V. évfolyam
2011/4. szám

De iurisprudentia et iure publico
JOG- ÉS POLITIKATUDOMÁNYI FOLYÓIRAT
www.dieip.hu | www.dieip.com
Tanulmány

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Corporate Political Speech Rights in a First Amendment Perspective

1. Introduction

Corporate entities have been steadily on the rise in the United States - both in number and influence - since the latter half of the 19th century. Compared with the small number of corporations in the founding era[2], today's number is well in the millions[3]. With this advance came a more pronounced participation in American politics. This enhanced role, usually in the form of lobbying and campaign funding, did not go unnoticed, and efforts at restricting corporate political speech did not wait long to make an appearance. In truth, as Professor David Cole notes, it was with corporations that the first regulative efforts at campaign finance started[4].

Naturally, any restriction on political speech - be it individual or corporate - needs to be justified on legitimate grounds in light of the free speech rights of the First Amendment of the U.S. Constitution[5]. Therefore the issue of treating corporations differently to natural persons in terms of political speech is - and has been for a long time - a controversial issue. The Supreme Court has always been hesitant to address corporate political speech directly[6] and even when it did, it never – to some extent not even in the recent case of Citizens United

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[2] As Lawrence M. Friedman notes, in the 18th century only 335 corporate charters were issued. In the colonial period, this number was seven. *See*: Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 129-130 (3rd ed. 2005).

[3] *See* US Census Bureau's figures for 2007: http://www2.census.gov/econ/susb/data/2008/us_state_totals_2008.xls (last visited July 29, 2011).

[4] David Cole, First Amendment Antitrust: *The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 253 (1991). For more on this, *see id.*, at 253-257.

[5] U.S. CONST. amend. I.

[6] Cole, *supra* note 4, at 252-253.

v. FEC[7] - took a clear-cut stance on corporate political speech rights. While in the past two years corporations have gained headway with some notorious campaign finance victories, the issue is far from resolved and the present situation much reflects the enduring ambiguity regarding their political role. As Professor Winkler notes:

> "Political philosophy has traditionally understood democratic self-governance to be a right attaching to individuals or the corporate entity of the 'People', but not to business corporations. Yet corporations, like individuals, have an interest in the product of government. In some forms of political participation, such as lobbying, corporations are the most active democrats. But whether or not corporations should have particular constitutional rights has been an elusive question throughout American history"[8].

Despite all ambiguity and elusiveness, however, the issue is one that America must face time and time again. Corporations will not go away. Their voice in politics is heard louder and louder every day, whether we realize it or not. Forget all illusions to the contrary: corporations play an ever-growing part in American democracy and they are here to stay. It is one of the inconvenient truths and political realities of our era.

Without falling into academic despair, however, it is imperative, perhaps now more than ever, to initiate an investigation of corporate political speech rights – for let us not be mistaken, corporations *do* have First Amendment speech rights[9] - and establish the framework in which they exist and the concerns that would possibly warrant a narrower role for them in American politics.

2. Corporate Political Speech Rights in a Historical Perspective

First Amendment jurisprudence – since 1919 at least - has not gone easy on restrictions on speech. Needless to say, political speech enjoys a particularly safeguarded place in this set-up; its protection, by tradition, has always been the crown-jewel of the First Amendment[10]. As noted in Mills v. Alabama:

[7] Citizens United v. FEC, 130 S.Ct. 876 (2010).
[8] Adam Winkler, *Beyond Bellotti*, 32 LOY.L.A.L.REV. 133, 194-195 (1998).
[9] I do not mean to imply that corporate speech rights do not exist. They most certainly do. For more on the topic, *see* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 868-872 (2007).
[10] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-122 (Free Press 1995).

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to the political processes"[11].

Nevertheless, no constitutional protection can claim universality and the First Amendment is no exception to this. Restrictions based on the identity of the speaker have been allowed in the past, with certain limitations. Differential treatment, of course, is always suspect in constitutional law - as the dissent in Citizens United notes -, "unless justified by some special characteristic of the regulated class of speakers"[12]. Specifically with regards to corporations, differential treatment has been accepted in the past; in fact, this is how campaign finance regulation first started out, shortly before the end of the 19th century. After repeated calls for reform and following the Great Walls Street Scandal of 1905[13], the Tillman Act of 1907[14] was adopted, which forbid any national bank or corporation to make a contribution in connection with an election to any federal office. Later acts, such as the Publicity Act of 1910[15], which provided for the publicity of contributions made for the purpose of influencing elections, and the Federal Corrupt Practices Act of 1925[16], which prohibited all corporate contributions, extended regulation over campaign finance issues and corporate speech rights. The Taft-Hartley Act, also known as the Labor Management Relations Act of 1947[17], prohibited labor unions and corporations from making either expenditures or contributions in connection with federal elections[18].

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[11] Mills v. Alabama, 384 U.S. 214, 218-219 (1966).

[12] Citizens United, 130 S.Ct. at 945-946. "Differential treatment is constitutionally suspect unless justified by some special characteristic of the regulated class of speakers, and that the constitutional rights of certain categories of speakers, in certain contexts, are not automatically coextensive with the rights that are normally accorded to members of our society" (inside quotation marks omitted). Justice Stevens referring to Morse v. Frederick, 551 U.S. 393, at 396-397, 404 (2007), and quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[13] For more on the Great Wall Street Scandal, *see* Adam Winkler, *„Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871, 877-881, 887-927 (2004).

[14] Tillman Act of 1907, 34 Stat. 864.

[15] Publicity Act of 1910, 36 Stat. 822.

[16] Federal Corrupt Practices Act of 1925, 43 Stat. 1070.

[17] Labor Management Relations Act of 1947, 61 Stat. 136.

[18] The Labor Management Relations Act also prohibited unions from using general treasury funds to make political contributions to federal election campaigns, a prohibition originally put in place by the 1943 Smith-Connally Act (also known as War Labor Disputes Act), which banned direct contributions from labor unions to candidates for federal office. In response, unions started establishing 'political action committees' (PACs) in order to circumvent the regulation. PACs collected voluntary contributions from union members, separate from the general treasuries of the union, and used those funds ('separate segregated funds' as they are kept in a

Some of these first efforts at trying to curtail corporate influence on political campaigns came from concern over the systemic distorting effects that corporate wealth had on the political sphere[19]. These concerns materialized early on; there had been warnings to such effect from as early as the end of the 19th century. As Elihu Root argued in 1894 before the New York Constitutional Convention:

> "The idea is to prevent … the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it."[20]

Another concern arose in time over the possibly immoral use of shareholders' money without their consent to fund political campaigns, in other words, the "managerial misuse of shareholders' money"[21]. Both of these concerns appeared in what are collectively known as the *Segregated Funds Cases*[22], which also signal the first time that the U.S. Supreme Court examined corporate and union political speech rights in terms of campaign finance[23]. In United States v. CIO, the first of these cases, the Court discusses at length prior Congressional efforts to curtail corporate campaign funding. Of the Tillman Act of 1907, it says:

> "This legislation seems to have been motivated by two considerations. First the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate

separate bank account from the general treasury) to make contributions to candidates. PACs therefore have been around since 1944. Their meteoric rise in recent times is due to the changes introduced by the 1974 Federal Election Campaign Act.

[19] *See* Cole *supra* note 4, at 253-254.

[20] *See* Elihu Root, Addresses on Government and Citizenship 143 (1916), quoted in United States v. UAW, 352 U.S. 567, 571 (1957).

[21] Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 362 (2004).

[22] United States v. CIO, 335 U.S. 106 (1948), United States v. Autoworkers 352 U.S. 567 (1957), and Pipefitters v. United States, 407 U.S. 385 (1972). I adopted the collective title "Segregated Funds Cases" from Professor Adam Winkler. *See* Winkler, *supra* note 21, at 361.

[23] Winkler, *supra* note 21, at 362.

> officials had no moral right to use corporate funds for contributions to political parties without the consent of the stockholders."[24]

As Adam Winkler notes, these three cases - United States v. CIO, United States v. Autoworkers, and Pipefitters v. United States -, spanning practically four decades in time, focused on the identity of the speaker instead of the audience, and although they established that labor unions and corporations do have free speech rights, they forbid these entities the use of their *general* treasury funds to finance political speech[25]. However, unions and corporations were both allowed to make contributions and expenditures, if the funds used for those were provided by their members voluntarily. This idea of establishing *separate segregated* funds first gained true official acknowledgment and acceptance in Pipefitters v. U.S. Once again, the main concerns dominating the Court's holding in this case were the protection of the political process from the effects of aggregated wealth, and the protection of the dissenting shareholder[26].

The Segregated Fund Cases worked as the primary guideline for corporate political speech cases prior to First National Bank of Boston v. Bellotti[27], decided just six years after Pipefitters in 1978, which brought a major turning point [28]. As Bellotti was a more direct treatment of corporation's political speech rights than the Segregated Fund Cases[29] - which dealt primarily with labor unions, and corporations were only indirectly involved[30] -, it is perhaps no surprise that following Bellotti, these previous cases somewhat lost their significance.

Bellotti was decided in the aftermath of the adoption of the Federal Election Campaign Act of 1971[31] and its 1974 Amendments ('FECA'); these laws essentially followed the Segregated Funds Cases line with regards to corporate political speech[32]. The FECA prohibited union and corporate use of general treasury funds in federal election campaigns, but the use of separate segregated funds, just like in the Segregated Funds Cases, was still permitted[33]. These restrictions naturally did not bar corporations from exerting influence in the political arena. Their voice could still be heard, but they had to resort to establishing

[24] CIO, 335 U.S. at 113.
[25] Winkler, *supra* note 21, at 361.
[26] Pipefitters, 407 U.S. at 414-415.
[27] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
[28] Winkler, *supra* note 21, at 365.
[29] In Bellotti, the Supreme Court ruled on the constitutionality of a Massachusetts criminal statute that prohibited corporations from making contributions or expenditures in referendums.
[30] Winkler, *supra* note 21, at 366.
[31] Federal Election Campaign Act of 1971, Pub. L. 92-223, 86 Stat. 3 (1972).
[32] Winkler, *supra* note 21, at 364.
[33] 2 U.S.C. §441b.

separate segregated funds, or in other words, political action committees ('PACs'), to influence political campaigns.

Not even Buckley v. Valeo[34] disrupted this idyll[35]. Bellotti, however, did. For in Bellotti, the focus was not on the speakers, as in the prior cases of CIO, Autoworkers, and Pipefitters; instead, it shifted to the rights of the listeners, and as such, the identity of the speaker became at once irrelevant. The Court found that speech that otherwise would be under First Amendment protection, cannot lose this protection simply because the speaker is a corporation[36]. Speech thus deserves First Amendment protection regardless of the identity of the speaker.

Bellotti, despite its direct treatment of corporate speech rights, could not, however, completely erase a four-decade long trend. The framework set up by the Segregated Funds Cases reappeared in later cases dealing with corporate political speech[37], most notably in the 1990 case of Austin v. Michigan Chamber of Commerce[38], which once again allowed for the distinctive treatment of corporations by prohibiting the use of general treasury funds for express advocacy. The concerns that appeared in Austin were eerily familiar once again: concern over the use of "other people's money", and by using the aggregate wealth of a corporation's general treasury, "obtaining an unfair advantage in the political marketplace"[39].

Thirteen years later, Federal Election Commission v. Beaumont[40], although upholding the Segregated Funds framework, was already pounding hard on the door that was eventually beaten down by the 2010 decision in Citizens United v. FEC, which – swiftly overruling Austin – essentially gutted the Bipartisan Campaign Reform Act of 2002[41] by allowing

[34] Buckley v. Valeo, 424 U.S. 1 (1976). The Buckley decision practically gutted the FECA by holding that money is essentially speech, and by affording different treatment to campaign contributions and independent expenditures. The decision necessitated a major revision of FECA, materializing in the 1974 Amendments to the law.

[35] Buckley did not touch upon the issue of using general treasury funds for political spending.

[36] Bellotti, 435 U.S. at 784.

[37] The trend of distinguishing from Bellotti started with the 1982 case of Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982), which stated that Bellotti only replied to corporate speech in referendums. In 1986, the Court once again distinguished Bellotti away, in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), as the case at hand concerned an ideological non-profit organization, and thus the dangers of corporate speech did not apply.

[38] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[39] *Id.* at 659.

[40] FEC v. Beaumont, 539 U.S. 146 (2003).

[41] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). A direct challenge regarding §203 of the BCRA was defeated in McConnell v. FEC, 540 U.S. 93 (2003), where the Court upheld a prohibition on labor and corporate disbursements for electioneering communications, except through PACs.

unlimited corporate spending in candidate elections (direct contribution to candidates by corporations is still not allowed)[42].

In the aftermath of the decision, corporate spending in federal elections soared. According to a report by Public Citizen[43], spending by outside groups reached $294.2 million in the 2010 election cycle. This is a 427% increase from the last mid-term elections in 2006, when outside spending topped at $68.9 million. What is even more worrying, more than 75% of the $294.2 million was spent by groups that accepted contributions larger than $5,000 or that did not reveal the sources of their money, and nearly half of the $294.2 million came only from ten groups[44]. In light of these figures, a spending spree of cosmic proportions is expected in the 2012 presidential elections. The undeniable reality behind these figures is that corporations are not playing shy; but perhaps the recent developments mark the time to reconsider corporate political speech rights and their place in American democracy.

3. Political Speech and Corporations

As noted in the preceding chapter, the main question arising in the corporate political speech context is whether distinctions should be allowed between individuals and corporations. "Although they make enormous contributions to our society, corporations are not actually members of it"[45], says Justice Stevens' powerful dissent in Citizens United. "(…)Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established"[46]. There is much truth in these words, but it should come as no surprise: the special existence of corporations is fueled by interests that at times can be contrary to the interests of the individuals composing society. Corporations are created and exist to fulfill economic goals and expectations. Their every action is - at least in theory - dictated by the rules of the economic marketplace, in other

[42] Direct contributions by corporations to political candidates is still not allowed; corporations still have to resort to PACs and can only use funds voluntarily contributed by shareholders and management.
[43] *See* http://www.citizen.org/documents/Citizens-United-20110113.pdf (last visited September 30, 2011).
[44] *Id*. at 13.
[45] Citizens United, 130 S.Ct. at 930.
[46] *Id*. at 972.

words "corporate participation (…) is more transactional than ideological"[47]. At the same time, their participation in the "marketplace of ideas" is stronger than ever.

On what grounds could a differential treatment regarding corporations' First Amendment rights be allowed, especially in the aftermath of Citizens United? The Supreme Court has never been particularly inclined to allow such differential treatment in the first place with regard to the First Amendment. As Frederick Schauer argues, "American free speech doctrine has never been comfortable distinguishing among institutions. Throughout its history, the doctrine has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural, political and economic differences among the differentiated institutions that together comprise a society."[48] This reluctance can be detected in the treatment of corporate political speech as well, even though – as illustrated in Chapter II. – in the past, corporations have been subjected to differential treatment both by Congress and the Court in the realm of campaign finance. This subjection, however, was never clear-cut.

One problem is that American jurisprudence still seems to struggle as to what model it should apply to corporations and this unresolved struggle can be detected in the Supreme Court's jurisprudence as well[49]. It is, however, crucial to see beyond traditional theories and look at the realities of corporate governance and how it fits into the fabric of American society. To do this, it is nevertheless imperative to take a closer look at the doctrine of political equality[50] in campaign finance legislation and the shareholder protection interest, as well as the anti-corruption rationale. In the past, all three of these interests have been used by campaign finance reform proponents to support limitations of corporate speech rights in elections. The question of corporate identity and the regulation of campaign spending by corporations necessarily invoke all three aforementioned rationales.

[47] Supp. Brief for Committee for Economic Development as Amicus Curiae 10. *See also* Citizens United, 130 S. Ct. at 973.

[48] Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998), at 84.

[49] Professor Thomas W. Joo describes the traditional models of corporation that have dominated American corporate theory and Supreme Court jurisprudence and offers a detailed criticism of these approaches. *See* Thomas Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L. Q. 1, 33-43 (2001).

[50] The political equality doctrine is sometimes mentioned as an anti-distortion rationale, in reference to the distorting effects that corporate wealth might have on the political debate.

3.1. The Modern Corporate Structure and Shareholders' Rights

America`s relationship with corporations, a history that stretches back to colonial times, has never been an easy one. In the past, various traditional models have been used to describe the processes through which corporations were viewed and analyzed[51]. These models, the grant theory[52], the aggregation theory[53] and the personality theory[54] have been applied to corporations oftentimes simultaneously, and their influence can be detected in campaign finance jurisprudence as well[55]. As Professor Joo points out, all three models, however, fail in one major aspect: they are unable to grasp the essence of contemporary corporations and their complexity[56]. Large, modern corporations, which have come a long way both in characteristics and number since the days of the Founding Fathers[57], are organized around a set of diverse, and often competing interests, those of the managers, shareholders, creditors and employees, who all struggle for the resources of the entity[58]. In this equation, shareholders - and this is true of large corporations at least - , are mainly forced into passivity and their participation in the decision-making process of the corporation is primarily restricted to formal activities, such as voting in the election of directors or voting on resolutions[59].

With regards to *political expenditures*, shareholders have very little input into these corporate decisions, as these are made by the management. Currently, no law requires that corporate managers seek shareholder authorization before making political expenditures. The business judgment rule further protects managers, stating that a decision by the managers is valid in case it is made by financially disinterested directors or officers, who are duly

[51] *See* Joo, *supra* note 49, at 27.
[52] The grant theory, which enjoyed its prime in early American jurisprudence, when corporations were created via charters or special incorporation, viewed corporations as artificial entities, created by special legislation to perform a particular service for the public benefit. The grant theory included the state`s power to impose regulations on the corporations it created. State regulations of corporations have usually been upheld based on the grant theory in the past. Austin is a good example for this approach. *Id*. at 28-30.
[53] The aggregation theory approached corporations not as artificial entities, but as the aggregation of individuals for business purposes. This theory came into practice after the special incorporation practice has receded, and general incorporation became the norm in America. The aggregation theory afforded the same constitutional protection to corporations as to individuals. Bellotti and now Citizens United are perfect examples for this approach. *Id*., at 30-31.
[54] The personality model views the corporation as a natural entity, distinct from its members (thus not simply the creation of the state or the sum of the individual shareholders). As such, corporations are afforded the same legal rights as individuals. Both Bellotti and Buckley apply some elements of this theory. *Id.* at 31-32.
[55] *Id*. at 27-28.
[56] Joo, *supra* note 49, at 33.
[57] *See supra* notes 2 and 3.
[58] Joo, *supra* note 49, at 33.
[59] *Id*. at 36, and also at 45-46. Bernard Black writes in detail about shareholder passivity in Bernard Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).

informed and who exercise judgment in a good faith effort to advance corporate interests[60]. Moreover, shareholders are very limited in their ability to sue managers for use of the corporation's assets in an inappropriate or wasteful way[61]. There is a strong presumption on the part of courts that decisions made by the management are made in good faith, which makes it close to impossible for shareholders to act against such decisions via suits[62].

Access to information by shareholders is rather limited in scope, as is communication among them[63], which necessarily provides an obstacle to organized action on their part[64]. The power of shareholders lies in their voting rights, yet the range of topics on which shareholders can vote is extremely limited[65], and managers have significant control over agenda setting, as it is essentially them who decide what the shareholders can vote on[66]. Besides the narrow scope of shareholders` voting rights, the fact that shareholder access to corporate information is also severely limited[67] puts serious constraints on the shareholders` ability to use their voting rights in a meaningful way[68]. Thus, participation in the corporate decision-making process is rather limited for shareholders, and is more illusory than the Court might suggest.

But even if we assume that an interested shareholder seeks out the information he needs, and finds out about the political expenditures made by the corporations, the measures

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[60] Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, at 29 (2009). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474421

[61] *Id*. at 30. The U.S. Supreme Court decision, Cort v. Ash, 422 U.S. 66 (1975), held that shareholders have no private right of action to use derivative suits against corporations for violations of the FECA's ban on the use of corporate general treasury funds in federal elections.

[62] *Id*. at 31.

[63] Joo, *supra* note 49, at 52-57.

[64] *Id*. at 46.

[65] *Id*. at 42-43.

[66] "Managers control what the shareholders get to vote on, when they get to vote, what order proposals are offered in, and when the shareholders learn what points the agenda consists of." *See* Black, *supra* note 59, at 592.

[67] Federal law prescribes two types of mandatory disclosure for corporations. Corporations must disclose certain information about political expenditures to the FEC, and federal securities law requires certain disclosure to shareholders by the corporation. There is no general obligation on the part of corporations to disclose all information that might be of interest to the shareholders.; a disclosure obligation must have a specific legal grounding, that is corporations must disclose information requested by the Securities and Exchange Commission, but nothing else. At the moment, Regulation S-K does not request disclosure about election-related spending by corporations. *See* Joo, *supra* note 48, at 46-50. This might change now with the Supreme Court`s decision in Citizens United, as the Government is looking into other ways of regulating campaign finance. See Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues, Congressional Research Service (CRS) Report for Congress R41096, at 7-8. Available at: http://www.fas.org/sgp/crs/misc/R41096.pdf (last visited: September 30, 2011).
See also Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress, CRS Report for Congress R41054, at 6-7. Available at: http://assets.opencrs.com/rpts/R41054_20100201.pdf (last visited September 30, 2011).There are proposals that would enhance the voice of shareholders in corporations` political spending decisions, by for example requiring corporations to obtain permission from the majority of the shareholders for a political spending, or requiring corporations to provide advance notice of corporate political expenditures.

[68] Joo, *supra* note 49, at 46.

he can take, the remedy he can reach for is - once again - limited. Voting out the board works in a fairly small number of situations. The "Wall Street rule" (selling one's shares) is not always an option, and clearly isn't the best or most democratic way to protect the dissenting shareholder[69]. As Professor Joo points out, selling shares does not provide remedy for the unauthorized use of shareholder money that has already occurred: it can only protect from future abuses[70], and exit from the corporation can entail significant costs[71], which could mean an unfair burden on the dissenting shareholder.

The fact that corporations` voices do not represent the voices of the shareholders *should* make a constitutional difference and this sentiment is embodied in the shareholder protection interest that has gained a major - albeit now defeated by Citizens United - foothold with previous campaign finance cases such as McConnell[72], and that had previously been a major concern in the Segregated Funds Cases. Ciara Torres-Spelliscy identifies at least two shareholder rights that are worth protecting in this situation: the shareholders' *right to a fair return* on their investment, and the shareholder's First Amendment *right to remain silent* in a political debate, or to support the candidate of his own choosing[73]. Both of these rights are at risk in the case of corporate spending from the company's general treasury funds. The Court in Bellotti - and now in Citizens United as well - , placed the rights of the audience in the center of the debate, but the shareholders' expressive rights are also at stake here[74]. Corporate speech, as it stands today, is not speech by the shareholder. "Instead, corporate speech reflects the hypothetical interests of a creature given reality by the market and the law: the fictional shareholder"[75]. This fictional shareholder, however, might bow to very different values that ordinary citizens of a democracy uphold.

Besides the interests of the actual shareholders themselves, there is also another, inherent danger in the speech of the fictional shareholder: corruption. For the fictional shareholder's interest in spending money on political speech would be to maximize economic benefits to himself, that is, to the corporation, without regard to other values that for ordinary

[69] Joo, *supra* note 49, at 57-58. Moreover, as Professor Winkler points out, over half of the available equity in American corporations is held by institutional investors, such as pension or mutual funds, and insurance companies. See: Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1268 (1999).
[70] Joo, *supra* note 49, at 58.
[71] *Id*. at 59.
[72] *See supra* note 41.
[73] Ciara Torres-Spelliscy, *supra* note 60, at 15.
[74] Joo, *supra* note 49, at 81.
[75] Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1002 (1998). Also at 1002-1004 and at 1052-53.

citizens might be of importance[76]. The narrow view of corruption that prevailed in Buckley and now in Citizens United, identifying corruption with only "quid pro quo" corruption - in other words, outright bribery - does not remotely cover the wide range of corrupt practices that can take place in the realm of corporate financed political speech, and as David Cole points out, this narrow understanding of corruption simply reaffirms faith in the laissez-faire approach to the marketplace of ideas[77].

3.2. Political Equality and Corporate Political Speech

While campaign finance jurisprudence has sometimes been dominated by a focus on speech itself, most prominently with Bellotti and Citizens United - disregarding perhaps the innermost value of the political marketplace, namely the common discussion by the citizens, "the People" themselves, as to what kind of life they envisage for themselves together as a society[78]-, a shift might be needed to refocus on the speakers themselves, instead of singularly focusing on the rights of the audience.

When we speak of the free marketplace of ideas, it conjures up images of the ancient Greek *agora*[79], where citizens gathered to discuss politics and made decisions regarding how they wished to live their life together as a community. It is perhaps a misnomer to use the expression "political marketplace" or the "free marketplace of ideas" in the context of political speech, as it might give rise to the image that the political marketplace resembles or echoes that of the economics. This, hopefully, isn't true[80]. Yet the imagery invoked by the marketplace of ideas metaphor - "perhaps the single most recognized metaphor in all of constitutional law"[81] - has strong roots in American First Amendment tradition ever since

[76] *See* Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L. J. 361, 369 (2002). *See also*: Joo, *supra* note 49, at 82.

[77] David Cole distinguishes between the corruption in Buckley, limited to quid pro quo corruption, and the „New Corruption" in Austin, which „acknowledged the systematic corrupting distortion that unequal resources can cause in the electoral marketplace". The corruption in Buckley is always meant as individual corruption, and thus seen as an aberration, and as such, it „implicitly affirms the legitimacy of the system" and is „congruous with a laissez-faire approach to the marketplace of ideas". *See* Cole, *supra* note 4, at 248-249.

[78] Greenwood, *supra* note 75, at 1065. *See also*: Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409-1410 (1986).

[79] David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 894 (1986).

[80] For one, the marketplace of ideas has traditionally been more free from state regulation than the economic marketplace. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L. J. 821, 836-837 (2008).

[81] Robert Tsai, *Fire, Metaphor, and Constitutional Myth-making*, 93 GEO. L.J. 181, 230 (2004).

Justice Holmes' famous dissent in Abrams v. United States[82], and then later on, Justice Brennan's concurrence from Lamont v. Postmaster General[83], with origins going much further back, to John Milton[84] and John Stuart Mill[85]. Its monopolistic dominance of First Amendment free speech jurisprudence will likely stay on in American jurisprudence[86], and perhaps with good reason; few, if any, nations possess such powerful metaphor as the centre of their free speech jurisprudence (just as few, if any, nations possess such robust protection surrounding free speech in general). At the same time, it is arguable – and very much so - whether the free marketplace of ideas metaphor, as it stands today, in a political, social and economic reality that is very different than it was at the time of the metaphor's conception, is still the best protection that free speech can possess or whether the metaphor of the free marketplace of ideas does more harm than good[87].

"The particular value of the free speech metaphor is that it depicts free speech as both an individual and a collective right"[88]. No doubt this is one of the reasons why the marketplace metaphor has become so embedded in the First Amendment free speech tradition, and why it has such an appeal that former First Amendment metaphors have gone into oblivion with its appearance[89]. We may try and pierce the corporate "veil", and see the citizens behind it, but the special existence of corporations is not structured in a way that that would be possible. After all, "(C)orporations, unlike people, do not have their well-being bound up with opportunities for self-expression. This crucial difference makes it entirely reasonable, Bellotti notwithstanding, that corporate free expression rights be construed as

[82] *See also*: „(...) the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market", Justice Holmes dissenting in Abrams v. United States, 250 U.S. 616 (1919), at 630.

[83] „The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers", Justice Brennan concurring in Lamont v. Postmaster General, 381 U.S. 301 (1965), 308.

[84] *See* John Milton, AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, in THE PROSE OF JOHN MILTON (ed. Patrick 1967), at 265-334.

[85] *See* John Stuart Mill, in ON LIBERTY, OF THE LIBERTY OF THOUGHT AND DISCUSSION (ed. Rapaport 1978), at 15-52.

[86] For more on the marketplace metaphor, *see* Tsai, *supra* note 81, at 189; Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1 (1984); Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L. J. 1757 (1995),; R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 834 (1974); Cole, *supra* note 79.

[87] I have written elsewhere extensively on the free marketplace of ideas metaphor. *See* Olivia Radics, *The Free Marketplace of Ideas Metaphor and the First Amendment*, JOGELMÉLETI SZEMLE, 2011/3. Available at: http://jesz.ajk.elte.hu/radics47.html.

[88] Cole, *supra* note 4, at 241.

[89] *See* Tsai, *supra* note 81, at 231-233.

narrower than those of individuals"[90]. It is true that a true return to the ideals invoked by the image of the *agora* would be unthinkable in modern times, a realization shared by the Founding Fathers too. Still, the image of the marketplace, so central to American democracy, lives on as it embodies the very vision that the Founders of America had: that an informed, interested citizenry will join together in a meaningful debate about the future of their country. Although this ideal has often been trampled on in the past, there were moments in the history of the United States when the country lived up to this ideal's promise. Echoes of this ideal can be found in, among others, Ronald Dworkin's or Cass R. Sunstein's scholarship on campaign finance reform as well[91]. When we think about this debate, it is clear that corporations, as they are part of society, should well be part of it as well. But it is imperative to protect the healthy balance of this ongoing discussion from the distortions that corporate wealth, among other factors, can cause. Forcing corporations to use segregated funds to finance their political speech is not excluding them from the marketplace of ideas; indeed, past experiences do not support this presumption. It is merely establishing a framework in which their voice does not drown out that of the rest of the citizenry, much like the government can intervene in the economic market as a regulator to prevent market failures, another issue that up to this day profoundly divides the country.

And this leads us to another concern with regard to corporate political speech; the way it is capable of distorting the democratic process. In the past, one of the primary grounds for upholding laws restricting corporate speech has been that corporations are granted special privileges and advantages by law; indeed this lied in part behind the decision in Austin[92][93]. These special advantages, or privileges, that lie behind the corporate structure facilitate corporations` ability to amass significant amounts of wealth, which - when used in the political sphere to enhance the voice of those who enjoy the support of corporations -, can easily distort the political process, at least according to the Court`s reasoning in the now overruled Austin. This line of reasoning, the antidistortion interest or political equality doctrine, was clearly refuted by the Court in Citizens United, with reference to Buckley, stating that the legislation cannot restrict the voice of some in order to achieve, or at the least

[90] *See* Marc M. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575, 640 (1989).
[91] *See* Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct.17, 1996; Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994).
[92] *See* Austin, 494 U.S. at 660.
[93] Professor Thomas W. Joo criticizes this argument, since corporations are chartered under the authority of a state government, therefore the special advantages argument is only valid with regard to state laws, and loses its force when applied to federal campaign finance regulations. Joo, *supra* note 76, at 365.

strive for, political equality[94]. Yet it is rather doubtful whether Buckley was right in that aspect, and the harsh criticism that has vilified the decision in the intervening decades goes against the almost canonical place it seems to have reached in certain circles.

One of the main concerns regarding such a square refusal of validating any attempt to strive for political equality in the political sphere is what Justice Stevens alludes to in his Citizens United dissent, and what Austin stood for, namely that corporations are economic creations, and enjoy certain benefits unavailable to other members of society in order to achieve economic gain. This gain, however, when it streams into the election process, might very well transform and upset its delicate balance, and corporations, with their unique structure and the benefits bestowed upon them by the state, may thus achieve unfair advantages in the political sphere.

One problem with the majority`s opinion in Citizens United is that it treats the status quo of the economic marketplace – which in turn can shape the face of the political one too – as given by nature, and not – as it really is – shaped by the legal system itself. This is what Buckley stands for, but should democracy? Property rules are not given by nature. Prior inequalities have been translated into economic imbalance, but should this imbalance, this inequality be treated as sacrosanct? Professor Sunstein, although not in the specific context of corporate political speech, argues that Buckley, as in some ways our era's Lochner[95], saw campaign expenditure limits as a sort of "taking", which disturbs the existing distribution of power[96]. Lochner, argues Sunstein, saw the regulation in question as "interference with an otherwise law-free and unobjectionable status quo"[97]. This view became untenable with the 1930s and Lochner was overruled[98]. Buckley, and now Citizens United, advances a similar view, this time with regard to the political marketplace, seeing expenditure limits as a sort of "taking", and treating the existing status quo in politics as sacrosanct, "neutral and just"[99], when in fact it is far from being so[100]. In fact, Professor Sunstein finds Buckley even more

[94] This "elegant phrase" in Justice Stevens` words in his dissent in Citizens, goes contrary to the fact that the Constitution does allow "restrictions on the speech of some in order to prevent a few from drowning out the many" (Justice Breyer dissenting in Nixon v. Shrink Missouri, 528 U.S. at 402). Such restrictions occur in the context of ballot access or the legislators` floor time. *See* Citizens United, 130 S. Ct. at 958.

[95] Lochner v. New York, 198 U.S. 45 (1905).

[96] Cass R. Sunstein, *supra* note 91, at 1397. *See also* Sunstein, *supra* note 10, at 97-98.

[97] Sunstein, *supra* note 91, at 1397-1398.

[98] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[99] Sunstein, *supra* note 91, at 1399.

[100] „Critics of Lochner, like Justice Marshall in Austin, maintained that the market was not natural, but was politically constructed by government rules and regulations, and therefore the government could alter the rules to offset the inequalities that its rules has produced. Justice Marshall's recognition in Austin that concentrations of corporate wealth create inequalities in the political marketplace and justify government

striking, as it involves free speech[101]. In a democracy, there is a need to distinguish between "the appropriate spheres of economic markets and politics"[102], and as Professor Sunstein goes on to note: "(…)the goal of political equality is time-honored in the American constitutional tradition, as the goal of economic equality is not. Efforts to redress economic inequalities, or to ensure that they are not turned into political inequalities, should not be seen as impermissible redistribution, or the introduction of government regulation into a place where it did not exist before."[103] This argument has an even more intense force when applied to corporate political speech[104].

Ronald Dworkin stated his argument for enhanced campaign finance legislation with equal force [105]:

> "Citizens play two roles in a democracy. As voters, they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens. (…)For when wealth is unfairly distributed and money dominates politics, then, though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests and convictions. When the Supreme Court said, in the Buckley case, that fairness to candidates and their convictions is "foreign" to the First Amendment, it denied that such fairness was required by democracy. That is a mistake because the most fundamental characterization of democracy – that it provides self-government by the people as a whole – supposes that citizens are equals not only as judges but as participants as well.
>
> (…)

intervention can thus be seen as an extension of the lesson of the Lochner era to the „marketplace of ideas". Cole *supra* note 4, at 271.

[101] Sunstein, *supra* note 91, at 1399.

[102] *Id*. at 1392.

[103] *Id*. at 1399.

[104] Professor Sunstein, on his part, has explicitly stated that restrictions on corporate speech, however, should not be the answer, as it „may well reflect a form of implicit viewpoint discrimination". Instead he recommends a more general effort on the government's part to reduce the effects of wealth. Sunstein, *supra* note 10, at 239.

[105] Ronald Dworkin, *supra* note 91.

> First, each citizen must have a fair and reasonably equal opportunity not only to hear the views of others as these are published or broadcast, but to command their attention for his own views, either as a candidate for office or as a member of a politically active group committed to some program or conviction. No citizen is entitled to demand that others find his opinions persuasive or even worthy of attention. But each citizen is entitled to compete for that attention, and to have a chance at persuasion, on fair terms, a chance that is now denied almost everyone without great wealth or access to it[106].

Dworkin's emphasis on participatory democracy, and the double role that citizens should play in a democracy, might seem illusory, yet at the same time it would be hard to deny the validity of this ideal (although this seems to be exactly what the Supreme Court has said with Citizens United). Political equality should not be restrained to the "one man, one vote" rule; indeed, this would be unsatisfactory, especially if we take into account that the rule itself might well be compromised, if equal participation in the political process - which should extend beyond the voting boot - is not guaranteed. In a society fractioned by wealth disparities, racial and ethnic divides, the fragile ideal of political equality has to be carefully held up and reinforced - with a force stronger than metaphors - from time to time. Allowing the distortion of the political process by corporate money and power might not be the greatest evil that American society and politics have faced, but it is still an evil that needs to be fought, within the limits set by the U.S. Constitution. We have to "accept that democracy – self-government by the people as a whole – is always a matter of degree"[107]. Or as David Cole argues: "Capitalism and democracy are an uneasy mix. Free market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities. (…)The threat posed by concentrated wealth is not merely the aberration of a bribed official, but the structural threat of a monopolized marketplace of ideas"[108]. It is true that corporations are not the sole actors responsible for this threat[109], but they seem to embody the most the dangers that capitalism has in store for democracy, and this concern clearly manifests itself in the fact that more and more American

[106] Dworkin, *supra* note 91, at 23.
[107] Dworkin, *supra* note 91, at 24.
[108] Cole, *supra* note 4, at 237.
[109] *Id*.

citizens believe that the health of their democracy is compromised by the unchecked influence of "big money".

We can also say that the *anticorruption concern* mentioned earlier in the previous section is in fact largely a variation on the political equality or antidistortion interest. If taken narrowly, in the quid pro quo sense, this is certainly not true, but the major concern lying behind the anticorruption rationale is the same systematic distortion of the political process that is present in the antidistortion concern[110]. The two phenomena are indeed inseparable.

4. Conclusion

Today's American society often needs to face dilemmas that were simply non-existent for the Founding Fathers of the country. Corporate political influence might fall under this very category, but this should not warrant that there is no constitutional solution to a problem that endangers the health of this democracy. The tradition of free speech seems to suggest that the less government intervention, the better, in line with the laissez-faire approach that – yet again – prevailed with Buckley. And there is much truth in that[111]. Yet, to maintain the "uninhibited, robust, and wide-open"[112] marketplace of ideas, we might need a paradigm shift. Owen Fiss argues, "When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment"[113]. In other words, it might be time to accept that we have come a long way since the state was the one and only evil that was threatening the integrity of the democratic process. There is a clash that is inherent whenever capitalism and democracy meet uncontrolled, a clash that in the realm of economics, outside the umbrella of the First Amendment, has been recognized since the New Deal and ever since the Lochnerian laissez-faire approach has been defeated. No free marketplace of ideas can be achieved, no "uninhibited, robust, and wide-open" marketplace of ideas is possible if the system itself is distorted in a way that not everyone has equal possibility to participate in the debate about the future of our democracy[114]. In David Cole's words, "We have a political system premised on equality, but an economic system based on

[110] Kathleen M. Sullivan attacks the corruption rationale for similar reasons. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 678-679 (1997).
[111] See Cole, *supra* note 4, at 245.
[112] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[113] Fiss, *supra* note 78, 1416.
[114] „The purpose of free speech is not individual self-actualization but rather the preparation of democracy, and the right of the people, as a people, to decide what kind of life it wishes to live". *See* Fiss, *id*. at 1409-1410.

the promise of inequality"[115]. The free marketplace of ideas, this long-cherished metaphor of the First Amendment tradition, can only fulfill its potential, its goal, if equal access to the market is guaranteed for all[116]. Currently, this is not so. The present Court, through its decision in Citizens United, has done away with the deferential approach that has characterized its jurisprudence since Austin and – brushing aside more than seventy years worth of precedents[117]- it has firmly embraced a laissez-faire approach with regard to corporate political speech, under an almost Lochnerian interpretation of the free marketplace of ideas metaphor.

The ripples caused by the recent shift in the Supreme Court's campaign finance jurisprudence will for a long time continue to shake the democratic process in the US. Although the political equality doctrine, never much of a favorite of the Court since Buckley, seems to have been cast away for the moment (never say forever in campaign finance jurisprudence), it does not mean that other avenues to restrict political spending by corporations are also closed. Recent policy suggestions – among others – include amending corporate statutes to require shareholder consent for political expenditures[118], and a new constitutional amendment[119] that would state that corporations do not possess the same First Amendment rights as people. Some of these suggestions will no doubt fail to yield results, but some may. Either way, it is time that the People of the United States of America rejoin the political debate and re-negotiate the terms of their democracy.

[115]Cole, *supra* note 4, at 273.
[116] Cole, *supra* note 4, at 243-244.
[117] *See* the Segregated Fund Cases, *supra* note 22.
[118] *See* http://www.govtrack.us/congress/bill.xpd?bill=h111-4790 (last visited September 30, 2011).
[119] There are several movements for initiating such a new amendment to the US Constitution. One can be found in the Public Citizen report, *supra* note 43, at 30.