, *supra* note 22, at 648.

52 *Buckley*, 424 U.S. at 44 n.52.

53 See Briffault, *supra* note 22, at 648 (providing examples of tactics used, such as praising or criticizing a candidate but not calling for the candidate’s actual election or defeat, and including a tag line urging the viewer or listener to call the candidate depicted in the ad and tell him or her what the caller thinks of the candidate’s actions or positions).
influence the election.”54 Hence the “electioneering communication” limitation in § 441b through the BCRA amendments,55 the Supreme Court ruled, in 2003, presented no constitutional issue.56 Four years later, a plurality of Supreme Court justices maintained the express versus issue advocacy delineation and created a test to determine whether an advertisement is the functional equivalent of express advocacy: whether it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”57

Based on this history of evolving statutory corporate campaign finance restrictions and subsequent Supreme Court scrutiny, it came as a bit of a surprise when the Citizens United Court expressly declared that the “electioneering communication” language in § 441b was unconstitutional.58 The Citizens United majority characterized § 441b as an unconstitutional outright ban on corporate speech, stating that “political speech


55See id. at 194 (noting that “Congress enacted BCRA to correct the flaws it found in the existing system”).

56Id. In fact, based on the amended § 441b, the Supreme Court “rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy.” Id.

57FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007). While the plurality did not question “that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy,” it concluded that § 441b was unconstitutionally applied—in determining whether the advertisements in question constituted express advocacy—in this particular case. Id. at 482.

58Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (“Section 441b’s restrictions on corporate independent expenditures are . . . invalid . . .”). The Supreme Court had previously upheld a state statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to any candidate in elections for state office. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990). Austin was overruled by Citizens United. 130 S. Ct. at 913 (“[T]he Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”). Citizens United also reversed the part of McConnell that upheld restrictions on corporate independent expenditures under the BCRA. 130 S. Ct. at 913. Representative Jerrold Nadler described the Citizens United decision as one in which “[t]he justices answered a question they weren’t asked in order to overturn a century of precedent which they had reaffirmed only recently.” First Amendment and Campaign Finance Reform After Citizens United: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 1 (2010) (statement of Rep. Jerrold Nadler, Chairman, Subcomm. on the Constitution, Civil Rights, and Civil Liberties).
does not lose First Amendment protection simply because its source is a corporation.”

As such, at least for political speech, the Constitution’s preamble of “We the People” includes artificial as well as natural persons.

The *Citizens United* majority’s characterization of corporations as being on equal constitutional footing as natural persons for purposes of political speech forces a re-examination of the nature of the corporation and its role in American society and politics, especially in light of Justice Scalia’s assertion that the founders had no intention of excluding corporations from protections when the Constitution and the Bill of Rights, particularly the First Amendment, were ratified. One commentator has characterized this conclusion as seemingly failing to correspond “with the actual historical record,” while another commentator, after analyzing documents contemporaneous to the drafting and ratification of the Constitution, concluded the Framers did not consider corporations to have constitutional rights equal to natural persons.

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59 *Citizens United*, 130 S. Ct. at 897, 900 (internal quotation marks omitted).

60 Id. at 927 (Scalia, J., concurring) (asserting there is “no evidence—none whatever—that the First Amendment’s unqualified text was originally understood to exclude . . . associational [i.e., corporate] speech from its protection.”). Justice Scalia appears to find it instructive that corporations and voluntary associations were not excluded from the First Amendment, reasoning that had the Framers wanted to exclude these speakers, they would have done so expressly. Id. at 926 (“The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak.”). Extrapolating what the Framers meant by what they did not express has already proved itself to be, in retrospect, a perilous argument. For example, when the Supreme Court held that tapping telephone lines constituted a search subject to the Fourth Amendment, Justice Black argued that, had the Framers intended to protect against eavesdropping, they would have included it in the text of the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 366 (1967) (Black, J., dissenting) (“Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was . . . an ancient practice which at common law was condemned as a nuisance. . . . There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment.” (citations omitted) (internal quotation marks omitted)).


62 Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. Davis Bus. L.J. 221, 265 (2011) (“[W]hile the drafters and ratifiers of the federal organic documents perhaps used words that if defined broadly could encompass corporations, the drafters and ratifiers did not, at least during the debates, use those words in a manner consistent with protecting juridical beings as real constitutional entities. Instead, their own words seem to
We next examine the role of corporations in American society at the time of the nation’s founding to provide insight as to their anticipated constitutional privileges.

II. CITIZENS UNITED AND CORPORATIONS AT THE TIME OF THE FOUNDING OF THE UNITED STATES

While corporations have existed for nearly two millennia, their role in dominating the U.S. economy is a fairly recent phenomenon. Throughout their history, corporations have consistently enjoyed the attributes of perpetual succession, the right to sue and be sued in their own names, the right to own and sell property, the right to self-regulate, and the right to act as single entities. English joint-stock companies, from which modern American corporations trace their lineage, were the major organizational structure and authority used to colonize North America. Prior indicate they held a concessionary view of corporations—a view fundamentally inconsistent with their view of constitutional rights." (citations omitted)).

Some historians note that the first corporations originated in ancient Greece, which “permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law.” 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 268 (O. W. Holmes, Jr. ed., 12th ed. 1884) (1827). There is also evidence of associations established for mercantile purposes in Assyria more than 2000 years ago. 3 DICTIONARY OF POLITICAL ECONOMY 65 (Robert Harry Inglis Palgrave ed., 1915). Legal commentators, however, credit Roman law as the primary origin of the corporation. See, e.g., 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 469 (James DeWitt Andrews ed., 4th ed. 1899) (1807) (“The honor of originally inventing these political institutions [i.e., corporations] entirely belongs to the Romans.”).

Limited liability for shareholders, common today, has not always been an attribute. See, e.g., E. Merrick Dodd, Jr., Statutory Developments in Business Corporation Law 1886–1936, 50 HARV. L. REV. 27, 28 n.1 (1936) (noting that many of the early American charters did not confer limited liability).

The Mysterie and Companie of the Merchants Adventurers for the discoverie of regions, dominions, islands and places unknown, chartered in 1553 and commonly known as the Russia Company, is generally recognized as the first joint-stock company, with its founders raising £6000 by issuing common stock priced at £25 per share to outfit three ships to explore trade routes along the Northeast Passage to China and the East. 1 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 18 (1912). “In the era of settlement and colonization, the [English] Crown’s use of charter companies
to the American Revolution, corporations represented England-based monopolistic trading companies that stifled local commerce by restraining competition.\(^{66}\) In fact, due to the extension of an English law known as the “Bubble Act” to the colonies,\(^{67}\) there were almost no known corporations that originated in America prior to the Revolution.\(^{68}\)

was a strategy to create a colonial empire by harnessing the capital and goals of private investors.” A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. Rich. L. Rev. 9, 10–11 (2007); see also Simeon E. Baldwin, *Private Corporations 1701–1901*, in *Two Centuries' Growth of American Law* 1701–1901, at 261, 261 (Yale Law Sch. 1901) (“The law of corporations was the law of their being for the four original New England colonies.”); Edward P. Cheyney, *Some English Conditions Surrounding the Settlement of Virginia*, 12 Am. Hist. Rev. 507, 511–12 (1907) (“At the close of the sixteenth century the English government was not in a position financially or politically to furnish the funds for colonization, so the only remaining practical method was the formation of a trading company, with its much more extended resources and its corporate life.”).

\(^{66}\)See *Adam Smith*, *An Inquiry into the Nature and Causes of the Wealth of Nations* 163 (1789). “The exclusive privileges of corporations are the principal means” used to restrain competition in some employments. *Id.* at 157; see also Adolf A. Berle, Jr., *Studies in the Law of Corporation Finance* 15 (1928) (“Wherever there was a corporation there was also taint of royal power; . . . in America it was feared as a tyranny of faraway England[;] . . . in the early phases people were thinking not of the power of massed wealth, but of the power of an avaricious central government.”).


\(^{68}\)See Baldwin, *supra* note 65, at 267–68. Baldwin documents five colonial-originated commercial charters prior to 1776 and no more than 225 total charters prior to 1800. *Id.* at 268, 312. Though others’ counts may differ slightly, it is clear the number was very low. Berle, *supra* note 66, at 15 (“Prior to 1789 corporations were few. The list has been disputed, though the disputes over individual cases are a matter rather for historians than for lawyers.”); *see also, e.g.*, Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* 8 (1917) (“Prior to 1801 over 300 charters were granted for business corporations, ninety percent of them after 1789.”); Samuel Williston, *History of the Law of Business Corporations Before 1800*, in *3 Select Essays in Anglo-American Legal History* 195, 234 (Ass’n of Am. L. Schs. eds., 1907) (noting only one business corporation chartered in America prior to the Declaration of Independence). Prior to the Revolution, most large colonial-based enterprises were carried out as partnership-type associations under a company name. *See* Baldwin, *supra* note 65, at 268.
The drafters of the Constitution and the Bill of Rights were familiar with the corporation in the form of English trading companies, and “[t]he distinguishing feature of these companies was not legal personality, but monopoly.”  

The fear of the potential of monopoly led to the Framers’ opposition during the Constitutional Convention to granting the new American federal government the exclusive right to grant corporate charters. Four states—Massachusetts, New Hampshire, New York, and Rhode Island—accompanied their ratification of the Constitution with the recommendation “[t]hat Congress erect no company of merchants with exclusive advantages of commerce,” or other words of similar import. As a result, in the early years of the United States, corporations could be chartered only through a special act of legislation, predominantly by the individual states. Prior to 1800, incorporations were primarily limited to quasi-public purposes, such as building canals, roads, bridges, and delivering

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70At the Constitutional Convention, “a proposal to delegate the power of incorporation to the federal government was debated . . . and defeated by a fair majority through fear lest the federal government, through power of incorporation, come to dominate the entire commercial life of the country.” Berle, supra note 66, at 16.

71Henderson, supra note 69, at 20.

72Kenneth K. Luce, Trends in Modern Corporation Legislation, 50 Mich. L. Rev. 1291, 1294 (1952) (“Incorporation by special act was the rule until the middle of the nineteenth century.”); see also Davis, supra note 68, at 8 (“The power of granting corporate privileges . . . was assumed by the state governments as the British control was thrown off . . . .”); James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780–1970, at 113 (1970) (noting that both state legislatures and Congress had the authority to grant charters); Margaret M. Blair, Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, 51 UCLA L. Rev. 387, 415 (2003) (“[A]fter the Revolution, no one questioned the authority of the states to grant charters.”).

73See, e.g., Currie’s Adm’rs v. Mut. Assurance Soc’y, 14 Va. (4 Hen. & M.) 315, 347 (1809) (“With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public.”); see also Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) (“[A]t first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.”); Hurst, supra note 72, at 15 (“[A]lmost all of the business enterprises incorporated . . . in the formative generation starting in the 1780’s were chartered for activities of some community interest. . . . That such public-interest undertakings practically monopolized the corporate form implied that incorporation was inherently of such public concern that the public authority must confer it.”).
water. Though nearly one-quarter of these early charters were for banks and insurance companies, very few were for manufacturing or other strictly commercial purposes.

Despite Justice Scalia’s protestations to the contrary in his *Citizens United* concurrence, there were very few corporations in America not chartered by England at the time of its founding—approximately thirty by one estimate. Of those, the vast majority were not “business” corporations, as Justice Scalia described them; as noted above, very few of these early corporations were strictly commercial in nature. It was well into the nineteenth century before corporations were allowed to be formed without

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74 Of the 225 charters documented by Baldwin that were granted prior to 1800, thirty-six were for bridges, twenty-one for canals, twenty-six for improving navigation, thirty-eight for road building, and twenty-one for water works—in all, sixty-three percent of charters. Baldwin, *supra* note 65, at 312.

75 There were twenty-eight charters for banks and twenty-five charters for insurance, representing twenty-four percent of the 225 charters granted prior to 1800. Baldwin, *supra* note 65, at 312.

76 There were only twelve charters granted for manufacturing concerns, a mere five percent of the 225 charters granted prior to 1800. *Id.* There were also six charters granted for general commerce, one for mining, two for logging, one for a land company, one for a fishery, one in aid of engineering, one for a burial ground, and five in aid of agriculture. *Id.* Between the Revolutionary War and the end of the eighteenth century, enterprises, such as banks and insurance companies and those established for internal improvements, including toll bridges, turnpikes, and canals, sought a form of organization that would enable them to combine the resources of a considerable number of persons in a single economic unit. Dodd, *supra* note 64, at 28. Dodd notes the “[d]esire for limited liability was also a factor in bringing about the trend towards incorporation, although many of the early charters did not confer that privilege.” *Id.* at 28 n.1.

77 Justice Scalia implied that the estimated 335 charters issued by the end of the eighteenth century represents an important development relative to the size of the nation at that time. See *Citizens United* v. FEC, 130 S. Ct. 876, 925–26 (2010) (Scalia, J., concurring). The authors consider Justice Scalia’s concurrence to complement and supplement the *Citizen United*’s majority analysis and believe it therefore may be used to support future related Supreme Court decisions. This article therefore includes a substantive analysis of the reasoning underlying Justice Scalia’s concurrence.

78 See Davis, *supra* note 68, at 8 (noting that ninety percent of his estimated 300 pre-1800 corporations were formed after 1789).

79 *Citizens United*, 130 S. Ct. at 926 (Scalia, J., concurring) (“There were approximately 335 charters issued to *business* corporations in the United States by the end of the 18th century.” (emphasis added)).

80 See *supra* note 76.
express legislative permission; prior to that, most corporations were allowed to exist only if they served a public necessity. The mistrust of corporations was reflected not only in the concerns expressed during the Constitutional Convention but also by Thomas Jefferson, who was instrumental in drafting the First Amendment and having it ratified by the states. For example, Jefferson warned of “the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws our country.”

Indeed, there was a clear anticharter movement during and after the American Revolution. For example, Philadelphia’s 1701 charter expired with the American colonies’ independence and proposals to reincorporate the city provoked intense opposition through much of the 1780s. Opponents considered municipal charters an anachronistic throwback to feudal barons that in a republic were harmful because of the special rights and privileges granted to a few individuals. The 1785 New York Council of Revision described corporations as ‘to most purposes independent republics,’ which raised the specter of imperia in imperio, of governments within a

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81 See, e.g., Luce, supra note 72, at 1294; supra note 73. Until the middle of the nineteenth century, legislatures granted corporate charters to private enterprises in order to provide necessary public services. See Hurst, supra note 72, at 60.

82 See supra note 70 and accompanying text.


84 Clermont, supra note 61, at 486–87 (quoting Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 12 The Works of Thomas Jefferson 42, 44 (Paul Leicester Ford ed., 1905)). This is perhaps one of the “corporation-hating quotations [Justice Stevens] . . . dredged up,” according to Justice Scalia. Citizens United, 130 S. Ct. at 926 (Scalia, J., concurring) (referencing id. at 949 n.54 (Stevens, J., dissenting)). Regardless, “considering that Madison and Jefferson both expressed serious fears about the growing powers of corporations, it seems unlikely that either would have wanted to oppose the power of the states, let alone the federal government, to restrict their activities, including their speech.” Clermont, supra note 61, at 488.


86 Id.
government, which to eighteenth-century observers threatened endemic conflict, even civil war, and the dissolution of the republic."87 Arguments raised against emergent business corporations were much like those against the incorporation of cities: "[O]pponents characterized business corporations, like incorporated cities, as aristocratic and so antirepublican because they gave privileges to the few at the cost of the many."88 “Corporations were also charged with promoting the maldistribution of wealth by circumventing” laws of mortmain.89

Finally, critics argued that corporations promoted economic development less effectively than companies owned by individuals or partnerships—that is, salaried corporate managers would have less commitment to the business compared to owner-managed unincorporated enterprises.90 Massachusetts led the first states in granting corporate charters, serving as a model for the attitudes towards incorporation in the newly formed United States: “[T]he corporation was conceived as an agency of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state.”91 The prevailing understanding of corporations at that time was clearly for the long-term benefit of the public and community rather than the accumulation of wealth and power.

87 Id. at 62 (footnote omitted).

88 Id. at 66.

89 Id. at 69. In England, corporations, particularly ecclesiastical, were restricted in their ability to hold and transfer real property through statutes of mortmain. See Corporations, 4 Am. Jurist & L. Mag. 298, 303 (1830). Mortmain restrictions were applied to early corporations in Pennsylvania, see Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548–53 (1933) (Brandeis, J., dissenting), and New York, see Ronald E. Seavoy, The Origins of the American Business Corporation 1784–1855, at 10–11 (1982). The original purpose of mortmain statutes was to prevent the permanent accumulation of lands in the hands of churches and charitable corporations. Seavoy, supra, at 10–11. Mortmain restrictions were initially applied to private corporations in New York to promote equal opportunities for individuals to own land. Id. at 11.

90 Maier, supra note 85, at 72; see also Smith, supra note 66, at 109 (“Like the stewards of a rich man, [directors] are apt to consider attention to small matters as not for their master’s honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.”).

In his concurrence in *Citizens United*, Justice Scalia acknowledged that the nature of corporations at the time of founding—chartered by special legislation often with monopoly privileges—has changed. In fact, he asserted, the founders would most likely favor the modern corporation that no longer enjoys such privileges. However, the historical post-eighteenth-century development of the corporation within American society does not necessarily support the notion that corporations, as state-created artificial persons, should be afforded full First Amendment constitutional protection for political speech, on par with natural persons.

III. CORPORATE PERSONHOOD AND CONSTITUTIONAL PRIVILEGES

In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall formally enunciated the legal status that had long been recognized in corporations: “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, either expressly, or as incidental to its very existence.” Within this context, it is important to examine corporate powers and corporate constitutional rights.

The extent of a corporation’s powers, express or implied, was a major concern in the development of corporations in American commerce during the nineteenth century. Just as the English charters in colonial America represented monopolistic interests, so too did the early charters granted by state legislatures. The extent to which those monopolies would

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93 *Id.*

94 17 U.S. (4 Wheat.) 518, 636 (1819). The *Trustees of Dartmouth College* Court also held that a charter is a contract between the corporation and the sovereign that created it, *id.* at 627, establishing that the Constitution prevents a legislature from impairing an original contract/charter, *id.* at 651–52, presumably, though never expressly stated, through Article I, Section 10. See R.N. Denham, Jr., *An Historical Development of the Contract Theory in the Dartmouth College Case*, 7 Mich. L. Rev. 201, 222 (1909) (asserting that *Trustees of Dartmouth College* “settled for once and always, that a charter of incorporation is a contract, and as such, any act passed by any state legislature impairing the rights existing under it, is such an act is [sic] will come under Section 10 of Article I, of the Constitution of the United States, and hence cannot stand as valid*”).
be allowed to continue became a central battle in determining the powers of corporations. In *Gibbons v. Ogden*, the U.S. Supreme Court addressed the extent to which a state legislature could grant a corporation a monopoly—in this case a special-privilege franchise. Chief Justice Marshall nullified Ogden’s monopoly, declaring that under the Constitution, Congress has the exclusive right to regulate interstate commerce.

Although corporations were initially used extensively for internal improvement projects—for example, canals, roads, bridges, and railroads—there began a contraction of state and local government involvement in such projects during the first half of the nineteenth century. Another rising argument against special-privilege franchises was that they stifled free enterprise; people began to see them as a barrier to economic growth. This attitude received formal legal recognition in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, in which the owners of the Charles River Bridge, a toll bridge connecting Boston and Charleston, objected to the erection of the nearby Warren Bridge,

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96See id. at 1. The case involved exclusive navigation rights by steamboat granted to Robert Livingston and Robert Fulton on all the waters within the jurisdiction of the State of New York. Id. Livingston and Fulton had licensed their exclusive navigation rights to Ogden. Id. at 1–3.

97Id. at 196 (holding that the power to regulate commerce, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution”); id. at 197 (“The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with ‘commerce . . . among the several States . . . .’”).

98See, e.g., Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 J. Econ. Hist. 145, 161–62 (1950) (“After the failures and difficulties of the state programs in the depression of the late thirties [of the nineteenth century], batteries of laissez-faire doctrine were more often and more vigorously applied to the case of internal improvements. Condemnations of government action on grounds of economic principle as well as of financial failure make a constant refrain in legislative proceedings and in the debates of constitutional conventions during the forties.”). Railroads, in particular, championed the withdrawal of government from internal improvements. See id. at 162 (quoting an editorial in the 1839 American Railroad Journal stating that they had no confidence “in any system of internal improvements under the control of the government”).


10036 U.S. 420 (1837).
which would become toll-free in a few years and would result, the plaintiffs claimed, in the complete destruction of the value of their franchise.\textsuperscript{101} Fundamentally, the proprietors of the Charles River Bridge argued their franchise granted them exclusive rights to transportation across the Charles River.\textsuperscript{102} In deciding against the plaintiffs, the Supreme Court ruled that powers conveyed in a charter must be found in the language of the charter itself.\textsuperscript{103} Chief Justice Taney echoed a growing sentiment regarding the role of corporations in American society: “The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations.”\textsuperscript{104} As stated by one commentator, “[T]he Charles River Bridge case represents another chapter in the process of discarding the old habit of conceiving of corporations as the recipients of special state-conferred favors and of adjusting the law to treat the act of incorporation as nothing more than a mere license to exist.”\textsuperscript{105} Laissez-fair attitudes and the Charles River Bridge case represent a shift in perspective in which the utility of the corporation for overall economic growth outweighed the limited special-privilege franchises, to the extent, as will be shown, that the law ultimately adapted to make the corporation “available on terms most responsive to businessmen’s needs or wishes.”\textsuperscript{106}

While the various states were beginning a move toward general incorporations, there remained one additional unresolved issue related to the corporation’s role in interstate commerce—comity. Can a corporation, which is formed in and exists under the laws of one state, enter into valid

\textsuperscript{101} Id. at 538.
\textsuperscript{102} See id. at 539.
\textsuperscript{103} See id. at 549–50 (“The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done.”).
\textsuperscript{104} Id. at 548.
\textsuperscript{105} Horwitz, supra note 99, at 137.
\textsuperscript{106} Hurst, supra note 72, at 62.
contracts in foreign states? The Supreme Court answered in the affirmative in *Bank of Augusta v. Earle*. Chief Justice Taney, who delivered the majority opinion in *Bank of Augusta*, distrusted corporations as aggregations of wealth and power that posed a direct threat to the democratic system. But, while Taney may have feared its abuses, he also recognized that the corporation served as an indispensable adjunct of the nation’s growth. In *Bank of Augusta*, two banks and a railroad company, all incorporated in states other than Alabama, sued defendants in Alabama for breach of contracts. The circuit court ruled that because the corporations were incorporated in states outside Alabama, they could not bring suit on their contracts in Alabama. The practical effect of the circuit court’s decision was “to limit corporate business to the states in which the corporations were chartered, which would have rendered all but impossible the growth of interstate enterprise of any consequence.” The Supreme Court ruled that the law of comity permits a corporation chartered in one state to enter into and enforce contracts in other states. At the same time, however, the Court also recognized the right of states to regulate the conduct of foreign corporations acting within their jurisdiction.

While the Supreme Court, reflected in Chief Justice Taney’s majority opinion, refused to recognize corporations as persons subject to the

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107 38 U.S. 519, 588 (1839) (stating that a corporation “must live and have its being in . . . [its domicile] state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another”).


109 See id. at 89.

110 *Bank of Augusta*, 38 U.S. at 584.

111 Id. at 521.

112 Schwartz, supra note 108, at 89–90.

113 *Bank of Augusta*, 38 U.S. at 592 (“We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts; and that the same law of comity prevails among the several sovereignties of this Union.”).

114 See id. (“Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favour of its adoption can no longer be made.”).
Privileges and Immunities Clause of the Constitution—holding that rights granted to a corporation through its charter are “not the rights which belong to its members as citizens of a state”—it has been argued that comity requires and defines the nature of the corporation as a “person”:

A group of people go through certain legal forms which, by virtue of the lex loci, confer upon them a valuable legal right, personality. Without this legal right, the property which they own, the contracts which they, as a group, have made, cannot be legally protected. If they were to step into a neighboring state; and that state were to deny their corporate existence, the property and contract rights would be impaired.

Although the Supreme Court was unwilling to grant corporations the same constitutional rights as those available to its individual owners, less than fifty years later the Supreme Court—in what can only be described as an off-hand manner—implied that the Fourteenth Amendment’s Equal Protection Clause applies to corporations:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Despite the questionable nature of the statement attributed to the Santa Clara County Court, by extension of the language in the headnote to the

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115See id. at 586 (quoting U.S. Const. art IV, § 2).
116Id. at 587.
117HENDERSON, supra note 69, at 5–6.
118Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (official Court Syllabus) (referencing U.S. Const. amend. XIV, §1). There has been some speculation about “whether this statement was ever made at oral argument, or if it was part of a larger ‘conspiracy’ to smuggle the notion of corporate personhood into constitutional dialogue.” Matthew J. Allman, Note, Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of the Natural Person Theory of Corporate Personhood, 38 Fla. St. U. L. Rev. 387, 395 n.54 (2011). In fact, the Supreme Court based its decision on whether assessed property was outside the jurisdiction of the tax authority, stating,

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot property [sic] be the basis of a judgment against the defendant. Santa Clara Cnty., 118 U.S. at 411. The court concluded that, because the judgment below could be based on the state assessing property outside its jurisdiction, “it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.” Id. at 416.
Court, that the Fourteenth Amendment applies to corporations, it eventually became settled law that, indeed, it does.\textsuperscript{119} The extent to which corporate due process rights imply additional constitutional rights is somewhat muddled, however, particularly after \textit{Citizens United}. As one commentator has noted, due process rights were initially reserved for determining when corporate property was being taken by the state, and they have only recently been applied to corporations for political and speech rights.\textsuperscript{120} In other words, “The Fourteenth Amendment protects only what an artificial entity possesses, which is delineated in the chartering process. For commercial corporations, the right to acquire property is the standard right protected by the equal protection and due process clauses of the Fourteenth Amendment.”\textsuperscript{121}

A combination of factors occurring in the nineteenth century therefore changed the role of the corporation in American society: states restricting their involvement in internal improvements, looking more to private enterprise, expanding laissez-faire attitudes, restricting corporate privileges to those expressly stated in their charters, granting rights of comity, and protecting corporate property. Incorporation through special legislative act was becoming outmoded. “Beginning about 1848, most of the states junked the special act system and enacted general incorporation statutes under which anyone could organize business corporations by preparing and filing articles subscribed by a prescribed number of incorporators.”\textsuperscript{122} Article VIII of the Third Constitution of New York of 1846 is

\textsuperscript{119}See, e.g., Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933) (stating that “corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons” when once again addressing inconsistent application of tax laws).


\textsuperscript{121}Id. at 32; see also Nw. Nat’l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906) (“The liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial, persons.”); Herbert Hovenkamp, \textit{The Classical Corporation in American Legal Thought}, 76 Geo. L. J. 1593, 1649 (1988) (concluding “the corporate personhood doctrine of \textit{Santa Clara} represented an efficient way for the corporation to assert the property rights of its shareholders”).

\textsuperscript{122}Luce, supra note 72, at 1294 (noting also that “[i]ncreasing economic activity pointed up the cumbersome aspects of the special charter system and led to widespread corruption in the obtaining of special charters”); \textit{accord} Seavov, supra note 89, at 180 (“The great depression of 1837–1844 was the watershed in the development of the modern American business corporation because the state constitutional conventions held after 1840 almost always contained
generally regarded as the first state constitutional provision eliminating special legislative acts for incorporation. Although no special legislative act was required for the incorporation of certain types of businesses in the early general incorporation statutes, the statutes still imposed strict limitations, particularly relating to capitalization requirements and the type of business that could be conducted through general incorporation. While it is claimed New Jersey adopted the first modern general incorporation law in 1896, the statute still restricted the types of allowable commercial activities. Delaware’s 1899 general incorporation statute was the first to expressly authorize the formation of a corporation for the transaction of any lawful business.

It can certainly be argued that passage of truly general incorporation statutes at the end of the nineteenth century led to the rapid growth of provisions that effectively separated corporate business opportunities from state politics . . . .

123 N.Y. CONST. of 1846, art. VIII; see also Louis K. Liggett Co., 288 U.S. at 549 n.4 (Brandeis, J., dissenting) (listing constitutional amendments among the states eliminating special legislation for most business incorporations).

124 See, e.g., Del. Const. amend ch. 1 (1875) (empowering the state legislature “to enact a general incorporation act to provide incorporation for religious, charitable, literary and manufacturing purposes, for the preservation of animal and vegetable food, building and loan associations, and for draining low lands”); 15 Del. Laws 181 (1875) (authorizing superior court judges to review and approve certificates of incorporation “for religious, charitable, literary or manufacturing purposes, or for the preservation of animal and vegetable food, or as building and loan associations, or for draining low lands”); 1851 Mass. Acts. 633 (permitting general incorporation for any business “for the purpose of carrying on any kind of manufacturing, mechanical mining or quarrying business” with a maximum capitalization of $200,000); The Pennsylvania Corporation Act of 1874, Act 29 Apr. 1874, § 2; P.L. 73 (enumerating twenty-five types of for-profit enterprises that could be incorporated under the general incorporation statute); Luce, supra note 72, at 1294 (“The first statutes conceived of an incorporated business as a static economic unit, in which growth or change was not to be expected.”). See generally Louis K. Liggett Co., 288 U.S. at 550–56 (Brandeis, J., dissenting) (describing historical limitations on the amount of capital and types of enterprises permitted under early general incorporation statutes).


corporations in the United States. While no one has published incorporation data for every state throughout the history of the United States, several researchers have collected limited data that reflect overall trends in the growth of corporations. For example, a compilation of incorporations under special legislative acts in six states from 1800 through 1891 reveals a total of 10,415 corporate charters. Total incorporations for the same six states under general incorporation laws from 1901 through 1929 total over one-half million. No one has published state-by-state annual incorporations since 1943, though the United States Census Bureau began tracking aggregate U.S. corporations beginning in 1916. The total number of corporations in the United States reached one million in 1958, and the most recent figures available record just under six million corporations.

Justice Brandeis, in a comprehensive review of the history of the corporation in the United States, recounted that through most of that history, the corporate privilege was granted sparingly, primarily due to “[f]ear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life,

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129Id. (Maine (18,318 incorporations), Maryland (18,820 incorporations), New Jersey (32,037 incorporations, 1901–1918), New York (365,499 incorporations), Ohio (83,851 incorporations), and Pennsylvania (32,666 incorporations, 1901–1920)). The number of total incorporations for the same time period increases to nearly three-quarters of a million when charters under general incorporation laws of Connecticut (16,208 incorporations), Delaware (82,551 incorporations), Illinois (67,957 incorporations, 1901–1917, 1925–1929), and Massachusetts (28,361 incorporations, 1901–1920) are included. Id.


131Id.

might bring evils similar to those which attended mortmain.”

Brandeis concluded that “[t]here was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.”

As noted above, the privilege of incorporation was still quite limited under the initial general incorporation laws, especially in terms of maximum capital, the type of enterprise permitted, and the length of the enterprise. All that changed, however, at the turn of the twentieth century. Almost all restrictions on capital, types of enterprises, length of existence, and management control that had been imposed on corporations vanished, but not because the concerns over the powers corporations could yield from their vast accumulations of wealth and capital had disappeared. Instead, the restrictions were removed by the individual states to compete for corporate charters and their resulting state revenues. In other words, “The race was one not of diligence but of laxity.” Justice Brandeis concludes, “Such is the Frankenstein monster which States have created by their corporation laws.”

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133Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting); see also supra note 89 (discussing mortmain).

134Louis K. Liggett Co., 288 U.S. at 549 (Brandeis, J., dissenting).

135See id. at 549–56 (discussing in detail the “severe restrictions upon size and upon the scope of corporate activity” embodied in the early general incorporation laws); supra note 124 and accompanying text.


137Id. at 559.

Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise.

Id. at 564–65 (footnotes omitted); see also Abram F. Myers, Federal Regulation of Corporations under the Commerce Clause, 129 ANNALS AM. ACAD. POLITICAL & SOC. SCI. 143, 145 (1927) (“The creation of corporations has lost its dignity as an exercise of the sovereign prerogative for the furtherance of commerce and in the interest of the people of the state. What was once regarded as the conferring of a great privilege, to be limited and circumscribed by all necessary provisions for the protection of the public, has become a bargain sale, and states are advertising and competing for the business.”).

138Louis K. Liggett Co., 288 U.S. at 567 (Brandeis, J., dissenting); see also Edgar H. Farrar, Address of the President Edgar H. Farrar of New Orleans Louisiana Before the American
Concentration of wealth and power fostered by general incorporation laws has been the greatest concern during the past century. One response to the growing concentration of economic power wielded by corporations was passage of the Sherman Act of 1890, which was designed to prevent large corporations from inhibiting competition in the marketplace through monopolistic tendencies. Still, corporations continued to grow in size and power throughout the twentieth century. By 1950, corporations held almost sixty percent of national income-producing wealth and “became inextricably linked with the idea of postwar prosperity.” Today, the two hundred largest corporations earn nearly one-quarter of total U.S. business revenues.

In his opinion for the Court in Citizens United, Justice Kennedy noted that the vast majority of corporations do not amass a great deal of

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139 See, e.g., Scott R. Bowman, The Modern Corporation and American Political Thought: Law, Power, and Ideology 76 (1996) (“[The] tendency toward centralized control within the business corporation and other forms of enterprise, which coincided with an ever greater concentration of wealth in the hands of progressively fewer industrialists and financiers, initially had developed as a strategy of survival within the competitive marketplace and had in turn facilitated the accumulation of capital that served as a basis for the emergence of corporate capitalism in the first decade of the twentieth century.”).


141 Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940) (stating that the Sherman Act “was enacted in the era of . . . capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern”).

142 See, e.g., Louis K. Liggett Co., 288 U.S. at 565 (Brandeis, J., dissenting) (noting that by the 1930s “perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations”).


144 This calculation is derived from U.S. Census Bureau Table 744, supra note 132 (reflecting 2008 tax returns, the latest available), and Fortune 500, Fortune, May 5, 2008, at F1, available at http://money.cnn.com/magazines/fortune/fortune500/2008/full_list/. Additionally, the largest one hundred U.S. corporations, representing less than 0.0017% of all corporations and 0.00032% of all businesses in the United States, earned twenty-four percent of total corporate revenues and nearly twenty percent of total business revenues in 2008. Id. Stated another way, a mere one hundred corporations earn nearly one-fifth of all business revenues in the United States.
wealth; 145 in addition, corporations comprise less than twenty percent of business entities in the United States. 146 Regardless, the Supreme Court had previously recognized and found no constitutional issue with the fact that smaller, less wealthy corporations would be subject to the same § 441b restrictions as large, wealthy corporations. 147 Ignoring the immense wealth and power that can be wielded by some corporations, the Citizens United majority instead focused on the relatively small number of total business that are subject to § 441b. The Citizens United majority concluded that § 441b “is not even aimed at amassed wealth,” 148 despite evidence to the contrary.149

Regardless of antimonopoly laws such as the Sherman Act, concentration of wealth and power has long been a natural by-product of the corporation:

Under the power to create corporations with unlimited capital stock, either directly or by consolidation, great aggregations of capital have been formed which have seized upon specific industries and driven everybody else out of them. They stand like armed colossuses astride the gateways of commerce and destroy every entrant who presumes to compete with them. They have no legal grant of monopoly, but monopoly comes to them by virtue of their size, 

145Citizens United v. FEC, 130 S. Ct. 876, 907 (2010) (citing statistics indicating that seventy-five percent of corporations have less than one million dollars in receipts per year).

146As of 2008, corporations represented approximately 18.5% of all businesses filing a tax return. U.S. Census Bureau Table 744, supra note 132. Yet corporations earned over eighty percent of total business revenues. Id.

147The Court wrote,

In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress’s judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared . . . . [T]he differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process.


148Citizens United, 130 S. Ct. at 907.

149See supra notes 142, 144 and accompanying text (describing the vast accumulation of wealth by relatively small numbers of corporations).
organization and strength, just as surely as monopoly went to the East India Company by royal grant.\textsuperscript{150}

These propensities of corporations to amass wealth and power are exactly the harm Congress has been trying to prevent with respect to the political process since 1907 and that \textit{Citizens United} has undone.

\section*{IV. The Consequences of \textit{Citizens United}}

Our review of the historical development of the corporation demonstrates that the modern corporation is not the same entity the Framers of the Constitution and the Bill of Rights understood; it has the capacity to speak with a much greater voice than the Framers could have conceived. Yes, the Framers were familiar with the corporate form—as representative of the oppressive monarchy they were overthrowing.\textsuperscript{151} Hence, there is a very strong argument that it should not be generally accepted wisdom that the Framers of the Constitution and the Bill of Rights necessarily would have viewed corporations favorably.\textsuperscript{152} For nearly one hundred years after the founding of the United States, the corporation remained predominantly a special privilege, granted sparingly and under significant regulation. It was well after the ratification of the Constitution and the Bill of Rights that corporations became commonplace behemoths of dynastic wealth and were afforded multiple constitutional protections. As such, we cannot presume the Framers contemplated the potential of the modern corporation’s voice to drown out the voice of individuals. The Framers did not contend with the now significant numbers of shareholders owning

\textsuperscript{150}FARRAR, \textit{supra} note 138, at 11.

\textsuperscript{151}See, e.g., BERLE, \textit{supra} note 66, at 15 (“Wherever there was a corporation there was also taint of royal power; . . . in America it was feared as a tyranny of faraway England[;] . . . in the early phases people were thinking not of the power of massed wealth, but of the power of an avaricious central government.”); HENDERSON, \textit{supra} note 69, at 19 (“The identification of incorporation with the grant of special and exclusive privileges or monopolies, and the fear that the corporation would infringe on the ‘natural rights’ of citizens, was the chief source of the early opposition to corporations.”) (referring to debate during the Constitutional Convention).

\textsuperscript{152}Carol R. Goforth, “A Corporation Has No Soul”—Modern Corporations, Corporate Governance and Involvement in the Political Process, 47 \textit{Hous. L. Rev.} 617, 659 (2011) (“Given the accepted notion that the Framers were indeed concerned with individual rights, they never would have contemplated giving such entities [(i.e., corporations)] free speech rights.”).
individual corporations or the designation and separate treatment of commercial and political speech of such entities. Given the present day size and speech categorizations of corporations, we identify three specific harms that can arise directly from the *Citizens United* decision\(^{153}\): (1) severely diminishing the political voice of individual corporate shareholders, (2) intermingling commercial speech with corporate political speech, and (3) creating an artificial corporate supercitizen.

### A. Diminishing the Political Voice of Individual Shareholders

In *Citizens United*, Justice Kennedy’s majority opinion limits the analysis of corporations to the role of media corporations. He notes that “[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”\(^{154}\) Justice Kennedy’s concern is not an issue, particularly because the federal campaign reporting statute exempts media companies from the definition of “electioneering communications” that is at the heart of *Citizens United*.\(^{155}\) Justice Kennedy’s argument appears to be a syllogism:

\(^{153}\)While our focus is the impact of *Citizens United* on the nature of corporate personhood and its attendant consequences, that in no way is meant to imply that the decision’s potential adverse effect on campaign financing is immaterial. *Citizens United* freed corporations to spend significant, if not unlimited, sums of money on political speech directly influencing elections, and corporations have already begun to do so, see Zachary Newkirk, *IRS Targets Donors to Politically Engaged Nonprofits*, OPENSECRETS (May 11, 2011, 4:30 PM), http://www.opensecrets.org/news/2011/05/irs-targets-donors-politically-engaged-nonprofits.html (noting, in the wake of *Citizens United*, a spike in spending by nonprofit groups using contributions from corporations to fund political messages at any time of the election cycle). According to an analysis of corporate political expenditures since *Citizens United*, “67% of total independent expenditures in 2010 came from groups ‘freed’ by *Citizens United*.” Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of: Citizens United v. Federal Election Commission*, CTR. FOR RESPONSIVE POLITICS, at slide 4 (May 5, 2011), http://www.slideshare.net/s_maccoll/effects-of-the-citizens-united-v-federal-election-commission-7847726; see also id. at slide 7 (noting that “37% of outside spending by unions in 2010 came from groups freed by *Citizens United*”).

\(^{154}\)Citizens United, 130 S. Ct. at 906.

the First Amendment protects the press; the press often uses the corporate form; therefore, the First Amendment protects the political speech of corporations.156 What is not clear from this logic is why the fact that media entities make a typically efficient and rational business choice to become corporations for the same financial reasons as other entities—for example, centralized management, accumulation of capital, perpetual succession—should result in the extension of the media’s special speech protections to all other corporations, regardless of their purpose.157 The result is that by adopting the financial advantages of the corporate form, media companies have now, through *Citizens United*, extended political speech protections to commercial, nonmedia corporations.

In addition, the Supreme Court has previously held that § 441b does not apply to nonprofit corporations that are “formed for the express purpose of promoting political ideas, and [that] cannot engage in business activities.”158 In *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), the Supreme Court carved out an exception for nonprofits that were formed for the express purpose of promoting political ideas, that have no shareholders who could have a claim on their earnings, that were not established by a corporation or labor union, and that did not accept contributions from such entities.159 In *Citizens United*, however, Citizens United accepted de minimis donations from for-profit corporations and

to media companies generally to ignore FECA’s provisions. The statute’s narrow exception is wholly consistent with First Amendment principles.”).

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156 *Cf. Citizens United*, 130 S. Ct. at 905 (noting that “media corporations accumulate wealth with the help of the corporate form”).

157 Justice Kennedy based part of this rationale on the fact that “[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not,” and that “[w]ith the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.” Id. at 905–06; see also Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 539 (2012) (concluding that the bulk of Supreme Court precedent “points towards equal treatment for all speakers . . . who use mass communications technologies, whether or not they are members of the press-as-industry”). A more cynical view holds that “the media transformed itself from a mere public necessity into an entertaining profit center for ever-expanding corporate empires.” JON S. STEWART ET AL., AMERICA (THE BOOK): A CITIZENS GUIDE TO DEMOCRACY INACTION 136 (2004).


159 *See id.*
therefore did not qualify as an exempt MCFL-type nonprofit.\textsuperscript{160} Rather than carve out an exception for nonprofits that accept de minimis contributions from for-profit corporations, as suggested by Justice Stevens in his dissent,\textsuperscript{161} the majority in \textit{Citizens United} declined to do so.\textsuperscript{162} The Supreme Court had already recognized that “[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.”\textsuperscript{163} Using a syllogistic reasoning reminiscent of the media–corporation–political speech logic noted previously,\textsuperscript{164} the \textit{Citizens United} Court chose to extend full political speech rights to all corporations merely because some nonprofit political associations chose to adopt the financial advantages of the corporate form.

The \textit{Citizens United} majority eliminated the differentiation between nonprofit political and media corporations when restricting campaign expenditures under § 441b and § 434(f)(3)(B)(i)—a move that makes little sense, particularly because owners of these types of corporations know and understand that general treasury funds will be used for political advocacy.\textsuperscript{165} Shareholders of for-profit commercial corporations do not necessarily factor in the potential for political advocacy when making their investment decisions, nor do they necessarily share the same political views among themselves:

[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, self-improvement, self-understanding, self-fulfillment.

\textsuperscript{160}See \textit{Citizens United}, 130 S. Ct. at 891.

\textsuperscript{161}See \textit{id.} at 937 (Stevens, J., dissenting) (discussing narrower grounds on which the majority could have ruled).

\textsuperscript{162}\textit{Id.} at 892.

\textsuperscript{163}MCFL, 479 U.S. at 263.

\textsuperscript{164}See supra text accompanying note 156.

\textsuperscript{165}See \textit{Citizens United}, 130 S. Ct. at 943 n.32 (Stevens, J., dissenting) (“[W]ith a media corporation there is . . . a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates.”); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, C.J., dissenting) (“There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.”).
and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not an integral part of the development of ideas, of mental exploration and of the affirmation of self. They do not represent a manifestation of individual freedom or choice.\ldots\]

There are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities 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. In fact,\ldots the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.\textsuperscript{166}

This disconnect between stock ownership for the purpose of economic gain and the political advocacy of the corporation itself is particularly true considering private stock ownership has become the primary means for individuals to save for retirement and pension plans have given way to individual 401(k) accounts as the predominate employer-based retirement-plan vehicle—meaning the “choice” of stock ownership is eroded by these realities.\textsuperscript{167} Tangentially, consumers will indirectly subsidize corporate

\textsuperscript{166} Bellotti, 435 U.S. at 804–05 (White, J., dissenting) (emphasis added) (citations and internal quotation marks omitted).

Although it is arguable that corporations make\ldots expenditures [designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets] 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\ldots

Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.

political speech by purchasing goods and services, adding to the general treasury funds that corporations can now use for direct advocacy.\(^{168}\) Perhaps consumers will now have to add a new dimension to consumption decisions beyond price, value, efficacy, and convenience.

Corporate political speech is not necessarily the speech of the shareholders—or the customers—of the corporation, but rather it is the speech of the managers, because dissenting shareholders’ views are not required to be taken into consideration. In fact, one criticism of \textit{First National Bank of Boston v. Bellotti}, in which the Supreme Court originally acknowledged limited political speech rights for corporations,\(^{169}\) is that corporate speech is an illusion: “Only individuals can speak, and corporate speech obscures the fact that managers use corporate assets to convey their own views; the nature of corporate governance is such that communication becomes managerial speech, unratified by shareholders.”\(^{170}\)

In his majority opinion in \textit{Citizens United}, Justice Kennedy expressed concern that campaign finance restrictions will silence potential critics who

\(^{168}\)See, e.g., Brian Montopoli, \textit{Target Boycott Movement Grows Following Donation to Support “Antigay” Candidate}, CBS NEWS (July 28, 2010), http://www.cbsnews.com/8301-503544_162-20011983-503544.html (reporting calls to boycott Target stores after the parent company reportedly donated $150,000 to a group that ran ads backing conservative Minnesota Republican gubernatorial candidate Tom Emmer, who opposes same-sex marriage, and noting that Target was reportedly able to make the donation because of the \textit{Citizens United} decision).

\(^{169}\)See 435 U.S. at 777 (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”). \textit{But see id. at} 775–76 (“The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. \textit{We believe that the court posed the wrong question.} The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the state statute at issue] abridges expression that the First Amendment was meant to protect.” (emphasis added)).

\(^{170}\)Mayer, \textit{supra} note 17, at 653 (citation omitted).
might otherwise be able to use corporate funds to criticize governmental policy and decision makers, asserting “[t]he censorship we now confront is vast in its reach.” Justice Kennedy claims the government has “muffle[d] the voices that best represent the most significant segments of the economy.” But Justice Kennedy’s assertion is a paraphrase of Justice Scalia’s opinion in *McConnell v. FEC*, concurring in part and dissenting in part, in which he was merely expressing his belief that “[i]n the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views.” The *Citizens United* majority cited no evidentiary basis for its conclusions on government censorship. In other words, the majority only assumed that § 441b has silenced corporations from effectively expressing their opinions regarding any policy, candidate, or any other political matter. As Justice Stevens noted in his dissent, “While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”

While it may not be permissible to censor the speech of wealthy individuals, an argument may be made that “it is permissible to limit the power of individuals to use their ownership or management of corporations to influence politics.” To do otherwise enables managers of corporations to stifle the political debate of citizens by deploying significant resources in disseminating corporations’ political messages, which are heard over the individual shareholders’ own messages due to their limited

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172 *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

173 540 U.S. at 257–58 (Scalia, J., concurring in part and dissenting in part).


175 See *id*.

176 *Citizens United*, 130 S. Ct. at 979 (Stevens, J., dissenting).

177 *Mayer, supra* note 17, at 653.
media access. Thus, corporations’ superior funding presents a roadblock to shareholders’ access of each other’s views rather than the views espoused by the corporations.\textsuperscript{178} It is not a tremendous leap from this concept of corporations’ political messages drowning out the political messages of individual shareholders to conclude that “the living People, if engaged in constitutional politics, would authorize their Article I representatives to legislate for purposes of preventing concentrations of private economic power from distorting political discourse.”\textsuperscript{179}

In Citizens United, however, the majority expressed no willingness to restrict the speech of an artificial person. Corporate political speech is acceptable to the Court even though the artificial person speaking has the interests of the entity at heart rather than the citizenry. The Court also did not require the speech to be directly related to the business of the corporation.\textsuperscript{180} The Court’s acceptance of speech that benefits the artificial person rather than its individual owners suggests that the speech of a corporation in furtherance of its corporate purpose or managerial position is more important than the speech of a natural person in furtherance of his or her civic responsibilities. Such a proposition is antithetical to the overall importance of freedom of speech as provided in the First Amendment. As the Supreme Court expressed in New York Times Co. v. Sullivan,\textsuperscript{181} the protection of speech provided by the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”\textsuperscript{182} Further, “[t]he maintenance of the opportunity for free political discussion to the end that government

\textsuperscript{178}See David Chang, Beyond Formalist Sovereignty: Who Can Represent “We The People of the United States” Today?, 45 U. RICH. L. REV. 549, 635 (2011) (discussing the power of communications inherent in corporations of all forms, which can result in “corporate managers . . . [using] that concentrated power in pursuit of corporate interests in ways that could undermine public debate by preventing citizens from effectively identifying and accounting for each other’s views”).

\textsuperscript{179}Id. at 637.

\textsuperscript{180}See First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978) (stating that a corporation’s speech that does not have “a material effect on its business or property” is not deprived of First Amendment protections).

\textsuperscript{181}376 U.S. 254 (1964).

\textsuperscript{182}Id. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted).
may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”183

Justice Kennedy’s “solution” to this dilemma is for shareholders to exercise their corporate democratic powers and elect new directors who will, theoretically, in turn hire new managers whose political views are not in conflict with a majority of the shareholders.184 Students of corporate governance long ago recognized that due to the wide dispersion of stock ownership, particularly in large corporations, control of the corporation has effectively passed from the shareholders to the directors.185 That shift is illustrated by several developments in corporate governance. First, the courts will typically only question the procedures that were followed, not the substance of a decision by a board of directors.186 Under this “business judgment rule,” a corporation’s decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority.187 Second, shareholders of publicly traded corporations, in almost all cases, do not even have

183Id. (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)) (internal quotation marks omitted).
184See Citizens United v. FEC, 130 S. Ct. 876, 911 (2010) (“The Government contends . . . that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech . . . . There is . . . little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.” (internal quotation marks omitted)).
185See, e.g., Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 277 (1933) (“[W]e have reached a condition in which the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up out of the aggregated contributions of perhaps many thousands of individuals.”).
186See, e.g., In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 967 (Del Ch. 1996) (“[C]ompliance with a director’s duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact[ ] believes a decision substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests. To employ a different rule—one that permitted an ‘objective’ evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.”).
the practical ability to nominate their own directors. Until September 2011, Rule 14a-8(i)(8) of the Securities and Exchange Commission (SEC) allowed a publicly traded corporation to exclude from its proxy a shareholder proposal if it related to a nomination or an election for membership on the company’s board of directors.188 In 2010, the SEC amended Rule 14a-8 to require companies to include in their proxy materials, under limited circumstances, shareholder proposals that seek to establish a procedure in the company’s governing documents for the inclusion of one or more shareholder–director nominees in the company’s proxy materials.189 Although the SEC also adopted a new Rule 14a-11, which would have required corporations to include in their proxy statements the names of directors nominated by shareholders under limited circumstances,190 the Court of Appeals for the District of Columbia vacated the new rule on the basis that the SEC acted arbitrarily and capriciously in promulgating the rule because it failed to adequately assess the economic effects of the new rule.191 The result is that shareholders of publicly traded corporations have only recently obtained the ability to seek the right to nominate directors through the corporation’s proxy, if they can muster sufficient votes. Former SEC chairman Arthur Levitt, Jr.’s quip will probably still hold true: “A director has a better chance of being struck by lightning than losing an election.”192

189 Proponents must have continuously held at least two thousand dollars in market value or one percent of the company’s securities entitled to be voted on the proposal at the meeting for a period of at least one year by the date the proponent submits the proposal. See Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,730 n.675 (Sept. 16, 2010); Facilitating Shareholder Director Nominations: Final Rule; Notice of Effective Date, 76 Fed. Reg. 58,100 (Sept. 20, 2011).
190 75 Fed. Reg. 56,668, 56,782 (proposed Sept. 16, 2010) (to be codified at 17 C.F.R. § 240.14a-11(a)) (2010). The proposed rule was still quite restrictive: the nominating shareholder or group of shareholders must have owned at least three percent of the company’s voting shares for at least three years, id. (to be codified at § 240.14a-11(b)); the company would not be required to include more than one shareholder nominee or nominees in excess of twenty-five percent of the total number of directors, whichever is greater, id. at 56,785 (to be codified at § 240.14a-11(d)); and the rule would not have applied if the company’s governing documents prohibited shareholders from nominating director candidates, id. at 56,782 (to be codified at § 240.14a-11(a)(2)).
Shareholders unable to control the political speech of their managers may also be financially hurt as a result of *Citizens United*. Two empirical studies indicate a negative correlation between corporate political activity and shareholder wealth. Harvard Law Professor John C. Coates IV found that (1) corporate political activity correlates with weak corporate governance, (2) firms with corporate governance provisions giving shareholders more power engage in less political activity, and (3) corporations that engage in political activity generate lower value for their shareholders relative to the value of the assets they control. Coates concludes the following:

If corporate managers could be trusted to spend corporate money on political activity that would benefit shareholders, then [*Citizens United’*s] relaxation in the constraints on corporate political activity might still be of concern to voters generally worried about the disproportionate power that the concentrated wealth represented by the largest corporations and its effect on government policy . . . . Unfortunately, existing research establishes beyond doubt that, at least at a large number of public companies, managers cannot be trusted with other people’s money, and that observable corporate governance provisions consistently predict the degree to which faithless managers divert shareholder wealth for their own ends, destroy corporate wealth, and reduce public welfare.

After examining corporate donations to political candidates for federal offices in the United States from 1991 to 2004, Aggarwal et al. found that such donations are negatively correlated with future excess returns and that “worse corporate governance is associated with larger donations.”

Only time will tell if the amended Rule 14a-8 transfers to shareholders any effective corporate democracy powers. In the meantime, shareholders are left with only one alternative if they do not agree with the politicking of their corporate board—namely, they can sell their

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194 *Id.* at 2.

shares.\textsuperscript{196} According to T. Boone Pickens, Jr., “That’s like the gardener
telling the estate owner, ‘If you don’t like the way I take care of your
property, sell it and move out.’”\textsuperscript{197} The political speech of the managers of
the corporation will therefore trump the speech of the individual share-
holders. Justice Kennedy never explains why it must be the shareholders
who are forced to suffer by selling their shares in an otherwise profitable
venture or having their investments diminished, just because managers
choose to use general treasury funds for electioneering communications,
particularly if the expenditures have no direct bearing on the business of
the corporation.

**B. Intermingling Commercial Speech with Corporate Political Speech**

As noted above, corporations have enjoyed some limited constitutional
privileges.\textsuperscript{198} It was not until 1975, however, that the Supreme Court
acknowledged that commercial speech is entitled to limited protection
under the First Amendment.\textsuperscript{199} In *Central Hudson Gas & Electric Corp. v.
Public Service Commission*,\textsuperscript{200} the Supreme Court fashioned a four-part test
to determine whether regulation of commercial speech is constitutional.
First, for commercial speech to be protected by the First Amendment it
must concern lawful activity and not be misleading. Second, the asserted
governmental interest must be substantial. Third, if the first two conditions
are met, the regulation must directly advance the governmental interest

\textsuperscript{196}See \textit{Mayer}, supra note 17, at 653 (“At the least, the shareholder is forced to chose [sic]
between contributing to political expression with which they disagree or foregoing a profitable
investment opportunity.”).

\textsuperscript{197}Steven Flax, \textit{Just What You Wanted: Another Shareholder Activist}, \textsc{Corporate Bd. Member}

\textsuperscript{198}See supra Part III.

\textsuperscript{199}See \textit{Bigelow v. Virginia}, 421 U.S. 809, 826 (1975) (“Advertising is not . . . stripped of all First
Amendment protection.”) (emphasis added)). Although the \textit{Bigelow} Court declined to decide
“the precise extent to which the First Amendment permits regulation of advertising,” \textit{id.} at
825, it did state that advertising “may be subject to reasonable regulation that serves a
legitimate public interest,” \textit{id.} at 826; see also \textit{Va. State Bd. of Pharmacy v. Va. Citizens
Consumer Council}, 425 U.S. 748, 761 (1976) (holding that speech that does “no more than
propose a commercial transaction” does not lack First Amendment protection (quoting

\textsuperscript{200}447 U.S. 557 (1980).
asserted. And fourth, the regulation must not be more extensive than is necessary to serve that interest.\textsuperscript{201}

Although the Supreme Court has described commercial speech,\textsuperscript{202} it has never defined it. The Supreme Court has fashioned three factors to help determine whether speech is commercial. The court looks at whether the speech is conceded to be an advertisement, whether it refers to a specific product, and whether the company communicating it had a clear economic motivation for the communication.\textsuperscript{203} None of these factors considered alone automatically compels a classification of commercial speech; however, “[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion that the [expression is] properly characterized as commercial speech.”\textsuperscript{204} Further, the Supreme Court noted that it is not necessary for each of the characteristics to be present for speech to be commercial.\textsuperscript{205} For example, reference to any particular product or service is a not necessarily an element of commercial speech, though it is indicative of it.

While some speech may be obviously commercial—I will sell you product X for price Y—some speech is more nuanced: it mixes what may arguably be commercial expression with fully protectable—for example, political—speech. \textit{Citizens United} complicates the analysis regarding mixed commercial speech. In theory, corporate managers have an overriding

\textsuperscript{201}Id. at 566. For an example of the application of this \textit{Central Hudson} test, see Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), in which the Supreme Court held that a ban on tobacco advertising within one thousand feet of any school or playground failed the fourth part of the test because it was not shown to be no more extensive than necessary to advance the state’s interest. \textit{See id.} at 561–65. Regulations restricting point-of-sale advertising in stores within one thousand feet of schools or playgrounds failed the third and fourth parts of the test because they did not advance the state’s purposes and were too extensive. \textit{See id.} at 566–67. But regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such products did pass all four parts of the test. \textit{See id.} at 568–69.

\textsuperscript{202}See, e.g., \textit{Central Hudson}, 447 U.S. at 561 (describing commercial speech as “expression related solely to the economic interests of the speaker and its audience”); \textit{Va. State Bd. of Pharmacy}, 425 U.S. at 761 (describing commercial speech as “I will sell you the X [product] at the Y price[]”); \textit{Pittsburgh Press Co.}, 413 U.S. at 385 (describing advertising as doing no more than proposing a commercial transaction).


\textsuperscript{204}Id. at 67.

\textsuperscript{205}See \textit{id.} at 67 n.14.
obligation to act in the best interests of the owners of the corporation—the shareholders.\textsuperscript{206} This shareholder primacy doctrine implies that any communication by a corporation must further the objectives of the corporation and that the ultimate objective for commercial corporations is to improve their financial standing. Under the shareholder primacy doctrine, corporations should not engage in political or other speech unless it promotes the financial interests of the corporation. An argument could therefore be made that because all actions of a commercial corporation are financially driven, all speech by a commercial corporation is commercial speech. And if all corporate speech is commercial, political speech by a corporation must also be commercial. Because political speech by a corporation may no longer be limited or banned by a governmental entity after \textit{Citizens United}, the argument can certainly be made that commercial speech can also no longer be regulated.\textsuperscript{207}

One of the first cases in which the Supreme Court addressed whether the First Amendment protected commercial speech involved a promoter printing an objection to a local ordinance on the back of handbills promoting his commercial attraction.\textsuperscript{208} In concluding at that time that

\textsuperscript{206}See, e.g., Milton Friedman, \textit{Capitalism and Freedom} 133 (2d ed. 1963) (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”); A.A. Berle, Jr., \textit{Corporate Powers as Powers in Trust}, 44 Harv. L. Rev. 1049, 1049 (1931) (arguing all powers granted to a corporation or its managers are exercisable only for the benefit of the shareholders); Jill E. Fisch, \textit{Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy}, 31 J. Corp. L. 637, 646 (2006) (describing shareholder primacy as the obligation of corporate decision makers to focus on shareholder interests and noting that it is a dominant principle in corporate law); Theodore Levitt, \textit{The Dangers of Social Responsibility}, 36 Harv. Bus. Rev., Sept.-Oct. 1958, at 41, 49 (“Business will have a much better chance of surviving if there is no nonsense about its goals—that is, if long-run profit maximization is the one dominant objective in practice as well as in theory.”); Gordon Smith, \textit{The Shareholder Primacy Norm}, 23 J. Corp. L. 277, 278 (1998) (“Corporate directors have a fiduciary duty to make decisions that are in the best interests of the shareholders.”).

\textsuperscript{207}See Darrel C. Menthe, Note, \textit{The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United}, 38 Hastings Const. L.Q. 131, 134 (2010) (advocating full First Amendment protection for commercial speech in order to control the “damage” resulting from the creation of the commercial speech doctrine). “Like ripping off a Band-Aid, the sooner that the Supreme Court follows up on the implications of \textit{Citizens United} and moves toward full First Amendment protections for commercial speech, the easier it will be to control the damage.” \textit{Id}.

\textsuperscript{208}See Valentine v. Chrestensen, 316 U.S. 52, 53 (1942).
commercial speech did not deserve constitutional protection, the Court made clear that including noncommercial speech in what was otherwise clearly commercial speech would not elevate all of the speech to full First Amendment protection. But modern commerce offers more subtle mixes of commercial and noncommercial speech.

In *Kasky v. Nike, Inc.*, Nike was accused of unfair competition and false advertising when it responded to allegations of engaging in foreign labor sweatshop practices by placing newspaper advertisements and sending letters to college athletic directors. The California Supreme Court agreed to hear the case to address precisely whether Nike’s statements—not directly relating to its products or their quality, availability, or prices, but rather dealing with Nike’s overseas manufacturing practices—constituted commercial speech. The California Supreme Court held that Nike’s statements constituted commercial speech for the following reasons: (1) Nike is a commercial speaker because it is engaged in commerce, (2) Nike’s statements were addressed directly to actual and potential purchasers of its products (in other words, a commercial audience), and (3) Nike’s representations of fact were of a commercial nature because it described its own labor policies and the practices and working conditions in factories where its products are made. The California Supreme Court rejected the argument that the commercial elements in Nike’s statements were “inextricably intertwined” with noncommercial social commentary and therefore held that Nike’s statements constituted commercial speech subject to regulatory restrictions.

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209 See id. at 54.

210 Id. at 55 (“It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance [of distributing handbills]. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”).

211 45 P.3d 243 (Cal. 2002).

212 See id. at 249–50.

213 See id. at 258.

214 See id. at 260. The U.S. Supreme Court has previously held that, when commercial and noncommercial speech are inextricably intertwined, the speech in question can lose its commercial character—that is, it can be fully protectable. See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[W]e do not believe that . . . speech retains its
It is possible that, post-Citizens United, any corporate speech—assuming, as we argue, that any speech by a commercial entity must be, to some degree, commercial—is an inextricably intertwined combination of commercial and political speech and therefore cannot be regulated.\textsuperscript{215} Using the same logic that because media and nonprofit advocacy entities use the corporate form and therefore all corporations deserve First Amendment political speech protection, it can be argued that if corporate political speech is also commercial speech then commercial speech can no longer be regulated.

C. Creation of an Artificial Corporate Supercitizen

A significant concern that remains after the Citizens United decision is that corporations are actually persons unlike any natural persons in existence. Unlike natural persons, corporations do not have a conscience,\textsuperscript{216} they do not go to jail,\textsuperscript{217} they do not vote, they must be represented by licensed commercial character when it is inextricably intertwined with otherwise fully protected speech.”). But commercial speech does not necessarily lose its commercial character when voluntarily (or unnecessarily) combined with otherwise protectable speech. See, e.g., Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 474 (1989) (“No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”); Valentine, 316 U.S. at 55.

\textsuperscript{215}Compare Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011) (holding that a Vermont statute restricting the sale, disclosure, and use of pharmacy records was designed to impose a specific, content- and speaker-based restriction on protected expression and was thus subject to heightened judicial scrutiny to determine whether it violated First Amendment free speech protections), with Yeager v. AT&T Mobility, LLC, No. CIV. S-07-2517 KJM, 2011 WL 3847178, at *5 (E.D. Cal. Aug. 30, 2011) (refusing to adopt the defendant’s argument that Citizens United will lead to elimination of the commercial speech doctrine).

\textsuperscript{216}See, e.g., JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 1–2 (2004) (arguing that the corporation is a pathological institution because its “legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others”).

counsel in federal court and most state courts, they cannot hold office, and they do not possess all of the rights afforded individuals under the Bill of Rights—namely, the protection from self-incrimination. By holding corporations’ political speech rights to be on par with the political speech rights of natural persons, the Supreme Court has created a supercitizen with immense capability for influence that may well drown out the voice of natural persons in a manner similar to the tendency of monopolies to exert undue influence on the commercial market. Additionally, the possibility of such supercitizen corporations banding together and acting collectively with other supercitizen corporations to “solicit, receive, and direct funds to independent political expenditures in no way undermines the First Amendment’s recognition of their right to engage in those activities.”

Just as the protection of individual consumers’ welfare was considered necessary by the Sherman Act’s regulation of monopolies, it is necessary to protect natural individuals’ political welfare in order to maintain and foster the fundamental individual rights provided under the Constitution and the Bill of Rights:

The governmental interest in regulating corporate political communications . . . is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . . The State need not permit its own creation to consume it.

We argue that free-speech protection was understood to be for the benefit of natural people rather than for the benefit of artificially created entities speaking for those people, regardless of whether they agree with those entities.

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221 See Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7, 10 (1966) (“The legislative history, in fact, contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.”).

V. RECOMMENDED ACTIONS IN LIGHT OF CITIZENS UNITED

While there are those who support the decision in Citizens United as a means of increasing political participation, we believe that a complete lack of restraints on corporate political speech creates unreasonably influential corporations in that sphere. While a constitutional amendment would be a potential solution to the issues presented by the holding in Citizens United, such an amendment would be difficult to accomplish and ideally would not be necessary. In contrast, there are a number of arguments upon which a subsequent Supreme Court might overrule Citizens United. While it has long been recognized that corporations are entitled to certain constitutional rights—such as the right of due process in protection of their property—it does not necessarily follow that all constitutional rights of natural persons must also accrue. In addition, despite Justice Kennedy’s assertion in Citizen United that PACs are burdensome,

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224 Resolutions have been introduced in both the House and the Senate to initiate a constitutional amendment “to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution of the United States.” S.J. Res. 33, 112th Cong. (2011); H.R.J. Res. 90, 112th Cong. (2011).

225 There have been only seventeen amendments to the Constitution subsequent to the ratification of the Bill of Rights.

226 After all, as Justice Stevens noted in his dissent, the only thing that appears to have changed since the Supreme Court last upheld corporate campaign restrictions is the composition of the Court itself. Citizens United v. FEC, 130 S. Ct. 876, 942 (2010) (Stevens, J., dissenting).

227 See, e.g., Harold Anthony Lloyd, A Right but Wrong Place: Righting and Rewriting Citizens United, 56 S.D. L. Rev. 219, 224–225 (2011) (“A person cannot physically give his voice over to a corporation as he can with his property, for if he authorizes the corporation to speak on his behalf, he still retains as much speech as he had before. Derivative corporate free speech rights therefore need not exist, and this conclusion squares with long standing prior Supreme Court precedent. If, on the other hand, a person grants the corporation property rights to the person’s speech, such as exclusive rights to a manuscript, the corporation’s rights in such a case are . . . property rights, not speech rights . . . . As a practical matter, citizens can have no right or ability to assign, lend or ‘entrust’ benefits of citizenship to others or to share them with others. If they had the right or ability to assign, share, lend, or entrust their voting rights or passports, for example, functioning government would break down.” (footnote omitted)).
expensive, and highly regulated, \textsuperscript{228} a future Supreme Court may not agree and therefore find them to be a viable alternative to permitting—albeit indirectly—corporate electioneering.

It appears unlikely Congress will be able to enact legislation directly restricting corporate campaign expenditures. Under a strict scrutiny analysis, \textsuperscript{229} the \textit{Citizens United} majority determined that even limited restrictions imposed only just prior to elections and primaries were unconstitutional bans on political speech. Congress could, however, strengthen disclaimer and disclosure requirements, which were not overturned in \textit{Citizens United} \textsuperscript{230} and, in fact, have been acknowledged in a number of recent cases.\textsuperscript{231} Another suggestion is imposing equal time restrictions on corporate political speech—that is, for every corporate political advertisement, media outlets would be required to provide equal time to opponents.\textsuperscript{232}

The \textit{Citizens United} majority did leave open the door of private ordering—in other words, allowing regulation through shareholders exercising their right of “corporate democracy.”\textsuperscript{233} While the SEC’s amended Rule 14a-8 permits shareholders to implement governance procedures that would enable them to nominate directors, the extent to which the new rule delivers effective corporate democracy is still uncertain.

Both the House of Representatives and the Senate have introduced nearly identical versions of the Shareholder Protection Act, which would require publicly traded corporations to provide for a separate shareholder

\textsuperscript{228}See \textit{Citizens United}, 130 S. Ct. at 897.

\textsuperscript{229}See id. at 898 (“Laws that burden political speech are subject to strict scrutiny . . .” (internal quotation marks omitted)).

\textsuperscript{230}See id. at 914 (stating that while disclaimer and disclosure requirements may burden one’s ability to speak, they do not prohibit speech).

\textsuperscript{231}See, e.g., Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1005 (9th Cir. 2010) (discussing the vital role disclosure plays in public discourse to ensure voters have the facts they need to evaluate the various messages competing for their attention); SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (acknowledging that other government interests such as disclosure can apply to justify certain regulation of campaign-related speech); Many Cultures, One Message v. Clements, 830 F. Supp. 2d (W.D. Wash. 2011) (noting that the \textit{Citizens United} Court did not limit its acknowledgement of the government’s informational interest in disclosure to campaign contributions and expenditures).

\textsuperscript{232}See \textit{Lloyd}, supra note 227, at 227 (discussing equal time but noting also that such a proposal would raise practical concerns in implementation).

\textsuperscript{233}\textit{Citizens United}, 130 S. Ct. at 911.
vote to authorize, by a majority of shareholders, any proposed expen-
ditures for political activities, excluding lobbying and maintaining a PAC. Failure to obtain shareholder approval could result in a corporation’s officers and directors being held personally liable for up to three times the amount of the expenditures.\textsuperscript{234} However, neither bill addresses dissenting shareholders who, like all shareholders under current law, may be forced into being associated with speech they may not support.\textsuperscript{235} Knowledge, through disclosure, appears to be the only recourse that dissenting shareholders retain with respect to speech to which they may be opposed.\textsuperscript{236} Even so, dissenting shareholders’ only corrective option is ultimately disassociating—that is, selling their shares; requiring one hundred percent shareholder approval of political speech would probably be “constitutionally impermissible, because as a functional matter the requirement is an excessive hindrance to political speech desired by an overwhelming majority of shareholders.”\textsuperscript{237} Ultimately, in order to pass constitutional muster after \textit{Citizens United}, any corporate law reforms applying to corporate political speech decisions must not be seen as deterring corporate political speech.\textsuperscript{238}

**CONCLUSION**

Corporations in some form existed long before the founding of the United States. Over the course of U.S. history, as corporations proliferated and grew larger, they were also granted additional constitutional rights. While corporations always held property rights and had the capacity to sue and

\textsuperscript{234}See S. 1360, 112th Cong. § 3 (2011); H.R. 2517, 112th Cong. § 3 (2011).

\textsuperscript{235}See Bebchuk & Jackson, \textit{supra} note 187, at 113.

\textsuperscript{236}See \textit{supra} note 231 and accompanying text.

\textsuperscript{237}Bebchuk & Jackson, \textit{supra} note 187, at 116 (suggesting that a requirement somewhere between fifty percent and four-fifths would probably pass constitutional muster). Bebchuk and Jackson also note that without legislation it is presently unclear whether shareholders of publicly traded corporations may use the federal proxy rules to put forward proposals recommending changes to the amount or targets of political spending. See \textit{id.} at 88. Such proposals, if included in the proxy and adopted by shareholders, would in any event be nonbinding. \textit{See id.}

\textsuperscript{238}See \textit{id.} at 107–08.
be sued, other rights and powers, such as Fourteenth Amendment rights, were granted over time through constitutional interpretation and application. The *Citizens United* decision has further extended these corporate powers to include the same unrestricted political speech freedoms that natural persons possess under the Constitution.

The fact that corporations’ vast wealth can fund a voice louder than that of natural persons calls into question individual suffrage, the fundamental democratic principle that the people possess the right to choose their governmental representatives. Arguably, the “people” are not choosing their governmental representatives if the “people,” in the form of behemoth corporations, are influencing votes of less powerful individuals.

In his fifth annual address in 1896, President Andrew Jackson said, “[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of... great corporation[s] are to be secretly exerted to influence their judgment and control their decisions.” Although the United States has obviously progressed tremendously since then, some things remain the same. In 2010, President Obama could easily have channeled President Jackson’s words and questioned whether, in the wake of *Citizens United*, the citizenry of the United States will still be able to elect representatives of their informed choosing. Given the newly unfettered political expenditures of U.S. corporations, citizens may lose their ability to make decisions based on an unbiased, free flow of information. In particular, noncorporate voices become nearly impossible to hear above corporate-funded messages in the crowded media stream. Suspicion regarding corporations remains in the

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239Powell v. McCormack, 395 U.S. 486, 540–41 (1969) (“The true principle of a republic is, that the people should choose whom they please to govern them.” (quoting Alexander Hamilton before the New York state convention)).

240ANDREW JACKSON, FIFTH ANNUAL MESSAGE, DEC. 3, 1833, H.R. Misc. Doc. No. 53–210, pt. 3, at 30 (2d Sess. 1896). Although the target of President Jackson’s warning was federally chartered banks, his words could equally apply today to corporate political speech.

241See Jesse Lee, *President Obama on Citizens United: “Imagine the Power This Will Give Special Interests over Politicians,”* WHITE HOUSE BLOG (July 26, 2010, 03:07 PM), http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit (reporting President Obama’s concerns over the potential corporate and special interest takeovers of American elections following *Citizens United*).
United States despite the apparent unwillingness of the current Supreme Court to acknowledge it or to guard against the further expansion of corporate supercitizenship. It has long been recognized that corporate supercitizens could threaten the economic balance of the country through monopolistic tendencies in the commercial arena. Corporate supercitizen status could now additionally threaten public life through similar monopolistic behaviors in the political arena given the newly recognized status of corporations as persons enjoying unrestricted rights of political free speech.