Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing


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I. Introduction

Late in 2011, Massachusetts Congressman James P. McGovern proposed a constitutional amendment to limit the terms “People, person, or citizens” as used in the Constitution to natural persons. As to provisions that do not explicitly use the terms “People, person, or citizens,” such as the First Amendment, the new amendment would clarify that “We the people who ordain and establish this Constitution intend the rights protected by this Constitution to be the rights of natural persons,” with the goal and effect of rendering impossible any constitutional recognition of corporations. Whatever one thinks about the merits of this proposal, there is little doubt that it taps into widespread confusion about and anger over the Supreme Court’s holding in its 2010 decision in Citizens United v. Federal Election Commission that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.” The widespread reaction of both legal scholars and educated lay people to the Citizens United decision was that it is preposterous to believe that a corporation could actually possess constitutional rights because a corporation is neither a “person” nor a “citizen.”

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2. Id. §§ 1–2.
3. Citizens United v. FEC, 130 S. Ct. 876, 903 (2010). More limited ideas regarding possible constitutional amendments to overturn Citizens United have been advanced as well. See Lawrence Lessig, Citizens Unite, NEW REPUBLIC (Mar. 16, 2010), http://www.newrepublic.com/article/politics/citizens-unite# (proposing an amendment stating, “Nothing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens of the United States during the last 60 days before an election”).
Most recently, the debate over corporate First Amendment rights has been impacted by the interesting and controversial—if seriously flawed—new book by Professor Tamara Piety, *Brandishing the First Amendment: Commercial Expression in America.* Professor Piety’s book develops an elaborate constitutional argument that all but excludes speech by profit-making corporations from the First Amendment’s protective scope.

This widespread reaction, while perhaps politically understandable, reveals a complete lack of familiarity with well-established precepts of American constitutional law. In reality, the *Citizens United* Court’s recognition of a corporation’s ability to invoke constitutional rights was nothing new. Corporations have been invoking numerous constitutionalized and subconstitutionalized rights in court for many years. Indeed, if Congressman McGovern’s amendment ever managed to become law, one wonders how the provision’s supporters would feel about the removal of the *New York Times* and *Washington Post*—both profit-making corporations, of course—from the First Amendment’s protective reach.

Most of the battles over the constitutional status of corporations were long ago resolved in favor of allowing corporations to invoke constitutional guarantees. Today, corporate standing to challenge constitutional violations is so well established that it usually goes unnoticed. Corporations regularly invoke the Due Process Clause, the Dormant Commerce Clause, the Diversity Clause, separation of powers protections, and the Sixth and Seventh Amendment rights to jury trial. Even when it comes to the First

5. TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012). Note that while Professor Piety’s subtitle refers to commercial expression, she makes clear early on that she characterizes all expression by profit-making corporations as “commercial.” Id. at 12–13.

6. *See discussion infra* Part II.


8. *See U.S. CONST.* art. I, § 8, cl. 3 (inferred from granting to Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); see, *e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970) (holding that “[i]t the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders”).

9. U.S. CONST. art. III, § 2, cl. 1; *see, e.g.*, Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010) (holding that for determining whether a federal court has diversity jurisdiction over a case with a corporate party, the court should look at the location of the corporation’s “nerve center”).


11. U.S. CONST. amend. VI, U.S. CONST. amend. VII; *see, e.g.*, S. Union Co. v. United States, 132 S. Ct. 2344, 2348–49 (2012) (holding that the Sixth Amendment provided a company with the
Amendment right of free expression, powerful corporate owners of newspapers and broadcast networks regularly invoke the First Amendment without the slightest controversy over their corporate form.\textsuperscript{12} Moreover, since 1976, the Supreme Court has provided continually expanding First Amendment protection to commercial speech, which is invariably disseminated by profit-making corporations.\textsuperscript{13}

Such practices should hardly come as a surprise. After all, if a corporation is defrauded in the marketplace by a contractor or competitor, would anyone seriously challenge that corporation’s ability to resort to the judicial process to remedy the legal wrong done to it? Our economy would no doubt quickly degenerate into a state of chaos if corporations were denied the opportunity to vindicate their legal rights in court. But if no doubt exists that corporations have standing to vindicate subconstitutional rights and protections, how, purely as a logical matter, could they be categorically denied the opportunity to invoke the nation’s highest law, the United States Constitution?

It is conceivable, we suppose, that one could acknowledge corporate rights to invoke some constitutional provisions, yet at the same time reject their ability to invoke the First Amendment right of free expression. It is certainly true that corporations have not been authorized to exercise all constitutional rights, especially in those situations in which it would be incoherent for them to do so. But it is far too late in the day to let the mere fact of their corporate form categorically disqualify them from constitutional protection. Those seeking to deny a particular constitutional right to corporate entities bear the burden of establishing such incoherence. Moreover, even within the confines of expressive rights, those who express shock and outrage at \textit{Citizens United} would themselves readily extend those guarantees to the institutional corporate press without any sound basis for drawing so stark a distinction.\textsuperscript{14}

Perhaps the problem is that the critics of \textit{Citizens United} (and there are many of them) have failed to view the question of corporate free speech through the broader lens of constitutional theory. Once one grasps the reason why we have so readily extended so many other constitutional guarantees to corporations, it should be far easier to understand both why the values and

\textsuperscript{12} See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”); United States v. Playboy Entm’t Grp., 529 U.S. 803, 807 (2000) (discussing the Playboy Entertainment Group’s First Amendment challenge to a statute that only applied to cable-television operators).

\textsuperscript{13} See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496–500 (1996) (summarizing important Supreme Court cases that expanded First Amendment protection for commercial speech).

\textsuperscript{14} See infra notes 60–62 and accompanying text.
purposes sought to be fostered by the First Amendment are significantly advanced by extending the provision’s protections to corporate entities. This is true regardless of how one judges the moral, social, or economic impact of those entities.

In this essay we undertake three tasks. First, we explore the intersection between corporations and the Constitution, showing how widespread and well established that intersection is. Second, we analyze critically the key arguments for categorically excluding corporations from the First Amendment’s protective scope. We do so primarily by intensively exploring and critiquing the most recent and important contribution to that side of the debate by Professor Piety. Our critique finds serious flaws in each and every argument she advances. But more importantly, our inquiry into Professor Piety’s work enables us to glean from all the individual arguments a thematic failure to place the question of corporate First Amendment rights into the broader tapestry of constitutional theory, which has so readily and—with only very rare exception—consistently authorized corporations to invoke constitutional guarantees in court.

That brings us to the final task we take on here—namely, to fashion a coherent explanatory theory of constitutional adjudication in order to understand this widespread systemic choice in favor of extending the overwhelming number of constitutional rights and protections to corporations. To understand this decision about corporations and the Constitution, one must first understand why and how decisions are made to allow particular litigants to invoke constitutional protections. That inquiry leads us to a number of insights which, we believe, inexorably lead to the conclusion that corporations must be authorized to invoke the constitutional guarantee of free expression. Thus, by grasping the fundamental premises of the theory of constitutional adjudication, we will be able to understand why corporations are authorized to invoke the First Amendment right of free expression.

We conclude that corporations do and should possess First Amendment rights. This is not necessarily because of the metaphysical nature of the corporate entity, the legal source of the corporation’s existence, or the dictates of corporate theory. It is, rather, because of the vital instrumental role which the corporation serves in advancing the fundamental goals served by the First Amendment right of free expression through the process of private litigation.

In this important sense, authorizing corporate entities to invoke the right of free expression parallels numerous other instances in which corporations

15. See discussion infra Part II.
16. See discussion infra Part III.
17. See discussion infra Part III.
18. See discussion infra Part III.
19. See discussion infra Part IV.
have been authorized to invoke constitutional protections. Rather than focusing on the litigant-centric task of defining the corporation as either an aggregation of individuals bound together by contract or a goliath created by the state, courts should begin by identifying the values and policies that each individual constitutional provision seeks to advance. They should then ask whether authorizing injured corporations to invoke the provision’s protections will foster and protect those policies and values. If the answer is in the affirmative, the corporation should be authorized to invoke the protection in judicial proceedings. This is so whether or not the corporation is itself the intended beneficiary of that provision. This approach wisely recognizes that incentivized litigants often perform an effective policing function, assuring that government complies with constitutionally imposed restraints and directives. In this sense, they act as an economically incentivized “private attorney general.” And this is so even when the injured litigant is not itself the intended beneficiary of the provision it is enforcing. This approach to the theory of constitutional enforcement refuses to presuppose that protection of the litigant itself is the ultimate goal of the provision, because its focus is the systemic goal of checking government, rather than exclusively advancing the litigant’s private interests. By describing and analyzing this instrumental view of the corporation’s relationship to the Constitution, we hope to enable courts and scholars to understand what the Supreme Court has failed to explicitly state: that the important questions in corporate constitutional litigation are about what the Constitution has to say about preservation of our form of self-government, not about what corporate theory has to say about the Constitution.

While self-conscious abandonment of a narrow focus on corporate theory in constitutional cases leads to many of the results the Supreme Court has already reached, it can also correct errors that the Court has made. The Court has, for example, failed to recognize that corporations are “Citizens” for the purposes of the Privileges and Immunities Clause of Article IV,20 despite the fact that that Clause was designed to limit the ability of individual states to begin trade wars by imposing economic hardship on out-of-staters.21 As the primary engines of economic activity in the United States, corporations are particularly well-suited to enforce that provision, even though it may be troubling to consider them “citizens” in other contexts, such as with regard to the right to vote. The Court has apparently recognized this reality in the context of the Diversity Clause of Article III. That Clause sprung from the related belief that states might prejudice out-of-state entities, with negative consequences for interstate relations, and attempted to work around that threat by providing a neutral, federal forum in order to ensure that citizens of the Union could confidently transact business in foreign

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states. If corporations can be “Citizens” for the purposes of the Diversity Clause, it is difficult to see why they cannot be “Citizens” under the Privileges and Immunities Clause. Although the Supreme Court has treated the two Clauses differently, the litigant-agnostic aim of interstate harmony should dramatically outweigh litigant-centric or anachronistically textualist stances on what sort of entity can qualify for recognition under those clauses.

From a broader perspective, the form of litigant-instrumentalism, which we advocate to rationalize corporate free speech rights, gains strength once one recognizes the fundamental role that constitutional adjudication plays in ensuring limited government. The goal of limiting the power and discretion of the political branches under the Constitution has led the Supreme Court to constrain government’s treatment of individuals, even when enforcing those constraints requires granting windfalls to those who some may deem not particularly sympathetic guardians of constitutional rights. Thus, in litigation involving a number of provisions, the courts often sacrifice values as important as the accuracy of adjudicatory outcomes in order to protect the broader government-limiting aims of the Constitution. For example, the Fourth Amendment’s exclusionary rule operates to protect only the victims of successful searches and seizures;\(^22\) in doing so, it attempts to deter the use of unreasonable searches and seizures to obtain evidence despite the potentially significant impact that evidence might have on the resolution of the case. In excluding evidence obtained by illegal searches or seizures, the courts are effectively subordinating the aim of accuracy to the general aim of deterring constitutional violations.\(^23\) Similarly, the broad protections of the Miranda rule show little regard for the sympathy due a particular defendant, who is often guilty of the crime of which he is accused; rather, the rule aims to regulate constitutionally pathological primary conduct.\(^24\)

This government-limiting, regulator-centric model of constitutional adjudication explains the extension of numerous constitutional protections to corporate entities. Nowhere is this more true than in the case of corporate free speech rights. Even if one doubts that corporations themselves are morally or conceptually deserving of that protection,\(^25\) there is value in

\(^{22}\) See Mapp v. Ohio, 367 U.S. 643, 659 (1961) (discussing the ramifications of the exclusionary doctrine on criminal defendants).


\(^{24}\) See id. (explaining that “[t]he privilege against self-incrimination denies the court highly probative evidence, and the benefits of the privilege are exceedingly difficult to pin down” and the best argument in its favor is the “‘strong policy in favor of government’s leaving people alone’” (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 317 (John T. McNaughton ed., rev. ed. 1961))); see also Miranda v. Arizona, 384 U.S. 436 (1966) (creating what became known as Miranda rights).

\(^{25}\) For reasons to be explained, we do believe that a wholly litigant-centric model of constitutional adjudication does in fact justify corporate ability to invoke First Amendment rights. See infra subpart IV(B).
extending injured corporations the power to challenge constitutional violations. The marketplace of ideas, the ability of listeners to receive as much speech as possible, and the fear of governmental viewpoint discrimination or paternalism militate strongly against permitting the government to stifle corporate speakers. From a litigant-instrumental perspective, neither hostility to the corporation as a speaker nor a finding that the corporate speaker fails to benefit from expressive activities in the way that individual speakers do supports exclusion of corporations from the First Amendment’s scope. Corporate expression may in numerous ways advance the constitutionally protected interests of others and further the regulatory-centric, government-limiting values underlying the expressive guarantee.

In the next section we discuss the numerous instances in which corporations have been authorized to invoke constitutional protections. In the section that follows we critically explore the wave of post-\textit{Citizens United} scholarly arguments opposing First Amendment protection for corporate expression. We do so by focusing primarily on the theories developed by Professor Piety in her provocative, if seriously flawed, new book. We then suspend our disbelief about the arguments recognizing any speaker-based developmental or dignitary value in corporate speech. We demonstrate in this section that investing injured corporations with the power to challenge First Amendment violations nevertheless instrumentally serves important expressive values.

II. Corporations and Constitutional Adjudication

The First Amendment is one of many constitutional provisions whose enforcement is appropriately governed by an instrumental theory of constitutional adjudication. As a result, profit-making corporations have long been authorized to enforce those provisions through resort to the adjudicatory process. By briefly examining the adjudicatory dynamic underlying corporate enforcement of other constitutional provisions, we will be better able to understand the importance of the instrumental model as a rationale for recognition of corporate free speech rights.

A. The Corporation and Separation of Powers

The separation of powers provisions of the Constitution adopt what is essentially a prophylactic rule, or set of rules, protecting liberty.\textsuperscript{26} The Framers structured the Constitution based on the recognition that, as Madison wrote in \textit{The Federalist}, “[i]f angels were to govern men, neither external nor internal controls on government would be necessary.”\textsuperscript{27} But lacking the

\textsuperscript{26} See Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 451 (1991) (“[T]he Framers chose to rely on a number of different structural devices to check what they assumed to be the natural and inherent tendency of government to proceed toward tyranny.”).

\textsuperscript{27} \textit{THE FEDERALIST} NO. 51, at 319 (James Madison) (Clinton Rossiter ed., rev. ed. 2003).
requisite personnel for such an ideal form of government, the Framers enacted “formal, organized, and prophylactic structures to continually police potential abuses before the government is allowed to subvert liberty.”28 By separating government power, but creating enough overlap for each branch to exert a check on its coordinate branches, the Framers created a system in which the ambitions of each branch would serve to limit the excesses of the others.29 Thus, the executive power is limited by the prospect of impeachment as well as Congress’s control over the purse, the legislative power is limited by judicial review, and the judicial power is subject to impeachment and limited to the resolution of cases and controversies.30

The judiciary’s ability to serve as a check on the coordinate branches of government is limited because, as an initial matter, the gears of the federal judicial machinery can be set in motion only in order to decide “cases or controversies.”31 And because the Supreme Court has unambiguously required a showing of “injury-in-fact” on the part of the plaintiff as a necessary element of the case-or-controversy requirement,32 only one who has been injured by another’s unlawful behavior can invoke the federal judicial process.33 Thus, although the Framers undoubtedly considered judicial enforcement of the separation of powers to be a necessary protection against the tyrannical impulses of the other branches of government,34 the judiciary itself cannot enforce the Constitution unless a potential litigant finds it to be in her best interest to sue.

29. Redish & Cisar, supra note 26, at 462–63; see also THE FEDERALIST NO. 51 (James Madison), supra note 27, at 319 (“Ambition must be made to counteract ambition.”).
31. See, e.g., Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement, 93 HARV. L. REV. 297, 297–98 (1979) (“[The case-or-controversy requirement] limits the jurisdiction of federal courts; when its requirements are not satisfied courts are without power to proceed.”).
32. See generally Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that an environmental group lacked standing because they could not show any particularized injury-in-fact and thus the case was not an Article III case or controversy); Massachusetts v. Mellon, 262 U.S. 447 (1923) (holding that to meet the case-and-controversy requirement, a party challenging a federal statute must suffer direct injury from the statute rather than a general harm and that states may not challenge federal statutes on behalf of their citizens).
34. See THE FEDERALIST NO. 78 (Alexander Hamilton), supra note 27, at 466 (discussing the role of the judiciary and noting that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority”).
It is well established that profit-making corporations qualify as such litigants. In the case of *Northern Pipeline Co. v. Marathon Pipe Line Co.*, the case raised detailed questions regarding the breadth of the Article III power, the relationship between the courts and the political branches, and the scope of Congress’s power under the Naturalization and Bankruptcy Clause. In particular, the question was whether bankruptcy courts—staffed by non-Article III judges who lacked the protections of life tenure and fixed compensation—could be empowered to decide disputes arising under general state and federal law simply because such disputes might arise in or relate to cases under the bankruptcy laws.

Relying expressly on the separation of powers—in particular, on the proposition that “[t]he Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial”—the Supreme Court held that the bankruptcy courts were powerless to adjudicate such disputes. In doing so, the Court did not even note the fact that the parties were corporations rather than natural citizens. Although Marathon undoubtedly raised the unconstitutionality of the Bankruptcy Act out of its own self-interest—its victory led to the mandatory dismissal of a breach of contract action in which it was a defendant—its success served to protect the separation of powers and clarify the constitutional rules limiting Congress’s ability to vest jurisdiction in non-Article III courts.

Because the *Northern Pipeline* Court completely ignored the corporate character of the parties, it cannot be said to have actually *held* that corporations may raise separation of powers arguments based on the requirements of Article III. But that is the point: The holding that an injured corporation has standing to object to a constitutional violation of the separation of powers was so well established that the Court took plaintiff’s standing for granted. And no one appeared to disagree. Thus, the case represents a sterling example of the obvious and litigant-agnostic principle.

36. Id. at 56–57.
37. See U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power “To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”).
39. Id. at 58, 76 (plurality opinion).
40. Indeed, immediately upon introducing the parties, the majority noted that it would refer to petitioner Northern Pipeline Construction Co. as “Northern” and to respondent Marathon Pipe Line Co. as “Marathon.” Id. at 56. Beyond those introductions, the opinion makes no reference to the corporate character of either of the parties.
that corporations, like individuals, can further constitutional aims by enforcing their personal self-interest.\textsuperscript{41} That proposition applies to litigation in the context of a number of different constitutional provisions.

\section*{B. The Corporation and the Diversity Clause}

The Diversity of Citizenship Clause of Article III extends the federal judicial power to suits between “citizens” of different states.\textsuperscript{42} Though no corporation is a “citizen” in the purely literal sense of the term, it has long been understood that a suit between corporations from different states, or between a corporation from one state and an individual from another state, fall within the diversity jurisdiction of the federal courts.\textsuperscript{43}

The reasons that corporations may appropriately be treated as citizens for purposes of the Diversity Clause are purely instrumental. Diversity jurisdiction was created to enable out-of-state citizens to avoid state courts, where they were likely to be subjected to prejudice in favor of in-state litigants. Such treatment would inevitably lead to retaliatory actions by courts of the other state, thereby creating substantial friction and disharmony between the two states. It was largely to avoid friction that the Clause was adopted. Corporations are today treated as “citizens” for purposes of the Clause, for the single reason that discrimination by state courts against out-of-state \textit{corporations} amounts to discrimination against out-of-state \textit{business}—the very type of interstate friction which the Framers feared. It is for these reasons that corporations may invoke the Clause even though textually it is confined to “citizens.”

\section*{C. Seeking a Dividing Line}

Some have sought to distinguish between the structural guarantees of the Constitution on the one hand and its rights-based provisions on the other hand, arguing that corporations should be permitted to assert claims and

\textsuperscript{41} It is worth noting the developing consensus that corporations are particularly effective litigants. For example, Professor Marc Galanter, who staunchly opposes the granting of constitutional recognition to corporations, observes that “[a]s law, driven by corporate expenditures, becomes more technical, complex, and expensive, individuals are just the wrong size to use legal services effectively.” Marc Galanter, \textit{Planet of the APs: Reflections on the Scale of Law and its Users}, 53 \textit{Buff. L. Rev.} 1369, 1385–86 (2006). Similarly, Professor Gillian Hadfield, while lamenting the degree to which top-tier legal resources are devoted to litigation on behalf of corporations, notes that “the market for lawyers . . . overwhelmingly allocates legal resources to clients backed by corporate aggregations of wealth.” Gillian K. Hadfield, \textit{The Price of Law: How the Market for Lawyers Distorts the Justice System}, 98 \textit{Mich. L. Rev.} 953, 998 (2000) (“Driven by corporate demand, backed by corporate wealth, the legal system prices itself out of the reach of all individuals except those with a claim on corporate wealth.”). As a practical matter, the societal interest in enlisting the most effective \textit{Hohfeldian} litigants to do the bidding of broader society as private attorneys general is obvious.

\textsuperscript{42} \textit{U.S. Const.} art. III, § 2, cl.1.

\textsuperscript{43} \textit{See Louisville, Cincinnati, & Charleston R.R. v. Letson}, 43 \textit{U.S. (2 How.)} 497, 555 (1844) (“A corporation created by a state . . . seems to us to be a person, though an artificial one . . . and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.”).
defenses relating to governmental structure, but not to assert rights, which can belong only to individuals. However, this line of argument ignores the strong instrumental justifications for allowing corporations to invoke constitutional protections which we previously explained. Even individually-held rights often have consequences, both theoretical and practical, well beyond the individual right-holder. Thus, even if one were to reject the myth that corporations are reified beings divorced from their constituent parts, it would still not follow that the ability to make rights-based arguments should be withheld from corporations. To the contrary, granting corporations the protection of rights-based provisions can serve an instrumental purpose analogous to that served by the granting of structural protections to corporations.

Are there certain constitutional rights which corporations should not be authorized to invoke? The Supreme Court has consistently refused to recognize corporate rights to invoke a limited number of constitutional protections—for example, the Fifth Amendment right against self-incrimination or the protection of Article IV’s Privileges and Immunities Clause. For reasons already explained, the Court’s well established doctrine interpreting this provision of Article IV makes not the slightest bit of sense, and indeed, could well benefit from the lessons of instrumentalism we have delineated here. Perhaps the Fifth Amendment is the exception that proves the rule: one of those rare constitutional provisions where application to a corporate entity would be truly incoherent. But even if that were so, it would in no way undermine extension of constitutional protection to corporations in the numerous situations where the instrumentalist model fits.

III. The Attack on Corporate Free Speech Rights

In constitutional academic circles, corporation bashing has in recent years become a very fashionable activity. In particular, the Supreme Court’s 2010 decision in Citizens United, which held that corporations have a First Amendment right to make independent expenditures for expressive purposes in political campaigns, stimulated a wave of writings, both scholarly and popular, slamming the notion that corporations could possibly possess

45. See discussion supra subpart IV(A).
46. See, e.g., United States v. White, 322 U.S. 694, 699 (1944) (“Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.”).
47. See, e.g., Blake v. McClung, 172 U.S. 239, 259 (1898) (“[A] corporation is not a citizen within the meaning of the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” (internal quotation marks and citations omitted)).
constitutional rights of any kind, much less a First Amendment right to contribute to the discourse or exercise in political campaigns. To be sure, scholarly criticism of the idea of corporate free speech rights is not entirely new. But it is as if Citizens United unleashed a flood of previously pent up intellectual contempt for the linkage of corporations and the Constitution.

A. The Lack of First Amendment Value of Corporate Expression

The traditional attack on corporate constitutional rights has focused on corporations’ inability to exercise the First Amendment right of free expression. Long ago, Professor C. Edwin Baker contended that corporations are incapable of asserting First Amendment free speech rights basically because they have no soul. He argued that the exclusive rationale for First Amendment protection is as an exercise of the speaker’s free will; because a corporation is little more than an artificial, state-created, robotic profit-maximizer, it cannot be deemed to have a free will to exercise. Similar sentiments have, more recently, been expressed by Professor Burt Neuborne. He points to

[t]he privileged status of the for-profit business corporation as an artificial, state-created legal entity blessed with unlimited life, limited-liability, highly favorable techniques of acquiring, accumulating, and retaining vast wealth through economic transactions having nothing to do with politics, and animated by one, and only one purpose—making money in the relatively short-term.

While he concedes that “it makes sense to vest corporations with constitutional protection against improper economic regulation,” he describes as an “unsupported . . . jump [the vesting of] corporations with non-economic constitutional protections that flow from our respect for human dignity.” “Robots,” he notes, “have no souls. Neither do for-profit business corporations.” Most recently, the “corporations-have-no-soul” argument

49. See supra note 4.
50. See generally C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (arguing for the use of the liberty theory to interpret the First Amendment and concluding that corporate speech does not deserve the same protection as individual speech). See also Randall P. Bezanson, Institutional Speech, 80 IOWA L. REV. 735, 739 (1995) (advocating that institutional speech be protected by a separate and distinct analytical framework than individual speech).
51. See BAKER, supra note 50, at 218–19 (pointing to the motivations of political commercial speech in analogizing that class of speech to commercial speakers rather than individuals).
52. Id.
53. It should be noted that while Professor Neuborne echoes Baker’s argument that corporations are incapable of self-realization, he has on occasion acknowledged that recognition of corporate free speech rights may, in limited instances, serve other First Amendment values. See infra note 106 and accompanying text.
55. Id. at 657.
56. Id.
has been raised by Professor Tamara Piety in her new book. Professor Piety argues that “[c]orporations do not have a ‘self’ to be actualized or affirmed.” The corporation, she suggests, “is a collective with no corporeal existence.” It is therefore incapable of deriving value from expressive acts.

The first point to note in response is that the absence of a soul has never prevented corporations from invoking constitutional protections. Corporations have regularly taken advantage of constitutional provisions, under such provisions as the Diversity of Citizenship Clause, the Dormant Commerce Clause, the Due Process Clauses, and the Equal Protection Clause. With the possible exception of the Dormant Commerce Clause, none of these provisions, as Professor Neuborne appears to assume, is tied directly to matters of economic regulation. Professor Piety, in expressing outrage at what she considers the aberrational nature of First Amendment protection for profit-making corporations, fails even to acknowledge this broader—and far more complex—constitutional context.

More importantly, even First Amendment rights have long been extended, without great controversy, to profit-making corporations. Media corporations have, since their inception, been deemed to possess full First Amendment protections. While Professor Piety mysteriously ignores this fact, Professor Neuborne at least acknowledges the point, though his attempts to distinguish this form of expression from the speech of non-media corporations are unsuccessful. He focuses on the fact that it is the Freedom of the Press Clause, rather than the Free Speech Clause, that extends First Amendment protection to these profit-making entities. Though Professor Neuborne may well be correct in this assertion, it is unclear why anything should turn on this fact. Neuborne reasons that “[t]he business of operating a ‘press’ (in the Founders’ time, a printing press) is the only economic activity explicitly protected by the Constitution.” So is Neuborne suggesting that someone who prints a newspaper for purposes other than profit—for example, a publisher driven solely by ideological considerations—is to be denied protection under the Press Clause? We cannot conceive of such a conclusion. Alternatively, would Neuborne suggest that an individual who

57. See generally Piety, supra note 5, at 141–51 (defining the corporate identity as lacking the touchstone emotions of individualism).
58. Id. at 59.
59. Id.; see also id. at 77 (“Nonliving creatures do not ‘self-actualize.’”).
60. Neuborne, supra note 54, at 658.
61. A plausible argument may be made, however, that he is incorrect. One may reasonably challenge the notion that broadcast media are protected by the Press Clause, since their communications are not written and therefore not part of the “press.” See Tom A. Collins, The Press Clause Construed in Context: The Journalists’ Right of Access to Places, 52 Mo. L. Rev. 751, 759 (1987) (noting it is consistent with history to conclude that “the press clause was written to emphasize that written words were to be protected to the same extent as oral speech”). At the very least, this fact renders dubious recognition of any formalized distinction between the two branches of the First Amendment’s expressive protection.
makes her living by giving speeches, and who is therefore relegated exclusively to the protections of the Speech Clause, is to be denied First Amendment protection because she speaks, at least in part, for profit making purposes? Surely, Professor Neuborne would recognize that both of these conclusions would be nonsense. Whether or not the expression is the outgrowth of a profession is, for First Amendment purposes, besides the point. The Press Clause, like the Speech Clause, is facially agnostic as to the profit-making motivation of the speaker. In any event, even if true, Neuborne’s argument is irrelevant. The issue is not whether the First Amendment protects profit-motivated speakers, but rather whether it protects profit-making corporations. It is anachronistic to believe that the Framers intended the Press Clause to protect the writings of modern profit-making corporations, since such entities did not even evolve until the Jacksonian period, long after the First Amendment was enacted. Thus to conclude that the Press Clause was designed to protect a “profession” does not necessarily imply that it should also be construed to reach artificial corporate entities.

The very basis for Neuborne’s and Piety’s almost categorical rejection of First Amendment protection of corporate speech belies any exception for protection for the corporate press. A media corporation is just as much “an artificial, state-created legal entity blessed with unlimited life, limited-liability, highly favorable techniques of acquiring, accumulating, and retaining vast wealth through economic transactions” as any non-media corporation. It is similarly “animated by one, and only one, purpose—making money.” Recall also that Professor Piety based her rejection of corporate speech protection on the fact that corporations lack “a ‘self’ to be actualized or affirmed.” Every one of these characteristics—the very characteristics which supposedly disqualify corporations from speech protection—apply equally to media corporations. Additionally, like all other mega-corporations, media corporations possess enormous economic power, enabling them to overwhelm any expressive marketplace they decide to enter. If these facts disqualify corporate expression from furthering the goals of the First Amendment’s Speech Clause, it remains a mystery why that disqualification fails to apply also to the Press Clause. Finally, scholars who see a distinction between media corporations and other corporate entities fail

63. See Bray Hammond, Sovereignty and an Empty Purse: Banks and Politics in the Civil War 15–16 (1970) (describing the shift from a primarily agrarian economy towards an industrial and financial one); see also Ronald E. Seavoy, The Origins of the American Business Corporation, 1784–1855: Broadening the Concept of Public Service During Industrialization 256 (1982) (stating that corporation growth represented “the economic aspect of the political and social forces that democratized the United States during the age of Jackson”); id. (noting that incorporation laws “helped equalize the opportunities to get rich”).

64. Neuborne would protect truthful commercial speech by corporations. See infra note 106 and accompanying text. And while she is not nearly as clear on the point, Piety might as well.

65. Neuborne, supra note 54, at 656; see also supra notes 53–56 and accompanying text.

66. Piety, supra note 5, at 59.
to explain why non-media corporations that decide to publish a quarterly magazine or run a blog are not, either conceptually or practically, appropriately categorized as “the press” when they engage in such media-like activities.

Although Neuborne asserts—without the slightest support in constitutional doctrine—that the level of protection given to speech and press differ, at no point has Supreme Court doctrine extended greater protection to the press than it has to speech. To the contrary, the Court has held that the protections are fungible. Doctrinally, the two protections have always been treated identically, leaving no basis on which to distinguish between them in their protection of the expression of profit-making corporations. Thus, the fact that media corporations fall under the protective umbrella of the Press Clause, rather than the Speech Clause, provides absolutely no basis on which to justify disparate treatment for non-media corporate speakers who derive protection from the Speech Clause. It is a distinction without a difference.

Professor Neuborne’s rejection of corporate speech protection takes on an almost surreal quality when one recalls his longstanding recognition of First Amendment protection for non-media corporate commercial speech. In his more recent work, to his credit, he acknowledges the seeming inconsistency, but attempts—unsuccessfully—to rationalize it. Neuborne goes so far as to contend that the extension of First Amendment protection to commercial speech “not only fails to support a general right of corporate free speech, it cuts strongly against it.” This is because, in his words, “Commercial free speech is avowedly designed to maximize the economic efficiency of the market. As such, it is closely linked with the other constitutional protections afforded corporations in order to permit them to fulfill their economic mandate.” But rather than support his distinction between commercial and noncommercial corporate speech, Neuborne’s argument actually proves the exact opposite. The level of constitutional protection extended to commercial speech far exceeds any protections extended to purely non-expressive economic activity under the Fifth or Fourteenth Amendment’s economic substantive due process protections. Even Neuborne would have to acknowledge that over at least the last sixteen years the level of protection extended to commercial speech under the First Amendment far exceeds anything given non-expressive commercial activity.

67. He asserts that the press receives “heightened” protection. Neuborne, supra note 54, at 658.
68. See generally, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (comparing the First Amendment protections afforded to a newspaper reporter to those afforded to ordinary citizens).
70. Neuborne, supra note 54, at 658.
71. Id. (footnotes omitted).
under the substantive due process heading.\textsuperscript{72} This dramatic difference in the level of constitutional protection for commercial speech on the one hand and non-expressive commercial activity on the other hand undermines the notion that the rationale for the extension of constitutional protection is some generic concern with economic efficiency. To the contrary, something more than economic efficiency is at stake in the case of commercial speech, explaining the significant level of constitutional protection. The Court has concluded that commercial \textit{speech} is deserving of substantial protection under the First Amendment, rather than under the minimal constitutional protection afforded commercial \textit{conduct}.\textsuperscript{73}

It is true, as Neuborne asserts, that under current doctrine “commercial speech may be regulated in ways that would never be permitted in the first class speech compartment—most importantly on grounds of its falsity or misleading nature.”\textsuperscript{74} But that distinction flows not from the corporate nature of the speaker but rather from the assumption that the type of expression is of less value.\textsuperscript{75} Indeed, while extending a lesser level of protection to commercial speech, the Supreme Court long ago emphasized that corporations nevertheless retain the “full panoply” of First Amendment rights to comment on political issues.\textsuperscript{76}

In any event, commercial speech doctrine is a work in progress. In the relatively short period of thirty-five years since it was established, the level of First Amendment protection extended to commercial speech has gone from no protection to limited protection to substantial protection. Indeed, the government has not won a case challenging suppression of commercial speech in the Supreme Court in over twenty years, and in its most recent statement on the issue the Court at least implied that any regulatory distinction of expression premised on the commercial nature of the speaker deserves strict scrutiny.\textsuperscript{77} In any event, the fact that the Court has not yet explicitly taken the final step of extending full First Amendment protection to commercial speech does not mean that the constitutional protection extended to it is fungible with the all but non-existent substantive due process protection extended to non-expressive commercial activity. Thus, the First Amendment’s protection of commercial speech is—as a doctrinal matter, at least—clearly inconsistent with the sweeping Neuborne/Piety


\textsuperscript{73}. Neuborne, supra note 54, at 658.

\textsuperscript{74}. See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978) (affording “commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values”).

\textsuperscript{75}. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (noting that a “company has the full panoply of protections available to its direct comment on public issues”).

\textsuperscript{76}. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011) (noting that content-based restrictions on speech require heightened scrutiny, and that “[c]ommercial speech is no exception”).
argument that because corporations are soulless robots they should be denied substantial First Amendment protection.

Finally, it is important to note that scholars who dismiss constitutional protection for corporate speech on the grounds that corporations are incapable of self-realization are viewing the self-realization process in far too truncated a manner. They ignore the fact that the corporate form was developed for the very purpose of facilitating the self-realization of the individuals who formed corporations, who work for them, and who invest in them. In this sense, corporations are appropriately viewed as catalysts in the process of self-realization.77

B. The Inherently Harmful Nature of Corporate Speech

The arguments against First Amendment protection for profit-making corporations are not confined merely to the absence of expressive value of corporate speech. Professor Piety in particular devotes much of her recently published book to arguments focused on the inherent harm caused by corporate speech. For one thing, she asserts, corporate speech may often manipulate consumers into making unwise or unnecessary choices in the marketplace, because consumers have been shown to be psychologically vulnerable to such manipulation.78 In addition, she contends that corporate speech will often lead to economic instability.79 Furthermore, she asserts, corporate expression may give rise to severe “social costs,” such as “in environmental pollution or child labor.”80 In a world of free and open corporate speech, she suggests that “social reality is fairly relentlessly focused on the material. The billions of dollars spent on marketing face little competition from speakers on other issues: political, religious, spiritual, altruistic, or, most pointedly, antimaterialist.”81 She suggests that “[c]omparatively little time is given in the commercial world to issues of labor, family, religion, altruism, or other noncommercial aspects of life, except insofar as they can be translated into something for sale.”82 Professor Piety here makes a stirring argument against the value choices implicitly or explicitly advocated by much corporate speech. But it is surprising that she believes these arguments have any role to play in the debate over the level of First Amendment protection to be extended to corporate speech. To the contrary, her arguments represent a paradigmatic illustration of viewpoint

77. For detailed development of this argument, see REDISH, supra note 28, at 76–80.
78. PIETY, supra note 5, at 107–20.
79. Id. at 186–87.
80. Id. at 61.
81. Id. at 60–61; see also id. at 228 (“Commercial expression also plays a role in boosting demand for products produced in a manner some find objectionable, whether because of animal testing, labor practices, or support for groups or causes offensive to some or many people. . . . [I]t also reinforces gender and racial stereotypes that undermine other societal attempts to remove barriers to full equality for women and disadvantaged minority groups.”).
82. Id. at 61.
discrimination—a mode of analysis universally shunned in First Amendment doctrine and theory.83 As one of us has previously argued,

Viewpoint discrimination . . . flows from normative premises determined by . . . factors of political, social, economic, moral or religious beliefs or concerns that are wholly external to the First Amendment itself. They grow not out of the process-based analysis that seeks to create the most viable or appropriate constitutional system, but rather from unrelated personal beliefs of those imposing the restriction. To those seeking to impose viewpoint discrimination, the First Amendment is not something to be deciphered and structured, but rather a potential obstacle to attainment of their political or ideological values and goals that needs to be circumvented.84

Professor Piety effectively employs corporate speech as a surrogate for all of the sociopolitical views which she detests. Professor Piety’s argument for upholding the constitutionality of the suppression of corporate speech is that it uniformly advances a set of values which she deems offensive. While we appreciate her candor and admire the fervency of her moral beliefs, we must categorically reject the viewpoint-based nature of her constitutional argument.

Professor Piety, in short, displays a mystifying willingness to fall back on naked viewpoint offensiveness as one of her primary rationales for denying corporate speech First Amendment protection. She also inexplicably (and inexcusably) fails even to discuss, much less distinguish, the fact of First Amendment protection for the speech of media corporations. These failures underscore the most significant failure in her analysis: her general failure to place the issue of First Amendment protection for corporate speech into a broader constitutional framework. The simple fact is that corporations have long been authorized to assert violations of numerous constitutional provisions and to invoke numerous constitutional protections.85 This is not necessarily because we have made the ex ante determination that the corporations themselves will benefit from or flourish because of such protections. As is often the case in constitutional theory, corporations are in many instances permitted to assert these constitutional protections as litigants for the simple reason that we know that they will be motivated by economic considerations to protect and defend broader societal goals and values which are intended to be implemented by adoption of particular constitutional protections.


85. See discussion supra Part II.
provisions. The corporation itself, in this theory of constitutional 
adjudication, is viewed simply as a means to a broader end. Because Piety 
fails even to attempt to place the issue of corporate speech protection within 
the broader theoretical framework underlying constitutional adjudication, she 
fails to grasp the real reasons why corporations must be permitted to invoke 
First Amendment protections. It is to this question that our analysis now 
turns.

IV. Instrumental Justifications for Constitutional Protection of Corporate 
Expression

Constitutional concerns having nothing to do with the corporation per se 
militate strongly in favor of allowing corporations to raise constitutional 
arguments. The Reporters are filled with cases in which litigants have 
advanced self-interested constitutional arguments, the success of which 
simultaneously furthered the aims of those litigants as well as aims that 
extend far beyond the interests of the litigants themselves. It is in this sense 
that the corporation can be viewed as a type of self-interested “private 
Attorney General,” advancing its own interests with the simultaneous 
collateral benefit of furthering values enshrined in the Constitution. And 
when considered in light of the ability of the corporation to use its status as a 
litigant to enforce broader societal norms, the question of whether a 
corporation should be entitled to invoke a given provision requires reference 
not to any dogmatic view of corporate theory, but rather to the systemic 
concerns of the constitutional provision sought to be enforced. It is in this 
sense that constitutional litigation is a largely instrumental process.

A. The Corporation as a Hohfeldian Plaintiff

Although the American legal system is undoubtedly concerned with 
achieving desirable outcomes for society as a whole, the only mechanism 
by which courts may permissibly engage in the pursuit of the public good is 
by deciding discrete cases which resolve claims brought by self-interested 
litigants. This is the essence of the nation’s “private rights” model of 
adjudication. In the words of a leading commentator, “[I]t is still holy writ 
that the citizen qua citizen is not a proper party plaintiff in a lawsuit testing
questions of constitutionality.”

Rather, in order to rule on the constitutionality of a governmental act, a court must first find that the plaintiff “is seeking a determination that he has a right, a privilege, an immunity, or a power.” Such litigants are often referred to as “Hohfeldian” plaintiffs, because the concept of the self-interested litigant was first articulated by Professor Wesley Hohfeld.

That the adjudicatory process delegates to private litigants the responsibility for fostering and protecting constitutionally protected interests should come as no surprise. Both the Constitution and the statute books abound with private rights designed to enlist personally aggrieved litigants in the broader effort to enforce systemic legislative and constitutional aims. As one of us has previously asserted, “[p]rivate litigation may often do the government’s work for it, by deterring and punishing violations of law.”

But while many have criticized certain subconstitutional regimes which rely on private enforcement to ferret out wrongdoing, there can be little doubt that litigants who seek to vindicate their own self-interest by advancing constitutional arguments enable the courts to further established public policies without raising the difficulties that attend other private attorney general actions.

It is true that private litigants who bring compensatory suits intend primarily to vindicate private interests. Although private compensatory litigants may of course seek to advance broader societal goals as an incident to vindication of their private rights, their primary (and often exclusive) personal goal is to use the legal system to advance their own private rights. But in pursuing their own private interests, they will often incidentally protect and enforce the systemic interests that underlie the substantive law they seek to enforce.

The profit-making corporation, by its very nature, falls into this category: by the rules of corporate law, the corporation must function as a

91. Id. For the origins of the phrase “Hohfeldian” turn to Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913).
92. Redish, supra note 86, at 86.
93. A number of scholars, for example, have argued that large class actions—the prototypical examples of “private attorney general” suits—create conflicts of interest between attorneys and class members. See, e.g., John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: the Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 671–72 (1986) (discussing misincentives that attorneys face during a class action suit). One of us has argued in Redish, supra note 86, at 73, that Federal Rule of Civil Procedure 23, which authorizes class actions, undermines democratic legitimacy by using a procedural device to drastically and fundamentally alter substantive law.
94. Redish, supra note 86, at 85–86.
95. Id.
self-interested litigant. It is, for that reason, perhaps the ideal private attorney general: the benefits of corporate litigation necessarily accrue to shareholders via changes in stock price, and when a corporation sues, there is always a real class of plaintiffs—the shareholders—whose decision to opt into the corporate structure necessarily confers on corporate managers a right to sue on their behalf. The corporation engaged in constitutional litigation, in other words, can realize many of the benefits of the class action without falling victim to its weaknesses.

B. Corporations as First Amendment Private Attorneys General

In deciding whether to allow corporations to invoke constitutionalized protections in court, it makes little sense—as opponents of corporate speech protections have—to obsess over whether a corporation possesses a soul, is capable of self-realization, or is conceptually characterizable as a “person.” The question, to be asked, rather, is whether enabling corporations to invoke First Amendment protection advances the First Amendment ball from Point A to Point B. In other words, the inquiry is largely an instrumental one: Will the corporation be in a position to advance or protect the values sought to be fostered by our constitutional commitment to the principle of free expression?

Of course, if one believes that the only value served by the constitutional protection of free expression is the self-development of the speaker, one might conclude that corporate entities are undeserving of that protection. Even on the basis of that narrow assumption, however, for reasons previously discussed, one should recognize that the corporation performs an important catalytic function in fostering the self-development of the individuals who create and participate in the operation of the corporation. But the main problem with this view is that it posits an unduly narrow version of the role properly served by litigation brought to vindicate First Amendment rights. Whether or not corporations self-realize as speakers, by advocating on behalf of the First Amendment they

96. To the extent that the corporation must act to maximize shareholder wealth, directors are required to initiate suits and advance legal arguments only to the extent that such suits and arguments would benefit shareholders. While it is of course plausible that agency problems might lead managers to authorize suits and legal arguments with the aim of benefiting the public interest as distinct from the interests of shareholders—in other words, to engage in lone ranger litigation—such a course of action would reflect a violation of managerial responsibility to shareholders.

97. See, e.g., Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 15–16 (1991) (discussing the historical role of the corporation in initiating legal action on its own—and thus its shareholders’—behalf).

98. See Redish, supra note 86, at 77 (arguing that “faux” class actions—those in which suit is not, “in any realistic sense, brought either by or on behalf of the class members”—improperly transform statutory provisions from guarantors of private rights to grants of a roving right to ferret out wrongdoing).

99. See discussion supra subpart III(A).

100. See discussion supra Part I.
instrumentally advance and protect broader systemic interests which underlie the constitutional commitment to free expression.

This analysis supports the universal acceptance of the right of profit-seeking media corporations to invoke First Amendment protections. We do not extend them this protection in order to enable these corporations to self-realize, or because they are appropriately conceptualized as humans any more than any other corporation is. Nor do we extend them protection because media corporations are exercising the right of the press, rather than the right of speech—a distinction without a difference, as well established First Amendment doctrine makes clear.\(^\text{101}\) We do so, rather, for two commonsense reasons: (1) to enable them to check governmental excesses through their publications or broadcasts, and (2) to assist readers and listeners in their own self-realization by providing them with information which may facilitate their personal and collective decision making processes.\(^\text{102}\) This is an extremely important insight for purposes of the debate over the free-speech rights of non-media corporations. The simple fact is that non-media corporations are capable of performing the exact same instrumental functions on behalf of the values sought to be fostered by the constitutional commitment to the principle of free expression. Protecting the expression of non-media corporations—even assuming that all such expression is self-advancing but not self-developing—serves the dual functions of checking government and informing the public.

The point may be illustrated by use of a hypothetical example. Imagine that the federal government has enacted a law which provides that profit-making non-media corporations are permitted to spend treasury funds for expression that approves of or supports the president’s policies, but that these corporations are not permitted to spend treasury funds for expression that criticizes or dissent from those policies. Presumably, those who believe that profit-making non-media corporations are not protected by the First Amendment would logically have to conclude that such a law is constitutional. After all, the law would in no way inhibit the speech of an actor protected by the First Amendment. But it is difficult to imagine any court upholding such a law against a First Amendment attack. On its face, the law constitutes a blatant form of selective viewpoint suppression, designed to skew public debate in favor of those in power. Yet all the arguments for excluding profit-making corporations would still apply: the speakers remain soulless, mindless, robotic profit maximizers, as well as artificially created centers of overwhelming economic power.\(^\text{103}\) If corporations are inherently incapable of exercising First Amendment rights,
it logically cannot matter what form the regulatory interference with corporate expression takes. In our hypothetical, however, the corporate nature of the victim should make little difference: we simply cannot allow government to skew public debate in this manner, thereby threatening core democratic values. By allowing corporations to challenge the constitutionality of this law, we would be policing governmental excess, thereby implementing the regulatory-centric model of constitutional adjudication.

By a process of reverse engineering, then, we should be able to glean from this example precepts of First Amendment theory that recognize what an instrumentally important role profit-making corporations can play in protecting and advancing important First Amendment values. Our hypothetical demonstrates that viewing the First Amendment from a purely speaker-centric perspective unduly truncates the safeguards necessary to assure that government acts in accordance with the social contract between government and citizen dictated by our governmental form. In addition, we need to add both listener-centric and regulatory-centric perspectives of free speech protection: there are certain behavioral patterns in which government may not be permitted to engage if we are to keep government within the confines of the First Amendment. Our hypothetical example is a perfect illustration of the importance of this regulatory-centric model of free speech protection. The danger may be assumed not to be to the self-development or self-realization of the corporation as speaker, if one has concluded that corporations are undeserving of such protection. Nevertheless, it is vitally important to vest the corporation with standing to challenge this blatant violation of free expression, lest government be permitted to exert dangerously excessive power to skew the nature of public debate.

As previously noted, Professor Neuborne himself, in earlier writing, essentially grasped the concepts of the listener-centric and regulatory-centric models of First Amendment theory. He once defended commercial speech protection, despite what he deemed to be the absence of speaker self-realization, both because of the First Amendment right of the listener to be informed and the fear of governmental paternalism inherently reflected in much governmental suppression of truthful commercial speech. These concerns are strikingly similar to the listener-centric and regulatory-centric models which we have described. Thus, Professor Neuborne has himself acknowledged that far more is at stake in First Amendment enforcement than

104. But see discussion supra Part IV(B) (discussing catalytic self-realization rationale for protecting corporate speech).
105. See supra notes 69–75 and accompanying text.
106. Neuborne, supra note 69, at 27. It should be noted that Professor Piety, unlike Professor Neuborne, appears to actually embrace the notion of governmental paternalism as a basis for rejecting or at least limiting corporate free speech rights. Piety, supra note 5, at 124–25.
107. See discussion supra Part I.
merely the developmental benefit to the speaker. Indeed, respected free speech philosophers have suggested that the only value served by the guarantee of free expression is listener-based.\footnote{108} While we believe that this perspective unduly truncates the category of those who benefit from free speech protection, surely more must be involved than a narrow focus on benefit to the speaker. Yet those who have attacked—indeed, mocked—\textit{Citizens United} for its extension of First Amendment protection to mindless, soulless profit-making corporate automatons have either (as in the case of Professor Piety) completely ignored the nonspeaker benefits of free expression or (as in the case of Professor Neuborne) conveniently forgotten that on other occasions they themselves have recognized those very nonspeaker values which may be defended and protected as vigorously by a corporate speaker as by an individual one.

If scholars such as Professor Neuborne recognize that corporate speech fosters both the listener- and regulatory-centric models of free expression in commercial speech contexts, it is difficult to understand why those very same values are not fostered at least as effectively in the context of a political campaign by protecting corporate political speech. It is in just this context that many free speech scholars have long argued that the need for an informed public is at its greatest.\footnote{109} Shutting down the ability of corporations to contribute information to political campaigns undermines this listener-centric model as much as would the restriction of the expression of human speakers. It should not be forgotten, after all, that the expression sought to be suppressed in \textit{Citizens United} was a movie critical of a major presidential candidate in the midst of a political campaign—expression which could potentially influence voter decision making. It is also in the political context that the need for the regulatory-centric model is arguably at its height, because the temptation to selectively suppress expression in support of the opposition is at its height in this context. In this context, it is worthy of note that the overwhelming majority of corporate sponsored expression is likely to support pro-capitalist policies and conservative candidates. Indeed, it is this very fact which has generally led to so much concern on the part of liberals about \textit{Citizens United}. Yet it is this knowledge of the likely content of the suppressed expression that renders the push against corporate speech a thinly veiled form of wholly impermissible viewpoint regulation.\footnote{110}

\footnote{108. See, e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965); Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 Ind. L.J. 1, 24–26 (1971) (asserting that only one of four benefits from Brandeis’s Whitney concurrence—“the discovery and spread of political truth”—can be held above other claimed freedoms (citing Whitney v. California, 274 U.S. 357, 375 (1927))).}

\footnote{109. See Bork, supra note 108, at 24–28 (arguing that only explicitly political speech should receive constitutional protection).}

\footnote{110. For a discussion of Professor Piety’s overt reliance on viewpoint discriminatory factors in her case against corporate protection speech, see supra note 83 and accompanying text.}
It does not necessarily follow, we should note, that *Citizens United* was correctly decided. One could arguably accept the premise of corporate free speech rights in the abstract, yet nevertheless conclude that the importance of limiting the role of money in political campaigns constitutes a sufficiently compelling interest to justify such restrictions. While this would not likely be our position, we do not reach the issue because the question of the generic role of money in political campaigns is beyond the scope of our present inquiry.\footnote{111} The point to be emphasized here is that if one were to reach this conclusion, it could not be grounded in the notion that corporations are incapable of exercising First Amendment rights, and therefore would logically have to apply equally to large campaign expenditures by individuals.

Of course, if one embraces, rather than rejects, the notion of governmental paternalism as grounds for regulating speech, then one would refuse to deem viewpoint-selective governmental behavior constitutionally troublesome. Professor Piety appears to do just that. Recall that she asserts as one basis for excluding corporate speech from the First Amendment’s scope the danger that such expression will unduly manipulate the minds and behavior of consumers.\footnote{112} But her reasoning necessarily rejects the foundational democratic assumption that the people are able to judge the wisdom of competing arguments for themselves without “assistance” by government.

Piety argues that although
\footnote{113} therefore it is appropriate, she concludes, for government to suppress corporate speech that would bring about unwise consumer choices. If one were to follow Piety’s logic to its ultimate conclusion, it would necessarily imply that *some* corporate speech would, in fact, have to be protected—any corporate speech which would lead to “wise” consumer conclusions. Presumably, some agency of government would be placed in the position of deciding which corporate speech would have to be protected and which would not by deciding which corporate speech would induce “wise” consumer choices. But if accepted, Piety’s argument would effectively do away with the foundational premises underlying our democratic system, not
to mention the societal commitment to free expression. If the people are incapable of being trusted to make rational choices on the basis of free and open debate and therefore must be aided by selective—and paternalistic—governmental suppression, the inevitable conclusion must be that the entire democratic process cannot be trusted.

In any event, Piety’s argument proves far too much. The kind of speech involved in *Citizens United* and many other cases has nothing to do with consumer choices in the commercial marketplace. It concerns, rather, debate over the political choices open to voters. If one applies her reasoning to this context (and there would appear no logical basis on which not to do so), then it is impossible to understand why corporate political speech is any more likely to bring about irrational choices than political appeals made by individuals. If the electorate is not to be trusted to make choices on the basis of free and open debate, it logically matters not at all who the speaker is. Thus, consistent with the theme of much of our criticism of her new book, Professor Piety’s failure even to attempt to place her stinging attack on corporate speech within either the broader context of democratic theory, the law and theory of free expression, or the doctrines of constitutional law which have long extended constitutional protections to corporations, ultimately deprives her theory of any persuasive force.

V. Conclusion

There appears to exist a post-*Citizens United* reflex among the uninformed and the ideologically driven to assume that because corporations are not humans, they are—both legally and metaphysically—incapable of asserting any constitutional right, much less the First Amendment right of free expression. As we have made clear, however, such a view could not be further from the truth. Corporations have long been authorized to assert numerous constitutional provisions, including the First Amendment right of free expression. And there are very good reasons for such a practice. Regardless of how one views the corporation on a metaphysical level, enabling corporations to invoke the First Amendment right of free expression serves important instrumental purposes in fostering constitutional values and checking government.

Like many scholars before her, Professor Piety expresses intense political hostility towards the modern profit-making corporation, but ignores all of the doctrine and history surrounding corporate assertion of constitutional rights. She even ignores the simple fact that profit-making media corporations have long asserted First Amendment rights, and therefore fails even to attempt to distinguish the speech of non-media corporations. Instead, she relies primarily on arguments wholly inconsistent with well-

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114. *See supra* subpart III(A).
established precepts of free speech theory—for example, political or social hostility to the ends sought to be achieved by corporate speech and skepticism about the public’s ability to judge competing arguments. Such scholarly work not only fails to advance free speech thought; if left unanswered it would set First Amendment theory back significantly.

116. See supra note 78–86 and accompanying text.