

CITIZENS UNITED AND THE PARADOX OF “CORPORATE SPEECH”: FROM FREEDOM OF ASSOCIATION TO FREEDOM OF *THE* ASSOCIATION

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ABSTRACT

Citizens United v. FEC has fundamentally reshaped American politics by enshrining into law a radical new conception of what it means to be a democratic participant. The Court strikes down, on freedom of speech grounds, a federal law prohibiting independent political expenditures by unions and corporations. Yet, throughout the approximately 180 pages of opinion, there is strikingly sparse discussion of just what “speech” is. Nor do any of the Justices adequately explore the rationale behind the phrase “corporate speech,” an arguably paradoxical syntactical combination rooted in the Court’s “freedom of expressive association” jurisprudence—a doctrine of relatively recent vintage. Justice Stevens’ passionate dissent is laced throughout with the concession that corporations themselves engage in “speech”—a term that, on its face, would seem to require a human “speaker.” Thus even the dissent implicitly accepts the default position that corporations are potentially eligible for protections clearly designed by the First Amendment’s framers for human beings. Legal academics and journalists of all stripes have likewise blithely accepted the conclusion that there is something called “corporate speech.” In doing so, the dissent and others who find the *Citizens United* decision troubling have unwittingly and unwisely ceded unnecessary ground. By reifying corporations and imbuing them with the sympathetic qualities of individual American citizens seeking to assert their fundamental First Amendment freedoms, the majority is able to craft an opinion that resembles constitutional common sense. In this article, I examine how the Court ultimately arrives at this destination. In the decades prior to *Citizens United*, the Court established that associating with others has a close nexus with the textual freedoms of speech and assembly, but the contours of the “right to

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associate” remained far from clear. I argue that the right to enhance individual expression through association gradually, and without acknowledgement, morphed into a right of *the association itself*. I trace and critique this development, looking closely at Court precedent, the views of the Framers, and the core philosophical underpinnings of free speech. After *Citizens United*, the fiction of the “corporate speaker,” useful in other contexts, was inappropriately accorded First Amendment status. The result, I argue, is contrary to democratic and republican ideals—allowing corporations and other associations to become potent players in political contests intended for individual citizens.

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I.

INTRODUCTION

Citizens United v. FEC has proven to be one of the most controversial and contested decisions of the modern Supreme Court.¹ The 5-4 opinion, which overturns significant Court precedent, has potentially reshaped political campaigning in America as well as, arguably, American democracy itself.² In

1. See *Times Topics: John G. Roberts Jr.*, N.Y. TIMES (updated July 26, 2010), http://topics.nytimes.com/top/reference/timestopics/people/r/john_g_jr_roberts/index.html (describing *Citizens United* as “the most controversial decision since the Rehnquist court handed the presidency to Mr. Bush a decade ago in *Bush v. Gore*, and . . . easily the most debated of the Roberts court era so far”). See also Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective*, 29 YALE L. & POL’Y REV. 235 (2010) (arguing that the Constitution should be amended to overrule *Citizens United*).

2. Editorial, *The Court and the Next President*, N.Y. TIMES Oct. 28, 2011, at A20 (“Sweeping aside established precedents that had not been challenged and inserting itself into politics, the conservative majority unleashed unlimited corporate and other money into American politics and gave the Republican Party a large advantage in fund-raising.”); *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). See also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581,

Citizens United, the Court strikes down a federal law prohibiting independent expenditures by unions and corporations "in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office."³ Heightening the perception by critics that the Court had taken a sharp reactionary turn,⁴ the Court reverses and substantially erodes its own precedent.⁵ However, in providing corporations with a constitutional right to spend unlimited sums of money on political communications—what the Court and others dub "corporate speech"—the Court has in fact followed a quite natural, but little-noticed, trajectory emanating from its freedom of association jurisprudence. Over the past seventy-five years, the Court has moved from recognizing a non-textual freedom of an individual to associate with others—understanding this right to be a "medium"⁶ by which individuals express their textual freedom of speech—to offering Constitutional protection to speech by the association itself. In a few short decades, the freedom of association has become a freedom of *the* association; it has been divorced from the individual right from which it was begotten.

This Article opens with a hypothetical intended to illustrate the misguided nature of the Court's jurisprudential shift. Part I of this article introduces the *Citizens United* decision and the concept of speech in the First Amendment. Part II closely traces the history of the Supreme Court's freedom of association jurisprudence. Part III examines and critiques the way this concept of association is utilized in *Citizens United*. Part IV explores how a freedom of *the* association fits—or doesn't fit—with the most commonly accepted philosophical goals and values of the First Amendment. Part V revisits the case the Supreme Court overruled in *Citizens United*, *Austin v. Michigan State Chamber of Commerce*, and suggests an alternative way forward.

A. A Political Speech Machine

Imagine thousands of political communications transmitted in the form of mass e-mail. These messages advocate for or against particular political candidates currently running in U.S. elections. Are these e-mail messages "speech?" Viewed in isolation, the communications might initially seem to be quintessential speech. Not only do they purport to convey ideas, but those ideas are also "political" in nature, and the Court has oft repeated the traditional First Amendment principle that restrictions on speech addressing issues of public

621 (2011) (arguing that although "the Court's jurisprudence will vary within a wide range," it is "likely constrained at its edges more by political considerations than legal coherence").

3. 2 U.S.C. § 441b(a) (2006).

4. Editorial, *supra* note 2 ("The Roberts court is closely divided but also the most conservative since the 1950s.").

5. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

6. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

concern must be subject to the most exacting of scrutiny.⁷

Now imagine that these messages are the product of a computer program devised by a team of programmers. Without any human intervention, the program uses fixed criteria to search the Internet, locate candidates, and randomly generate both positive and negative electronic mail pertaining to those candidates. In addition to culling source material from the Web to produce the messages, the program also draws upon data stored on the hard drive of the particular personal computer on which it was installed. Would the answer to the question posed above change?

As with the proverbial monkey pounding out a message on a manual typewriter, most would likely agree that the computer-generated political spam is not in fact “speech” that deserves First Amendment protection. Once one learns that the messages were produced randomly by a computer, the conclusion that they should constitute protected speech becomes suspect. Speech is not merely that which *resembles* speech; to constitute speech, a communicative product must have, at its source, a “speaker.” By the very first three words of the Constitution’s Preamble, it is clear that “We the People” are the objects of the Constitution’s guarantees. The First Amendment should not be thought to protect computers or monkeys, no matter how eloquently they may string words together. Quite simply, they do not constitute speakers—or at least the kind of speakers the Framers of the Constitution had in mind.

Granted, these e-mail messages could not exist “but for” human influence. The programmers who designed the software worked together, as part of a collective enterprise, to develop a political “speech” machine. By designing the parameters and structure of the program, they are collectively responsible for formulating the rules that produced the random computer-generated political messages. The unique personal data on each hard drive and the information culled from the Web include a trove of human ideas. These data, albeit in a scrambled form divorced from their original context and meaning, are used to produce the messages. Do these original influences by true “speakers” make the e-mail “speech?” One’s conclusion would still likely be negative, for the simple reason that, under this logic, speech would be ubiquitous. Even if one were to focus on the perspective of the listener, answering in the affirmative would remain untenable. For the listener, a “right to listen” that extends this far would become illimitable, and would morph into an unwieldy generalized right completely untethered from the origin of the sound or sight. One could, for example, claim a First Amendment right to listen to the sound produced by the spinning of a hard drive. Under such a conception, any human influence in the

7. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–19 (2011) (holding that the free speech clause of the First Amendment can protect picketers at a funeral from tort liability); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–92 (1975) (subjecting a Georgia statute to strict scrutiny because it regulates pure public expression); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964) (limiting the scope of tortious libel out of respect for the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

chain of causation that ultimately produces anything that could in any sense be said to be communicative would place that thing in the "speech" category. Limiting principles are, of course, essential to First Amendment jurisprudence. This definition of "speech" lacks any such limitation and would thus be unworkable. Perhaps even more troubling, the very power to define and constrain the meaning of the word "speech" would be taken from courts and handed over to a group of computer programmers.

I argue that an analogous approach to defining speech for First Amendment purposes is at work in *Citizens United*.⁸ The Court effectively sidesteps what should have been its threshold question: just what does it mean to "speak?" The Court's treatment of this central definitional question is surprisingly sparse. In the five *Citizens United* opinions, totaling approximately 180 pages, there is strikingly limited discussion of just what "speech" is.⁹ By virtually ignoring this question, the Court implicitly accepts a conception of speech not unlike the computer-generated spam discussed above.

State legislators, like our hypothetical programmers, devise the rules (the laws) that dictate the structure and functions of the corporate form. The structure of internal governance within the corporation adds another layer of rules and procedures that further constrain any messages ultimately propagated. Individual corporations, like our personal computers, produce speech-like output. Just like the e-mail, communication disseminated by corporations will no doubt contain many elements derived from individual human ideas. Such communications will, similar to the randomly generated messages, look very much like speech produced by individuals. Looks, however, can be deceptive. Corporate communications do not represent the product of an individual mind; they are a complex consequence of multiple layers of collective action, highly constrained and narrowly tailored to achieve limited goals.¹⁰ Human beings certainly make this communication possible, but this does not make it *their* speech. It is as much *their* speech as are randomly generated political e-mail messages, derived in part from fragments of their ideas taken from personal data on their hard drive and patched together out of context. The ultimate result may communicate a message, but it merely simulates "speech."

The opinions in *Citizens United*—majority, concurrences, and dissents—simply take for granted the constitutional existence of something called "corporate speech," a syntactical combination that is arguably akin to "simian electioneering." Justice Stevens, writing for himself and three other Justices, issues a remarkably lengthy and comprehensive dissent.¹¹ However, when

8. *Citizens United*, 130 S. Ct. at 876.

9. For example, Justice Scalia's concurrence in *Citizens United* summarily addresses this question in a single footnote. *Id.* at 928 n.7 (Scalia, J., concurring).

10. See ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* § 14 (4th ed. 1996) (describing the various duties of the many actors that play a role in corporate governance).

11. *Citizens United*, 130 S. Ct. at 929–79.

Justice Stevens reaches the question of corporate speech, the powerful voice of his dissent is tempered. He tepidly explains: “Given that corporations were conceived of as artificial entities and do not have the technical capacity to ‘speak,’ the burden of establishing that the Framers and ratifiers understood ‘the freedom of speech’ to encompass corporate speech is, I believe, far heavier than the majority acknowledges.”¹² He relegates this point—perhaps his strongest and most persuasive critique—to a mere footnote. Throughout his dissent, Stevens concedes that corporations themselves are “speakers,” implicitly accepting the default position that they are potentially eligible for protections clearly designed by the Amendment’s framers for human beings.

Without the baseline foundation that corporate communications somehow constitute “speech,” the majority’s opinion would stand on nothing but ether. With it, the majority crafts a decision that even the adamant dissenters admit has “rhetorical appeal.”¹³ Why does it have such appeal? Because the *Citizens United* majority won the jurisprudential language war. Stevens uses the term “corporate speech” fourteen times throughout his dissent.¹⁴ Scholars and journalists of all stripes have likewise blithely accepted the assumption that there is something called “corporate speech.”¹⁵ In doing so, the dissenters—and others who find the *Citizens United* decision troubling—have unwittingly and unwisely ceded unnecessary ground. By reifying corporations and imbuing them with the sympathetic qualities of citizens seeking to assert their fundamental First Amendment freedoms, the majority opinion resembles constitutional common sense. The dissenters become the ones who appear to be sidestepping “ancient” constitutional principles.¹⁶ The result is that the dubious underlying assumptions of the majority are validated.

B. The Decision

For over a century, the United States has struggled to establish a regime of effective campaign finance laws to address myriad concerns about the influence of money on politics. Congress passed the first significant federal campaign finance law, the Tillman Act, in 1907, at the urging of President Theodore Roosevelt.¹⁷ However, it was not until 1976, in *Buckley v. Valeo*, that the Supreme Court held that restrictions on campaign spending may constitute a restraint on protected political speech in violation of the First Amendment.¹⁸

12. *Id.* at 950 n.55.

13. *Id.* at 930, 945.

14. *Id.* at 929–79 (Stevens, J., dissenting).

15. See, e.g., Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1022 (2011); Noah Feldman, *Equality: What a Liberal Court Should Be*, N.Y. TIMES, June 27, 2010, at 38 (Magazine); Editorial, *The Court and Free Speech*, N.Y. TIMES, Apr. 23, 2010, at A18.

16. *Citizens United*, 130 S. Ct. at 886.

17. Wayne Batchis, *Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America’s Borders*, 25 QUINNIPIAC L. REV. 27, 33 (2006).

18. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

In *Buckley*, the Court famously split the baby, leaving only half of the ambitious Federal Election Campaign Act of 1972 (FECA) and its amendments intact.¹⁹ The *Buckley* Court struck down spending restrictions on political communications but upheld restrictions on political contributions to candidates or campaigns.²⁰ The Court reasoned that "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions."²¹ The decision accepted that combatting corruption and the appearance of corruption may constitute a "constitutionally sufficient justification" for campaign finance regulations, but that this state interest was only sufficiently relevant where money is contributed to political candidates.²² According to the Court, spending by campaigns themselves presented less danger of an improper quid pro quo.²³ Other justifications for restrictions on spending by campaigns, such as the "governmental interest in equalizing the relative ability of individuals [to] influence the outcome of elections," were flatly rejected as unduly burdening First Amendment rights.²⁴ However, as the *Buckley* Court took care to draw these fine distinctions, the litigants never asked the Court to address the constitutionality of the bar on *corporate* contributions and expenditures.²⁵ According to Justice Stevens, the *Buckley* Court's "silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures."²⁶

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA) to comprehensively address the perceived regulatory gaps left behind in *Buckley*'s wake.²⁷ BCRA represented the most significant attempt at reforming campaign finance since the passage of FECA and its amendments. Like FECA before it, BCRA was comprehensively challenged on First Amendment grounds. In the politically momentous decision *McConnell v. FEC*, the Court upheld the vast majority of BCRA, including the provision that prohibited corporate use of

19. *Id.*

20. *Id.* at 19–21.

21. *Id.* at 23.

22. *Id.* at 26, 47–48.

23. *Id.* at 47. This singular conception of corruption as an improper quid pro quo guided the Court's inquiry throughout *Buckley*. *Id.* at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.").

24. *Id.* at 48.

25. *Citizens United v. FEC*, 130 S. Ct. 867, 954 (2010) (Stevens, J., dissenting) ("[N]o one [in *Buckley*] even bothered to argue that the bar as such as was unconstitutional.").

26. *Id.*

27. See J. Robert Abraham, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1078 (2010) ("[The] passage of the Bipartisan Campaign Reform Act of 2002 . . . attempted to limit the influence of political money by banning 'soft money' contributions to party organizations and restricting the ability of corporations to fund electioneering communications.").

“general treasury funds to finance electioneering activity.”²⁸

Now, just over six years after *McConnell*, the Court has handed down *Citizens United*. *Citizens United*, however, is not merely a refutation of *McConnell*. *McConnell*’s focus was on the many dramatic changes BCRA made to campaign finance law, including a ban on soft money contributions and new disclosure requirements, among other changes.²⁹ In *McConnell*, the basic principle that corporations and unions may be prohibited from using their treasury funds for express political advocacy appeared to be beyond question. The *McConnell* Court characterized this understanding as “firmly embedded in our law.”³⁰ It explained that the formation and administration of PACs—separate organizations allowing corporations to solicit individual contributions used for political expenditures—“has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.” This “has been the Court’s unanimous view, and it [was] not challenged in [the *McConnell*] litigation.”³¹ In *Citizens United*, however, the Court reaches beyond *McConnell* and takes specific aim at *Austin v. Michigan Chamber of Commerce*, the 1990 decision that had firmly embedded the principle that banning corporations and unions from using their treasury funds for political advocacy is constitutionally valid.³² It did so despite the fact that—as the *Citizens United* dissenters would point out—the notion that campaign spending by corporations may be treated differently than individual spending had largely gone unquestioned for over one hundred years.³³

C. What Is “Speech”?

The First Amendment commands that “Congress shall make no law . . . abridging the freedom of speech, or of the press”³⁴ There is no suggestion that the meaning of the word “speech,” standing on its own, has changed appreciably since the Framers decided to include it in the text of the Bill of Rights.³⁵ Then, as now, the “primary definition” of “speech” is typically limited to “oral communication by individuals” or “the power of expressing thoughts by vocal words.”³⁶

28. *McConnell v. FEC*, 540 U.S. 93, 204, 209 (2003) (upholding new FECA § 316(b)(2) as amended by BCRA § 203).

29. *Id.* at 133–34.

30. *Id.* at 203.

31. *Id.*

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

33. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J. dissenting) (“The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*.”).

34. U.S. CONST. amend. I.

35. *See Citizens United*, 130 S. Ct. at 950 n.55 (Stevens, J., dissenting) (discussing “normal usage” of the word “speech” in the eighteenth century and today to argue that “[i]n normal usage then, as now, the term ‘speech’ referred to oral communications by individuals”).

36. *Id.*

The Court has long read the word "speech" more broadly than this literal definition. As even Justice Scalia has acknowledged, the text of the First Amendment "does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored."³⁷ Some of the Court's earliest First Amendment decisions, dating from the first decades of the twentieth century, addressed the degree to which the Amendment protected non-oral communications by individuals.³⁸ Indeed, the Court's first major First Amendment decision, issued in 1919, involved the free *speech* implications of a criminal conviction for circulating a *written* document imploring its readers to "assert [their] opposition to the draft."³⁹

In *Schenck*, the Court ultimately, and infamously, rejected the defendants' First Amendment claim.⁴⁰ However, it did so not because the communication at issue came in a form not literally protected by the language of the First Amendment, but rather because of a "clear and present danger" exception to First Amendment protections. In a memorable excerpt, Holmes wrote, "[w]hen a nation is at war many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."⁴¹ Justice Holmes made no suggestion whatsoever that there might be any interpretive concern involved in the use of words such as "said" and "utterance" in reference to a printed document.⁴² Indeed, Holmes conflated oral speech with the written word: "We admit that in many places and in ordinary times the defendants in saying what was said in the circular would have been within their constitutional rights."⁴³ Although the Court's jurisprudence would ultimately grow much more speech-protective, after *Schenck* there would be no question that written expression would be treated in a similar manner as oral communication. Both are within the constitutional ambit of "speech."

Furthermore, the phrase "freedom of speech" is frequently used interchangeably with the phrase "freedom of expression."⁴⁴ It was clear from a

37. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-38 (1997).

38. *Schenck v. United States*, 249 U.S. 47 (1919) (addressing and rejecting a First Amendment challenge to a conviction based on the circulation of a document); *Frohwerk v. United States*, 249 U.S. 204 (1919) (addressing and rejecting a First Amendment challenge to a conviction based on the publication of a series of articles in a German language newspaper); *Abrams v. United States*, 250 U.S. 616 (1919) (addressing and rejecting a First Amendment challenge to a conviction based on the distribution of leaflets).

39. *Schenck*, 249 U.S. at 51 (1919). See also David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

40. *Schenck*, 249 U.S. at 52 (1919).

41. *Id.*

42. *Id.*

43. *Id.*

44. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 7 (2005).

relatively early point in its jurisprudential history that the Court would not be wedded to an unduly rigid definition of the word “speech.” This reasonable interpretive concession in *Schenck*, however, was still quite distant from the notion that “speech” should be expanded to include financial expenditures on political campaigns by legally constructed corporate entities, which depends upon the judicial development of associational freedoms. In the following section, I trace the gradual—and misguided—emergence of a First Amendment freedom of *the* association. As we shall see, without this jurisprudential wrong turn, *Citizens United* would not have been possible.

II.

THE CONSTITUTIONAL HISTORY OF ASSOCIATIONAL RIGHTS

A. *A Funny Thing Happened on the Way to Citizens United*

The question of whether organizational membership for expression-related purposes is afforded First Amendment protection was first posed to the Supreme Court in the 1927 case *Whitney v. California*.⁴⁵ In *Whitney*, the defendant was found guilty of violating California’s Criminal Syndicalism Act on the grounds that she was a member of the Communist Labor Party of California, which purportedly advocated government overthrow.⁴⁶ The Court affirmed the conviction, concluding that it could not “hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly *or* association.”⁴⁷ Thus, although the Court rejected the defendant’s claim of First Amendment immunity, it implicitly accepted, with minimal explanation, the view that “association” is to be included alongside the textual protections of “speech” and “assembly.”⁴⁸

In a vehemently critical concurrence, Justice Brandeis explained that the “novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.”⁴⁹ In effect, *Whitney* can be read to support the proposition that the freedom of speech may in some circumstances—but not here—encompass an individual’s right to join an association.⁵⁰ At root, this early articulation of a “freedom of association”

45. 274 U.S. 357 (1927).

46. *Id.* at 358–66.

47. *Id.* at 372 (emphasis added).

48. See Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543, 550–51 (2011) (describing *Whitney* as the first case to dedicate sustained attention to associational rights under the First Amendment).

49. *Id.* at 373.

50. See Bhagwat, *supra* note 48, at 550–51 (2011).

remained centered within a discourse of individual rights.⁵¹ Gradually, in the decades ahead, the freedom of association would gradually morph into something very different—culminating, of course, in the stunning leap for associational rights in *Citizens United*.

This evolution began in the civil rights era of the 1950s. In *NAACP ex. rel. Patterson v. Alabama*, the Court firmly and explicitly established that a freedom of association is included among the protections provided by the Constitution.⁵² *Patterson* may be the most recognizable doctrinal starting point demarcating an unequivocal right to association. However, the constitutional underpinnings of the opinion are, in many respects, enigmatic. While the *Patterson* Court took care to limit "freedom of association" to the adjudication of an association member's individual rights, the Court did not elucidate this point as thoroughly as it could have. As a result, *Patterson* added association to the Court's jurisprudential arsenal in a manner that would contribute to more than a half-century of troubling ambiguity as to the source and scope of this right.⁵³

In *Patterson*, the Court unanimously struck down, as applied to the NAACP, an Alabama law that required the association to publicly disclose a list of its members.⁵⁴ The association itself, as an entity, was deemed an appropriate party to bring the constitutional claim.⁵⁵ The Court reasoned that the disclosure required by the Alabama law would have a "deterrent effect" on speech-related freedoms in the Jim Crow South.⁵⁶ The Court explained that there was an "uncontroverted showing that on past occasions revelation of the identity of [the NAACP's] rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other

51. In *Whitney*, the Court explained: "We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that *those persons* are protected from punishment by the due process clause *who abuse such rights by joining and furthering* an organization thus menacing the peace and welfare of the State." 274 U.S. at 371 (emphasis added).

52. *NAACP ex. rel. Patterson v. Alabama*, 357 U.S. 449, 460 (1958).

53. John D. Inazu speculates that the vague language of the opinion was perhaps a way for its author, Justice Harlan, to achieve a unanimous opinion. According to Inazu, disputes within the Court eventually led Harlan to strip his draft of language explicitly grounding the associational right in the First Amendment. As Inazu writes, "Justice Douglas and Frankfurter were both troubled by the draft language, but for opposite reasons. Frankfurter pushed for Harlan to rely expressly on the liberty argument and avoid any mention of the First Amendment . . . Douglas, on the other hand, feared that Harlan's due process analysis diluted the First Amendment as applied to the states." Although Justice Black eventually relented, Black "thought that the opinion . . . read 'as though the First Amendment did not exist,'" and thus intended to file a concurring opinion clarifying his view. As Inazu observed, initial reaction to *Patterson* by legal scholars mirrored the lack of clarity in the opinion; there was great disagreement within the community of legal commentators regarding the constitutional source of this newly identified right of association. John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 514–17 (2010).

54. *Patterson*, 357 U.S. at 466.

55. *Id.* at 458–59.

56. *Id.* at 466.

manifestations of public hostility.”⁵⁷

As in *Whitney*, the Court in *Patterson* tossed “association” into the mix alongside the explicit textual rights provided by the First Amendment; here, the Court referred to “indispensable liberties . . . of speech, press or association.”⁵⁸ Unlike in *Whitney*, the Court proceeded to explain specifically how and why an associational right can and should be derived from these other liberties. Wrote Justice Harlan for the majority, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . [t]his Court has more than once recognized [this] by remarking upon the close nexus between the freedoms of speech and assembly.”⁵⁹

While Justice Harlan acknowledged the logical relationship between association and speech, a close reading of the decision shows that he also took care to state that the constitutional implications of this relationship were limited to the adjudication of an association member’s individual rights. Here, the NAACP was granted standing because it “assert[ed], on behalf of its members, *a right personal to them*.”⁶⁰ To the Court, the association was a mere “medium through which its individual members” were able to express their ideas.⁶¹ In other words, at this point in the Court’s jurisprudential history, the “freedom of association” had not yet become synonymous with “freedom of *the* association.” There was no suggestion in the opinion that associations *qua* associations may assert First Amendment rights.⁶² Indeed, as I shall argue, to claim that they could is to carve out an entirely new set of rights, rights nowhere to be found in the Constitution itself.⁶³ As is exemplified by *Citizens United*, such associational rights may even be in tension with the actual individual rights enumerated in the Constitution.⁶⁴

A quarter of a century after *Patterson*, the Court revisited the so-called “freedom of association” in *Roberts v. United States Jaycees*.⁶⁵ By this time, the Court had issued numerous decisions addressing associational rights through the prism of substantive due process cases, without addressing the communication of ideas.⁶⁶ In *Roberts*, the Court drew a clear distinction between the due process

57. *Id.* at 462.

58. *Id.* at 461.

59. *Id.* at 460.

60. *Id.* at 458 (emphasis added).

61. *Id.* at 459.

62. *See id.* at 466 (“We hold that the immunity from state scrutiny of membership lists which the Association claims *on behalf of its members* is here *so related to the right of the members* to pursue *their* lawful private interests privately and to associate freely with others *in so doing* as to come within the protection of the Fourteenth Amendment.”) (emphasis added).

63. *See infra* Part III.

64. *See infra* Part IV.A.

65. 468 U.S. 609, 617–18 (1984).

66. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (discussing associational rights in the context of marriage and the right to privacy); *Moore v. City of East Cleveland*, 431 U.S. 494, 510 (1977) (discussing associational rights with respect to family living arrangements)

and communicative lines of association cases.⁶⁷ The Court reasoned that, while at times these classes of associational rights may overlap, the liberty interest of "maintain[ing] certain intimate relationships" implicates fundamentally different concerns than the right to join together with others to participate "in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."⁶⁸ Thus in *Roberts*, the Court for the first time used the phrase "expressive association," a fresh term of art that would help solidify this relatively new concept in constitutional adjudication.⁶⁹ Indeed, the Court used the term in twelve additional cases in the twenty-six years between *Roberts*, decided in 1984, and *Citizens United*, decided in 2010.⁷⁰ During this period, "expressive association" evolved from verb to noun—from an individual right to an entity itself purportedly deserving of First Amendment rights.

In *Roberts*, the freedoms of both "intimate association" and "expressive association" were at issue. The respondent claimed that its members' freedom of association had been violated by the application of a Minnesota antidiscrimination statute.⁷¹ Under the law, the Jaycees, an organization with a policy of denying full membership to women, was required to admit women as regular members.⁷² After disposing of the intimate association question—and holding that a "large" and "unselective" group such as the Jaycees may not exclude particular members under the constitutional shelter of a right of intimate association⁷³—the Court proceeded to explore whether expressive association was implicated. The majority opinion, penned by Justice Brennan, stated clearly that the "[f]reedom of association . . . plainly presupposes a freedom not to associate."⁷⁴ Requiring an association to include members it would otherwise exclude would "interfere with the internal organization . . . of the group" and

(Brennan, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (discussing intimate associational rights in marriage).

67. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

68. *Id.*

69. *Id.* at 618.

70. The twelve cases in chronological order are *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545, 549 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 563–65, 580 (1995); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 485 (1997) (Souter, J., dissenting); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591–92 (2000) (Stevens, J., dissenting); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–59 (2000); *Id.* at 680–87, 696 (Stevens, J., dissenting); *Id.* at 701–02 (Souter, J., dissenting); *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68–69 (2006); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.9 (2008); *Id.* at 463, 467, 468 (Scalia, J., dissenting).

71. *Roberts*, 468 U.S. at 618.

72. *Id.* at 615.

73. *Id.* at 621.

74. *Id.* at 623.

potentially intrude upon the associational freedoms of individual members.⁷⁵ However, the Court explained that it must balance any asserted adverse impact on associational rights against the compelling interests of the state—here, combatting gender discrimination and promoting public access.⁷⁶ Under this formulation, the Court ultimately upheld the application of the Minnesota law to the Jaycees.⁷⁷

Upon first glance, it might appear that little had changed since *Patterson*—aside, of course, from the added complexity that accompanied the newly articulated dual-track analysis for associational freedom. As for the nature of so-called “expressive association,” however, it still appeared from much of the language of the decision to be a quintessential *individual* right. Justice Brennan repeatedly referred to the relevant alleged infringement as one that occurred against the “male members” of the organization.⁷⁸ In other words, the rights at stake were the rights of the association’s individual members, not the association itself. Indeed, the complaint itself stated the claim in these terms, alleging that “application of the Act would violate the *male members*’ constitutional rights of free speech and association.”⁷⁹ The members of the Jaycees were simply bringing suit on behalf of *their* individual right to freely associate. Or were they?

Reading a bit closer, one notices certain points in the *Roberts* opinion in which the lines begin to blur and it becomes somewhat less clear that the Court was protecting a purely individual right. Justice Brennan inserted language in his opinion that clouded the issue—for example, where he conceded that “enforcement of the Act causes some incidental abridgement of *the Jaycees*’ protected speech.”⁸⁰ Whatever it may mean for an organization without vocal chords, penmanship, or a brain to “speak,” the Jaycees’ purported speech is not necessarily synonymous with the interests of individual “male members” to associate with a like-minded group of individuals for the purpose of “speaking.” Yet, the Court did not address this troubling, perhaps subtle, conundrum. In fact the Court failed to acknowledge that it interchangeably referred to what are really two distinct interests.

Quite simply, the expressive interests of an organization are distinguishable from—if not at odds with—the expressive interests of many of its individual members. This is particularly true in the case of sizable general interest organizations such as the Jaycees. Associations that serve a wide array of goals—and are large enough in size to accommodate a broad range of members, most of whom do not even know each other—are bound to include individuals with a diversity of viewpoints. Members participate in associations for a wide

75. *Id.*

76. *Id.* at 628.

77. *Id.* at 609, 612.

78. *Id.* at 615, 623, 626.

79. *Id.* at 615 (emphasis added).

80. *Id.* at 628 (emphasis added).

variety of reasons, particularly when such organizations have loosely defined objectives and engage in a broad range of activities. Indeed, one could easily imagine a member of the Jaycees remaining affiliated with the organization despite, rather than because of, its ostensibly male-centric message. When focus shifts from the constitutional rights of individual members to those of the organization itself, constitutional tensions such as this one become increasingly apparent. Just whose right to "speak" was infringed upon by Minnesota? Who was the "speaker" in *Roberts*, considering that the organization served many goals and contained a diversity of viewpoints? If the organization itself is eligible for First Amendment protection, should this "right" be treated any differently if only 51 percent of the members individually share the desire to speak a particular message? What if the number is only 5 percent?

Admittedly, an organization such as the Jaycees is a voluntary one; members who are disgruntled with a particular organizational message may revoke their membership at any time. However, voluntary resignation is not necessarily a reasonable expectation where the expression of certain disagreeable ideas represents just a small fraction of an organization's overall activities. On balance, an individual member might understandably determine that the benefits of continued membership outweigh the costs of being a disgruntled accomplice to unwanted "speech." In the alternative, a member may neither find the time nor have the inclination to learn of the "speech" propagated by the organization in the first place. Once we acknowledge the inherent tension between individual free speech and so-called associational speech, vexing questions arise. For example, are there any circumstances under which the association's right would be trumped by conflicting interests of particular members who wish to assert their right *not* to speak? This issue is particularly germane in the case of organizations so large and diverse that it would not be reasonable to expect each individual member to take the time to vet all official organizational "speech."

In a perfect world, the right of the association itself *would* correlate directly with the right of the individuals who comprise the association. In the case of a small association that is 100 percent devoted to speech, the choice of individual members to remain affiliated with that association would presumably—again, in a perfect world—be entirely rooted in each individual's continued support for that association's speech. In such a scenario it might be said that the association's speech is an unequivocal proxy for individual speech. Individuals in this perfect world would either become members, or revoke their membership, entirely on the basis of whether or not they want to utilize the association as a First Amendment conduit.

Justice O'Connor's concurrence in *Roberts* acknowledged some of the complications that become inevitable when the *individual* right of free speech morphs into a *collective* right. By contrasting a hypothetical organization "engaged exclusively in protected expression" with a commercial association

engaging in a limited amount of “incidental” speech, Justice O’Connor obliquely addressed this definitional challenge.⁸¹ For Justice O’Connor, the crux of the problem was that “[m]any associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings.”⁸² Furthermore, even an ostensibly purely expressive association will presumably propagate a range of communication, and with associations of significant size, it would be the rare case in which absolute agreement was reached among all members as to each expressive idea conveyed.⁸³ Collective action typically involves some degree of compromise, even among highly cohesive groups.

While Justice O’Connor is to be commended for being an outlier justice who acknowledged this conundrum, her proposed solution is unsatisfying. O’Connor’s framework would require the construction of artificial doctrinal categories for each association asserting a claim to this new constitutional right of expressive association.⁸⁴ O’Connor’s test would require an assessment of whether a particular “association is predominantly engaged in protected expression,” which even O’Connor herself conceded would be “difficult” to “determine.”⁸⁵ Only if this question is answered in the affirmative would “state regulation of its membership [be determined to] affect, change, dilute, or silence one collective voice that would otherwise be heard.”⁸⁶

This framework is problematic. The claim that it is possible to determine with principled consistency what constitutes “predominant engagement” in expression by an association is questionable. O’Connor stated that the “proper approach to analysis of First Amendment claims of associational freedom is . . . to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter.”⁸⁷ But courts are poorly equipped to quantify the activities and purposes of organizations in a manner that would avoid claims of unconstitutional vagueness. Under this framework, laws regulating associations would cast a shadow of constitutional uncertainty on all organizations that might—but also might not—be determined to be an “expressive association.” More importantly, this proposed test would further the misconception that the First Amendment should confer a right to associations *per se*, rather than a right to the individuals who may or may not choose to exercise *their* rights *through* an association.

81. *Id.* at 633–35 (O’Connor, J., concurring).

82. *Id.* at 635.

83. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

84. *Roberts*, 468 U.S. at 638.

85. *Id.* at 635.

86. *Id.* at 635–36.

87. *Id.* at 638.

O'Connor is not the only one who has struggled with this question of freedom of association. Many scholars, in numerous disciplines, have devoted considerable effort to unpacking the meaning and import of freedom of association.⁸⁸ Ashutosh Bhagwat argues that the Supreme Court went astray not by acknowledging a First Amendment associational right, but by linking it to speech.⁸⁹ He points to the similarities between the textual right to "assembly" found in the First Amendment and the concept of association.⁹⁰ However, it takes quite a logical leap to conclude that because there is a textual right to assemble, and an assembly is related in form and purpose to an association, we should extend First Amendment rights to associations *qua* associations. Indeed, Bhagwat acknowledges that there is historical "ambiguity about whether the assembly and petition clauses were understood by (some of) the Framing generation to protect permanent associations."⁹¹

While Bhagwat agrees that the O'Connor formulation is flawed—affording "free speech" rights to associations based on a nebulous assessment of whether or not a particular association is "expressive"—his proposed alternative is perhaps even more problematic.⁹² To Bhagwat, the "better distinction is one drawn based on the primary *goals* of the association at issue. Protected associations are those whose primary goals are relevant to the democratic process. These include not only expression but also political organization, value formation, and the cultivation of skills relevant to participation in the democratic process."⁹³ However, asking courts to draw such lines, effectively picking and choosing which associations are deserving of First Amendment protection, would, on its face, appear to demand wildly subjective decision-making. There are likely as many views on what "skills" are "relevant to participation in the democratic process"—and how to effectively "cultivate" those skills—as there are judges.

88. See, e.g., FREEDOM OF ASSOCIATION (Amy Gutman ed., 1998) (exploring the importance of association in America from the perspective of political science); ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001) (arguing that Americans have become increasingly disconnected from one another and are less likely to be members of civic associations than they were in the past); THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2004) (contemplating the consequences for U.S. democracy if voluntary participation in civic associations continues to wither). See also Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 981 (2011); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

89. Bhagwat, *supra* note 15, at 981 ("[T]he nontextual association right is best understood as a significant and distinct right, tied to the Assembly Clause and not (as the modern Supreme Court has suggested) derivative of the free speech guarantee.").

90. *Id.* at 990 ("Both [assemblies and associations] were seen as forums in which citizens could engage in the process of self-governance, with the difference being that assemblies were probably understood as ad hoc groups gathered in public or private while associations constituted more permanent groupings of citizens.").

91. *Id.* (citing Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 742–43 (2002)).

92. *Id.* at 991.

93. *Id.* at 999–1000.

The Court's confused constitutional jurisprudence in *Roberts* laid the groundwork for the profoundly misguided *Boy Scouts v. Dale* decision, and ultimately, for *Citizens United*. Yet, in the late 1980s, the direction the Court would take with regard to so-called "expressive association" was still far from certain. A majority of the Court continued to articulate a freedom of association that appeared firmly wedded to the constitutional origins of that right. Rather than shifting its attention to the association to determine the extent to which that association was itself entitled to First Amendment protection, the Court rightfully kept its eye on the constitutional ball, and maintained focus on the right of the individual speaker.⁹⁴

Just three years after *Roberts*, the Court in *Rotary International v. Rotary Club of Duarte* once again upheld a state antidiscrimination law requiring the admission of women to a formerly all-male organization.⁹⁵ In an opinion written by Justice Powell—and in a case in which Justice O'Connor took no part⁹⁶—the Court was consistent in its approach. It declined to adopt O'Connor's language from her *Roberts* concurrence, which argued that associations themselves possess First Amendment entitlements.⁹⁷ The contrast in *Duarte* could not have been clearer. Throughout Justice Powell's majority opinion, he repeatedly and unequivocally referenced "individual's" and "members'" freedom of association.⁹⁸ The clear suggestion was that the frustration of the exclusionary goals and practices of the association only implicated First Amendment rights to the extent that it may have impeded "the *freedom of individuals* to associate for the purpose of engaging in protected speech or religious activities."⁹⁹

This is not to say that Justice Powell failed to explore the nature of the association itself. The Court pointed to Rotary characteristics such as the typical size of the clubs, their relatively "inclusive" membership policies, their quest to represent "a true cross section of the business and professional life of the community," and their "service based on diversity of interest."¹⁰⁰ These traits led the Court to conclude that the addition of women would not "interfere unduly with members' freedom of private association."¹⁰¹ Similarly, the Court looked to the fact that "Rotary Clubs do not take positions on 'public questions'" to

94. An arguable exception to this assessment may be found in the Court's line of cases addressing the rights of political parties. For example, in *Cousins v. Wigoda*, the Court asserted that "[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association." 419 U.S. 477, 487 (1975). See also *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958).

95. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

96. *Rotary Int'l*, 481 U.S. at 538.

97. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring) (arguing that the majority "approach . . . accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment").

98. *Rotary Int'l*, 481 U.S. at 544, 545, 548, 549.

99. *Id.* at 544 (emphasis added).

100. *Id.* at 546-47.

101. *Id.* at 547.

determine that there had been slight, if any, infringement on Rotary members' rights of expressive association.¹⁰² Unlike O'Connor's *Roberts* concurrence, the Court did not assess the association to place it in a doctrinal box and determine *its* rights. Rather, the Court assessed, in light of the club's characteristics, the extent to which the challenged statute interfered with constitutional rights of individuals who would like to "speak" through, or as a part of, that association. This is a crucial difference.

Although the *Duarte* Court seemed to return to a coherent and rational vision of associational rights as derived directly from an individual's freedom of speech, the Court's lack of analytical clarity regarding freedom of association returned the following year in *New York State Club Association v. City of New York*.¹⁰³ The confusion was perhaps caused by the fact that the appellant bringing the case was itself a consortium of over one hundred private clubs and associations.¹⁰⁴ New York City had enacted a municipal law prohibiting discrimination by certain private clubs,¹⁰⁵ and the appellant, as an association of associations, brought a facial challenge against it.¹⁰⁶ This challenge was not only two steps removed from the individuals whose free speech might be said to be inhibited—as it was brought by an association of associations bringing together such individuals—it was, as a facial challenge, not connected to any tangible First Amendment harm imposed on any particular individual. Because of this posture, it might have been predictable, although not excusable, that in identifying whose rights the Court was addressing, the language of the opinion would mirror some of this ambiguity.

As to the issue of whether the appellant could bring the claim in the first place, the Court was quite clear that an association only "has standing to sue on behalf of its members 'when . . . its members would otherwise have standing to sue in their own right.'"¹⁰⁷ It was only because the associations that constituted the consortium bringing the suit would also have had standing to sue on behalf of *their* members—who were in fact individual people—the Court agreed that the consortium had standing. The Court explained "that appellant's member associations would have standing to bring this same suit on behalf of their own individual members, since *those individuals* 'are suffering immediate or threatened injury' to their associational rights as a result of the Law's enactment."¹⁰⁸ With regard to the standing issue, the Court was quite clear that any associational claims must be ultimately rooted in claims derived from an individual.

102. *Id.* at 548.

103. 487 U.S. 1 (1988).

104. *Id.* at 8.

105. *Id.* at 4.

106. *Id.* at 11.

107. *Id.* at 9 (quoting *Int'l Union, United Auto. Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274 (1986)).

108. *Id.* at 9–10 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)) (emphasis added).

However, in other places, Justice White's opinion included language that suggested otherwise. For example, with regard to an intimate association claim, he referred to the possibility that "there may be *clubs* that would be entitled to constitutional protection" rather than stating that there may be clubs *whose members* would be entitled to constitutional protection.¹⁰⁹ Nevertheless, the likelihood that the majority truly intended to imply that associations themselves hold a separable First Amendment right distinct from the individuals who comprise them is doubtful. This language addressed only the right of "intimate association," a substantive due process claim that is not primarily rooted in the First Amendment.¹¹⁰ When speaking directly to the First Amendment claim in subsequent paragraphs, White referred to "*every club member's* right of expressive association" and concluded that "[o]n its face, Local Law 63 does not affect 'in any significant way' the ability of *individuals* to form associations that will advocate public or private viewpoints."¹¹¹

In stark contrast, Justice O'Connor's concurrence, this time joined by Justice Kennedy, once again boldly argued for an independent right of associations *qua* associations.¹¹² O'Connor stated that "our cases . . . recognize an '*association's* First Amendment right to control its membership.'" ¹¹³ She argued that "[a]n association or club thus is permitted to demonstrate that its particular characteristics qualify *it* for constitutional protection."¹¹⁴ And finally, providing examples of hypothetical associations whose nature purportedly makes them appropriate candidates for constitutional protection, O'Connor emphatically asserted that "[t]he associational rights of *such organizations* must be respected."¹¹⁵

As the multiple disagreements between Justice O'Connor and the majority make clear, the "right of association" as First Amendment protection was still taking shape throughout the late 1980s. It was clear that the ability to choose one's associates was deserving of First Amendment protection on the theory that individual association leads to a more dynamic exchange of ideas both within that group and to the outside world.¹¹⁶ It was also well settled that associating with others had a close relationship with the ability to speak freely and assemble.¹¹⁷ However, the contours of the "right to associate"—as a First Amendment claim in itself—were far from clear. Many questions remained

109. *Id.* at 12 (emphasis added).

110. *See supra* notes 65 through 77 and accompanying text.

111. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 at 13 (1988) (quoting *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)) (emphasis added).

112. *Id.* at 18.

113. *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring)) (emphasis added).

114. *Id.* at 19 (emphasis added).

115. *Id.* (emphasis added).

116. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–60 (1958).

117. *See id.* at 460.

regarding the extent to which a government could regulate the membership of an organization. The Court stated that "effective advocacy . . . is undeniably enhanced by group association,"¹¹⁸ while, at the same time, conceding that an association is "but the medium though which its individual members seek to make more effective the expression of their own views."¹¹⁹ Although the Court had yet to fully embrace the view that associations are, for First Amendment purposes, distinct from the individuals who comprise them, its opinions left open the possibility that it might eventually be willing to untether the associational right from the individual right.

B. *A New Century, A New Constitution*

Going forward, the challenge for the Court was to determine precisely *how* to establish the boundaries of the freedom of association. Free association is quite simply, in many circumstances, a speech facilitator. This does not mean, however, that this ancillary or derivative right should, or must, become an *equivalent* to the initial right. The Court had elaborated, beginning in *Roberts*, that this qualified freedom of association comes in two varieties, *expressive* and *intimate*. Both are *subsets* of association.¹²⁰ Association does not necessarily fall into one of these categories, but, to be constitutionally protected, the association at issue should presumably have a concrete connection to an actual constitutional right. At the turn of the twenty-first century, a range of questions still confronted the Court regarding associational rights. The weakness of categorizing association into *expressive* and *intimate* varieties was that the categories themselves begged the most important questions. Just how are courts to determine when an association is "expressive" or "intimate" in nature? Are such categories dichotomous, or do they exist on a continuum?

How should a court treat an association that is "just a little bit" expressive or "somewhat" intimate? Should it allocate Constitutional rights on a sliding scale, or should the freedom of association be an all-or-nothing proposition? Finally, and of central concern here, what of the relationship between the individual and the association? Should a constitutional right *to join* an association suggest a concomitant constitutional right *of the association* to determine *its* membership? If so, how do we go about determining the true, unified voice of that association? An association, like any collective body, contains a range of views and desires. While it may make sense to impute, for some purposes, "a single voice" to an association, particularly for corporations and other entities provided with a unique legal status, this unified voice is ultimately something of a convenient fiction.

A critical turning point for the freedom of *the* association came in 2000,

118. *Id.*

119. *Id.* at 459.

120. See *supra* Part II.A (discussing *Roberts v. U.S. Jaycees*).

when, in *Boy Scouts of America v. Dale*, a highly fractured Supreme Court confronted many of these lingering questions.¹²¹ In *Boy Scouts*, the Court for the first time held a state antidiscrimination law unconstitutional as applied against an association's exclusionary membership policy.¹²² Cobbling together disparate elements from the Court's confused precedents addressing the so-called "right of expressive association"—minted less than two decades earlier—a five-member majority struck down the application of a New Jersey public accommodations statute.¹²³ The law would have required the reinstatement of an adult Boy Scout leader whose membership had been revoked based on his sexual orientation.¹²⁴

The majority opinion, written by Justice Rehnquist, was quick to adopt, with minimal explanation, what had been a perspective articulated only by Justice O'Connor in her *Roberts* and *New York State Club Association* concurrences. However, rather than acknowledging this, the majority mischaracterized the *New York State Club Association* majority opinion. Rehnquist borrowed from the opinion's language referring to potential First Amendment infringement "upon every club member's right of expressive association,"¹²⁵ and asserted that it stands for the legal principle that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association."¹²⁶ By interpreting *New York Club Association* to protect the ostensible rights of the expressive association itself, rather than an individual member's act of "expressive association," the Court was able to convert an after-the-fact policy statement against homosexuality by a "representative" of an organization composed of over one million members into a tool for unprecedented and potentially limitless constitutional immunity.

The Court acknowledged that "the Scout Oath and Law do not expressly mention sexuality or sexual orientation" and conceded that "[d]ifferent people would attribute . . . very different meanings" to Scout Oath and Law terms such as "morally straight" and "clean."¹²⁷ However, under the guise of judicial modesty, the Court professed that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."¹²⁸ To support this claim, the Court cited the well-established principle that First Amendment freedoms are not to be interfered with "on the ground that [a Court] view[s] a particular expression as unwise or irrational."¹²⁹

121. 530 U.S. 640 (2000).

122. *See id.* at 657–61.

123. *Id.* at 659.

124. *Id.* at 644.

125. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).

126. *Boy Scouts*, 530 U.S. at 648 (emphasis added).

127. *Id.* at 650.

128. *See id.* at 651.

129. *Id.* at 651 (quoting *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981)).

However, the Court did not acknowledge the perverse consequences of applying this common sense First Amendment principle to an entity to which it was simply not intended to apply. It is uncontroversial that the First Amendment protects individuals who make absurd or foolish statements and individuals whose speech is socially unpopular or broadly unaccepted.¹³⁰ However, there is simply no logical relationship between the goals behind this principle—promoting free and uninhibited expression of ideas by individuals—and the Court's refusal to apply scrutiny to an association's purported statement of its expressive values. The "unwisdom" or "irrationality" that Rehnquist rightfully argued is traditionally protected by the First Amendment is a protection intended for individuals. Yet he used it to immunize associations against claims of internal inconsistency—claims, in other words, that the ostensible expressive goals of the association do not authentically represent the views of the individuals who compose it. This deferential posture would afford any association that professes to be in some respect "expressive" immunity from any regulation that might be said to even marginally or tangentially impact its "expressive message"—which, of course, can be defined however that organization decides to define it. This application of First Amendment principles where they do not belong—to associations themselves with a strained and insufficiently justified "group speech" theory—can only produce circular and potentially illimitable results.

This has been exacerbated by the breadth with which the *Boy Scouts* Court defined what it means to be an "expressive" association. It would be difficult to identify an organization that cannot *in some way* be said to be "expressive" in nature. In *Roberts* and *Rotary Club*, the Court avoided a rigid doctrinal formula, instead looking at the associations at issue in a fact-sensitive manner.¹³¹ Rather than simply asking a black-or-white question of whether or not the organizations engage in "expressive association," the Court assessed the nature of their expression, evaluated how and to what extent their particular brand of expression would be impacted by the law at issue, and examined the relationship between their purported expression and their individual members.¹³² The *Boy Scouts* Court, in contrast, seemed intent on establishing a bright line rule that would do away with much of the nuance that consumed the Court in previous expressive association cases.¹³³ Rehnquist explained, quite succinctly: "To determine

130. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Watts v. United States* 394 U.S. 705 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

131. See *supra* Part II.A (discussing *Roberts* and *Rotary Club*).

132. For example, in *Roberts*, the Court determined that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984).

133. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000),

whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.'"¹³⁴ This protection "is not reserved for advocacy groups."¹³⁵ To enjoy First Amendment protection, the association simply "must engage in some form of expression, whether it be public or private."¹³⁶ Under such a definition, it is difficult to imagine any group that would not qualify as an expressive association.

Beyond the initial inquiry, the *Boy Scouts* majority constructed a second threshold "issue" that must be answered to claim a right of expressive association. According to the Court, this next hurdle was to "determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."¹³⁷ Once again, the Court asked a question with an answer that was effectively preordained. To answer it, we must "explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality."¹³⁸ But the Court had already set up a dramatically deferential approach to determining an association's "view."¹³⁹ Putting aside the highly dubious proposition that a large and diverse general interest organization such as the Boy Scouts even has a single, definable viewpoint, the Court told us that it would essentially take the association at its word, even in the face of contradictory evidence.¹⁴⁰ In other words, the viewpoint of an association is defined as whatever the anointed representative—for the purposes of the particular litigation—says it is.

The majority did not deny or refute the New Jersey Supreme Court's finding that the organization "includes sponsors and members who subscribe to different views in respect of homosexuality."¹⁴¹ Rather, it dismissed the significance of this fact by concluding that "the First Amendment simply does not require that every member of a group agree on every issue for the group's policy to be 'expressive association.' The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."¹⁴²

This is a radical reconception of the First Amendment. One might even argue that such a conclusion turns the original reasoning for recognizing a First Amendment right to associate on its head. Under this conception, not only is the right to associate no longer primarily about acknowledging the link between associating with a group and facilitating individual speech, but here, the majority seems to be telling us that an association's speech may *trump* the speech of the

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 650.

138. *Id.* (emphasis added).

139. *Id.* at 651.

140. *See id.* at 651.

141. *Id.* at 654–655 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999)).

142. *Id.* at 655.

individuals who compose it. The Court strayed unrecognizably far from the most common understanding of the First Amendment.¹⁴³ Not only was the Court not protecting individual speech, it was asserting that, by way of one "official statement" by a "representative" of a membership organization the size of Chicago,¹⁴⁴ a group may circumvent laws intended to protect individual liberties. At the same time the Court was carving out an unprecedented associational right, it was disregarding the fact that a sizable percentage of that association's members likely disagree with this "official" statement.¹⁴⁵

As the exasperated dissenters exclaimed: "We have never held . . . that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views."¹⁴⁶ Yet the dissenters themselves contributed to the doctrinal confusion by conceding that "[a]t a minimum, a group . . . must adhere to a clear and unequivocal view."¹⁴⁷ This concession implicitly validated the fundamentally misguided approach to the First Amendment that enabled the majority to arrive at its holding. The Court accepted the underlying assumption that "group views" can somehow be determined with a requisite degree of certainty, such that any law that might indirectly interfere with a group's supposedly expressive actions may be struck down as unconstitutional. However, unless it is explicitly and closely tied to each individual's freedom of expression, such a formulation offers nothing other than a license for judicial activism akin to the economic substantive due process of the *Lochner* era.

Group rights are often at odds with the individual rights the First Amendment was intended to protect. The Framers feared tyranny of the majority, and the First Amendment was intended to protect individuals from oppressive government officials who might use their position to suppress unpopular speech.¹⁴⁸ The *Boy Scouts* majority inverted this principle, utilizing

143. See *supra* Part II.A (discussing the Court's expressive association jurisprudence and noting that, from the time it first acknowledged an expressive associational right, the Court long emphasized the centrality of the individuals involved).

144. In 2000, the Boy Scouts of America had approximately 4.5 million members (approximately 3.3 million youth and approximately 1.2 million adults). Boy Scouts of America, Annual Membership Summary, <http://www.scouting.org/About/AnnualReports/PreviousYears/2000/11.aspx> (last visited January 18, 2012). In 2000, Chicago had a population of approximately 2.9 million. U.S. Census Bureau, Cities With 100,000 Or More Population in 2000, <http://www.census.gov/statab/ccdb/cit1020r.txt> (last visited January 18, 2012).

145. There was significant evidence of internal dissent among Boy Scouts members. Devin Smith, "The Double Standard of the Boy Scouts' Honor," CORNELL DAILY SUN, Feb. 27, 2001 ("The New York City board of The Boy Scouts of America called the national leadership's policy banning homosexual scouts and troop leaders 'stupid' and 'repugnant.'"). Editorial, *Discrimination by the Scouts*, N.Y. TIMES, Sept. 3, 2000 (noting that, in response to the *Boy Scouts* holding, "[i]n some areas, parents and local council leaders are mobilizing to change the national leadership's policy banning homosexuals").

146. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 676 (2000).

147. *Id.*

148. ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 18–20 (1941) (discussing the

the First Amendment as a tool for oppression, rather than as a remedy. Large organizations, particularly those the size of the Boy Scouts, are in many respects analogous to representative democratic states. As with a citizen of a representative democracy, a member of a large voluntary organization does not typically agree with all of the official positions taken by that organization's leadership.¹⁴⁹ Indeed, one takes for granted the existence of significant diversity, changing or revolving representational leadership, and sizable groups of minorities with positions on many issues that are utterly distinct from current "official" views.¹⁵⁰

The dissenters' alternative suggestion—that sufficient evidence should first demonstrate significant group unity with regard to that group's viewpoint—while preferable to the majority's approach, is also problematic. Once the right of free speech is construed as a right possessed by the association itself—divorced from the individuals it was intended to protect—constitutional contradictions are inevitable. How would a judge determine what it means for a million-plus member organization to have, in the dissenters' words, a "clear and unequivocal view?"¹⁵¹ What would be an appropriate and manageably applicable threshold? Suppose it is determined that 90 percent of the members of an organization agree with a particular position statement and that this ratio is deemed to be sufficient to grant that organization constitutional immunity from any law that might adversely impede the pursuance of expressive goals related to that purpose. This would leave 10 percent of the association's members unable to avail themselves of laws passed by their democratically elected officials simply because of their membership in an "expressive association."

The Court in the twenty-first century is thus arguably subverting the democratic process—distorting the First Amendment to endow associations, entities the Framers characterized as dangerous factions, with a constitutionally protected status.¹⁵² One possible rejoinder is that a membership organization such as the Boy Scouts is purely voluntary, and that if one has sufficient disagreement with an official position of that organization, one can simply revoke one's membership. This is, of course true. It is also true that American citizens may voluntarily revoke *their* citizenship. This theoretical "choice" did not change the Framers' belief that minority interests still require protection. Any theoretical freedom of exit should not carry that implication today. It would be repugnant to republican ideals to propose that an American whose ideas are detested by 90 percent of the population must revoke her citizenship if she

likely "fear" the Framers had for the "danger" faced by "political writers and speakers" from the government).

149. See, e.g., Dora C. Lau and J. Keith Murnighan, *Demographic Diversity and Faultlines: The Compositional Dynamic of Organizational Groups*, 23 ACAD. OF MGMT. REV., 325 (1998) (addressing issues of diversity and the creation of fault lines within organizational groups).

150. *Id.*

151. *Boy Scouts*, 530 U.S. at 676.

152. THE FEDERALIST NO. 10 (James Madison) (Gary Wills ed., 1982).

wishes to speak freely. Should a similar principle, mandated by the constitution, apply to private associations?

C. *The Lead-Up to Citizens United*

Words matter. In 2010, two words redefined First Amendment jurisprudence and political campaigning in one fell swoop: "corporate speech." This paradoxical phrase was not entirely new to the Supreme Court's lexicon; the Court had previously used this combination of words in seven cases, beginning in 1978.¹⁵³ However, it was not until *Citizens United* that these words would be used to fundamentally reshape American politics and the conventional understanding of the First Amendment.¹⁵⁴ Not long ago, it would have been equally preposterous to refer to "corporate emotions" or "corporate arthritis" as it would have been to posit that there is something called "corporate speech." But today, there is no doubt that, at least from a legal perspective, the fiction of corporate speech has become doctrinal fact. The non-human has become human.

A corporation (if it is composed of more than one individual) is, of course, a particular kind of association. Three neighborhood friends may get together—or associate—to set up a lemonade stand. They may place a makeshift sign atop their counter that says "Lemonade for the GOP: 5¢." They clearly constitute an association; they have come together to achieve a particular purpose. One might even argue that they are an "expressive association," for this association's commercial goals seem at heart to be an attempt to promote a particular political message. However, this association does not become a "corporation" unless it follows the legal requirements of its state; typically this involves filing documents with an appropriate government official and paying a required fee.¹⁵⁵ It is at this point that, at once, an informal association attains a new status and becomes subject to an entirely new legal regime. For a single "associate"—let's call her "Sally"—the transformation from informal association to legal corporation would presumably have no impact on First Amendment rights. As an individual, Sally is just as free after her lemonade stand incorporates as she was before to sit in a public park and share her thoughts on the relationship between citrus and the free market economy. The act of associating with others who are similarly minded might have helped her opinions take shape—just as coming

153. The seven cases in chronological order are *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 772–87 (1978); *Id.* at 797 n.1 (Burger, C.J., concurring); *Id.* at 805–07 (White, J., dissenting); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980); *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 14 n.10 (1986); *Id.* at 34 (Rehnquist, J., dissenting); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Id.* at 689 (Scalia, J., dissenting); *Id.* at 704, 709 (Kennedy, J., dissenting); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995); *McConnell v. FEC*, 540 U.S. 93, 256–59 (2003) (Scalia, J., concurring in part and dissenting in part); *Id.* at 290–91, 319 (Kennedy, J., concurring in part and dissenting in part); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–78 (2007); *Id.* at 499 (Scalia, J., concurring).

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

155. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* § 3.3 (4th ed. 1996).

from a home where citrus fruits are readily available, living within close proximity to a suburban supermarket, residing in a predominantly Republican state, or a limitless number of other potential factors, might be said to have contributed to her ideas. However, Sally's speech remains *Sally's* speech, whatever the origin of the ideas from which this speech evolved. The same principle that applies to a child running a neighborhood lemonade stand holds true for a corporate shareholder, a member of a board of directors, or a corporate employee—her individual right of free expression is a constant. It is not diminished as a result of her choice to associate with an organization with its own legal status.

The cases discussed thus far have been concerned primarily with the free speech benefits derived from association. In some contexts, the ability of an individual to speak is assisted by her associations. Sally's words may become possible, or perhaps more persuasive, because she has the benefit of the group with which she shares, exchanges, and refines her ideas. However, it is one thing to acknowledge that associating with others may carry important advantages for individuals; it is quite another to treat associations as if they are themselves individuals. As we saw, the right to enhance or make possible individual expression through association, gradually, and without acknowledgement, evolved into a right of the association itself.¹⁵⁶ One layer of free speech rights became two. This new layer of free speech comes with a wide range of challenges. Defining the association for First Amendment purposes has proven difficult. In *Boy Scouts*, the Court ultimately allowed an association to define itself on its own terms through a litigant representative in an adversarial setting.¹⁵⁷ Yet, as discussed, identifying the true unified "voice" or "viewpoint" of an association is a nearly impossible task unless a court simply defers to the words of whomever the association's designated spokesperson happens to be for purposes of the litigation.¹⁵⁸

Such blind adherence to a spokesperson's words becomes even easier with the assistance of state law. If "speech" is deemed to exist wherever state law creates an artificial "person," then the entire question of whether or not a particular organization is a so-called "expressive association" falls away. Indeed, at the same time that the Court was fleshing out the meaning of "expressive association," quietly transforming an individual's right into a group right, it was wrestling with the inevitably knotty issues that accompany corporate "personhood" for First Amendment purposes. Although the mid-1980s Court was not yet ready to take the startling leap it would in 2010—essentially declaring *all* corporations to be the equivalent of individuals for First Amendment purposes—the Court was unevenly moving in that direction. Just

156. See Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1494–95 (2001).

157. See *supra* Part II.B (discussing *Boy Scouts of Am. v. Dale*).

158. *Id.*

two years after *Roberts* was decided, the Court decided *FEC v. Massachusetts Citizens for Life (MCFL)*.¹⁵⁹ In *MCFL*, a majority of the Court, led by Justice Brennan, embarked on the precarious and misguided adventure of handpicking *which* incorporated associations were worthy of the First Amendment's protections. On the basis of a highly case-specific analysis, the majority in *MCFL* declared that it was unconstitutional to restrict independent political expenditures by particular nonprofit, nonstock corporations.¹⁶⁰ Ironically, it was Justice Rehnquist, along with three other dissenters, who chastised the majority for taking "a well-defined prohibition [on corporate political spending and adding] a vague and barely adumbrated exception certain to result in confusion and costly litigation."¹⁶¹ Such "confusion" could have been avoided had the Court simply rested on the quite logical conclusion that "free speech" applies only to individual "speakers." Instead, the Court's most liberal member perhaps inadvertently paved the way for the decision that would politically empower moneyed corporations to an extent that would have been unimaginable in previous generations.

Unlike in *Citizens United*, the majority in *MCFL* did not dismiss the importance of federal election law's allowance for the establishment of political action committees (PACs).¹⁶² The Court explained that "corporation[s] remain free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending."¹⁶³ PACs, of course, make the very distinction to which the Supreme Court in *Citizens United* was willfully blind—that is, the fundamental difference between individual speech and corporate communications. By design, PACs simply provide a mechanism to more closely correlate what might be characterized as "corporate speech" with *actual* speech. By strictly segregating and earmarking funds contributed by *individuals* to further the expressive goals of those *individuals*, a PAC's activities are more directly linked to individual speech.¹⁶⁴ Although the *MCFL* Court ultimately relied upon the presence of the segregated fund provision to find the application of the Massachusetts law unconstitutional, it still maintained that there had not been "an absolute restriction on speech."¹⁶⁵ In stark contrast, the *Citizens United* majority characterizes the law prohibiting corporate political expenditures as "an outright

159. 479 U.S. 238 (1986).

160. *Id.* at 241.

161. *Id.* at 271.

162. *Id.* at 252.

163. *Id.*

164. *Id.* at 258. The majority in *MCFL* explains that "by requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee." *Id.*

165. *Id.*

ban . . . notwithstanding the fact that a PAC created by a corporation can still speak.”¹⁶⁶ The Court reasons that a “PAC is a separate association from the corporation. So the PAC exemption . . . does not allow corporations to speak.”¹⁶⁷ Unlike *Citizens United*, the *MCFL* Court showed an appreciation for the individual-speech-facilitating function of PACs.¹⁶⁸ Yet, at the same time, as applied to organizations “formed to disseminate political ideas, not amass capital,” the *MCFL* Court concluded that the PAC requirement was a *hindrance* to speech.¹⁶⁹ Establishing a segregated fund involves compliance with a range of administrative requirements that may prove costly.¹⁷⁰ Thus, the *MCFL* Court concluded that these “regulations may create a disincentive for such organizations to engage in political speech.”¹⁷¹

Defined correctly, PACs have nothing whatsoever to do with impeding “speech.” Instead, PACs are designed to facilitate speech; they create a legal mechanism by which a fictional legal entity may act as a true conduit for individual speech.¹⁷² As the *MCFL* dissenters explained, the Court had previously “declined the invitation to modify [a] statute to account for the characteristics of different corporations. . . . We saw no reason why the governmental interest in preventing both actual corruption and the appearance of corruption could not ‘be accomplished by treating unions, corporations, and similar organizations differently from individuals.’”¹⁷³

With *Citizens United*, the Court has returned to an unambiguous view of corporations and other associations. However, the Court’s consistency has taken the form of an absolute reification of the corporation for First Amendment purposes. The Court’s equivocation and dubious balancing in *MCFL* allowed for misplaced certitude twenty-four years later in *Citizens United*. In the following section, I explore the inherent contradictions in the approach taken by the *Citizens United* majority.

166. *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010).

167. *Id.*

168. *MCFL*, 479 U.S. at 258.

169. *Id.* at 255.

170. *Id.* at 254–55.

171. *Id.*

172. *Id.* at 258. Since—and on account of—*Citizens United*, we have seen emergence of the so-called “Super PAC,” an entirely new form of PAC that is receiving wide-ranging attention and criticism as this article goes to press. The *Citizens United* holding has permitted corporations themselves to contribute unlimited amounts of money to such Super PACs. These Super PACs may then spend without limit on political advertising as long as they ostensibly remain “independent” of the candidate they support. The result, in the 2012 Republican primaries and caucuses, has been enormous spending on negative advertising. See Nicholas Confessore & Jim Rutenberg, *Group’s Ads Rip at Gingrich as Romney Stands Clear*, N.Y. TIMES, Dec. 30, 2011, at A1.

173. *MCFL*, 479 U.S. at 269 (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 210–11 (1982)).

III.

THE CONCEPT OF ASSOCIATION IN *CITIZENS UNITED*

It is difficult to imagine how the *Citizens United* Court, in addressing whether and to what extent corporations are protected by the First Amendment, could avoid addressing the vexing question of what it means for an association to "speak."¹⁷⁴ One might expect that the question of associational rights would preoccupy the Court. As discussed previously, the Court has been forced to confront the question "what is speech?" in a number of contexts. Although the Court's analysis in the "expressive association" line of cases, beginning with *Roberts*, left much to be desired, these decisions did spend considerable time questioning what it means for an association to speak for First Amendment purposes.¹⁷⁵ The Court in *Citizens United* does not focus primarily on how constraints imposed on a corporation might adversely affect First Amendment rights of shareholders. Nor does the Court adopt the approach of O'Connor's concurrence in *Roberts*, which would require an assessment of whether *Citizens United*, as an association, was "predominantly engaged in protected expression" as opposed to "commercial activity."¹⁷⁶ Instead the Court simply sidesteps the issue, no doubt aided by the term of art "corporate speech" that covertly answers the question for them.¹⁷⁷

In fact, this most vexing of questions is addressed only as an aside in Justice Scalia's concurrence.¹⁷⁸ Scalia acknowledges "that when the Framers 'constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.'"¹⁷⁹ Yet he goes on to assert, with a striking absence of support, that this "individual person's right to speak includes the right to speak *in association with other individual persons*."¹⁸⁰ On its face, this might sound like a reasonable proposition; but upon inspection, it means very little. Does an individual have a right to speak among or in the presence of her associates? Of course. Does someone attending a rally with a large group of similarly-minded individuals have a First Amendment right to hold up a sign, next to others doing the same, detailing a political position? This is classic freedom of expression.¹⁸¹ Could a member of this association, at this same public rally, repeatedly chant that her organization supports the repeal

174. Even under the so-called hearer-centered view of the First Amendment, the sounds the listener is said to have a right to hear must, at minimum, constitute "speech." Otherwise, the First Amendment would expand beyond recognition into a nonsensical generalized right to hear anything audible, and to see anything visible.

175. See *supra* Part II (discussing the Court's "expressive association" line of cases).

176. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring).

177. *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010).

178. *Id.* at 928 (Scalia, J., concurring) (citing Justice Stevens' dissenting opinion).

179. *Id.*

180. *Id.*

181. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–19 (2011) (holding that the First Amendment protects picketers at a funeral from tort liability).

of anti-polygamy laws across the nation if she is entirely aware that two members strongly disagree with this position? This presents a different question. Her words, if maliciously uttered, could be construed as slander, leaving her exposed to a potential legal penalty.¹⁸² Would the result be different if this potentially slanderous member declared herself to be the official spokesman of the group? If there was some dispute within the group as to who was in fact the designated spokesman, would this matter? Would using these words still constitute, in Scalia's words, "the right to speak in association with other individual persons?"¹⁸³ How much disagreement among the group would suffice to remove such speech from this category? The answers to all of these questions are far from clear. While a right to speak for one's self is firmly established First Amendment orthodoxy, the right to speak for others has clear limits—illustrated by the Court's well established libel exception to the First Amendment.¹⁸⁴ Yet Scalia presents his claim as if it were simple common sense, no nuance involved.

Scalia derides the argument that corporations are not protected by the First Amendment because they are non-humans and incapable of oral speech as "sophistry."¹⁸⁵ He explains that "[t]he authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members."¹⁸⁶ If only matters were this simple.

"Authorization" to represent a group, whether it is a corporation or informal association, comes in many forms. And while the types of statements that are authorized to be made by official "authorization" are likely as vast and diverse in number as there are associations, one thing is clear: "authorization" has its limits. The word "authorized" implies that much remains "unauthorized" and that even an officially designated spokesperson is limited to a circumscribed role. This spokesperson may be allowed to speak for the association only on particular topics, or only following a vote among association members to determine its official views; but this "representative" speech, coming from a spokesperson, certainly shares little resemblance to uninhibited individual speech. As *an individual*, this spokesperson is generally free to say whatever she likes. It is *her* speech. If she exceeds the limits of her authorized role, she, as an individual, must deal with the consequences. If her statement purports to be the official position of the organization, but does not comport with association or legal guidelines governing such statements, she may be reprimanded or ejected from the organization. Like a private employer who may freely penalize an

182. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964) (holding that a state cannot award damages for libel unless a plaintiff proves malice).

183. *Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010).

184. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) ("States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.").

185. *Citizens United*, 130 S. Ct. at 928 n.7.

186. *Id.*

employee for her words while on the job, this spokesperson is responsible for her own speech, whether it is false, misleading, libelous, or even just inconsistent with the views of some in the organization.¹⁸⁷

In other words, so called associational "speech" is a matter internal to each association, governed by that association's internal processes. As Daniel A. Farber suggests, "we do well to remember that associations are in the end merely groups of people, and that it is their rights (and ours)—not those of abstract entities called expressive associations—which the Constitution ultimately seeks to protect."¹⁸⁸ Official or designated "speech" of an association or corporation may reflect a hard-fought compromise during a business meeting, a majority vote among various proposed official policy positions, or an internal political power play among members, but it *is not*, by any means, the equivalent of the individual speech the Framers intended to protect in the First Amendment. Yet, well before *Citizens United*, the Court began conflating these concepts. As far back as 1981, the Court struck down a Wisconsin law that would have bound the national Democratic Party, in contravention of party rules, to honor results from "open" primaries that included non-Democrats.¹⁸⁹ The Court took care to use the language of individual rights, concluding that "the interests advanced by the State do not justify its substantial intrusion into the *associational freedom of members* of the National Party."¹⁹⁰ At the same time, it explained that "the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the process leading to the selection of delegates to their National Convention."¹⁹¹ This justification begs the question: just what kind of "rules" did the Democratic Party "speak" through? The Court did not ask whether these associational rules merit constitutional protection—it simply assumed that by virtue of the existence of rules purporting to "speak" for the members of the party, the members and the party should be treated as one and the same for First Amendment purposes. In making this assumption, the Court failed to acknowledge ways in which individual speech is fundamentally distinct from the ultimate product of associational rules and procedures. Individual speech reflects thoughts or desires derived from a single human brain.

It is especially ironic that Justice Scalia, of all members of the Court, takes the view in *Citizens United* that an "individual person's right to speak includes the right to speak *in association with other individual persons*."¹⁹² Scalia is well known for a particularly vehement hostility to the use of legislative history.¹⁹³

187. See, e.g., ROBERT W. HAMILTON, THE LAW OF CORPORATIONS § 11.2 (4th ed. 1996).

188. Farber, *supra* note 156, at 1513.

189. Democratic Party of U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981).

190. *Id.* at 125–26 (emphasis added).

191. *Id.* at 122.

192. Citizens United v. FEC, 130 S. Ct. 876, 928 (2010).

193. Scalia favors reliance upon the text of a law itself. He writes: "What I look for in the Constitution is precisely what I look for in a statute: The original meaning of the text, not what the

He is primarily concerned that judges not be encouraged to cherry-pick among a wide array of statements of intent to produce a results-oriented holding—one that comports with the judge's desired outcome, rather than what the law itself demands.¹⁹⁴ He states: "Legislative history provides . . . a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody."¹⁹⁵ The rationale behind Scalia's position on the utility of legislative history is both quite lucid and related to the way that Congress functions as an association: an individual is inescapably distinct from a collective. The sum is not a simple reflection of each individual part.

Under such an understanding, claiming that an associational right of free speech naturally flows from the Framers' intent establishing an individual right to speak—and, of course, the textual original meaning of the Constitution—is a non sequitur. As Chief Justice Marshall explained in 1819, 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."¹⁹⁶ Given the temporal proximity of this statement to the founding and the close relationship of Marshall with the Framers, it is difficult to conclude that Scalia's footnote 7—declaring that the voice of a spokesperson for a corporation and the voice of individual human speakers may be treated as equivalent—is tied to anything remotely resembling his standard criterion, original understanding.¹⁹⁷ Unfortunately, as the previous review of so-called

original draftsman intended." ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). This approach presumably rests on an understanding that legislation is ultimately the product of a collectivity: Congress. Statutory language is typically the result of painstaking compromise, hours of volatile debate, and the input of innumerable outside experts, lobbyists and advocates. The end product only becomes law upon a series of successful votes. To Scalia, the stated intention of any single individual involved in the legislative process is irrelevant and potentially misleading. *Id.* Adherents to this interpretive methodology believe that there is simply no reason to accept that the view of one congressperson reflects the meaning of the legislation as a whole.

194. Scalia explains:

The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant.

Id. at 17–18.

195. *Id.* at 36.

196. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

197. It would be exceedingly difficult to square Marshall's understanding of a corporation with Scalia's view. If Marshall was correct that corporations exist "only in contemplation of law"—with a character that is defined and constricted by what is provided in their charter—

associational rights jurisprudence reveals, it is not simply the justices in the *Citizens United* majority who stray far from the Framers' original intent with respect to the First Amendment. Although many of Scalia's predecessors on the Court would likely have disagreed with the outcome of *Citizens United*,¹⁹⁸ many justices either implicitly or explicitly accepted the claim that associations may somehow claim "speech" rights separable and distinct from, and inevitably at times adverse to, the claims of individuals. A quarter of a century of confused "expressive association" decisions certainly clouded the issue and contributed to the majority's ultimate disposition. Indeed, in his *Citizens United* dissent, Justice Stevens acknowledges: "In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today."¹⁹⁹

IV.

CORE FIRST AMENDMENT VALUES AND CORPORATIONS

It is thus clear that the word "speech" in the First Amendment contemplated communications by individuals, and that, in most settings, equating associational speech with an individual's speech—especially when that association is a corporation—requires a sustained exercise in jurisprudential gymnastics. The campaign finance jurisprudence—and the debate in the United States over campaign finance laws generally—has been shaped not only by arguments grounded in legal doctrine, but also by arguments grounded in the values the First Amendment was intended to protect. Although scholars have long been frustrated by the lack of evidence regarding original intent,²⁰⁰ philosophical arguments generally recognize three widely accepted purposes of the First Amendment. R. George Wright identifies these purposes as "truth, democracy, and self-realization."²⁰¹ Of these three, the *Citizens United* majority understandably spends little time on the third value, for there is, as we have seen, no "self" involved in corporate expression. Instead the Court devotes much of its energy to the first and second of these values.²⁰² In the following discussion, I argue that neither the goals of democracy-promotion nor truth-seeking are served

Scalia's conception would afford an astounding and untenable grant of power to the authors of corporate charters. With the mere stroke of a pen, drafters could endow their "artificial," "invisible" and "intangible" creation with whatever constitutionally protected characteristics they choose.

198. There were six justices in the majority in *Austin*, the primary decision overruled by *Citizens United*. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654 (1990).

199. *Citizens United v. FEC* 130 S. Ct. 876, 952 (2010) (Stevens, J., dissenting) (internal citations omitted).

200. See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS SUNSTEIN, PAMELA S. KARLAN & MARK V. TUSHNET CONSTITUTIONAL LAW 1019 (6th ed. 2009); R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1221-22 (2010).

201. *Id.* at 1231.

202. *Citizens United*, 130 S. Ct. at 899, 904 (2010).

by the Court's holding in *Citizens United*.

A. Democracy

With regard to the claim that corporate expenditures during political campaigns are beneficial to the health of American democracy, the *Citizens United* Court explains that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”²⁰³ This is true. But what the Court fails to acknowledge is the inseparable relationship between the first and last words of this quotation. The veracity of the statement is premised on an accurate reading of the word “speech.” “Speech” is beneficial to a political process made up of “people” because it is “of the people.” If the word “speech,” for example, were replaced with the object contemplated in the hypothetical at the beginning of this article, this dignified statement would degenerate into absurdity. It would read: “Random computer generated political e-mail is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.” Similarly questionable is the statement: “Spending on political advertisements by massive and powerful artificial entities who are legally obliged to pursue their shareholder’s economic interests is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.” It may be within the realm of possibility that such activity could result in political accountability in some instances—just as it is possible that a random lightning strike could take the life of a corrupt politician. It is a stretch, however, to call either an “essential mechanism of democracy.”

While the concept of “accountability” is consistent with a thoughtful evaluation of the impact political behavior has had on the economic interests of entities, individuals, and the country as a whole, true political accountability is much broader than this. When an individual engages in political speech to demand accountability of her political leaders, she presumably does so based on a cumulative assessment of that representative’s performance. Yes, political leaders must be accountable for the way their actions might be thought to impact the economic fortunes of that individual. But concomitantly, political speech by individuals may reflect assessments of a candidate’s trustworthiness, approach to foreign policy, political party, or views on everything from family values to global warming. Individual speech in opposition to or in support of a particular candidate may be informed by the speaker’s perceptions on how ethical that candidate is, how her policies might affect generations to come, or whether or not she is a persuasive speaker. In other words, as most social scientists would surely attest, human beings are complex multivariate decision makers—corporations, much less so.²⁰⁴ The limited goals of a corporation are right there

203. *Id.* at 898.

204. See Richard R. Lau, *Models of Decisionmaking*, in OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 19–59 (2003) (describing the differences between collective decision-making and individual decision-making, and exploring various approaches political psychologists employ to

for all to see, spelled out in their articles of incorporation and the applicable laws that narrowly construe their permissible objectives. Although modern civilization has yet to fully grasp the true complexity of human nature, in a democracy intended to represent "We the People," human beings, confounding and multifaceted as they may be, must be the primary participants. By inappropriately attaching the label "speech" to nonhuman corporations, we dilute the effectiveness of true speech coming from the American people.

The analogy between American government and corporate governance is particularly apt. Collective action—whether in government, business, or any other endeavor—is a challenging proposition.²⁰⁵ The Framers understood this just as well as those who draft corporate laws and articles of incorporation. At the time of America's founding, rule by "We the People" was hardly assured. In the eighteenth century, autocracy or monarchy was the dominant system of government. To avoid this fate, the Framers established what would prove to be a remarkably enduring governmental structure with highly defined rules.²⁰⁶ Madison describes the "great object" of constitutional government as "secur[ing] the public good, and private rights, against the danger of [a majority] faction, and at the same time . . . preserv[ing] the spirit and the form of popular government."²⁰⁷ While the Court's freedom of association cases focus almost exclusively on the benefits of association, Madison's concerns about the power of "factions" reveal a different strain of thinking—one highly suspicious of group power. In *Citizens United*, the majority mischaracterizes and distorts Madison's argument. Citing Madison, the Court argues that "[f]actions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease.'"²⁰⁸ Madison however, writes not of the liberty of the factions *themselves*. Rather, he warns of the danger of "destroying the liberty which is essential to [the factions'] existence"—that is, individual liberty.²⁰⁹ In an eloquent metaphor, Madison argues: "[I]t could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."²¹⁰ The Court spins Madison's assertion that taking away individual liberties is not an acceptable solution to the problem of factions into an argument for affirmatively empowering factions by providing them with rights intended for individuals. As Professor Farber explains, there is a "venerable American tradition that takes a

understanding political decision-making by individuals).

205. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (exploring the difficulty of collective action, especially among large groups).

206. See *THE FEDERALIST* NO. 51, at 261 (James Madison) (Gary Wills ed., 1982).

207. *THE FEDERALIST* NO. 10, at 45 (James Madison) (Gary Wills ed., 1982).

208. *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

209. *THE FEDERALIST* NO. 10, at 45 (James Madison) (Gary Wills ed., 1982).

210. *Id.*

more jaundiced view of associations. This view was reflected in George Washington's Farewell Address, which condemned 'all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities.'"²¹¹

The Supreme Court's confused, if not revisionist, perspective on the Framers' view of political associations is on full view in its decisions addressing the rights of political parties to exclude non-party member voters. For example, in *California Democratic Party v. Jones*, the Court struck down a so-called blanket primary law because it would have required that all primary ballots "list[] every candidate regardless of party affiliation and allow[] the voter to choose freely among them."²¹² To justify its holding, Justice Scalia sought to highlight the foundational importance of parties, observing that "[t]he formation of national political parties was almost concurrent with the formation of the Republic itself."²¹³ This is most certainly true; but "almost" is the key word here. Many of the Framers did not intend American politics to be dominated by political parties and in fact warned of their dangers.²¹⁴ In *Federalist No. 1*, Hamilton cautioned that "nothing could be more illjudged than that intolerant spirit, which has, at times, characterized political parties. For, in politics as in religion, it is equally absurd to aim at making proselytes by fire and sword."²¹⁵ The *Jones* majority, however, ignored this side of the equation. Indeed, at the same time that it emphasized "a political party's associational freedom,"²¹⁶ it cavalierly dismissed the dissent's suggestion that there might be "'First Amendment associational interests' of citizens to participate in the primary of a party to which they do not belong, and [a] 'fundamental right' of citizens 'to cast a meaningful vote for the candidate of their choice.'"²¹⁷ The majority thus perversely seemed to favor a conception of the First Amendment that sanctifies the rights of parties (or factions) while at the same time denying rights to the individual voters. This posture is confounding, particularly in light of the fact that the dominant party duopoly in the United States risks completely locking out those individuals who choose not to affiliate with the two major parties—effectively preventing them from having a voice in all relevant political contests leading up to a general election.²¹⁸

211. Farber, *supra* note 156, at 1503, citing Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 100 (Amy Gutmann ed., 1998).

212. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

213. *Id.* at 574.

214. *Id.* at 591 n.2 (Stevens, J., dissenting) (citing RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES* 2–3 (1969)).

215. *THE FEDERALIST NO. 1*, at 3 (Alexander Hamilton) (Garry Wills ed., 1982).

216. *Jones*, 530 U.S. at 582.

217. *See id.* at 573 n.5 (quoting *id.* at 601 (Stevens, J., dissenting)).

218. *See* LISA JANE DISCH, *THE TYRANNY OF THE TWO-PARTY SYSTEM* (2002) (arguing that the two-party system inhibits democracy).

Understanding that democratic governments are themselves associations of individuals with certain shared interests and values, the Framers not only warned of factions external to the government; they also allocated and divided power within government with great caution.²¹⁹ To prevent the people's government from itself becoming an oppressor, the Framers established a governmental structure imbued with ceaseless—perhaps maddening—internal conflict. Madison famously declared that "[a]mbition must be made to counteract ambition."²²⁰ And to Madison, this concern was by no means limited to the governmental sphere:

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights.²²¹

Of course, to many Framers, even this conflictual structure was not sufficient.²²² A Bill of Rights carving out individual rights, in the face a powerful association (here the federal government), was necessary to seal the deal.²²³ As Jefferson emphatically argued in a letter to Madison, "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."²²⁴

These debates over the structure of American government occurred, in part, because there is no perfect representation of a collectivity, no precise algorithm for determining the voice of a people. Indeed, except in the case of autocratic rule, it is difficult to conceive of an instance in which the "collective view" in a representative association would ever replicate with precision the perspective of any single represented individual, let alone all individuals at the same time. In the context of democratic rule, strict majority voting on every issue of concern by members of a collective might risk fatally weakening the whole, as it does not allow an effective leader to take the reins. A majority vote will also inevitably leave behind an unhappy minority. Thus, to ensure stability, durability, and governability, the Framers granted an executive the power to lead for a

219. THE FEDERALIST NO. 51, at 262 (James Madison) (Gary Wills ed., 1982).

220. *Id.*

221. *Id.* at 263.

222. See THE FEDERALIST NO. 84 (Alexander Hamilton) (responding to the most significant of the "'remaining objections' to the Constitution as proposed, that the plan of the convention contains no bill of rights").

223. LOUIS FISHER AND DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW 389 (2007) (noting that, in supporting the first ten Amendments, Madison "argued that a Bill of Rights would remove apprehensions that the people felt toward the new national government").

224. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 91 (Michael Kammen ed., 1986).

designated period of time, while delegating the authority to make law to a majoritarian legislature. Concomitantly, regardless of majority sentiment, certain individual rights were constitutionally guaranteed, indelibly carved into our system of representative government.

Similar principles and needs apply to non-governmental associations. However, such associations may opt to afford greater or lesser power to leadership and increased or decreased protection for the individual members, in accordance with their goals and mission. Individual guarantees might be perceived to be more essential where individual members face greater barriers of exit—for example, in the case of corporate shareholders whose economic stake in the association may require a long-term investment. Durability of leadership might be of greater importance in a politically-driven organization that strives to promote a consistent message, even in the face of significant differences of opinion among its membership. Systems of collective decision-making invariably come in many forms, governed by idiosyncratic rules intended to achieve particular ends or promote a particular vision of the good. As artificial legal entities, corporations, just like representative governments, must have a set of procedural rules to produce something that might be said to roughly resemble collective goals. Ultimately, any official “viewpoint” or “voice” of the whole is merely a useful construct. Having a reliable system of rules to establish an institutional voice simply allows an association, whether for the purposes of civil government, commerce, or advocacy, to function effectively in its legally prescribed role. Yet, what is useful, if not essential, in one setting may be counterproductive, if not dangerous, in another.

Electoral politics is ideally a fierce contest of individual ideas. The battle to make sure that it remains so has been one of the important and difficult ongoing challenges since the Constitution was ratified over two centuries ago. In *Citizens United*, the majority perverts the Framers’ rulebook for fair and effective collective action in the electoral setting. The Court converts an individual right, one intended to carve out and protect individual speech even in the face of a hostile majority, into a collective one. The majority takes the critical defense of the individual built into American constitutional government, a system that by necessity allows enormous power to accrue to those with majority support, and turns it into a bludgeon to be used *against* individuals. As Justice Stevens explains, “Corporations have ‘special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets’—that allow them to spend prodigious general treasury sums on campaign messages that have ‘little or no correlation’ with the beliefs held by actual persons.”²²⁵ They are structured this way for a reason.

Few would argue against the claim that the corporate form has been a valuable, if not essential, ingredient in promoting economic advancement and

225. *Citizens United v. FEC*, 130 S. Ct. 876, 956 (2010) (Stevens, J., dissenting) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)) (internal citations omitted).

prosperity in the United States. However, to equate an individual's economically rational choice to associate in the corporate form—and the economic benefits that accrue as a result—with the freedom and benefits that attach to the individual speech right protected by the Framers is to strain credulity. Corporations only began to resemble their contemporary form during the early waves of industrial development, when the benefits of being able to raise large amounts of capital from a large number of investors, while at the same time maintaining centralized control, became increasingly apparent.²²⁶ Presumably, the corporate structure was perceived to be in the economic interest of both the individuals who sought to establish corporations and the states whose laws made them possible. If corporations were simply replicating the legal, economic, and ideational interests of the individuals involved, there would have been neither need nor impetus for the corporate form. In effect, corporations allowed individuals to join together to extract and concentrate one particular aspect of their individuality: their economic interests. Corporations "are legally required to represent not a group of people but a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation."²²⁷ It is quite rational for individuals to join in and become members of this kind of association, because corporations allow such individuals to leave behind certain less desirable aspects of their personhood, such as legal and financial liability.²²⁸ However, in exchange for the potential economic benefit, investors must largely cede decision-making authority over how their funds are used unless they are majority shareholders.²²⁹

The *Citizens United* decision converts a single decision by a shareholder to purchase and hold an interest in a particular company—a choice that in the case of publicly-held for-profit corporations is typically limited to one's economic interests as an investor—into a proxy for that individual's political speech. It is infeasible enough, as previously explored, to attempt to correlate the supposed "viewpoint" of an association with its members in the case of so-called expressive associations such as the Jaycees and the Boy Scouts. In the case of large, publicly-held profit-making corporate associations, the claim is downright ludicrous. Not only does one's choice to invest in a company as a stockholder represent a *de minimis* aspect of an individual who might otherwise exercise her right to free speech in the context of a political campaign, it may be a stretch to even call it a choice. For much of the American population, mutual funds—investment vehicles that compile interests in hundreds if not thousands of

226. ROBERT W. HAMILTON, THE LAW OF CORPORATIONS § 1.4 (4th ed. 1996).

227. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 521 (2010) (quoting Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995 (1998)).

228. ROBERT W. HAMILTON, THE LAW OF CORPORATIONS § 2.3 (4th ed. 1996).

229. *Id.* at § 8.2.

stocks—have become an essential component of a secure retirement.²³⁰

After *Citizens United*, the fiction of the “associational corporate speaker” has taken on a new identity as a potent player in political contests intended for individual citizens. It does so at the expense of both (a) those individuals outside the corporation whose voices will be potentially overwhelmed by the collective and concentrated power accrued as a result of legal grants by the state, and (b) shareholders within the corporation, who either disagree with, do not have knowledge of, or do not wish to convey the message corporations now have a constitutional right to express. The spurious notion that “speech” can somehow be divorced from an actual “speaker” is responsible for this perverse outcome. Troublingly, this blind spot has obscured the vision of not only the members of the majority and dissent in *Citizens United*, but of one of the preeminent scholars of the First Amendment.

Writing in the *Harvard Law Review*, Kathleen Sullivan characterizes the dissenting and majority opinions in *Citizens United* by asserting that the former represents an egalitarian vision of free speech and the latter a libertarian vision.²³¹ Convinced of the merits of the libertarian approach, Sullivan perpetuates the logical fallacy that has informed much of the Court’s freedom of association jurisprudence. She begins by explaining that the “view of free speech as liberty starts from a textual interpretation of the Free Speech Clause as written in terms of speech, not speakers.”²³² She then mentions some of the implications of accepting this notion that the First Amendment is “indifferent to a speaker’s identity or qualities”—one of which is the bizarre claim that the First Amendment might apply to “inanimate” objects.²³³ Perhaps implicitly acknowledging the lunacy of a First Amendment for rocks, Sullivan backpedals two sentences later, conceding that “[i]f this interpretation requires an ultimate foundation in the rights of individuals, corporations enable individuals to ‘speak in association with other individual persons,’ banding together in a ‘common cause.’”²³⁴ Of course, this caveat does not merely qualify the premise of a First Amendment “indifferent” to the “identity” of a “speaker”—i.e., whether or not a speaker is a real-life person—it *contradicts* it. Sullivan seems to support the purest ideal of a First Amendment that protects speech without regard to a “speaker,” yet is unable to avoid implicitly acknowledging that such a conception is just a conceit.

The nature of this paradox comes into high relief on the next page of her

230. See, e.g., Ron Lieber, *Seeking Investment Flexibility In a 401(k)*, N.Y. TIMES, Jul. 9, 2011, at B1.

231. Kathleen M. Sullivan, *The Supreme Court, 2009 Term: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010).

232. *Id.* at 155 (2010) (citing *Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring)) (internal quotation marks omitted).

233. *Id.* at 156.

234. *Id.* (emphasis added) (quoting *Citizens United*, 130 S. Ct. at 928 (2010) (Scalia, J., concurring)).

article, when Sullivan explains the "speech as liberty" response to the claim that prohibiting corporate spending protects dissenting shareholders.²³⁵ Sullivan suggests that Justice Kennedy rejects the shareholder protection justification as "impermissibly paternalistic" because there are "other means" for protecting dissenting shareholders.²³⁶ Sullivan sees Kennedy as mandating that "government . . . leave speakers and listeners in the private order to their own devices in sorting out the relative influence of speech."²³⁷ However, the "other means" that Kennedy offers for protecting the dissenting shareholder is "changing state corporate governance laws to increase the opportunities for shareholders to control whether and in what amounts and to what ends corporate political expenditures will be made."²³⁸ This alternative approach to protecting the shareholder, implicitly endorsed by Sullivan, blatantly violates the purest ideal that "speakers . . . in the private order" should be left "to their own devices."²³⁹ In the same breath that advocates of the "speech as liberty" model make a "keep government out" argument, they concede that this is workable only with significant state governmental involvement. This is the paradox of decrying government suppression of what we now call corporate speech: there can be no such thing as "corporate speech" without government. State governments define its very meaning by defining the parameters of what it means to be a corporation.

B. Truth and the Marketplace of Ideas

The *Citizens United* majority claims that allowing for unlimited spending on corporate political expression contributes to the key First Amendment goal of seeking truth by those who might listen.²⁴⁰ Even if corporate spending serves as a proxy for individual speech, the freedom to disseminate a political message through corporate spending is said to contribute to the marketplace of ideas.²⁴¹ According to the majority, "[t]he Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."²⁴² However, all of the true speakers who have ties to the corporation, as well as all of the individuals who are collectively responsible for the corporations' actions—whether they be employees, shareholders, or members of the board of directors—retain their First Amendment rights. They remain free to speak, and the public remains free to listen. The establishment of the corporate form is an act of legislative grace—

235. *Id.* at 157.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

241. *Id.*

242. *Id.*

premised upon the belief that allowing individuals to structure certain narrowly defined economic affairs through a particular legal vehicle will be beneficial to society at large. By restricting corporate communications, the government is not depriving anyone of anything; it is merely declining to extend to a particular affirmative legal benefit (the corporate form) all aspects of individual civic membership. The Court has long held that “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”²⁴³ Corporations, just like any other government-subsidized program, are mere creatures of law. Corporate tax benefits and limited liability encourage particular activities because the government designed the corporate form to achieve limited goals. As the Court acknowledges in *Rust v. Sullivan*, “[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected.”²⁴⁴ In deciding to join a corporation, individual members are not required to forfeit their constitutional rights. As before, they are free to speak at will.

Thus, from the perspective of the listener, no one’s voice has been quieted. The only deprivation is the inability to receive the emissions of what is essentially a non-human, rule-based message-machine, designed for purposes that have nothing to do with a search for truth and established to produce, disseminate, or finance combinations of visual or auditory communicative stimuli that are thought to best advance its single-minded economic purpose. As with the hypothetical computer program designed to produce random political e-mail in perpetuity, there is no speaker and thus no speech for the public to be deprived of. Corporate political advertising might be said to be “idea-like” in the way the hypothetical computer program is “idea-like”—on its face, it resembles human ideas and is derived from human beings—but it is not “speech” as conceived by the Framers. And corporate-generated political communications are in fact potentially much more harmful than the would-be computer generated spam. In contrast to the hypothetical, human minds are actively used to cultivate this “idea-like” material, but these minds are not propagating or sharing their own ideas or beliefs; they are filtering ideas through the lens of the corporation’s narrow purpose.²⁴⁵ Such ideas are utterly truth-neutral. They are only valuable, and therefore will only presumably be disseminated, if they further the well-defined economic interests of the corporation.²⁴⁶ Truth, in other words, takes on an entirely different meaning in this setting.

243. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (addressing government-funded family planning that failed to allow counselors to discuss abortion as an option).

244. *Id.* at 201.

245. See HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* 203 (1976) (noting that, with respect to a person participating in an organization, “personal considerations . . . will not determine the content of his organizational behavior”).

246. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* § 14.4 (4th ed. 1996).

The *Citizens United* majority asserts that "[c]orporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."²⁴⁷ Once again, however, the majority reifies an artificial entity, imbuing it with human characteristics where none are to be found. It is certainly true that the individuals who make up a corporation typically accrue expertise, and that the knowledge that accompanies such expertise is of value. But corporations do not have "views," let alone "monolithic" ones. Thus, any decision to "point out errors or fallacies in speech" of others will be made in a truth-neutral manner. A corporation may aggressively and publicly point out falsehoods when such whistle-blowing serves its economic interests. However, if this falsehood is coming from a politician who promotes deregulatory policies that are an economic boon for the corporation, it becomes increasingly unlikely that the corporation will "point out" the politician's "errors." Indeed, a corporation may very well be inclined to leverage its perceived expertise to "point out . . . fallacies" where they do not exist, especially when the source of the speech is a politician whose policies impede that corporation's economic interests.

There are, of course, limits to how far this truth-neutral "speech" may be utilized. Malice and commercial misrepresentation are well established exceptions to the First Amendment's protections.²⁴⁸ However, for those with adequate resources, high levels of sophistication in the advertising industry have meant that blatant misrepresentations are no longer necessary to achieve one's ends.²⁴⁹ For those who are able to foot the bill, political messages can be conveyed in a wide variety of high production formats, propagating powerful imagery intended to provoke emotional reactions that ultimately promote or deter desired outcomes.²⁵⁰ At this level, communication is merely a tool to achieve narrow ends; it is not speech. The belief that increased corporate spending on political advertising somehow equals a greater contribution to the marketplace of ideas has never been substantiated—it is simply "assumed to be" by the majority.²⁵¹ Because of the distortion of incentives built into the design of the corporate structure, there is reason not only to believe that extending the freedom of expression to corporations *does not* contribute to the marketplace of ideas and the search for truth, but rather, that it actively, and mischievously,

247. *Citizens United*, 130 S. Ct. at 912.

248. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976) (concluding that commercial speech that is deceptive or misleading, even if it is not provably false, is not protected by the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that intentional lies are not protected by the First Amendment).

249. Benedict Carey, *Can Fear Win Undecided Voters? Psychologists Say Maybe Not*, N.Y. TIMES, Oct. 5, 2004 (discussing studies assessing the impact of emotional political advertisements on voting behavior).

250. *Id.*

251. *Citizens United*, 130 S. Ct. at 906.

subverts this goal. After *Citizens United*, what has been dubbed “corporate speech” in the political process will be used freely as a tool of economic advancement. Truthfulness will have minimal bearing on the words or images conveyed. Truth is irrelevant to an artificial entity with a legal obligation to narrowly pursue its economic interests except to the extent that truth bears a positive correlation with those interests—for example, where truthfulness is necessary to work within the confines of the law to avoid financial or other penalties.²⁵²

Corporations lack fundamental human traits; they possess neither a conscience, nor a multiplicity of motivations, nor an appreciation for the complex ramifications that accompany taking hard positions on nuanced issues. In contrast, individuals may have some ambivalence speaking on a particular issue or in favor of a particular political candidate; for any major public policy debate or political election, innumerable human concerns are at stake all at once. This diversity of interests and concerns push in various directions simultaneously, and an individual speaker presumably takes them into account—consciously and unconsciously.²⁵³ For example, would speechmaking that intentionally deemphasizes the adverse consequences of a particular law, when the benefits would clearly accrue to the speaker, feel like the morally correct decision to that speaker? Would doing so be felt to manipulate the truth in an inappropriate way? If so, might the speaker’s reputation or sense of self be tarnished as a result? Would the speaker feel comfortable with the internal conflict that might result from speaking to promote her interests without regard to the truth? An individual’s internal moral compass might help answer these questions—and a so-called moral-compass is just one of the limitless intangible forces that shape human speech. As artificial entities, corporations do not share in the subtle, if not subconscious, internal balancing that all human beings must by necessity engage in when they speak. Nor do they have to deal with the moral, spiritual, ethical, or personal accountability that is central to being human. Due to mechanisms such as limited liability, the individuals who make up these associations are sheltered, not only from the internal inevitable human trade-offs of real speech, but also from adverse financial or legal consequences beyond the amount invested. In sum, corporate political spending contributes to the human marketplace of ideas only in the way counterfeit currency might be said to contribute to the economic marketplace: its presence simply manipulates and distorts the ultimate goal of the system. The ongoing quest for truth is in no way served by applying an individual’s right to free speech to a legal artifice.

Although the dissent in *Citizens United* is highly critical of the majority’s

252. In the political context, such limits are narrowly construed, barring only blatantly fallacious and malicious messages. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (protecting false speech not containing “actual malice” from liability).

253. See Richard R. Lau, *Models of Decisionmaking*, in *OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY* 19–59 (2003) (exploring various approaches to understanding political decision-making by political actors).

claims regarding corporate political spending, no member of the current Court seems willing to accept this core tenet. The fault lies with the doctrinal trend that began with the Supreme Court's first unfortunate use of the phrase "corporate speech" in 1978²⁵⁴ and continued through its confused expressive association jurisprudence that gradually, and insidiously, converted an individual right into a group right.²⁵⁵ The *Citizens United* dissent would have benefited from a clear line between that which falls under the logical category of "speech"—expressive activity that has, at its source, the attributes of an individual speaker—and that which is simply too distant to qualify. Instead, the dissent contends with (and perpetuates) a mushy, qualified argument that makes for an easy target.

V.

THE *AUSTIN* MISTAKE AND AN ALTERNATIVE WAY FORWARD

In this final section, I revisit the decision the *Citizens United* majority reversed and briefly propose an alternative vision. Justice Marshall's majority opinion in the now-overturned decision *Austin v. Michigan State Chamber of Commerce* rightfully emphasized the "special advantages" granted under state law to corporations "such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."²⁵⁶ However, instead of utilizing these and other facts to argue the obvious—that corporate political expenditures simply do not fall within the concept of "speech" the Framers intended to protect—Marshall referred to such spending as "corporate speech."²⁵⁷ The Court thus gave the impression that it was carving out selective exceptions to the First Amendment rather than simply applying a straightforward reading rooted in its textual meaning. In doing so the *Austin* majority effectively ceded the high ground to the two *Austin* dissenters, creating the false impression that the dissenters were the First Amendment purists. Nothing could have been further from the truth. Yet, Scalia, empowered by this concession, began his *Austin* dissent with this alarming allusion: "Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate"²⁵⁸ The only reason Scalia could have read the majority opinion as an "endorse[ment of] the principle that too much speech is an evil that the democratic majority can proscribe"²⁵⁹ is because the majority made the fatal error of recognizing speech where it does not exist.

254. First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

255. See *supra* Part II (discussing the evolution of the Court's expressive association jurisprudence).

256. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–59 (1990).

257. *Id.* at 658.

258. *Id.* at 679.

259. *Id.*

Accepting that “corporate speech” is a misnomer raises the question of whether communications disseminated by other types of associations, such as nonprofit advocacy groups, should be denied classification as speech for First Amendment purposes. Many nonprofits ostensibly represent mere groups of individuals who seek to come together to facilitate, and perhaps amplify, their own voices. The suggestion that a reputable organization with a primary goal of contributing to the marketplace of ideas to promote a particular view of truth would not be protected by the First Amendment might strike some as deeply troubling. In *Austin*, the majority addressed just such a claim. The respondent argued that “even if the Campaign Finance Act [prohibiting the use of corporate treasury funds to support or oppose political candidates] is constitutional with respect to for-profit corporations, it nonetheless cannot be applied to a nonprofit ideological corporation like a chamber of commerce.”²⁶⁰ The *Austin* Court rejected this argument with respect to the Michigan State Chamber of Commerce,²⁶¹ but continued to accept the premise of “corporate speech,” therefore necessitating that courts pick and choose which speech is deserving of protection.

In *Austin*, the Court distinguished the Michigan State Chamber of Commerce from Massachusetts Citizens for Life, Inc. (MCFL), a non-profit corporation that it had, in 1986, concluded *was* protected by the First Amendment.²⁶² It delved into a case-specific analysis of the respective associations, pointing specifically to three characteristics of MCFL that purportedly qualified *it* for First Amendment protection, but *not* the Chamber of Commerce.²⁶³ Specifically, the Court identified “MCFL’s narrow political focus,”²⁶⁴ its “absence of shareholders,”²⁶⁵ and its “independence from the influence of business corporations.”²⁶⁶ The majority concluded that the Chamber lacked two of these three attributes.²⁶⁷ The two corporations did have an “absence of shareholders” in common. However, the Court explained that the intent of focusing on this attribute was to ensure

that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber’s political expression, because they wish to benefit from the Chamber’s nonpolitical programs and to

260. *Id.* at 661.

261. *Id.* at 662.

262. *Id.*

263. *Id.* at 662–65.

264. *Id.* at 662.

265. *Id.* at 663.

266. *Id.* at 664.

267. *See id.* at 662–64.

establish contacts with other members of the business community.²⁶⁸

The attributes that distinguished the Michigan State Chamber of Commerce from MCFL were enough for the Court; it upheld the Michigan law as applied to the Chamber.

While these are certainly legitimate distinctions, by engaging in this hair-splitting exercise the Court obscured the simple fact that all corporations, regardless of their attributes, are fundamentally distinct from the individuals who are the intended beneficiaries of the First Amendment. It is true that individual members of the Chamber of Commerce may remain members because they have other reasons for doing so, despite that corporation's expression. Yet, while this concern may be more evident in the case of businesses (or shareholders) who are economically motivated, it is no less a possibility for members of associations that have goals that are not primarily economic. For example, a member of the KKK in the Jim Crow South might have remained a member because of the political and social connections membership provided, despite disagreeing with the association's message. Indeed, the iconic First Amendment absolutist Justice Black infamously joined the Klan as a way of capitalizing on its political influence in early twentieth century Alabama.²⁶⁹ According to Noah Feldman, "[t]he decision was motivated primarily by Black's political ambition . . . [h]e was not greatly concerned about the Klan's views."²⁷⁰ Likewise, a member of the NRA may remain a member because she is an avid gun enthusiast, even if she deplores the organization's political opposition to gun control in particularly violent urban areas. The decision to remain a member in these examples—and countless others—may not be economically motivated, but it has much in common with an oil company shareholder, who, despite disagreeing with the corporation's position on the regulation of off-shore drilling, continues to hold that corporation's stock because it provides ample dividends. There is simply no constitutionally principled way of distinguishing between associations that deserve constitutional rights and those that do not. The First Amendment protects *individuals*. But under the Court's misguided jurisprudence, these same individuals are essentially asked to give up their First Amendment right *not* to speak unless they make the requisite sacrifice of withdrawing from membership in an organization from which they derive significant, non-speech-related benefits.

What is the alternative, then? Would the argument I am making relegate influential political advocacy organizations to irrelevancy and impede the free flow of critical political dialog? Certainly not. There is no reason to believe that individuals would have to sacrifice the ability to associate for speech-related purposes. On the contrary, they would continue to do so, and continue to derive

268. *Id.* at 663 (internal citations and quotation marks omitted).

269. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 57 (2010).

270. *Id.*

expressive benefits from such association. It would simply be made clear that the *constitutionally* protected right belongs to them, as individuals. If people seek to pool their resources with others, rather than utilizing a corporate form or establishing some other artificial entity, they would contractually join together with others in partnership. But without individual accountability for the communications made, and a clear intent on the part of the individuals to “speak” the message conveyed, the First Amendment’s protections would not be implicated. Rather than the tortured analysis the Court has engaged in the past, under this formulation there would be only one threshold question: whether the speech at issue is legally equivalent to individual speech.

Furthermore, for associations with the singular mission of contributing to the marketplace of ideas, the literal text of the Constitution provides a reprieve: the Press Clause of the First Amendment, which states that “Congress shall make no law . . . abridging the freedom . . . of the press[.]”²⁷¹ The Press Clause can be read to provide First Amendment protection where the speech clause would not—to a narrow class of associations dedicated to the propagation of ideas. As Justice Stevens argues in his dissenting opinion in *Citizens United*, “The text and history [of the First Amendment] suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status.”²⁷² Unlike the word “speech,” “press” does not necessarily imply, nor require, the existence of an individual “speaker.”²⁷³ Ironically, as the *Citizens United* dissent pointed out, Justice Scalia “emphasizes the unqualified nature of the First Amendment” while at the same time “seemingly read[ing] out the Free Press Clause.”²⁷⁴ However, if one goal of Constitutional interpretation is to best apply the law in accordance with the document’s original spirit, the Press Clause would appear to be a much more rational route to protecting communications of a certain narrow class of associations.²⁷⁵ Adapted to today’s world, the word

271. U.S. CONST. amend. I.

272. *Citizens United v. FEC*, 130 S. Ct. 876, 952 n.57 (2010).

273. Indeed, more than thirty-five years ago, Justice Potter Stewart observed that “[m]ost of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. . . . In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.” Potter Stewart, *Or Of The Press*, 26 HASTINGS L.J. 631, 633 (1975). As Randall Bezanson observes, the *Citizens United* majority’s claim that there has not been ample precedent supporting legal distinctions between media corporations and non-media corporations “is stunningly incorrect.” Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 655 (2011). According to Bezanson, this claim by the majority “calls into question a host of media exemptions from taxation and regulation that have never been questioned in the Court’s opinions.” These distinctions would only presumably be constitutional if “the press guarantee means something different from the speech guarantee.” *Id.*

274. *Citizens United*, 130 S. Ct. at 951 (Stevens, J., dissenting).

275. See Patrick Garry, *The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept*, 72 MARQ. L. REV. 187, 233 (1989) (“[T]he press clause seems to protect a physical entity—the press. The language, along with the historical conditions of the press, seem to indicate that the framers of the first amendment sought to protect the press as a competitive industry within society.”).

"press" might reasonably be expanded to include a range of corporations singularly dedicated to the propagation of ideas.

VI.

CONCLUSION

Citizens United marks an understandable but troubling development in the Court's First Amendment jurisprudence, particularly when one closely examines the gradual shift that has occurred in the Court's treatment of associational freedom since the 1950s. This quiet revolution has had radical implications. With little notice from scholars, the Court has subtly converted the quintessentially individual right of free speech into a collective right. This new group right is not "more of a good thing"—an expansion of rights consistent with the Supreme Court's grand tradition of broadening the Constitution's applicability. On the contrary, there is reason to believe that the fiction of the "corporate speaker" runs counter to foundational First Amendment principles. While this jurisprudential wrong turn did not begin—nor will it likely end—with *Citizens United*, in ruling as it did the Court has subverted the very goals the First Amendment was intended to promote. Honestly confronting this regrettable mistake is the first step toward repairing the damage it has done.

