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Amendment XXVIII? Defending Corporate Speech Rights

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**AMENDMENT XXVIII?
DEFENDING CORPORATE SPEECH RIGHTS**

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I. INTRODUCTION

Consider the following proposed amendment to the United States Constitution:

SECTION 1. The U.S. Constitution protects only the rights of living human beings.

SECTION 2. Corporations and other institutions granted the privilege to exist shall be subordinate to any and all laws enacted by citizens and their elected governments.

SECTION 3. Corporations and other for-profit institutions are prohibited from attempting to influence the outcome of elections, legislation or government policy through the use of aggregate resources or by rewarding or repaying employees or directors to exert such influence.

SECTION 4. Congress shall have power to implement this article by appropriate legislation.¹

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1. ReclaimDemocracy.org, Proposed Constitutional Amendments, http://reclaimdemocracy.org/political_reform/proposed_constitutional_amendments.html (last visited June 17, 2007).

This proposal may sound like an ill-conceived pipe dream. But a growing minority of activists and left-wing interest groups has begun a crusade to strip corporations of their constitutional protections. Indeed, three California municipalities and at least two Pennsylvania townships have passed resolutions advocating such an amendment.² In New Jersey, an assemblyman introduced legislation that would remove corporations from state and federal constitutional protection.³ And at least four state Democratic parties have made this goal part of their platforms.⁴ These initiatives, which seek to eliminate the establishment of so-called “corporate personhood,” fly in the face of Supreme Court precedent that recognizes corporations have constitutional rights against arbitrary government actions,⁵ are citizens under the Fourteenth Amendment, and are thus entitled to protection under the Bill of Rights.⁶

Above all, these groups seek to lessen the influence and, quite literally, voices of corporations in public life. On this theory, companies are profit-motivated machines with no feelings and thus no stake in social debate; as a result, communications by their employees and agents should merit no

2. Most notably, the Berkeley City Council passed such a resolution at its June 15, 2004 meeting. Letter from the Peace and Justice Comm. to the Mayor of Berkeley and Berkeley City Council (June 15, 2004), *available at* <http://www.ci.berkeley.ca.us/citycouncil/2004citycouncil/packet/061504/2004-06-15%20Item%2027a.pdf>. In Arcata, California, the city council passed a similar resolution one month earlier. Press Release, Arcata City Council, Arcata City Council Passes Resolution Against Corporate Personhood (May 22, 2004), *available at* <http://www.duhc.org/images/ArcataCPResol.doc>. The city council of Point Arena, California also passed a similar resolution in 2000. *See* Press Release, Point Arena City Council, Resolution on Corporate Personhood in the City of Point Arena, *available at* <http://www.mcn.org/e/iii/afd/resolute.htm>. In Pennsylvania, several similar ordinances have been enacted. *See, e.g.,* Russell P. Kaniuka, *Stop Imported Sludge*, BANGOR DAILY NEWS, Jan. 14, 2003, at A8 (reporting that a western Pennsylvania town had adopted “an ordinance eliminating corporate claims to civil and Constitutional privileges”); Tom DiStefano, *Licking Revokes Corporate Rights*, CLARION NEWS, <http://www.celdf.org/news/lickingtowshipreveokescorporaterights/tabid/137/default.aspx> (last visited June 16, 2007) (describing an ordinance enacted “to eliminate the purported constitutional rights of corporations”).

3. Assem. 3823, 210th Leg., Reg. Sess. (N.J. 2003).

4. DEMOCRATIC PARTY OF WASH., PLATFORM OF THE DEMOCRATIC PARTY OF WASHINGTON § 3 (2006), *available at* <http://www.wa-democrats.org/files/Platform%20and%20Executive%20Summary%20of%20the%20Democratic%20Party%20of%20Washington%20-%20June%203,%202006.pdf>. For more information on the stance of the Democratic parties of Oklahoma, New Hampshire, and Maine, see ReclaimDemocracy.org, Oklahoma Democratic Party Opposes Corporate Welfare, Personhood, http://reclaimdemocracy.org/personhood/oklahoma_democrats_oppose_corporate_rights.html (last visited June 16, 2007); ReclaimDemocracy.org, New Hampshire Democrats Oppose “Corporate Constitutional Rights,” http://reclaimdemocracy.org/personhood/new_hampshire_democratic_oppose_corporate_rights.html (last visited June 16, 2007); Maine Democratic Party, 2006 MDP Platform, <http://www.mainedems.org/about/platform-rules.aspx> (last visited June 16, 2007).

5. *E.g.,* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 651–52, 654 (1819) (recognizing that a corporation can invoke the Contract Clause of the Constitution against a state’s attempt to impair a corporate charter).

6. *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886). “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are of the opinion that it does.” *Id.* at 396 (quoting, in the statement of facts preceding the Court’s opinion, Justice Field during oral argument).

protection under the First Amendment. Marc Kasky and his supporters made precisely this argument in a landmark case before the California Supreme Court.⁷ Kasky sought to limit the speech rights of Nike after the latter responded to a series of highly publicized reports on allegedly poor working conditions of its overseas workers using advertisements, letters, and press releases.⁸ In finding for Kasky, the court developed a novel commercial speech test which vastly expands the definition of commercial speech to limit the protections of the First Amendment for any speech and publication attributed to businesses.⁹

In this Essay, we suggest this new standard, apparently prompted by an inordinate fear of commerce and trade, would allow content-based regulation of corporate speech, which necessarily results in the treatment of corporations as second-class citizens and the elimination of important First Amendment protections. In doing so, the ruling in *Kasky* and the activist groups that pushed for it have ignored the historic role of corporations, the range of corporations in existence, and the value of corporations in promoting the commercial, consumer, and other valuable societal interests that are at the core of American life today. Part II describes the *Kasky* decision, the standard the California Supreme Court invented, and its implications for corporate speech. Part III argues against the distinction between individuals and corporations under First Amendment speech doctrine. Part IV briefly examines traditional arguments levied in opposition to such rights, considering the specific case of for-profit corporations and arguments relating to redistributive justice.

II. THE *KASKY* STANDARD

At the time of *Kasky*, Nike—a leading producer of athletic shoes and apparel—manufactured most of its products in China, Vietnam, and Indonesia.¹⁰ Nike discovered early, as did a few other large American companies, that outsourcing physical labor to Southeast Asia was a cheaper alternative to making products in the United States.¹¹ But, politically, the move was risky, given the relatively lax and under-enforced labor laws in these countries.¹²

In the mid-1990s, American labor groups, and eventually the press, took note. In October 1996, the CBS news program *48 Hours* broadcast a story suggesting that Nike did not pay its workers the required minimum wage, mandated overtime, and subjected its mainly female worker population to

7. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003).

8. See *id.* at 248–49.

9. *Id.* at 256.

10. *Id.* at 247.

11. See Richard Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike* 8–9 (Sloan Sch. of Mgmt. Mass. Inst. of Tech., Working Paper No. 24, 2006), available at http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_24_locke.pdf.

12. See *id.* at 11.

physical, verbal, and sexual abuse.¹³ Other major news outlets produced similar stories.¹⁴

In response, Nike launched a campaign to combat what it considered false allegations through advertisements, press releases, editorial pieces in newspapers, and letters to university presidents, the latter of whom constituted a major consumer base for the company.¹⁵ The company not only denied these allegations but also asserted that it paid workers “on average double the applicable local minimum wage” and gave them free meals and health care.¹⁶ The media took Nike’s claims with a healthy dose of skepticism, investigating each and pointing out its potentially misleading nature.¹⁷

Marc Kasky, an anti-trade activist, brought suit under California’s unfair business practices law, alleging Nike had distributed false and misleading statements.¹⁸ The trial court dismissed the lawsuit, reasoning that the speech was not commercial, and thus, could not be the subject of a lawsuit under this statute.¹⁹ A California appellate court affirmed the decision.²⁰ But in May 2002, by a 4–3 vote, the California Supreme Court reversed the ruling and in doing so, announced a new and extraordinarily broad definition of commercial speech to be applied “when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception.”²¹ The three-part test for determining whether speech is commercial examines the speaker, intended audience, and content of the message.²²

Under the first prong of the test, a plaintiff must show the speaker was “someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged.”²³ Under the second prong, a plaintiff must show the audience is

13. *48 Hours: Just Doing It* (CBS television broadcast Oct. 17, 1996), transcript available at <http://www.saigon.com/~nike/48hrfint.htm>.

14. *Kasky*, 45 P.3d at 248.

15. *Id.*

16. *Id.*

17. For example, *Business Week* noted that Nike’s workers in Indonesia earned twice the minimum wage only because they must work overtime. Mark L. Clifford, Michael Shari & Linda Himelstein, ‘On the Inside, It’s Hell’: Despite Improvements, Nike Workers Face Tough Conditions, *BUS. WK.*, July 29, 1996, at 46. The *San Francisco Examiner* noted that Nike lobbied to keep the minimum wage below subsistence level in the countries where it manufactured goods. Stephanie Salter, Editorial, *Decent Wages for Nike Workers? Just Do It*, S.F. EXAMINER, Jun. 27, 1996, at A19, available at <http://sfgate.com/cgi-bin/article.cgi?f=/e/a/1996/06/27/EDITORIAL12782.dtl>. In another article the *San Francisco Chronicle* reported that rather than giving its workers free meals, a factory in Indonesia was deducting the cost of such meals from paychecks. Julia Angwin, *The Tired Soles Behind Nike Soles: Indonesian Worker Tells of Suffering*, S.F. CHRON., July 26, 1996, at B3.

18. *See Kasky*, 45 P.3d at 247.

19. *See id.* at 248–49.

20. *Id.* at 249.

21. *Id.* at 256.

22. *Id.*

23. *Id.*

“likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers.”²⁴ Under the third prong, speech must “consist[] of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.”²⁵ Although the United States Supreme Court had an opportunity to consider the constitutionality of the test, granting certiorari, it subsequently dismissed the writ as improvidently granted.²⁶

The California Supreme Court’s new “commercial speech” standard was, in effect, a decision about corporate speech. The test sweeps within its ambit almost any statements by any corporate speaker or entity involving any public controversy that touches upon the corporation’s practices and policies.²⁷ Moreover, by singling out statements likely to be reported by the media,²⁸ the court, in effect, ruled that the more public and more newsworthy the controversy, the more likely it would deem the speech about the controversy “commercial” and not entitled to full First Amendment protections. The third prong of the test does little to limit this breadth, for a plaintiff need merely allege that a corporation’s ultimate purpose is to promote sales—something that will almost always be partially the case.

III. CORPORATIONS AS SECOND-CLASS CITIZENS

The *Kasky* standard butts heads, then, with well-established Supreme Court precedent that corporations are entitled to free speech rights on political issues in which they have an economic interest.²⁹ More importantly, however, the result in *Kasky*—the degradation of nearly all corporate speech—and the calls for limiting corporate speech are ill-considered when examining the role of corporations. Historically, companies, as entities set up on behalf of shareholding individuals seeking to do business in a limited-liability format,

24. *Id.*

25. *Id.*

26. *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam).

27. In his dissenting opinion, Justice Brown noted that the majority’s commercial speech test “taken to its logical conclusion, renders all corporate speech commercial speech.” *Kasky*, 45 P.3d at 272 (Brown, J., dissenting).

28. *See id.* at 256 (majority opinion).

29. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77, 784–86 (1978). In addition, notwithstanding the *Kasky* court’s effort to expand the definition of commercial speech to encompass corporate speech, the category is very narrow and generally involves “speech which does ‘no more than propose a commercial transaction.’” *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)) (holding speech proposing a commercial transaction does receive some First Amendment protection).

have served the interests of government and people. Moreover, establishing a corporation, especially in the age of the Internet, is an easy task because the corporate form is accessible to virtually anyone. In addition, the *Kasky* theory neglects to consider the wide range of corporations that have little or no greed motive, such as charitable organizations, advocacy groups, schools, colleges, universities, museums, libraries, and theaters.

The roots of incorporation are not ignoble. The first corporations in Europe, for example, generally existed to help non-profit organizations build charitable and cultural institutions.³⁰ America was created by corporations, beginning with the first English joint-stock company, the Muscovy Company chartered in 1554, and then the settlements created by the Virginia Company, the Plymouth Company, the Massachusetts Bay Company,³¹ the Dorchester Company,³² and the Dutch East Indies Company (which created New York City),³³ to the Hudson's Bay Company³⁴ and the North West Company, which explored and developed the new continent.³⁵ In fact, the oldest corporation in the Western Hemisphere governs one of the country's most venerable educational institutions—Harvard University.³⁶ At the time of Harvard's incorporation in 1650,³⁷ corporations were merely a way for the government to form a separate entity to pursue a specific endeavor. Over time, incorporation also became the best way for groups of individuals seeking to achieve a specific goal to shield themselves from personal liability they might incur along the way; without the corporate form, many of these groups would not have survived. Furthermore, today virtually anyone can create a corporation with very little cost.³⁸

Thus, corporations are merely collections of individuals.³⁹ Corporations are

30. See *A Short History of Corporations*, NEW INTERNATIONALIST, July 2002.

31. See Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 111–20 (2004) (discussing the origins of the various companies which colonized and established trade in America).

32. GREAT ISSUES IN AMERICAN HISTORY: FROM SETTLEMENT TO REVOLUTION, 1584–1776, at 46 (Clarence L. Ver Steeg & Richard Hofstadter eds., 1969).

33. WILLIAM CULLEN BRYANT, A POPULAR HISTORY OF THE UNITED STATES 358 (1888).

34. Gevurtz, *supra* note 31, at 117.

35. See H. Robert Baker, Article, 17 LAW & HIST. REV. 209, 213–14 (1999).

36. “President and Fellows of Harvard College” is the actual name of the corporation chartered by the Massachusetts Bay Colony, Harvard University, *The Harvard Guide: The Early History of Harvard University*, <http://www.hno.harvard.edu/guide/intro/index.html> (last visited June 17, 2007), which was itself interestingly also a corporation chartered by King Charles I that transformed itself into a colony and later a state.

37. *Id.*

38. In Washington State, for example, the filing fee for limited liability companies, limited partnerships, limited liability partnerships, and for-profit corporations is \$175; for non-profit organizations that figure drops to \$30. WASH. SEC’Y OF STATE, REGISTRATION FEE SCHEDULE (2007), available at http://www.secstate.wa.gov/corps/registration_fee_schedule.aspx.

39. Of course, the inherent nature of a business enterprise, as a collective entity, may preclude equating corporations completely with individuals in evaluating the rights and powers they can claim or exercise. Many privacy protections, for example, are not extended to corporations. See *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 100, 1104 (9th Cir. 2006) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)).

not robots. Corporations themselves do not “speak”; they do not “say” anything. That is, the adage “guns don’t kill people, people kill people” is analogous: corporations do not talk, people—who also happen to be company agents and employees—talk. Under the California system, these speakers would also be denied their rights simply because their viewpoints coincide with or are being promoted by their employers, or because they happen to have access to a corporate soap box.⁴⁰

An examination of the wide variety of groups that are incorporated in the United States today underscores the benefits of the corporate form. Colleges and universities are merely one example. Consider the innumerable non-profit charities in existence: the YMCA, the United Way, and the Salvation Army. Numerous cultural organizations also exist: the Smithsonian Institution, the Metropolitan Museum of Art, the Nature Conservancy, the New York Public Library, the Art Institute of Chicago, the Wildlife Conservation Society, and National Public Radio. Corporate organizations in the medical field include the Mayo Foundation, Planned Parenthood Federation of America, the American Heart Association, the Cystic Fibrosis Foundation, and the American Lung Association. Other groups seek to serve youth: the Boy Scouts of America, Big Brothers Big Sisters of America, the United Negro College Fund, and the Make-A-Wish Foundation of America. Finally, consider also the many groups seeking to uphold civil rights themselves: the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Lawyers’ Committee for Civil Rights Under the Law, and People for the American Way.

Most of these groups thrive on their ability to deliver particular messages to a large group of people. Moreover, in doing so, they are obviously engaging in corporate speech and likely meet the *Kasky* test for commercial speech. As corporate entities, they are “engaged in commerce.” They likely also sell goods and services that their audience may wish to buy. Finally, they engage in speech that, while intended to educate and inform generally, also by its very nature promotes their goals, and thus these products. Elimination of First Amendment rights in these corporate settings makes no sense, for stifling the speech of these types of groups would hinder progress in areas like the arts, medicine, charities, and even civil rights.⁴¹

Even more paradoxically, the rule advanced by these activists (and adopted, in part, in *Kasky*) would apply to the American media, eliminating the likes of the New York Times Company and the Washington Post Company from the full protections of free speech simply because of the accident of their incorporations.

40. For a competing view, see C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 (2004) (arguing against affording free speech protections to corporate speech because “when claims are made on behalf of commercial entities, the conflict involves people’s creations claiming rights over their creators”).

41. In addition to the non-profit groups listed above, Reclaimdemocracy.org, the proponent of the constitutional amendment set out above and a chief supporter of *Kasky* as author of an amicus brief, is also a non-profit organization. The rules it seeks thus limit not only the rights of these charitable, cultural, and medical organizations, but also its own rights.

This disregards Supreme Court precedent, which makes clear that the First Amendment grants the media full speech rights, even though in the United States most of the media are commercial.⁴²

Yet, this strange logic, which denies a media entity the usual First Amendment protections merely because of its status as a commercial entity with commercial activities, has already been embraced by at least one court. In *Doe v. TCI Cablevision*,⁴³ the Missouri Supreme Court issued an en banc decision finding that the First Amendment did not protect the rights of a comic book company to create a character based on former National Hockey League player Anthony Twist.⁴⁴ In finding that Twist had presented a cognizable right-of-publicity claim, the court found the speech to be predominantly commercial in nature, relying on the comic book company's stipulation that the use was neither a parody nor a fictionalized account of the real Twist⁴⁵ (the fictional character was part of the Mob)⁴⁶:

[T]he metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value. On the record here, the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.⁴⁷

A jury subsequently awarded Twist \$15 million in damages.⁴⁸

The *TCI Cablevision* case, which is flatly at odds with another comic book

42. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.") (citing *Smith v. California*, 361 U.S. 147, 150 (1959)). In addition, denying a corporate media entity the right to enter into the traditional commercial transactions that allow it to stay in business itself violates the First Amendment. See *Pitt News v. Pappert*, 379 F.3d 96, 101 (3rd Cir. 2004).

Indeed, one may ask how the American press could develop and grow to be strong enough to resist and oppose government power if only the unemployed are allowed full freedom of expression. As access to the public and private financial markets is denied, everyone owning the enterprise must face unlimited personal liability, and the government is in charge of ensuring that speakers are denied the protections of shareholders.

43. 110 S.W.3d 363 (Mo. 2003) (en banc), cert. denied, *McFarlane v. Twist*, 540 U.S. 1106 (2004).

44. See *id.* at 374.

45. *Id.*

46. *Id.* at 367.

47. *Id.* at 374.

48. *Doe v. McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006).

case from California,⁴⁹ may well end up in the United States Supreme Court. The right of artists to create work has long been protected by the law. For example, in a recent case involving a piece of art depicting Tiger Woods (exploited commercially by the artist, who sold copies to the public), the Sixth Circuit stated that “[t]he fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment.”⁵⁰ More importantly, comic book companies, like other members of the media, should be fully protected by the clear language of the First Amendment.⁵¹ The press lies at the heart of speech protections, as evidenced by a long line of Supreme Court cases and the clear intent of the Constitution’s framers.⁵² Moreover, limiting the rights of the press to unemployed individuals, and not protecting the institutional media and their employees, simply does not make sense. Surely the First Amendment does not offer more protection to an unsuccessful corset-maker-turned-pamphleteer (Thomas Paine, the author of *Common Sense* in 1776),⁵³ than it does James Risen, the *New York Times* reporter who investigated and disclosed the secret scheme by President George W. Bush and his officials to violate Americans’ rights under the United States Constitution and defy the express requirements of a 1978 federal statute, merely because he was writing as an employee of a corporation.⁵⁴

Perhaps an anti-corporate activist would exempt the media from a ban on corporate speech. Other scholars have advocated special treatment for the press,⁵⁵ and the Supreme Court itself has acknowledged the possibility.⁵⁶ Since 1974, in the wake of President Richard Nixon’s resignation following the

49. See *Winter v. DC Comics*, 69 P.3d 473, 479–80 (Cal. 2003) (holding that comic books are “entitled to First Amendment protection”).

50. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (citing *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988)).

51. In the late 1950s and early 1960s, a series of cases overturned state laws regulating the sale of comics. See, e.g., *Katzev v. County of L.A.*, 341 P.2d 310, 317–18 (Cal. 1959); *Police Comm’r v. Siegel Enters., Inc.*, 162 A.2d 727, 729–30, 734–35 (Md. 1960); *Adams v. Hinkle*, 322 P.2d 844, 850, 852 (Wash. 1958).

52. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (noting that the First Amendment’s guarantees of free speech and of free press “share the common core purpose of assuring freedom of communication”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (“Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”).

53. See DAVID FREEMAN HAWKE, *PAINE* 11, 16–17, 44 (1st ed. 1974).

54. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also *Amer. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006) (discussing the interception, without a warrant, of international communications that President Bush authorized in a secret order).

55. See Baker, *supra* note 40, at 1171.

56. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) (“The Act’s definition of ‘expenditure,’ § 169.206, conceivably could be interpreted to encompass election-related news stories and editorials. The Act’s restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.”).

Watergate scandals, when Justice Potter Stewart suggested in a famous speech at Yale Law School that the Press Clause had independent viability in addition to the Speech Clause,⁵⁷ the United States Supreme Court has retreated from recognition of any independent press rights.⁵⁸ Nonetheless, the task of defining the media is an ever-growing nightmare as evidenced by the numerous struggles across the nation in drafting a reporter's privilege law⁵⁹; a chief concern in these negotiations has been the difficulty in deciding who is a member of the news media, and as a result, what constitutes news.⁶⁰ In *Branzburg v. Hayes*,⁶¹ the Court acknowledged this difficulty.⁶² Justice White, writing for the Court, declined to find a constitutional privilege for a reporter to keep his sources confidential before a federal grand jury proceeding:

Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.⁶³

Although some scholars have argued this to be merely a “red herring” in the debate over corporate speech rights,⁶⁴ this fear is real, as evidenced by a recent episode in campaign finance law. The McCain-Feingold Campaign Finance Reform Act⁶⁵ prohibits interest groups from using soft money to air television and radio advertisements less than a month before a primary or two months before a general election.⁶⁶ But it also contains an exemption for “a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are

57. See Potter Stewart, Assoc. Justice of the United States Supreme Court, Address at the Yale Law School Sesquicentennial Convocation: Or of the Press (Nov. 2, 1974), in 26 HASTINGS L.J. 631, 633–34 (1975).

58. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (“[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”).

59. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 518 (2007).

60. See *id.* at 518–19; see also *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99–105 (2006) (discussing the numerous problems the Internet creates in interpreting the scope and applicability of a reporter's privilege law).

61. 408 U.S. 665 (1972).

62. See *id.* at 703–05.

63. *Id.* at 704.

64. Baker, *supra* note 40, at 1170 n.42.

65. Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Campaign Finance Reform Act), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 2 U.S.C. § 431).

66. 2 U.S.C. § 434(f)(3)(A) (Supp. 2005); see James Dao, *Gun Group's Radio Show Tests Limits on Advocacy: N.R.A. Says It Is Joining the News Media*, N.Y. TIMES, June 16, 2004, at A14.

owned or controlled by any political party, political committee, or candidate.”⁶⁷ The National Rifle Association, in an effort to meet the media exemption, began broadcasting a daily radio program “to provide news and pro-gun commentary” on satellite radio.⁶⁸ As the group’s executive vice president noted, “[t]here is no government licensing of journalists. Tom Paine was free to pamphlet. So are we.”⁶⁹

IV. THE WEALTH FACTOR AND OTHER COUNTERARGUMENTS

Perhaps these anti-corporate activists instead would seek to exempt non-profit organizations from any corporate speech ban. After all, neither charities nor advocacy groups are filling the coffers of wealthy causes; instead, according to ReclaimDemocracy.org, the Wal-Marts of the world fit this category.⁷⁰ On this note, the group is not alone, falling in line with a host of scholars who favor tighter regulation of corporate speech as a form of redistributive justice. For example, Yale Law School professor Owen Fiss argues that “gross inequalities of social and economic power lurk behind the seemingly neutral façade of traditional [First Amendment] doctrine.”⁷¹ Under this approach, by placing the thumb of government on the scales of justice to limit free speech by companies and commercial interests, liberals can advance the views of their supporters at the expense of more powerful, and presumably better-funded, business groups. Similarly, scholar Cass Sunstein has proposed that the government intervene to restrict mere marketplace freedom of speech and instead promote democratic values and “considered debate” among its citizens.⁷²

This type of argument improperly focuses on the identity—as opposed to the purpose—of the speaker. As the court noted in *First National Bank of Boston v. Bellotti*, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual,”⁷³ but rather “affording the public access to discussion, debate, and the dissemination of information and ideas.”⁷⁴

But, as John F. Kennedy once said, “Life is unfair.”⁷⁵ Even if we disregard the fact that not all of us are eloquent or articulate or have an interesting point to

67. 2 U.S.C. 434(f)(3)(B)(I) (Supp. 2005); accord 2 U.S.C. 431(9)(B)(I) (2000) (excluding media outlets from the definition of “expenditure”).

68. Dao, *supra* note 66.

69. *Id.*

70. ReclaimDemocracy.org, Articles, Studies, and Research on Walmart, <http://reclaimdemocracy.org/walmart/> (last visited June 17, 2007) (“Wal-mart is perhaps the most visible symptom of the disease—runaway corporate power—that [ReclaimDemocracy.org] work[s] to cure . . .”).

71. Owen Fiss, *Speech and Power: Is First Amendment Absolutism Obsolete?* (pt. 3), THE NATION, July 21, 1997, at 11, 14.

72. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 73 (2d ed. 1995).

73. 435 U.S. 765, 777 (1978).

74. *Id.* at 783.

75. President’s News Conf. of Mar. 21, 1962, 107 PUB. PAPERS 254, 259.

make, the ability to obtain access to the media and the public is a skill or piece of luck that is not distributed equally among all citizens.⁷⁶ Thus, the same distortion argument could be made about celebrities, who routinely set the tone of national debate on important political issues. In 2005, for example, *Time Magazine* named Bono, lead singer of the band U2, one of its Persons of the Year, alongside Bill and Melinda Gates, for his fight against HIV and poverty in Africa.⁷⁷ As another example, consider Michael J. Fox, whose highly-publicized struggle with Parkinson's Disease led him to endorse a Senate candidate supporting embryonic stem cell research in a controversial campaign advertisement.⁷⁸

Furthermore, for-profit corporations can and often do take stances on matters of public import.⁷⁹ For example, a book recently chronicled the journey of twelve black executives who were among the first hired by a major American business—Pepsi.⁸⁰ CEO Walter S. Mack hired them to attract black consumers.⁸¹ As part of this campaign, Pepsi ran advertisements in black publications profiling black Americans; Mack's new team became "community role models," and their efforts earned Pepsi "a reputation as the 'liberal' soft drink."⁸² Although Nike did not participate on the "liberal" side of a public debate, it did

76. The Supreme Court has recognized that some speakers will necessarily have more access to the marketplace because they own the means of communication. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250 (1974). The rise of the Internet has largely remedied these inequities—whether a big or small company, an individual blogger, or the mainstream media—everyone has access to the Internet, and everyone is accessible through a Google search.

77. Nancy Gibbs, *Persons of the Year*, TIME, Dec. 26, 2005/Jan. 2, 2006, at 44–45. Similarly, the Supreme Court has essentially recognized that the wealthy have a First Amendment right to expend more for freedom of speech than others. See *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) ("The ceiling on personal expenditures by candidates on their own behalf. . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." (citation and footnote omitted)); MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 36 (2001) ("A candidate for political office, for example, obviously lacks objectivity of expression; anything the candidate says will, in at least some sense, be uttered with the purpose of furthering her chances of electoral success. Yet her speech—quite correctly—is afforded full First Amendment protection."). Redish goes on to note: "[T]he court rejected equality as applied to individuals as a rationale for a limitation on expressive expenditures in *Buckley v. Valeo* and has shown no inclination to shift from that position." *Id.* at 105.

78. See Matthew Mosk, *Michael J. Fox Records TV Ad for Cardin: Actor Questions Steele's Stance on Funding for Stem Cell Research*, WASH. POST, Oct. 24, 2006, at B1.

79. As Redish makes clear, "it is often impossible to distinguish speech concerning commercial products and services from speech concerning matters of public importance, for the simple reason that the two subjects of expression are in no sense mutually exclusive." REDISH, *supra* note 77, at 19.

80. *Nonfiction Reviews*, PUBLISHERS WKLY., Dec. 4, 2006 (reviewing STEPHANIE CAPPARELL, THE REAL PEPSI CHALLENGE: THE INSPIRATIONAL STORY OF BREAKING THE COLOR BARRIER IN AMERICAN BUSINESS (2007)).

81. *Id.*

82. *Id.*

participate in a debate of public import.⁸³ And Justice Breyer, in dissenting from the Supreme Court's decision to dismiss the writ of certiorari in *Nike, Inc. v. Kasky*, made clear that he would have relied largely upon principles of public speech in deciding the case.⁸⁴ Moreover, limiting the ability of corporations to speak out limits the media's ability to accurately cover the issues.⁸⁵ This is important, for "the press not only is effective in ventilating corporate speech and in unmasking misleading claims regarding issues of public concern, but it also is a constitutionally preferred means of doing so."⁸⁶

By ignoring these suggestions, arguments about the distortion of debate also overlook yet another possibility: corporate speech in fact balances the debate, and its elimination would allow others to manipulate it.⁸⁷ "Corporate speech, precisely because of both its power to disseminate widely its message and its obvious underlying motivating force of economic self-interest, can serve as an effective check on governmental excess."⁸⁸ Moreover, corporations have the resources to gather information and come to conclusions independently.⁸⁹ Corporate speech is particularly effective and important when the media merely describes political events, or aligns itself with the government.⁹⁰ To curtail corporate speech rights thus unfairly handicaps the debate; as Justice Chin noted in *Kasky*, "[w]hen Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy."⁹¹ Even if a corporation could speak out on a particular issue, it may, in fear of retribution, choose not to. For example, after *Kasky*, "Nike chose not to release its fiscal year 2002 corporate responsibility report" and decided to limit its participation in the California public.⁹²

Even if, *arguendo*, focusing on the identity of the speaker were appropriate,

83. See *supra* notes 11–17 and accompanying text. Judge Chin in the Southern District of New York recently recognized the importance of corporate speech, particularly if it relates to scientific debate, an area traditionally afforded full First Amendment protection—like political speech. See *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006) ("‘The First Amendment protects public debate on matters of public [concern], including scientific matters.’ Courts cannot inquire into the validity of scientific works, for ‘[a]ny unnecessary intervention by the courts in the complex debate and interplay among the scientists that comprises modern science can only distort and confuse.’” (quoting *McMillian v. Togus Reg’l Office, Dep’t of Veteran Affairs*, 294 F. Supp. 2d 305, 316, 317 (E.D.N.Y. 2003))).

84. *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting).

85. Bruce E. H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243, 1253 (2004).

86. *Id.*

87. See Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1206 (2004).

88. Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 262 (1998); see also REDISH, *supra* note 77, at 65 (“[C]orporate speech may serve a vital role in checking potential government excesses.”).

89. *Id.*

90. *Id.* at 263.

91. *Kasky v. Nike, Inc.*, 45 P.3d 243, 263 (Cal. 2002) (Chin, J., dissenting).

92. See La Fetra, *supra* note 87, at 1215.

this does not render the debate moot. Martin Redish and Howard Wasserman argue that “corporate use of economic power will inevitably have a social and political impact beyond the narrow interests of the corporation itself.”⁹³ Moreover, these authors assert that corporate interests do not always prevail over the interests of individuals, citing for this proposition the creation of the New Deal, “the ‘Great Society’ programs in the 1960s, the heavy federal regulation of the tobacco and drug industries, and the modern congressional failure to enact federal tort reform legislation that would substantially benefit corporate defendants.”⁹⁴ Finally, Redish and Wasserman reason that “[b]ecause of their expertise, resources, and incentives, corporations are uniquely suited to provide the electorate with information that will make it more informed as to many of the socio-economic issues facing the nation.”⁹⁵

In addition, arguments about the distortion of debate mischaracterize, to some degree, the nature of corporations themselves. Corporations are associations of individuals, and these individuals all have full First Amendment rights. The mere fact that these individuals have chosen to pool their resources to create an entity that shields them from personal liability should not remove this protection.⁹⁶ Their choice to speak through the corporate entity should be seen not as a drive to influence the debate improperly, but rather to provide a unified voice that represents the views of a large number of individuals, much like the activities of political associations.⁹⁷

At their base, most arguments that seek to limit corporate speech rights are founded, impermissibly, on the content of corporate speech and the self-interested motivation of corporate speakers.⁹⁸ These arguments assume corporations have nothing to offer the debate. This logic is flawed. Most speakers, if not all, are self-interested in some way; that a corporation is economically self-interested should come as no surprise.⁹⁹ In fact, individuals are capable of acknowledging this fact and interpreting information accordingly;¹⁰⁰ so are the media, as evidenced by the tempering of Nike’s

93. Redish & Wasserman, *supra* note 88, at 247.

94. *Id.* at 247–48.

95. *Id.* at 248; *accord* La Fetra, *supra* note 87, at 1222 (arguing that not providing corporate speech full First Amendment protections damages the democratic process).

96. *See* Redish & Wasserman, *supra* note 88, at 254–55.

97. *See id.* at 254.

98. *See, e.g.,* Baker, *supra* note 40, at 1175–76 (arguing against corporate free speech rights because the competitive market and enterprise survival are the primary motivation and goal of corporate speakers).

99. Redish & Wasserman, *supra* note 88, at 269–70. As Redish more fully explains in *Money Talks*, “it is likely that most contributions to public debate today are motivated by the desire to further one personal interest or another. This fact hardly leads to a reduction in their First Amendment protection. It is unclear, then, why the very same factor should reduce the protection given to commercial advertising.” REDISH, *supra* note 77, at 36. “[T]here is nothing necessarily immoral or illegitimate in using expression to further one’s personal interests. Any theory of free expression that selectively reduces protection of self-interested expression is inconsistent with the historical and philosophical traditions of democracy” *Id.* at 91.

100. *Id.* at 269.

assertions in news coverage.¹⁰¹ Between their own faculties and media reports, Nike customers would have known that the company's responses to Kasky's allegations were self-motivated—not only economically, but politically and legally as well.¹⁰² Arguments based on a corporation's greed also ignore the full protection granted by the First Amendment to other speech that many people properly consider undesirable in its purposes and goals—speech motivated by hate, religious irrationality, party loyalty, ideological rigidity, or by many of the “isms” that have dominated the last two centuries of public debate.

V. CONCLUSION

In their ground-breaking article on commercial speech, Ninth Circuit Court of Appeals Judge Alex Kozinski and his former clerk Stuart Banner¹⁰³ wrote that “[t]he commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech.”¹⁰⁴

The recent attack on corporate speech merely confirms Kozinski and Banner's warning regarding the dangers from the left. Before the California Supreme Court decided *Kasky v. Nike, Inc.*, anti-globalization activists had opposed the speech rights—and more generally, constitutional rights—of corporations. These activists argued that companies were essentially robots, without feelings or thoughts, and were not entitled to the benefits of legal personhood. The court's decision in *Kasky* only furthered this notion, for in essence, though it purported to create a new commercial speech standard, in reality it relegated corporate free speech rights to second-class status. This approach may satisfy and inspire some of those commentators and scholars who suggest that corporate wealth corrupts public debate, but it ignores many facets of the debate over corporate speech rights and the value of corporations in a market-oriented society.

Corporations, however, are not merely profit-maximizing entities—they are our colleges, schools, churches, theaters, newspapers, charities, research institutes, and advocacy groups. Moreover, whether for-profit or not-for-profit, they have the resources to, and often do, take important and valuable stands on issues of public import. To silence them based merely on the fact that they are incorporated would eliminate or deter the very speech at the heart of the First Amendment.

101. See *supra* note 17 and accompanying text.

102. See La Fetra, *supra* note 87, at 1223.

103. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990).

104. *Id.* at 652.

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