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CONTINENTAL DRIFT: CONTEXTUALIZING *CITIZENS UNITED* BY COMPARING THE DIVERGENT BRITISH AND AMERICAN APPROACHES TO POLITICAL ADVERTISING

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Abstract: There is perhaps no more vital an issue to a healthy democracy than its attitude towards political speech. Because political speech—and particularly political advertising—has a profound influence on the outcomes of elections, most vibrant democracies recognize the need to avoid arbitrary distinctions among political advertisers that might sway elections for reasons other than the popularity of the candidates. The First Amendment avoids arbitrary distinctions by ensuring a free and open marketplace of ideas in the political speech realm, with almost no restrictions on political advertising. The United Kingdom, by contrast, addresses the problem by way of an outright ban on political advertising. This Note explores the recent, and controversial, *Citizens United* decision in the context of avoiding such groundless distinctions. In particular, this Note compares the American approach to the British approach, and argues that *Citizens United* is a correct reaction, within American constitutional law and case law, to the problem of arbitrary distinctions in the political advertising realm.

INTRODUCTION

In a democratic society, there is perhaps no more fundamental an issue than choosing how to protect political speech—and why.¹ The Founders of the United States enshrined the right to free speech at the very top of the Bill of Rights.² Indeed, the protection of speech en-
sconced in the First Amendment was one of the reasons for the separa-

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¹ Cf. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (discussing the “profound” commitment of the United States to freedom of political speech).

² See U.S. CONST. amend. I.

tion of the Colonies from the United Kingdom.³ So it is not surprising that, over the last 200 years, American and British conceptions of protected speech have evolved along very different lines.⁴

With the U.S. Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, the ocean that separates the United States' and the United Kingdom's respective laws has grown wider still.⁵ In fact, the United States and the United Kingdom are moving in separate directions.⁶ Whereas in *Citizens United*, the Supreme Court removed a longstanding ban on corporate expenditures on political advertising, the House of Lords, together with Parliament, has recently circled the wagons against European Union challenges to the United Kingdom's robust restrictions on political advertising—both by individuals and corporations.⁷

Yet these policies—which differ with respect to political advertising in particular, and independent expenditures in general—are actually reactions to the same basic problems: How can society draw the line in determining which speech to protect, and by whom?⁸ And who is to make such decisions?⁹ The *Citizens United* Court rejected the distinction between corporations and individuals in the political advertising context, thus widening the scope of protected speech, whereas the categorical ban in the United Kingdom has always applied equally to both.¹⁰

Part I of this Note sets forth the laws of the United States and the United Kingdom as they relate to corporate political advertising. Part II discusses the policies and assumptions that undergird and explain current law in the United States and the United Kingdom. Finally, Part III

³ See *Talley v. California*, 362 U.S. 60, 64–65 (1960) (discussing British impingements on colonial free speech and their deleterious effects on colonial citizens).

⁴ Compare *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 917 (2010) (striking down a ban on corporate political advertising), with Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law*, 2 ELECTION L.J. 499, 522 (2003) (“The spending limits in British electoral law are more wide ranging and comprehensive than in almost any comparable democracy.”).

⁵ Compare *Citizens United*, 130 S. Ct. at 917 (striking down a ban on corporate political advertising), with *R (on the application of Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport*, [2008] 1 A.C. 1312 (H.L.)1349 (appeal taken from Eng.) (U.K.) (upholding a categorical ban on all political advertising, no matter the source).

⁶ Compare *Citizens United*, 130 S. Ct. at 917, with *Animal Defenders*, [2008] 1 A.C. at 1349.

⁷ Compare *Citizens United*, 130 S. Ct. at 917, with *Animal Defenders*, [2008] 1 A.C. at 1349.

⁸ Cf. 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, 260 (1998) (discussing the process of creating distinctions among speakers in the political speech domain).

⁹ See *id.*

¹⁰ Compare Communications Act, 2003, c. 21, § 321(2) (Eng.), with *Citizens United*, 130 S. Ct. at 917.

argues that *Citizens United* is consistent with First Amendment jurisprudence in the United States, and that any attempt to reverse the result of *Citizens United* would require a fundamental reordering of the American electoral process and free speech jurisprudence.

I. BACKGROUND

Restrictions on corporate political advertising have followed very different paths in the United States and the United Kingdom.¹¹ In Britain, heavy restrictions on political advertising—both corporate and otherwise—have been in place in some form for over 100 years.¹² In the United States, restrictions on independent political expenditures are a more recent phenomenon.¹³

As discussed *infra*, the United States has pulled back from its restrictions on political advertising by removing the legal distinction between corporations and individuals in the political advertising sphere; in contrast, the British government has bristled at the European Court of Human Rights' (ECHR) insistence that the British scheme banning all political advertising runs afoul of Article 10 of the European Convention on Human Rights (the Convention) by imposing an unnecessary restriction on political speech.¹⁴

A. *The History and Development of U.S. Law on Corporate Political Advertising*

1. Statutory History

Although political tension has accompanied the corporate form ever since corporations were created by individual acts of state legislatures, the issue of corporate involvement in politics reached fever pitch in the 1904 presidential contest between Theodore Roosevelt and Al-

¹¹ Compare *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 917 (2010), with *R* (on the application of *Animal Defenders Int'l*) v. *Sec'y of State for Culture, Media & Sport*, [2008] 1 A.C. 1312 (H.L.) (appeal taken from Eng.) (U.K.). Because spending on political advertising is a subset of the broader class of "independent expenditures," for the purposes of this Note, a restriction on independent expenditures will be considered to be a de facto restriction on political advertising as well.

¹² See *Ewing*, *supra* note 4, at 501.

¹³ See *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting) (stating that the ban on corporate independent expenditures was passed in 1947); *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 511 (2007) (Souter, J., dissenting).

¹⁴ Compare *Citizens United*, 130 S. Ct. at 917, with *Animal Defenders*, [2008] 1 A.C. at 1349.

ton B. Parker.¹⁵ Parker noisily drew attention to Roosevelt's acceptance of large amounts of corporate donations.¹⁶ Although Roosevelt prevailed, he was shamed into calling for a ban on corporate contributions the following year.¹⁷ Congress responded by passing the Tillman Act in 1907, which placed special limitations on corporations' campaign spending, including a ban on corporate contributions to federal candidates.¹⁸

The Senate Report that accompanied passage of the Tillman Act was hardly loquacious in justifying the codification in law of a distinction between individuals and corporations:

[T]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.¹⁹

This justification was evidently sufficient to convince thirty-six states to pass similar laws by 1928.²⁰

In 1947, Congress passed the Taft-Hartley Act, thereby extending the prohibition on corporate spending to cover not only direct contributions, but also the use of general treasury funds for independent expenditures, defined as non-contribution spending to influence an election.²¹ A similar provision restricting individuals from making political expenditures of \$1,000 or more was struck down by the Supreme Court, thus creating a de facto distinction in law between independent expenditures made by corporations and those made by individuals.²²

As of the hearing of *Citizens United*, 2 U.S.C. § 441b contained the restriction on a corporation's use of general treasury funds to make independent expenditures that expressly advocate for the election or de-

¹⁵ See Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1247 (1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tillman Act of 1907, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2000)); *Citizens United*, 130 S. Ct. at 952; Winkler, *supra* note 15, at 1247.

¹⁹ *Citizens United*, 130 S. Ct. at 952-53 (Stevens, J., dissenting) (quoting S. Rep. No. 59-3056, at 2 (1906)) (second brackets in original).

²⁰ Winkler, *supra* note 15, at 1247.

²¹ *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting); *Wis. Right to Life*, 551 U.S. at 511 (Souter, J., dissenting).

²² *Buckley v. Valeo*, 424 U.S. 1, 39, 45 (1976).

feat of a particular candidate, or that function as “electioneering communications.”²³ The statute defines “electioneering communications” as communications that: (1) refer to a “clearly identified candidate for Federal office”; (2) are made within thirty days of a primary or sixty days of a general election; and (3) are targeted to the “relevant electorate.”²⁴

2. Case Law

Perhaps the best starting point for a discussion on corporate political advertising is the foundational case that established the proposition that corporations should be treated as people under the law.²⁵ In *Santa Clara County v. Southern Pacific Railroad Co.*, the Supreme Court held that corporations are persons within the meaning of the Fourteenth Amendment.²⁶ Thus, since *Santa Clara* the onus has been on those arguing that corporations *should* be distinguished from individuals to prove that they are in fact different under the law.²⁷

The ban on independent political expenditures was challenged in the Supreme Court in *Buckley v. Valeo*.²⁸ In *Buckley*, the Court found that a ban on independent political expenditures of over \$1,000 was an unconstitutional restriction on free speech under the First Amendment—at least insofar as it applied to individuals.²⁹ The Court did not pass explicitly on the question of the constitutionality of sustaining the ban with respect to corporations; the Court did, however, point out that the First Amendment protects political association as well as political expression.³⁰

Two years later, in *First National Bank of Boston v. Bellotti*, the Supreme Court considered a Massachusetts law prohibiting corporations from making contributions or expenditures intended to influence or affect the vote on any issue submitted to voters, other than one affecting any of the property, business, or assets of the corporation in a material fashion.³¹ The Court held that the law was unconstitutional under the First Amendment, because it restricted expression that the First

²³ Federal Election Campaign Act, 2 U.S.C. § 441b (2000); *Citizens United*, 130 S. Ct. at 887.

²⁴ Federal Election Campaign Act, 2 U.S.C. § 434(f) (3) (2000).

²⁵ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978); *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

²⁶ See *Bellotti*, 435 U.S. at 780; *Santa Clara*, 118 U.S. at 396.

²⁷ See *Bellotti*, 435 U.S. at 780.

²⁸ See generally *Buckley*, 424 U.S. at 39, 45.

²⁹ See *id.*

³⁰ See *id.* at 15.

³¹ *Bellotti*, 435 U.S. at 767–78.

Amendment is designed to protect.³² Significantly, the Court wrote that the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”³³ Still, the *Bellotti* case dealt with the issue of restrictions on corporate expenditures during a referendum, not an election.³⁴ This fact, together with the Court’s careful limitation of its holding, left unresolved the question of whether a distinction could be made between corporations and individuals in an electoral setting.³⁵

That question was taken up twelve years later in *Austin v. Michigan Chamber of Commerce*.³⁶ In *Austin*, the Court evaluated a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office.³⁷ The Court found that the statute was constitutional, because it was narrowly tailored to serve the compelling state interest of preventing corruption and distortion of the political process.³⁸ In so holding, the Court blessed the legal distinction between corporations and individuals in the political expenditure (and by extension political advertising) sphere.³⁹

Austin was at the front of the Court’s mind when *Citizens United* reached the Court’s docket at the end of 2009.⁴⁰ At issue was § 441b, discussed above, and whether its prohibition of corporate political advertising expenditures violates the First Amendment.⁴¹

In January of 2008, Citizens United, a nonprofit corporation, released a film entitled *Hillary: The Movie (Hillary)*.⁴² *Hillary* was a ninety-minute documentary meant to expose the shortcomings of Senator Hillary Clinton, a candidate for President.⁴³ Citizens United wanted to distribute *Hillary* via video on demand, a technology that allows cable sub-

³² *Id.* at 776.

³³ *Id.* at 777.

³⁴ *See id.* at 767–78.

³⁵ *See Citizens United*, 130 S. Ct. at 958 (Stevens, J., dissenting); *Bellotti*, 435 U.S. at 787–88.

³⁶ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990), *overruled by* 130 S. Ct. 876 (2010).

³⁷ *Id.*

³⁸ *Id.* at 655.

³⁹ *See id.* (implying that corporations and individuals could be treated differently under political speech law because corporate independent expenditures could be suppressed, whereas individuals’ independent expenditures were allowed).

⁴⁰ *See Citizens United*, 130 S. Ct. at 886.

⁴¹ *See id.*

⁴² *Id.* at 887.

⁴³ *Id.*

scribers to download video programs to their home televisions.⁴⁴ In order to avoid the civil and criminal sanctions of § 441b, Citizens United sought declaratory and injunctive relief against the Federal Election Commission (FEC).⁴⁵

After a lengthy discussion regarding the tenability of a distinction between corporations and individuals in the political speech domain, the Court struck down § 441b as an unconstitutional restriction on protected speech.⁴⁶ Consequently, any law restricting corporate—but not individual—spending for political advertising was rendered unconstitutional.⁴⁷

B. *The History and Development of British Law on Independent Political Expenditures*

I. Statutory History

The United Kingdom has placed some manner of restrictions on independent political expenditures since 1883.⁴⁸ In 1983, Parliament passed the Representation of the People Act, which contains a provision providing that only candidates and their agents may incur expenses of the kind set forth in the Act “with a view to promoting or procuring the election of a candidate.”⁴⁹ Expenses set forth in the Act include those associated with public meetings, ads, publications, or otherwise presenting views to the electorate—but with an exception for newspaper editorials.⁵⁰ The Act carved out one additional exception: individuals could make independent political expenditures of fifty pence.⁵¹ This amount was subsequently raised to five pounds, and has recently been elevated to 500 pounds.⁵²

⁴⁴ *Id.*

⁴⁵ *Id.* at 888.

⁴⁶ See *Citizens United*, 130 S. Ct. at 917. The Justices’ various opinions in *Citizens United* stretched to over 100 pages and included prolix and nuanced arguments, counter-arguments, and historical analysis. See generally *id.* at 876–982. Some of the most salient arguments for a ban on political advertising will be detailed below; it is unnecessary for the purposes of this Note to go into any more detail here.

⁴⁷ See *id.*

⁴⁸ Ewing, *supra* note 4, at 501.

⁴⁹ Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, *supra* note 4, at 503.

⁵⁰ Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, *supra* note 4, at 503.

⁵¹ Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, *supra* note 4, at 503.

⁵² Representation of the People Act, 1983, c. 2, § 75 (Eng.) (displaying the new 500 pound limit); Colin Feasby, *Issue Advocacy and Third Parties in the United Kingdom and Canada*, 48 MCGILL L.J. 11, 28 (2003).

Nevertheless, because of the Communications Act 2003, none of these 500 pounds may be spent on television or radio advertisements.⁵³ The Act provides that no licensed broadcast stations may air an advertisement produced by a group “whose objects are wholly or mainly of a political nature,” or any advertisement that is “directed towards any political end.”⁵⁴ The Act sets forth a broad definition of “political ends,” including statements that would influence an election, changes in law or policy, or public opinion—whether in the United Kingdom or elsewhere.⁵⁵ Thus the prohibition discriminates based on both the content of speech and the identity of the proponent speaker.⁵⁶

2. Case Law

Unlike in the United States, recent challenges to the United Kingdom’s regulatory structure governing political advertising have come from outside the country.⁵⁷ The first such challenge was *Bowman v. United Kingdom*, a case calling into question the United Kingdom’s scheme on independent expenditures.⁵⁸ Mrs. Bowman, a British woman heading a pro-life group, spent in excess of five pounds (the statutory maximum at the time) in order to distribute a leaflet that detailed various parliamentary representatives’ voting histories on abortion issues.⁵⁹ Mrs. Bowman was prosecuted under the United Kingdom’s criminal statutes, but she escaped conviction based on a procedural technicality.⁶⁰ Nevertheless, she took her challenge of the United Kingdom’s ban to the ECHR.⁶¹

⁵³ See Communications Act, 2003, c. 21, § 321(2) (Eng.) (stating that advertisements that are political in nature contravene the prohibition set up by the Act).

⁵⁴ *Id.*

⁵⁵ See *id.*; *Animal Defenders*, [2008] 1 A.C. at 1337–38.

⁵⁶ See Communications Act, 2003, c. 21, § 321(2) (Eng.); *Animal Defenders*, [2008] 1 A.C. at 1337–38.

⁵⁷ See, e.g., *Bowman v. United Kingdom*, App. No. 24839/94, 26 Eur. H.R. Rep. 1, 1–2 (1998); see also Ewing, *supra* note 4, at 522 (discussing the impact on British law of *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. 24699/94, 34 Eur. H.R. Rep. 4 (2002)).

⁵⁸ See *Bowman*, 26 Eur. H.R. Rep. at 1–2.

⁵⁹ *Id.* Unimaginably for Americans, the British political parties consider abortion to be an issue of personal moral import, and do not keep track of their members’ voting records on the issue. *Cf. id.* at 4–5 (stating that Mrs. Bowman had to inform voters of their representatives’ voting histories on abortion); Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373, 379 (2009). British citizens are similarly in the dark as to their representatives’ votes with respect to abortion. *Cf. Bowman*, 26 Eur. H.R. Rep. at 4–5; Issacharoff, *supra*, at 379.

⁶⁰ Feasby, *supra* note 52, at 25.

⁶¹ *Id.*

Mrs. Bowman challenged the British political expenditures law on the grounds that it violated Article 10 of the Convention.⁶² Article 10 guarantees protection of free speech in Member States of the European Union.⁶³ The ECHR noted that a restriction on free speech could be upheld in the face of Article 10 if it is both proportionate to a legitimate governmental aim and “necessary in a democratic society.”⁶⁴ Ultimately, however, the ECHR found the British government’s arguments in favor of the law unconvincing, and held that the ban violated Article 10 of the Convention.⁶⁵

Several years later, another ECHR ruling cast doubt on the British regulatory system’s compatibility with Article 10.⁶⁶ Although the specific statute in question in *VgT Verein gegen Tierfabriken v. Switzerland* (*VgT*) was Swiss, it was nearly identical in content to the Communications Act 2003 in that it banned political advertising by third parties, and was motivated by largely the same policy concerns.⁶⁷ In *VgT*, the ECHR held that the Swiss ban on political advertising by third parties violated Article 10; in so holding, the court rejected many of the arguments put forth by Switzerland (and the United Kingdom) that the ban was “necessary in a democratic society.”⁶⁸

In 2008, the House of Lords responded to these extra-national challenges to British law.⁶⁹ Although British courts are not bound by ECHR decisions, by law they must take these decisions into account—and British courts often follow them.⁷⁰ Nevertheless, in *R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media & Sport*, the House of Lords upheld the Communications Act 2003 in the face of a challenge to its compatibility with Article 10, stating that the ban on political advertising on television and radio is indeed “necessary in a democratic society,” and is therefore a legitimate restriction on free speech under Article 10.⁷¹

⁶² *Bowman*, 26 Eur. H.R. Rep. at 9.

⁶³ *Id.*

⁶⁴ *See id.* at 10, 12.

⁶⁵ *See id.* at 13.

⁶⁶ *See VgT*, 34 Eur. H.R. Rep. at 178; Ewing, *supra* note 4, at 522 (calling *VgT* a potential “mortal blow” to the advertising ban in Britain).

⁶⁷ Ewing, *supra* note 4, at 521.

⁶⁸ *See VgT*, 34 Eur. H.R. Rep. at 178.

⁶⁹ *See Animal Defenders*, [2008] 1 A.C. at 1349.

⁷⁰ Human Rights Act, 1998, c. 42, §§ 3, 2(a) (U.K.) (stating that “[s]o far as it is possible to do so, primary legislation and subordinate legislation [in the United Kingdom] must be read and given effect in a way which is compatible with the Convention rights” as spelled out by the ECHR); Ewing, *supra* note 4, at 521.

⁷¹ [2008] 1 A.C. at 1349.

II. DISCUSSION

Ultimately, the United States' and the United Kingdom's divergent approaches to political advertising can be explained by policymakers' different justifications for their respective rules.⁷² In the United States, legislators and courts have focused largely on protection of the marketplace of ideas—a concept that emphasizes the quantity of allowed speech over its quality.⁷³ The United Kingdom, by contrast, has pursued equality of voice for individuals, corporations, and candidates.⁷⁴ In doing so, British policymakers have favored the supposed quality of speech in an election cycle, consciously at the expense of its quantity.⁷⁵

A. *Motivations for the Overturned American Ban on Corporate Political Advertising*

I. Anticorruption

One of the most commonly deployed arguments in favor of restrictions on corporate political expenditures and, more specifically, political advertising, is the concern over the potentially corruptive influence of corporate spending.⁷⁶ Critics of corporate political spending typically address both classic quid pro quo corruption and more subtle, less direct forms of corruption, whereas advocates of corporate advertising focus only on quid pro quo arrangements.⁷⁷

With respect to quid pro quo corruption, the argument is that corporations would use their ability to spend vast sums on political advertising as a lever in securing political favors from the politicians they support.⁷⁸ “Subtler,” non-quid pro quo corruption is more difficult to define.⁷⁹ In his dissent in *Citizens United*, Justice John Paul Stevens argues that political expenditures (whether made by individuals or corporations), including political advertising, are essentially fungible with

⁷² See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. at 901–02 (2010); R (on the application of Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport, [2008] 1 A.C. 1312 (H.L.) 1346 (appeal taken from Eng.) (U.K.); Redish & Wasserman, *supra* note 8, at 256.

⁷³ See *Citizens United*, 130 S. Ct. at 907, 912; Redish & Wasserman, *supra* note 8, at 256.

⁷⁴ See *Animal Defenders*, [2008] 1 A.C. at 1346.

⁷⁵ See *id.*

⁷⁶ *Citizens United*, 130 S. Ct. at 901–02; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by* 130 S. Ct. 876 (2010).

⁷⁷ Compare *Citizens United*, 130 S. Ct. at 907, 912, with *Austin*, 494 U.S. at 660.

⁷⁸ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 388 (2009).

⁷⁹ See *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting).

direct campaign contributions—and may even exert “far more influence” than direct contributions.⁸⁰ The dispute between the majority and Justice Stevens regarding the meaning of “corruption” in Supreme Court jurisprudence—that is, whether it refers to quid pro quo corruption only, or whether it is a more general term—remains unresolved.⁸¹

The Court has bundled the interest to prevent the *appearance* of corruption into the anticorruption argument, in an effort to preserve not only the functioning of the political system, but also the electorate’s faith in that system.⁸² As Justice Stevens writes in his *Citizens United* dissent, a “democracy cannot function effectively when its constituent members believe laws are being bought and sold.”⁸³

Whatever the term’s specific meaning, the Court made it clear in *Austin* that, if corporate political advertising is to be limited at all, the anticorruption interest *would* be the most convincing rationale for such a limitation.⁸⁴ According to the *Bellotti* Court, “[p]reserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance.”⁸⁵ Still, the Court’s decision in *Citizens United* (together with *Buckley*) reversed course from *Austin*, and rejected the argument that the anticorruption interest is sufficient to justify a ban on corporate political advertising.⁸⁶

2. Antidistortion

Although elements of the antidistortion interest have cropped up in the political speech debate for decades, this interest found its clearest expression in *Austin* and *Citizens United*.⁸⁷ Whereas the anticorruption interest focuses on the inner machinations of the political process, proponents of the antidistortion interest seek to protect public debate from disruptive influence.⁸⁸ According to Justice Stevens’ dissent in

⁸⁰ See *id.* at 965 (Stevens, J., dissenting).

⁸¹ See *id.* at 901–02, 965 (showing the dispute between the majority, who only mentioned quid pro quo, and Justice Stevens, who in his dissent also explored subtler forms of corruption); Teachout, *supra* note 78, at 385. The academic literature is more helpful than the Supreme Court case law in distinguishing between quid pro quo and other forms of corruption. See, e.g., *id.* at 373–83.

⁸² *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

⁸³ *Citizens United*, 130 S. Ct. at 964 (Stevens, J., dissenting).

⁸⁴ See *Austin*, 494 U.S. at 660; *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978).

⁸⁵ See *Bellotti*, 435 U.S. at 788–89.

⁸⁶ See *Citizens United*, 130 S. Ct. at 886 (holding that the anticorruption interest is not sufficient to uphold a ban on corporate political advertising); *Austin*, 494 U.S. at 660.

⁸⁷ See *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting); *Austin*, 494 U.S. at 660.

⁸⁸ See *Austin*, 494 U.S. at 660.

Citizens United, corporations are capable of “unfair influence” in the electoral process which can “distort public debate in ways that undermine rather than advance the interests of listeners.”⁸⁹ This distortive effect is attributable to two characteristics of corporations: first, their unique ability to easily raise large amounts of capital with which to purchase advertisements and other communications; and second, the fact that, owing to directors’ fiduciary duties, corporations must participate in the political process only to enhance shareholder value, “no matter how persuasive the arguments for a broader or conflicting set of priorities.”⁹⁰

This rhetoric masks a somewhat vague set of motivations for the antidistortion interest.⁹¹ As will be discussed below, the antidistortion interest shares with the British political equality interest at least a surface concern with the ability of “ordinary people” to have their voices heard in the political process.⁹² Nevertheless, at other times, American advocates of the antidistortion interest have expressly disavowed the argument that limits should be placed on corporate political speech in the pursuit of speech equalization.⁹³

Perhaps the most accurate articulation of the antidistortion interest is twofold.⁹⁴ First, commentators are concerned about corporations’ ostensibly unique ability to spend prodigious amounts of money to publicize their positions.⁹⁵ Second, there is the avowed danger that corporations will use their deep coffers to fund advertisements that bear “little or no correlation to the ideas of natural persons.”⁹⁶

3. Shareholder Protection

The third argument for distinguishing between private individuals and corporations in the political advertising context focuses on the in-

⁸⁹ *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting).

⁹⁰ *See id.* (internal quotation marks omitted).

⁹¹ *Cf. id.* at 958 (discussing several possible motivations for the antidistortion interest).

⁹² *Cf. id.* (arguing that the Constitution permits restrictions on speech by some in order to “prevent the few from drowning out the many”); *Animal Defenders*, [2008] 1 A.C. at 1345–46.

⁹³ *See, e.g., Citizens United*, 130 S. Ct. at 558.

⁹⁴ *See id.* at 974 (Stevens, J., dissenting); *Austin*, 494 U.S. at 660; Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1111 (2002).

⁹⁵ *See Austin*, 494 U.S. at 660; Sitkoff, *supra* note 94, at 1111. Critics have noted that this argument applies equally to wealthy individuals whose independent political expenditures remain unrestricted. *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

⁹⁶ *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting) (internal quotation marks omitted).

ternal structure and function of the corporation, rather than on the integrity of the political marketplace of ideas.⁹⁷ The shareholder protection rationale begins with the premise that shareholders' First Amendment rights are compromised when a corporation uses its treasury funds to publicize a view to which its shareholders are opposed.⁹⁸

Opponents respond that, if shareholders are opposed to the political messages that the corporation has broadcast, they are free to either pursue their cause using the normal mechanisms of corporate governance, or sell their shares and invest in a company whose politics are more in line with their own.⁹⁹ Proponents of shareholder protection argue that requiring shareholders to sell their shares if they disagree with the political speech of the corporation would "impose a financial sacrifice on those objecting to political expenditures."¹⁰⁰

There is intense debate surrounding the latter contention.¹⁰¹ In the process of rejecting the shareholder protection rationale, the *Bellotti* Court noted that "shareholders normally are presumed competent to protect their own interests."¹⁰² Scholars have also pointed out that shareholders invest in stock for the purposes of securing income, and therefore only a threat to their rate of return could constitute an economic disincentive.¹⁰³ By hypothesis, such an economic investor would be indifferent between two companies with similar rates of return.¹⁰⁴ Therefore, unless there is simply no other company offering a comparable return—an unlikely prospect in a well-developed, efficient market—the shareholder faces no *economic* disincentive from merely shifting his investment to another company.¹⁰⁵ Furthermore, according to the efficient capital markets hypothesis, which postulates that stock prices reflect all publicly available information, proper disclosure of corporate spending on political advertising would ensure that "the size of a corporation's treasury available for political activity lines up with its investors' support for that activity."¹⁰⁶

⁹⁷ See *Austin*, 494 U.S. at 673.

⁹⁸ *Citizens United*, 130 S. Ct. at 977 (Stevens, J., dissenting).

⁹⁹ See *Austin*, 494 U.S. at 687 (Scalia, J., dissenting).

¹⁰⁰ *Id.* at 674 (Brennan, J., concurring).

¹⁰¹ See, e.g., *Bellotti*, 435 U.S. at 795 (Burger, J., concurring); Sitkoff, *supra* note 94, at 1120 (calling the financial sacrifice argument "nonsense").

¹⁰² *Bellotti*, 435 U.S. at 795.

¹⁰³ See Sitkoff, *supra* note 94, at 1120.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 1110. More specifically, commentators claim that investors will react unfavorably to excessive political donations, and managers will respond by reducing such expenditures to remove the drag on their company's stock price. See *id.*

In sum, the shareholder protection argument suggests that corporations can receive differential treatment in election law because their internal structure creates First Amendment concerns that are not implicated by individual speech.¹⁰⁷

4. Corporations as Creatures of State Law

Proponents of regulation have countered resistance to limitations on corporate political speech by pointing out that corporations are creatures of state law, and are therefore susceptible to regulation by the State.¹⁰⁸ State law grants corporations “special advantages” like “limited liability, perpetual life, and favorable treatment” that facilitate the raising of capital.¹⁰⁹ In turn, these special advantages, which are intended to encourage success in the economic marketplace, may be utilized to dominate the political marketplace.¹¹⁰ Proponents argue that corporate political speech must be regulated to prevent this potentially harmful spillover into the political sphere.¹¹¹ In his dissent in *Citizens United*, Justice Stevens wrote, “[l]egislatures are entitled to decide that the state-granted privileges of the corporation require particular scrutiny and higher level of regulation of their activities.”¹¹²

Notably, this argument is generally advanced as a non-arbitrary reason why the law may distinguish between corporations and private individuals, rather than as an independent justification for the regulation of corporate political advertising.¹¹³ The impetus for actually making this distinction is generally supplied by one of the arguments discussed above, rendering the state law argument derivative of the others.¹¹⁴

¹⁰⁷ See *Austin*, 494 U.S. at 673 (Brennan, J., concurring).

¹⁰⁸ *Citizens United*, 130 S. Ct. at 947 (Stevens, J., dissenting).

¹⁰⁹ *Austin*, 494 U.S. at 658–59.

¹¹⁰ *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

¹¹¹ See *Citizens United*, 130 S. Ct. at 947 (Stephens, J., dissenting); *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

¹¹² *Citizens United*, 130 S. Ct. at 947 (Stephens, J., dissenting).

¹¹³ See *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

¹¹⁴ See, e.g., *Citizens United*, 130 S. Ct. at 974 (Stephens, J., dissenting); *Austin*, 494 U.S. at 673 (Brennan, J., concurring).

B. Motivations for the United Kingdom's Categorical Ban on Political Advertising

1. Anticorruption

As previously discussed, the United Kingdom does not distinguish between private individuals and corporations; its ban on political advertising is categorical.¹¹⁵ The British anticorruption interest is virtually identical to its American counterpart, and British courts take no great care to distinguish it from the other arguments in support of a ban on political advertising.¹¹⁶

2. Antidistortion

The British antidistortion interest is, on the surface, similar to its American counterpart, but courts in the United Kingdom have articulated the interest with more force.¹¹⁷ British courts and commentators have vociferously advanced the antidistortion rationale as one of the twin pillars of justification for a categorical ban on political advertising.¹¹⁸

The British antidistortion interest is grounded in a protective attitude towards British citizens.¹¹⁹ As the *Animal Defenders* court commented, there is a risk that “objects which are essentially political may come to be accepted by the public not because they are . . . right but because, by dint of constant repetition, the public has been conditioned to accept them.”¹²⁰ In *VgT*, the ECHR noted that a Swiss statute with similarities to the British ban was motivated by a desire to protect the public from the pressures of powerful financial groups that might distort the political debate.¹²¹ These formulations of the argument each hint at the fundamental risk that some participants in the political process, particularly wealthy individuals and groups, would, if allowed to participate, contribute speech that would lead voters astray.¹²² In the United States, such reasoning is anathema to constitutional commentators who argue

¹¹⁵ See Communications Act, 2003, c. 21, § 321(2) (Eng.).

¹¹⁶ See Feasby, *supra* note 52, at 16.

¹¹⁷ See *Animal Defenders*, [2008] 1 A.C. at 1346.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. 24699/94, 34 Eur. H.R. Rep. 4, 174 (2002).

¹²² See *Animal Defenders*, [2008] 1 A.C. at 1346.

that government cannot suppress speech “on the grounds that it is *too* persuasive.”¹²³

3. Political Equality

The most important argument advanced by the United Kingdom to justify its ban on political advertising is almost completely absent from the mainstream debate in the United States.¹²⁴ In the United Kingdom, the powerful blanket ban is justified by the concern that rich citizens and organizations might be able to be heard over the average citizen, based solely on ability to pay.¹²⁵ In the context of the electoral process, “political equality” is typically defined as the equality of individuals’ ability to affect political debate.¹²⁶ The role of British electoral law, therefore, is to avoid giving any advantage to wealthy participants.¹²⁷

The *Animal Defenders* court explained the theory underlying British elections as follows:

The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice But it is highly desirable that the playing field of debate should be so far as practicable level.¹²⁸

One might question precisely *why* the State should deny any advantage to the wealthy. The *Animal Defenders* court stresses that, to function properly, a democracy must be “truly democratic.”¹²⁹ If participants in the electoral process can purchase opportunities to advertise in proportion to their ability to pay, elections “become little more than an auc-

¹²³ Redish & Wasserman, *supra* note 8, at 267 (emphasis added).

¹²⁴ *Compare Citizens United*, 130 S. Ct. at 958 (Stephens, J., dissenting), *with Animal Defenders*, [2008] 1 A.C. at 1346. In fact, judges who favor regulation of corporate political speech have been explicit in disavowing political equality as the motivation for their positions. *See Citizens United*, 130 S. Ct. at 958 (Stephens, J., dissenting). Nevertheless, the idea is not completely devoid of proponents in the academic sphere. *See, e.g.*, Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 602 (arguing that political equality should be a motivating premise in the political speech domain).

¹²⁵ *See Animal Defenders*, [2008] 1 A.C. at 1344–45.

¹²⁶ Feasby, *supra* note 52, at 17.

¹²⁷ *See Animal Defenders*, [2008] 1 A.C. at 1346.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1345–46.

tion.”¹³⁰ Commentators have suggested that the concept of political equality should not be stretched to limit speakers’ influence based on their ability to persuade; instead, it ought to be targeted specifically at advantages produced by simple possession of wealth.¹³¹

III. ANALYSIS

A. *The High Value of Political Speech*

Despite the distance between the United States’ and the United Kingdom’s respective approaches to the regulation of political advertising, the two nations start with a common premise: political speech is the most sacred form of communication in a democracy, and therefore deserves the State’s highest protection.¹³² In *Austin*, the Court wrote that independent campaign spending constitutes “political expression at the core of our electoral process and of the First Amendment freedoms.”¹³³ There are two key reasons for the exalted position of political speech.¹³⁴ First, political discourse between and among candidates and citizens is the mechanism by which the government is held accountable to the people.¹³⁵ Second, a robust political dialogue enhances the ability of the public to make an informed decision among the various candidates for office.¹³⁶

Similarly, the United Kingdom places great emphasis on freedom of political speech.¹³⁷ According to the *Animal Defenders* court, such freedom is an “essential condition of an intellectually healthy society.”¹³⁸ The court also emphasized the importance of political speech for the proper functioning of a democratic government.¹³⁹ At first blush, the United Kingdom’s outright ban on third party political ad-

¹³⁰ *Id.* at 1346.

¹³¹ *See, e.g.*, Feasby, *supra* note 52, at 17. Nevertheless, commentators outside the United States have not been as sympathetic as American thinkers to the idea that the ability to accrue wealth in the marketplace might be in some way indicative of personal talents. *See, e.g., id.*

¹³² *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) *overruled by* 130 S. Ct. 876 (2010); *R (on the application of Animal Defenders Int’l) v. Sec’y of State for Culture, Media & Sport*, [2008] 1 A.C. 1312 (H.L.) 1345 (appeal taken from Eng.) (U.K.).

¹³³ *Austin*, 494 U.S. at 657 (internal quotation marks omitted).

¹³⁴ *See Citizens United*, 130 S. Ct. at 898; *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976).

¹³⁵ *Citizens United*, 130 S. Ct. at 898; *see* Redish & Wasserman, *supra* note 8, at 246.

¹³⁶ *Buckley*, 424 U.S. at 14–15; *see* Redish & Wasserman, *supra* note 8, at 246.

¹³⁷ *See Animal Defenders*, [2008] 1 A.C. at 1345.

¹³⁸ *Id.*

¹³⁹ *Id.*

vertising would seem to be inconsistent with the exalted status of political speech.¹⁴⁰ Nevertheless, as will be discussed more fully below, this result is attributable to the subtly different conceptualization in the United Kingdom of what “free speech” means—specifically, that the right to free speech also encompasses the rights to be protected from potentially damaging speech by others and to ensure the equality of one’s voice in relation to that of others.¹⁴¹

B. *Framing the Issue—Same Motivation, Different Approach*

As discussed above, American and British electoral laws strive to protect different aspects of the electoral process.¹⁴² The American regulatory system protects the marketplace of ideas, at the expense of voters’ equality of voice.¹⁴³ In contrast, the United Kingdom emphasizes political equality by stifling a wide range of political speech.¹⁴⁴ Nevertheless, despite these different approaches, policymakers in the United States and the United Kingdom are reacting to the same reality: distinctions between permissible and impermissible speech are difficult to make, especially in the protected realm of political speech.¹⁴⁵ Except for the narrow exception in statutory law prohibiting corporate political advertising, the United States has largely *allowed* comparatively extensive political advertising.¹⁴⁶ In sharp contrast, the United Kingdom has *banned* all third-party advertising pertaining to an election or a candidate.¹⁴⁷ Thus, as will be discussed below, the *Citizens United* decision makes sense within the American electoral regulation system, and any

¹⁴⁰ See Communications Act, 2003, c. 21, § 321(2) (Eng.) (banning political advertising, an ostensibly significant form of communication); *Animal Defenders*, [2008] 1 A.C. at 1345 (stating that freedom of speech is an “essential condition of an intellectually healthy society”).

¹⁴¹ See *Animal Defenders*, [2008] 1 A.C. at 1345–46.

¹⁴² See *Citizens United*, 130 S. Ct. at 901–02; *Austin*, 494 U.S. at 660; *Animal Defenders*, [2008] 1 A.C. at 1346.

¹⁴³ See *Citizens United*, 130 S. Ct. at 911.

¹⁴⁴ See Communications Act, 2003, c. 21, § 321(2) (Eng.); *Animal Defenders*, [2008] 1 A.C. at 1345–46.

¹⁴⁵ See *Citizens United*, 130 S. Ct. at 892; *Animal Defenders*, [2008] 1 A.C. at 1345; see also Redish & Wasserman, *supra* note 8, at 237 (asserting that no argument yet presented justifies a restriction of the scope of protected speech).

¹⁴⁶ See, e.g., *Buckley*, 424 U.S. at 45 (striking down a ban on independent political expenditures by individuals).

¹⁴⁷ Communications Act, 2003, c. 21, § 321(2) (Eng.).

effort to change that case's result must be accompanied by broader electoral reform and a shift in First Amendment jurisprudence.¹⁴⁸

C. *The American Approach to Regulation of Political Advertising*

The United States' and the United Kingdom's differing approaches to the regulation of political advertising are, in fact, motivated by the same premise: that a system of fine distinctions among speakers and types of speech is both unjustifiable in theory and unsustainable in practice.¹⁴⁹ In the United States, whatever the commonsense appeal of a distinction between corporate and individual speakers, courts and commentators have found it surprisingly difficult to articulate a bulletproof argument justifying such a distinction.¹⁵⁰

Moreover, advocates of a ban on corporate political advertising have struggled to identify a consistent jurisprudential thread justifying different treatment of corporate speakers.¹⁵¹ The *Citizens United* Court notes that, although legislation discriminating against corporate political expenditures has been on the books for some time, until *Austin* in 1990, no Supreme Court case had upheld such a distinction.¹⁵² Given the consistency of the Court's decisions prior to *Austin*, especially *Buckley* and *Bellotti*, *Austin* and its progeny seem to be a short-lived aberration in case law.¹⁵³ Additionally, it is difficult to ignore the Court's commentary on the issue in *Bellotti*: "We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . ." ¹⁵⁴ Thus, the lack of a consistent precedent justifying a distinction between corporate and individual speakers, and the Court's open hostility to such a concept in *Bellotti*, are significant impediments to a categorical ban on political advertising by corporations.¹⁵⁵

¹⁴⁸ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898; *Buckley*, 424 U.S. at 49; Redish & Wasserman, *supra* note 8, at 264, 268 (arguing that the protection of persuasive speech is a central premise of American democracy).

¹⁴⁹ See *Citizens United*, 130 S. Ct. at 892; *Animal Defenders*, [2008] 1 A.C. at 1345; Redish & Wasserman, *supra* note 8, at 260 (discussing the difficulties of distinctions in speech law).

¹⁵⁰ Cf. Redish & Wasserman, *supra* note 8, at 287 (citing examples of claims made by the Court with little or no empirical support).

¹⁵¹ See *Citizens United*, 130 S. Ct. at 903.

¹⁵² *Id.*

¹⁵³ See *id.*

¹⁵⁴ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

¹⁵⁵ See *Citizens United*, 130 S. Ct. at 903; *Bellotti*, 435 U.S. at 784.

Aside from the precedential record, there are also conceptual difficulties with making excessively fine distinctions between speakers and types of speech.¹⁵⁶ One of the fundamental tenets of American government is that the State cannot be trusted with too much discretion in setting the boundaries of acceptable speech.¹⁵⁷ Instead, that trust should be placed in the people.¹⁵⁸ Justice Scalia gave perhaps the most memorable articulation of this view in his dissent in *Austin* (which would later help undergird the majority opinion in *Citizens United*):

[G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives . . . and often with the very best of genuinely intended objectives. The premise of our Bill of Rights, however, is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do.¹⁵⁹

Thus, unless the case for the unconstitutional nature of corporate political advertising is unassailable, such advertising should be permitted—especially because it is by its nature political speech, which is accorded the highest degree of constitutional protection.¹⁶⁰ The *Citizens United* Court explicitly attacked the *Austin* framework for requiring “intricate case-by-case determinations” and vesting too much power in the FEC to select which political speech deserves constitutional protection.¹⁶¹

The American reaction to the problem of distinguishing between productive and unproductive political advertising has been to protect the marketplace of ideas.¹⁶² The result has been implementation of policies that emphasize the *quantity* of available speech, even to the detriment of its *quality*.¹⁶³ In *Buckley*, the seminal case on political speech, the Court reasoned that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”¹⁶⁴ Indeed, according to the Court, the very purpose of the First Amendment is to ensure “the widest possible dissemination of information

¹⁵⁶ See *Citizens United*, 130 S. Ct. at 892.

¹⁵⁷ *Austin*, 494 U.S. at 692 (Scalia, J., dissenting).

¹⁵⁸ *Id.* at 706 (Kennedy, J., dissenting).

¹⁵⁹ *Id.* at 692 (Scalia, J., dissenting) (emphasis in original).

¹⁶⁰ See *Citizens United*, 130 S. Ct. at 911; *Austin*, 494 U.S. at 657.

¹⁶¹ *Citizens United*, 130 S. Ct. at 891–92.

¹⁶² See *id.* at 911; Redish & Wasserman, *supra* note 8, at 246.

¹⁶³ See *Citizens United*, 130 S. Ct. at 911.

¹⁶⁴ *Buckley*, 424 U.S. at 49.

from diverse and antagonistic sources, and to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people.”¹⁶⁵ The Court was even blunter in *Citizens United*: “[M]ore speech, not less, is the governing rule.”¹⁶⁶

D. *The British Approach*

British courts have also recognized the difficulty of drawing distinctions in the political speech domain.¹⁶⁷ Still, the reaction of policy-makers in the United Kingdom has been decidedly different from that of their American counterparts.¹⁶⁸ In the United Kingdom, the exercise of drawing distinctions among third party expenditures has been eliminated altogether; instead, all third-party political advertising has been banned outright.¹⁶⁹

The justification for this categorical ban has taken two forms.¹⁷⁰ First, the ban supports the soundness of the framework for political debate by equalizing political voice and denying an advantage to “those best able to pay.”¹⁷¹ Second, and most salient for the purposes of this discussion, “[t]he completeness of the prohibition avoids arbitrary and anomalous distinctions in practice.”¹⁷² Such a system, so different from that in the United States, is only possible because of the unique British electoral approach: protect political equality at the expense of protection of speech.¹⁷³

E. *Contextualizing the Citizens United Decision*

Simply put, the *Citizens United* decision is the natural extension of the American approach to the regulation of political advertising.¹⁷⁴ First, the First Amendment establishes a presumption that speech—especially political speech—is constitutionally protected, absent some

¹⁶⁵ *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

¹⁶⁶ *Id.*

¹⁶⁷ See *Animal Defenders*, [2008] 1 A.C. at 1345–46.

¹⁶⁸ Compare *Citizens United*, 130 S. Ct. at 917 (expanding the scope of protected speech), with *Animal Defenders*, [2008] 1 A.C. at 1349 (upholding a blanket ban on political advertising).

¹⁶⁹ See Communications Act, 2003, c. 21, § 321(2) (Eng.).

¹⁷⁰ See *Animal Defenders*, [2008] 1 A.C. at 1345–46.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1345.

¹⁷³ See *id.* at 1345–46; cf. Feasby, *supra* note 52, at 16–17 (contrasting the anticorruption rationale of American campaign finance regulation with the political equality of the British ban on political advertising).

¹⁷⁴ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898, 907; Redish & Wasserman, *supra* note 8, at 264.

overriding reason for its prohibition.¹⁷⁵ Thus, any argument for banning corporate political speech because of its source is subject to strict scrutiny.¹⁷⁶ Given this high hurdle, any argument to ban corporate political advertising because it unduly distorts the political process is unlikely to carry the day, due to what can be called the proof problem—it is difficult, if not impossible, to produce viable empirical proof that corporate political speech is damaging to the democratic process.¹⁷⁷

In contrast, the United Kingdom does not have such a powerful tradition of protecting individual units of speech.¹⁷⁸ Instead, British policymakers actually justify banning individual units of speech in order to protect equality of speech in the aggregate, and to protect against potentially misleading speech.¹⁷⁹ Therefore, the commonsense argument that corporate political speech—and, indeed, individual political spending—can distort elections because of its self-serving nature has produced a blanket ban on such speech during election time.¹⁸⁰

Second, the American system is predicated on a fundamental distrust of the government's capacity to make important distinctions in a variety of areas, speech foremost among them.¹⁸¹ In his influential dissent in *Austin*, Justice Scalia wrote, “[t]he fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech ‘for fairness’ sake’ simply out of bounds.”¹⁸² Consequently, there is little room for maneuver in conjuring a blanket ban on a certain type of speech by certain speakers.¹⁸³

¹⁷⁵ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898.

¹⁷⁶ See *Citizens United*, 130 S. Ct. at 898.

¹⁷⁷ See, e.g., *id.* at 910, 912; Radish & Wasserman, *supra* note 8, at 287 (citing as an example Judge Wright's argument that a divergence between early poll results and the final tally in an election indicated that corporate advertisements distorted the result, despite having no empirical evidence to that effect).

¹⁷⁸ See *Animal Defenders*, [2008] 1 A.C. at 1354. Indeed, in *Animal Defenders*, the court wrote: “Important though political speech is, the political rights of others are equally important in a democracy.” *Id.*

¹⁷⁹ See *id.* at 1346.

¹⁸⁰ See Communications Act, 2003, c. 21, § 321(2) (Eng.); *Animal Defenders*, 1 A.C. at 1346.

¹⁸¹ See *Austin*, 494 U.S. at 692 (Scalia, J., dissenting).

¹⁸² *Id.* at 692–93.

¹⁸³ See *id.* Further, the argument that government would have good reason to silence the voices of corporations because they are more prevalent and persuasive, owing to corporations' large treasuries, has not been applied to other logical targets. See *id.* at 704–05 (Scalia, J., dissenting); Radish & Wasserman, *supra* note 8, at 284, 286. For instance, this contention would also seem to justify a ban on political advertising by extremely wealthy individuals, or by particularly notable individuals like actors or athletes. See *Austin*, 494 U.S. at 704–05 (Scalia, J., dissenting); Radish & Wasserman, *supra* note 8, at 284, 286.

In the United Kingdom, the government has adopted as its *purpose* the goal of equalizing political voice and purifying the political process.¹⁸⁴ British elections are closely regulated events that are “not [arenas] of open political discourse,” but instead “confined decision[s] by the voters among the choices presented by the established political parties.”¹⁸⁵ In *Animal Defenders*, the House of Lords discusses—in an explicit manner unimaginable to Americans—the government’s duty to protect its citizens from the “potential mischief” of political advertising.¹⁸⁶ As evidence of this mischief, the court openly voices distrust in British citizens’ ability to reach electoral decisions on their own: “The risk is that objects which are essentially political may come to be accepted by the public not because they are . . . right but because, by dint of constant repetition, the public has been conditioned to accept them.”¹⁸⁷ In this environment, banning certain categories of political speech is not only justifiable—it is encouraged.¹⁸⁸

Third, the American electoral process relies heavily on third party participants to develop the marketplace of ideas.¹⁸⁹ When the aim is to ensure the robustness of that marketplace—to encourage the highest volume of speech in order to ensure that the most productive ideas are expressed and given the opportunity to prevail—it becomes quite difficult to limit speech for any but the most compelling reasons.¹⁹⁰ In *Citizens United*, the Court attacked the ban on corporate political advertising for depriving the public of “information, knowledge and opinion vital to its function,”¹⁹¹ and pointed out that corporations may possess “valuable expertise” in certain areas, as well as the unique ability to facilitate discussion on such topics.¹⁹² The Court’s emphasis on the completeness of the political debate creates an environment that is toxic to excessively fine distinctions between permissible and impermissible political speech.¹⁹³

¹⁸⁴ See *Animal Defenders*, [2008] 1 A.C. at 1345–46, 1354.

¹⁸⁵ Issacharoff, *supra* note 59, at 378.

¹⁸⁶ *Animal Defenders*, [2008] 1 A.C. at 1346.

¹⁸⁷ *Id.* at 1345–46.

¹⁸⁸ See *id.* In the United States, the equality debate takes on another meaning—namely, that government should behave neutrally towards speakers and speech, as opposed to the idea that all speakers are entitled to equal amounts of expression. See Redish & Wasserman, *supra* note 8, at 295.

¹⁸⁹ See *Citizens United*, 130 S. Ct. at 907.

¹⁹⁰ See Redish & Wasserman, *supra* note 8, at 290–91.

¹⁹¹ *Citizens United*, 130 S. Ct. at 907 (internal quotation marks omitted).

¹⁹² *Id.* at 912.

¹⁹³ See *id.* at 907, 912; Redish & Wasserman, *supra* note 8, at 290–91.

In contrast, the British system relies far more heavily on the political parties to set the political agenda.¹⁹⁴ Third party political speech by citizens and corporations is seen as a potential source of disruption and distortion, rather than as vital participation in the democratic process.¹⁹⁵ British policymakers view regulation of third party expenditures as a way to dissipate layers of distortion around the core of the electoral process—specifically, the parties’ agendas.¹⁹⁶ As such, it is easier to justify a ban, whether comprehensive or limited, in the British system.¹⁹⁷

F. *How to Change the Citizens United Result*

In order to change course from the *Citizens United* decision in an internally consistent way, American policymakers would have to make serious structural changes to the American electoral approach—if not its First Amendment jurisprudence.¹⁹⁸ The American approach is predicated upon a robust marketplace of ideas furnished by third party participants and facilitated by a powerful presumption that speech is protected.¹⁹⁹ Further, given this foundation, the proof problems associated with the argument that corporate advertising significantly distorts the political process render an outright ban untenable.²⁰⁰

In short, a critique of the *Citizens United* decision really goes to the core of the American attitude towards political speech and elections.²⁰¹ Whether one approves of the result in *Citizens United* or not, it is difficult to argue that the decision was not at least consistent with the American political structure.²⁰² Absent compelling empirical evidence of the distortional effect of corporate political advertising, no interpretive gloss over existing law can justify a blanket ban on corporate political

¹⁹⁴ Compare *Citizens United*, 130 S. Ct. at 907, with Feasby, *supra* note 52, at 19.

¹⁹⁵ See *Animal Defenders*, [2008] 1 A.C. at 1346.

¹⁹⁶ See *id.*; Feasby, *supra* note 52, at 19.

¹⁹⁷ See *Animal Defenders*, [2008] 1 A.C. at 1346; Feasby, *supra* note 52, at 19.

¹⁹⁸ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898, 911; *Buckley*, 424 U.S. at 49; Redish & Wasserman, *supra* note 8, at 264, 268 (arguing that restrictions on speech run contrary to American values).

¹⁹⁹ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898, 907, 911; Redish & Wasserman, *supra* note 8, at 290–91.

²⁰⁰ See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 907; see also Redish & Wasserman, *supra* note 8, at 287 (citing examples of claims made by the Court with little or no empirical support).

²⁰¹ See *Citizens United*, 130 S. Ct. at 898; *Buckley*, 424 U.S. at 49; Redish & Wasserman, *supra* note 8, at 268.

²⁰² See U.S. CONST. amend. I; *Citizens United*, 130 S. Ct. at 898, 907; *Buckley*, 424 U.S. at 49; Redish & Wasserman, *supra* note 8, at 264.

advertising.²⁰³ Consequently, a principled ban on political advertising would require modification of current law, perhaps by grafting a U.K.-like political equality interest onto American jurisprudence, in order to provide a basis in American law for a distinction between corporate and individual political advertising.²⁰⁴ Alternatively, Congress could pass legislation that makes corporate political advertising more difficult or expensive.²⁰⁵

CONCLUSION

A democracy can survive only if its institutions exhibit unswerving devotion to their foundational limiting principles in the face of tempting opportunities for digression. The political advertising realm presents a beguiling challenge: although common sense may suggest that the value of participants' speech may differ, it is difficult to maintain principled distinctions among speakers and types of speech. In the United Kingdom, courts have displayed their fidelity to the British electoral approach by upholding a blanket ban on political advertising against outside challenges—a policy that furthers the twin goals of equalizing political voice and maintaining the political parties as the center of electoral debate. In the United States, the Supreme Court has recommitted itself to upholding the fundamental protection of the political marketplace of ideas enshrined in both the First Amendment and the general American approach to elections.

Comparing the United Kingdom's and the United States' recent reactions to the question of how to make distinctions in the political speech domain illuminates the internal consistency in each country's respective answer. In the end, any attempt to contest the *Citizens United* result will have to contend with the fact that, far from representing a dramatic shift in judicial attitudes towards elections, *Citizens United* is in fact a reaffirmation of basic First Amendment principles long-recognized in Supreme Court jurisprudence.

²⁰³ See *Citizens United*, 130 S. Ct. at 876, 898, 907, 911; Redish & Wasserman, *supra* note 8, at 268.

²⁰⁴ See *Citizens United*, 130 S. Ct. at 898, 907, 911; Ewing, *supra* note 4, at 520 (stating that the British ban pursues the goal of political equality); Redish & Wasserman, *supra* note 8, at 268; see, e.g., Pasquale, *supra* note 124, at 603.

²⁰⁵ See, e.g., Sean Higgins, *Dems' Next Target: The Supreme Court and Corporate Cash*, INVESTOR'S BUS. DAILY, Mar. 30, 2010, at A1 (discussing the possibility of legislation that would increase disclosure requirements and require CEOs to appear in political ads).