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Invested in Politics: Gun Jumping, Corporate Political Speech, and Citizens United

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NOTE

INVESTED IN POLITICS: GUN JUMPING, CORPORATE POLITICAL SPEECH, AND *CITIZENS UNITED*

I. INTRODUCTION

In June of 2011, Groupon, Inc. (“Groupon”) made the first step toward its highly anticipated initial public stock offering (“IPO”) by filing with the U.S. Securities and Exchange Commission (“SEC” or the “Commission”).¹ It was projected that the deal could raise as much as one billion dollars at a valuation of around twenty billion.² By September of 2011, however, it was reported that the blockbuster deal would probably have to be delayed because of an internal email that the Chief Executive Officer of Groupon wrote that was leaked to the press.³ How could an internal email derail the largest IPO of the year? The concern was that the email, once leaked to the public, had violated the quiet period imposed by the gun jumping provisions of the Securities Act of 1933 (the “Securities Act”).⁴ Thus, it is easy to see why the SEC has also been called the “Content Regulation Commission.”⁵ Securities regulation is, after all, generally the regulation of speech.⁶

1. See Shira Ovide, *Groupon IPO: It's Here!*, WALL ST. J. DEAL J. (June 2, 2011, 2:56 PM ET), <http://blogs.wsj.com/deals/2011/06/02/groupon-ipo-its-here/>.

2. *Id.*

3. See Steven M. Davidoff, *In a Quiet Period, Groupon Feels the Noise*, DEALBOOK (Sept. 2, 2011, 9:03 AM), <http://dealbook.nytimes.com/2011/09/02/in-a-quiet-period-groupon-feels-the-noise/>.

4. 15 U.S.C. §§ 77a to 77aa (2006); Davidoff, *supra* note 3. See also Peter Edmonston, *Google's I.P.O., Five Years Later*, DEALBOOK (Aug. 19, 2009, 9:30 AM), <http://dealbook.nytimes.com/2009/08/19/googles-ipo-5-years-later/> (describing a similar gun jumping problem encountered by Google, Inc. during its IPO in 2004).

5. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778 (2004) [hereinafter *The Boundaries of the First Amendment*].

6. Roberta S. Karmel, *The First Amendment and Government Regulation of Economic Markets*, 55 BROOK. L. REV. 1, 1 (1989). At the most basic level, the SEC regulates the securities industry by compelling and reviewing speech in the form of written documents attesting to the financial health and character of a company, asks for changes to those statements, and files suit as

Accordingly, scholars have argued over the constitutionality of securities regulations.⁷ Their analyses have tended to approach the issue within the framework of the commercial speech doctrine.⁸ However, the U.S. Supreme Court's recent holding in *Citizens United v. Federal Election Commission*⁹ suggests that constitutional protections of corporate political speech are also ripe for use in challenges to the restriction and compulsion of disclosure by the SEC.¹⁰

The gun jumping provisions of the securities laws present a particularly auspicious target for a constitutional challenge.¹¹ The gun jumping provisions restrict the ability of corporations and other parties involved in a new stock offering to make offers to sell those securities prior to an SEC mandated registration statement becoming effective.¹² These gun jumping provisions have been a popular target amongst scholars challenging the constitutionality of securities regulations because they restrict a broad range of speech by limiting the ability of those parties to make "offers," a term that is defined broadly by the SEC.¹³ Thus, the gun jumping provisions present a sort of head-on collision with the First Amendment.¹⁴ When the SEC's gun jumping restrictions are viewed within the newly broad political speech framework articulated in *Citizens United*, it is likely they cannot survive a constitutional challenge.¹⁵ Accordingly, it is clear that the *Citizens United* holding must be limited to its facts or overturned in order to

punishment when those statements are considered materially misleading. See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 3-5 (Vicki Been et al. eds., 6th ed. 2009). Further, in the case of gun jumping regulations, SEC regulation acts to limit the kinds of public statements a company can make to the public even before the filings process occurs. *Id.* at 160.

7. See *infra* Part III.B.

8. See, e.g., Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 759 (2007); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 5-6 (1989); Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 37, 47-48 (2005); Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 78-79 (1989).

9. 130 S. Ct. 876 (2010).

10. See *infra* Part III.D.

11. See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 656-58 (2006); Edward T. Highberger, Note, *Not So Fast! Scrutinizing the "Gun Jumping" Provisions of the Securities Act Under the Commercial Speech Doctrine*, 83 NOTRE DAME L. REV. 2141, 2160 (2008).

12. Eric A. Chiappinelli, *Gun Jumping: The Problem of Extraneous Offers of Securities*, 50 U. PITT. L. REV. 457, 458-59, 466-67 (1989); Siebecker, *supra* note 11, at 656.

13. See Chiappinelli, *supra* note 12, at 458-59, 461; Siebecker, *supra* note 11, at 656; Highberger, *supra* note 11, at 2160.

14. See Neuborne, *supra* note 8, at 51 & n.152.

15. See *infra* Parts II.C., IV.B.

allow for necessary government regulation of corporate activities, and for the SEC to shift its focus from predominantly regulating and punishing speech to regulating and punishing the actual bad acts and actors that victimize investors and the markets.¹⁶

This Note will examine the SEC's gun jumping regulations, the interaction of those regulations with First Amendment political speech protections, and those regulations' constitutionality in light of *Citizens United*. Part II of this Note will discuss the background to this issue by looking at the nature and development of the SEC's disclosure regime and of corporate political speech protections under the First Amendment. This Note will then discuss the holding and impact of *Citizens United* and its implications for the future. Part III of this Note will identify and discuss the problem posed by the intersection of constitutional free speech protections and the gun jumping provisions of the securities laws, examine previous approaches to the problem, and recognize the elevating effect that *Citizens United* has on the issue. Part IV of this Note will discuss why gun jumping restrictions and similar restrictions on truthful speech are incompatible with the Supreme Court's view of corporate political speech in *Citizens United* and, thus, must be unconstitutional, and why there is no persuasive policy reason for the Court to uphold the gun jumping provisions in the face of the First Amendment. Finally, Part V of this Note will discuss how First Amendment doctrine should be developed to avoid undermining the current system of securities regulation, and how the SEC can attain its goals of adequate disclosure and investor protection without violating the First Amendment.

II. CORPORATE SPEECH, SECURITIES REGULATION, AND THE FIRST AMENDMENT

It is strange to think that well-established parts of the current securities regulation regime could be unconstitutional. However, it seems equally incongruent that a system of federal government regulation based largely on the control of speech, like our current securities regulation regime, could coexist with the First Amendment.¹⁷ So how do we reconcile the securities regulation regime with the First Amendment? This question is particularly difficult to answer in light of the Court's recent decision in *Citizens United*, which included the assertion that "the Government lacks the power to ban corporations from

16. See *infra* Part V.

17. See *The Boundaries of the First Amendment*, *supra* note 5, at 1778.

speaking.”¹⁸ This confusion is only compounded by the Court, which has made passing references to the application of the First Amendment to securities regulation but has never dealt directly with the issue.¹⁹

The problem of attempting to reconcile the current system of securities regulation with First Amendment doctrine stems from the considerable growth and judicial development that both areas have undergone since the Securities Act became law.²⁰ Indeed, when the SEC was established, the First Amendment was considered inapplicable to securities regulation because First Amendment protections had yet to be extended to either commercial speech or government-compelled speech.²¹ To what degree the First Amendment can be applied to securities regulations today is still unclear.²² However, with securities regulations built around a system of compelling and restricting speech disclosure on the one hand, and corporate speech protections that define limits on the ability of government to control speech on the other, the two bodies of law are clearly on a collision course.²³ Therefore, any attempt to reconcile the two with one another must begin with a fundamental understanding of each.

A. *Compelled and Restricted Disclosure in the Registration Process*

Congress enacted the Securities Act and the Securities Exchange Act of 1934 (the “Exchange Act”)²⁴ in the wake of the Great Depression as part of President Roosevelt’s New Deal.²⁵ The Securities Act and Exchange Act, while often seen as a response to the stock market crash of 1929, were actually instituted in response to complaints of fraud, manipulation, and significant public pressure on the government to “do

18. *Citizens United v. FEC*, 130 S. Ct. 876, 903 (2010).

19. Antony Page, *Taking Stock of the First Amendment’s Application to Securities Regulation*, 58 S.C. L. REV. 789, 790, 797-800 (2007); Highberger, *supra* note 11, at 2149. *But see* Drury, *supra* note 8, at 759, 765 (suggesting that there is a “strong presumption . . . that securities regulation was not subject to constitutional protections available for free speech”).

20. *See* Page, *supra* note 19, at 793-797 (discussing the development of commercial speech doctrine); Page & Yang, *supra* note 8, at 10-11 (discussing development and interpretation of certain securities regulation statutes and rules); Siebecker, *supra* note 11, at 636-41 (discussing the development of corporate political speech doctrine).

21. Page, *supra* note 19, at 789-90.

22. *Id.* at 797 (discussing the sparse record of cases touching on the relationship between securities regulations and the First Amendment, none of which deal with the issue directly).

23. Siebecker, *supra* note 11, at 621, 651 (describing the “impending jurisprudential collision” of First Amendment doctrines through the framework of securities regulation and arguing to resolve the conflict through an “institutional approach”).

24. 15 U.S.C. §§ 78a-78nn (2006 & Supp. IV 2011).

25. Susan M. Phillips & J. Richard Zecher, *The Securities Exchange Commission: Where From, Where to?*, in *SECOND THOUGHTS: MYTHS AND MORALS OF U.S. ECONOMIC HISTORY* 136, 137-38 (Donald N. McCloskey ed., 1993).

something” to combat the lengthy period of economic stagnation following the crash of 1929.²⁶ Thus, it was not until five years after the 1929 crash and amidst considerable debate that the Securities Act passed into law.²⁷ The goal was to ensure investors were provided with the material information necessary to make informed investment decisions and to prohibit fraud in the sale of securities.²⁸ The Exchange Act gave teeth to the Securities Act in 1934 by creating the SEC, providing for liability in some cases, and setting requirements for the registration of securities traded on national exchanges with the SEC, periodic financial reporting, registration of exchanges and broker-dealers, and adding further antifraud provisions.²⁹

Today, the Securities Act and the Exchange Act form the significant regulatory structure that controls the securities markets,³⁰ along with the rules and regulations propagated by the SEC and lesser-known acts like the Trust Indenture Act of 1939,³¹ the Investment Company Act of 1940,³² and the Investment Advisors Act of 1940.³³ The SEC regulates the markets through a two-pronged system of controlled disclosure and antifraud policies in line with the two main policy goals

26. *Id.* at 136-37.

27. *Id.*

28. *Id.* at 137.

29. *Id.* at 138; Drury, *supra* note 8, at 764. President Hoover had originally resisted the idea of significant federal regulation of the markets, preferring instead a scheme of state and self-regulation. Phillips & Zecher, *supra* note 25, at 136. However, after Hoover's pleas to the New York Stock Exchange to eliminate market manipulation were essentially ignored, Hoover initiated a Senate investigation that provided headlines of market manipulation throughout the 1932 presidential campaign. *Id.* at 137. It was the political pressure from this investigation that drove the passage of the Securities Act and the Exchange Act rather than concern for the market activities that had caused the 1929 crash. *Id.* It is worth noting that even after significant examples of market manipulation were uncovered, President Hoover advocated that only specific wrongdoings should be punished and continued to question the constitutional authority of securities regulation generally. *Id.* It is further worth noting that the Securities Act provided for the Federal Trade Commission (“FTC”) to regulate the national securities exchanges. *Id.* The creation of the SEC was actually a concession fought for and won by the New York investment community, hoping that the private sector would be able to exercise greater control over the Commission. *Id.* at 138. These hopes were largely disappointed, however, when three former members of the FTC were appointed to the Commission. *Id.* In the end, the sole representative of the private sector on the initial Commission was its chairman, Joseph Kennedy. *Id.* The utility of federal regulation under the SEC quickly became apparent, with early actions of the FTC including the shuttering of nine exchanges including a one-man “exchange” located in a poolroom in Hammond, Indiana. *See id.*

30. Drury, *supra* note 8, at 763-64.

31. 15 U.S.C. §§ 77aaa-77bbb (2006 & Supp. IV 2011).

32. Pub. L. No. 768, 54 Stat. 789 (1940) (codified at 15 U.S.C. §§ 80a-1 to 80a-64 (2006 & Supp. IV 2011)).

33. Pub. L. No. 768, 54 Stat. 847 (1940) (codified at 15 U.S.C. §§ 80b-1 to 80b-21 (2006 & Supp. IV 2011)).

of the Securities Act.³⁴ The general goal of the system is to promote efficiency, fairness, and integrity in the capital markets by equipping investors with material information about a stock and its issuer through mandatory disclosure.³⁵ By choosing this method of regulation, Congress initiated a regulatory structure essentially predicated on the control of corporate speech.³⁶

In addition to mandating disclosure of certain information, the Securities Act and the rules promulgated by the SEC also significantly restrict corporate speech.³⁷ Section 5(c) of the Securities Act prohibits any person from offering to sell or buy a security unless a registration statement disclosing certain information about the security has been filed with the SEC and is in effect.³⁸ When a premature offer is made, it is referred to as “gun jumping.”³⁹ The term “offer” is given an expansive definition by the courts and the SEC.⁴⁰ Section 2(a)(3) of the Securities Act states that the term “‘offer’ shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.”⁴¹ The SEC further expanded the definition to include everything that “condition[s] the public mind or arouse[s] public interest in the particular securities.”⁴² This expansion swept a wide range of speech beyond what a layman would consider to be an offer within the purview of the SEC.⁴³

These restrictions apply to a broad range of persons beyond the issuer itself.⁴⁴ Section 5 of the Securities Act also applies to underwriters

34. See Phillips & Zecher, *supra* note 25, at 137; Drury, *supra* note 8, at 764.

35. Phillips & Zecher, *supra* note 25, at 137; Drury, *supra* note 8, at 764-65.

36. See Drury, *supra* note 8, at 771-72, 779 (arguing that SEC disclosure is commercial speech).

37. See Securities Act of 1933 § 5, 15 U.S.C. § 77e (2006); 17 C.F.R. § 230.135 (2011).

38. Securities Act of 1933 § 5, 15 U.S.C. § 77e(c); Chiappinelli, *supra* note 12, at 459. Section 5(c) specifically states:

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

Securities Act of 1933 § 5, 15 U.S.C. § 77e(c).

39. Chiappinelli, *supra* note 12, at 466.

40. Securities Act of 1933 § 2(a)(3), 15 U.S.C. § 77b(a)(3) (2006 & Supp. IV 2011).

41. *Id.*

42. *In re Carl M. Loeb, Rhoades & Co.*, 38 S.E.C. 843, 850 (1959); Chiappinelli, *supra* note 12, at 461.

43. See Chiappinelli, *supra* note 12, at 461.

44. *Id.* at 467.

and dealers.⁴⁵ Similarly to the SEC's treatment of the term "offer," the term "underwriter" is also given an expansive definition.⁴⁶ An "underwriter" is defined by the Securities Act:

[A]ny person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking⁴⁷

Therefore, the tight restrictions imposed by the Securities Act apply to a broad swath of persons well beyond the traditional meaning of "underwriter."⁴⁸

The restrictions on offers under Section 5(c) of the Securities Act also extend temporally to the so-called pre-filing period prior to the submission of a registration statement.⁴⁹ This pre-filing quiet period is considered to have taken effect thirty days prior to the filing of the registration statement.⁵⁰ Thus, the current securities regime places significant restrictions on corporate speech both before and after a registration statement is filed.⁵¹ Any statement that can be seen as conditioning the market for the sale of a security during this so-called quiet period could offend Section 5.⁵² Corporate advertising provides a useful example of the chilling effect Section 5 may have on corporate speech.⁵³ While the SEC encourages stock issuers to continue normal

45. *Id.*

46. *Id.*

47. Securities Act of 1933 § 2(a)(11), 15 U.S.C. § 77b(a)(11) (2006). The definition continues:

[S]uch term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Id.

48. See Chiappinelli, *supra* note 12, at 467-68.

49. See 17 C.F.R. § 230.163A(a) (2011); see also Chiappinelli, *supra* note 12, at 458-59; Siebecker, *supra* note 11, at 656.

50. 17 C.F.R. § 230.163A(a); Highberger, *supra* note 11, at 2163-64.

51. See Page, *supra* note 19, at 803-06. Professor Eric Chiappinelli observes that similar restrictions on speech actually continue beyond the effective date of a registration statement. Chiappinelli, *supra* note 12, at 459 & n.14. In this period, while offers are of course permitted, they must be preceded or accompanied by a final prospectus. *Id.* Thus the same actions of an offeror could be gun jumping or an improper offer in violation of the securities laws, with the only difference being the time at which the offer is made. *Id.* at 467. Because of this negligible difference, Professor Chiappinelli refers to all such improper offers as "extraneous offers." *Id.*

52. See Chiappinelli, *supra* note 12, at 459, 461.

53. See Siebecker, *supra* note 11, at 656.

advertising practices during the quiet period, a significant increase in advertising, even advertising that does not mention a securities offering, can be considered gun jumping in violation of Section 5(c) of the Securities Act.⁵⁴

However, there are some SEC rules that ease this substantial regulatory burden.⁵⁵ SEC Rule 135 provides a safe harbor for statements concerning an impending securities sale made during the quiet period as long as the comments fall within eight specific categories of limited information.⁵⁶ Additionally, SEC Rules 163, 168, and 169 substantially reduce the threat of a Section 5 violation by providing exemptions for seasoned issuers of stock, so long as their offers are preceded or accompanied by a prospectus that discloses specified information, and for the release of certain regularly released business information.⁵⁷ However, any issuer who does not meet these exceptions, or an issuer seeking to make an IPO will still be subject to the strict prohibitions of Section 5 of the Securities Act and SEC Rule 135.⁵⁸

The chilling effect of the gun jumping restrictions is compounded by the substantial cost and delay that an issuer, underwriter, or dealer may incur for a gun jumping violation.⁵⁹ A violator may be civilly liable under Section 12(a) of the Securities Act and may be criminally liable for a willful violation under Section 24 of the Securities Act.⁶⁰ A violation occurs whenever the requirements of Section 5 and SEC Rule 135 are not met, regardless of the intent of the defendant.⁶¹ Additionally, a violator may be liable even where the defendant later complied with the requirements of the statute and the policies underlying the gun jumping requirements have not been defeated.⁶² Indeed, no evidence of causation is even required for a plaintiff to sue for a violation of Section

54. *Id.* An example of this would be if an issuer who has never previously engaged in public advertising instituted a new advertising campaign during the quiet period. *See, e.g.,* Georgeson & Co., SEC No-Action Letter, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,118 (Mar. 3, 1977). While the advertising may be factual and may not reference the issuing of a security, the drastic increase in publicity may give rise to an inference that the issuer is advertising for the purpose of priming the market for its issue and may give rise to a gun jumping problem. *See id.*

55. Siebecker, *supra* note 11, at 656-57.

56. 17 C.F.R. § 230.135(a) (2011); *see also* Siebecker, *supra* note 11, at 656. It is illustrative of the limited nature of these exceptions to point out that while the “basic terms” of the offering are permitted, “basic terms” does not include the share price unless the offer is to employees of the issuer or an offering of rights to existing shareholders. Highberger, *supra* note 11, at 2164-65.

57. *See* 17 C.F.R. §§ 230.163, .168 to .169.

58. Siebecker, *supra* note 11, at 657.

59. Securities Act of 1933 § 12(a), 15 U.S.C. § 77l(a); § 24, 15 U.S.C. § 77x (2006).

60. Securities Act of 1933 § 12(a), 15 U.S.C. § 77l(a); § 24, 15 U.S.C. § 77x.

61. Chiappinelli, *supra* note 12, at 463.

62. *Id.*

5 of the Securities Act.⁶³ A violation may be actionable even where the defendant did not cause the plaintiff's damages, or where the plaintiff suffered no damages.⁶⁴ Additionally, all waivers of a plaintiff's right to sue for a gun jumping violation are invalid according to Section 14 of the Securities Act.⁶⁵ Thus, any issuer of stock subject to Section 5 of the Securities Act runs an unusually high risk of liability for any mistake made in the offering process.⁶⁶

Additionally, the SEC may investigate and seek injunctive relief for Section 5 violations.⁶⁷ While investigating any party related to an offering, the SEC may delay the effective date of the registration statement,⁶⁸ and may discipline parties for willful violations.⁶⁹ Thus, even though a gun jumping violation does not result in private litigation, the issuer may still be subject to substantial cost and delay at the hands of the SEC.⁷⁰ It is clear that the strict requirements and prohibitions of the securities regulation regime described in this section place substantial burdens and prohibitions on both corporate and personal speech.⁷¹ Accordingly, the current regulation regime is particularly difficult to justify from a modern First Amendment framework.⁷²

B. Corporate Speech and the First Amendment

Corporations have enjoyed constitutional rights since 1886.⁷³ However it took until 1976 for First Amendment protections⁷⁴ to be extended to corporations.⁷⁵ Since then, the bounds of corporate free speech protections have been developed in a line of cases divided into two supposedly distinct doctrines: the commercial speech doctrine and the political speech doctrine.⁷⁶ A different standard of review is applied

63. *Id.*

64. Securities Act of 1933 § 12(a), 15 U.S.C. § 77l (stating that a plaintiff may recover the cost of the security with interest, but "less the amount of any income received" from the security); Chiappinelli, *supra* note 12, at 463.

65. Securities Act of 1933 § 14, 15 U.S.C. § 77n.

66. See Chiappinelli, *supra* note 12, at 463-64.

67. Securities Act of 1933 § 19(c), 15 U.S.C. § 77s(c); § 20(a)-(b), § 77t(a)-(b).

68. 17 C.F.R. § 230.461(b) (2011).

69. Securities Act of 1933 § 15(b)(4)(D)-(E), 15 U.S.C. § 78o(b)(4)(D)-(E).

70. See Chiappinelli, *supra* note 12, at 466.

71. Siebecker, *supra* note 11, at 655.

72. *Id.*

73. Page, *supra* note 19, at 793 (citing *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886)).

74. "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

75. Page, *supra* note 19, at 793.

76. See Neuborne, *supra* note 8, at 5-6.

for each doctrine, yielding two different conceptions of, and limitations to, corporate speech.⁷⁷ This history of development evidences an increasingly broad understanding of corporate speech protections by the Supreme Court and provides a strong indication that the Court could find portions of current law, such as the gun jumping provisions of the securities laws, unconstitutional.⁷⁸

The commercial speech doctrine essentially originated in *Valentine v. Chrestensen*,⁷⁹ which erected a strict structural divide between various kinds of speech.⁸⁰ Under *Valentine*, speech that implicated religious or political expression received the highest level of protection while speech that would be defined as commercial today received no protection whatsoever.⁸¹ This changed in 1976 when the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁸² that truthful speech that proposed a legal commercial transaction was constitutionally protected speech.⁸³ The Court's rationale for this shift toward a more inclusive understanding of First Amendment protections was predominantly that the public had an interest in hearing the commercial speech.⁸⁴ The Court also noted that commercial speech was subject to greater regulation than non-commercial speech, noting specifically that false or misleading speech could be regulated.⁸⁵ The Court did not, however, articulate a meaningful way to identify commercial speech.⁸⁶

Four years later, the Court articulated the modern standard of the commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸⁷ In *Central Hudson*, the Court articulated a four-part analysis to determine whether a restriction to commercial speech was constitutional.⁸⁸ First, to even qualify for possible protection, the speech must relate to lawful activity and not be misleading.⁸⁹ Second,

77. Siebecker, *supra* note 11, at 628-29.

78. See Highberger, *supra* note 11, at 2142-48.

79. 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

80. *Id.* at 54; Neuborne, *supra* note 8, at 17.

81. *Valentine*, 316 U.S. at 54; Neuborne, *supra* note 8, at 9-11.

82. 425 U.S. 748 (1976).

83. *Id.* at 770; Page, *supra* note 19, at 793. It is important to note that prior decisions of the Court had impliedly extended First Amendment protections to commercial speech. *Id.* at 793 n.13.

84. *Va. State Bd. of Pharmacy*, 425 U.S. at 763-64; Page, *supra* note 19, at 793.

85. *Va. State Bd. of Pharmacy*, 425 U.S. at 770-72 & n.24; Siebecker, *supra* note 11, at 630-31.

86. See *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24; Siebecker, *supra* note 11, at 631.

87. 447 U.S. 557, 566 (1980).

88. *Id.*

89. *Id.*

for a restriction to be constitutional, a substantial governmental interest must support the restriction.⁹⁰ Third, the restriction must directly advance the substantial governmental interest.⁹¹ Fourth, the restriction must not be more expansive than necessary to serve the substantial governmental interest.⁹² By creating this test, the Court applied an intermediate standard of review, a less rigorous standard than the strict scrutiny applied in political speech cases.⁹³ This test has drawn more than its fair share of criticism, including from the Supreme Court justices themselves.⁹⁴

The commercial speech doctrine also provides some limited protection against compelled speech, a protection that may apply when the speaker is a corporation.⁹⁵ However, this protection is generally easily outweighed by consumer protection concerns.⁹⁶ Despite this, the Court has struck down some statutes that compel commercial corporate speech on First Amendment grounds.⁹⁷

Additionally, in *Central Hudson* the Court again failed to provide a meaningful way of separating commercial speech from other kinds of protected speech.⁹⁸ Indeed, the Court has since admitted that ambiguities sometimes exist in determining whether certain speech falls within the commercial speech doctrine, and that no precise definition of commercial speech exists.⁹⁹ Accordingly, some scholars have expressed significant concern that this ambiguity will allow for speech that should be entitled to higher protection under the First Amendment to be suppressed under the commercial speech doctrine.¹⁰⁰ Others, in turn, have expressed concern that speech that should be subject to greater regulation may be able to escape regulation by deliberately mixing commercial speech with speech that triggers a higher standard of

90. *Id.*

91. *Id.*

92. *Id.*

93. Page, *supra* note 19, at 793-94.

94. *Id.* at 794 (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) (acknowledging the reservations of several justices to applying the *Central Hudson* test)).

95. *Id.* at 794-95.

96. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding that corporations may be compelled to put warnings or disclaimers on their products in order to reduce the possibility of consumer confusion or deception).

97. Page, *supra* note 19, at 794-95. See also *United States v. United Foods, Inc.*, 533 U.S. 405, 408-09, 416 (2001) (holding that mushroom growers could not be compelled to contribute to advertising where there was no risk of consumer deception).

98. Page, *supra* note 19, at 795.

99. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); Page, *supra* note 19, at 795 (quoting *Edenfield v. Fane*, 507 U.S. 761, 765 (1993)) (discussing the difficulties of identifying what constitutes commercial speech).

100. Page, *supra* note 19, at 795.

review.¹⁰¹ Still others argue that the dichotomy between commercial and economic speech is essentially meaningless and a cover for the difference between hearer-centered and speaker-centered models of First Amendment protection.¹⁰² These concerns are indicative of the traditional high regard given to the protection of free speech and still afforded by the strict protections of the political speech doctrine.¹⁰³

Political speech tends to receive the highest protection afforded under the First Amendment.¹⁰⁴ Indeed, the protection of political deliberation and commentary is recognized as the core purpose of the First Amendment.¹⁰⁵ Accordingly, any regulations affecting political speech are subject to strict scrutiny and rarely survive judicial review.¹⁰⁶ Under strict scrutiny, the government must show that the restriction at issue “furthers a compelling interest and is narrowly tailored to achieve that interest.”¹⁰⁷ However, until the Court’s decision in *Citizens United*, this strict standard seemed to be more flexible when applied to corporate political speech.¹⁰⁸ Rather, the protection afforded corporate political speech, while still more substantial than the protections afforded corporate commercial speech, seemed to vary depending on context.¹⁰⁹ Generally, corporations were afforded equivalent political speech protection to non-corporate speakers.¹¹⁰

Indicative of this approach is *First National Bank of Boston v. Bellotti*,¹¹¹ in which the Court struck down a Massachusetts criminal statute that prohibited corporations from trying to influence voter opinion on ballot issues not related to the corporation’s own business interest with monetary contributions.¹¹² In its decision, the Court focused on the interest of the general public in hearing political speech.¹¹³ The

101. See Siebecker, *supra* note 11, at 657-58.

102. See Neuborne, *supra* note 8, at 12-15.

103. See U.S. CONST. amend. I; Page & Yang, *supra* note 8, at 6; Siebecker, *supra* note 11, at 636.

104. Siebecker, *supra* note 11, at 636.

105. *Id.* (citations omitted).

106. *Id.*

107. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks omitted). The Supreme Court also noted, “it might be maintained that political speech simply cannot be banned or restricted as a categorical matter.” *Id.* (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)).

108. See Siebecker, *supra* note 11, at 636 (noting that in the context of an upcoming election corporate political speech was subject to greater regulation than non-corporate political speech).

109. *Id.*

110. *Id.*

111. 435 U.S. 765 (1978).

112. *Id.* at 767, 784.

113. *Id.* at 777, 783, 791-92. See also Siebecker, *supra* note 11, at 637.

Court noted that “[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.”¹¹⁴ The Court’s approach, however, seemed to change in the context of an impending election.¹¹⁵

In *Austin v. Michigan Chamber of Commerce*,¹¹⁶ the Supreme Court upheld a statute that prohibited corporations from using their general treasury funds for independent expenditures opposing or supporting candidates in state elections.¹¹⁷ The Court based its holding on the concept that significant corporate influence on the electoral process has substantial negative effects and garners the corporation an unfair advantage in public debate.¹¹⁸

The Court affirmed this line of reasoning in *McConnell v. Federal Election Commission*.¹¹⁹ In *McConnell*, the Court upheld a federal regulation that barred corporations from using general treasury funds to create advertisements that mention a candidate’s name within sixty days of an election.¹²⁰ In so holding, the Court recognized the government’s substantial interest in combating “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹²¹ Prior to the Supreme Court’s holding in *Citizens United*, this more flexible, contextual approach to corporate political speech seemed to indicate at least some willingness of the Court to allow for the regulation of political speech in furtherance of a compelling enough government interest.¹²² However, *Citizens United*—throwing into doubt the ability of the government to regulate political speech absent an extraordinarily compelling state interest—overruled both *Austin* and, in part, *McConnell*.¹²³

One conceptualization of the different approaches applied by the commercial speech doctrine and the political speech doctrine, as well as by various courts in general, is the difference between a speaker-

114. *Belotti*, 435 U.S. at 777.

115. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 664 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

116. 494 U.S. 652 (1990).

117. *Id.* at 655, 664, 669.

118. *Id.* at 658-60.

119. 540 U.S. 93, 205 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

120. *Id.* at 204-05, 246.

121. *Id.* at 205 (quoting *Austin*, 494 U.S. at 660) (internal quotation marks omitted).

122. See *id.* (quoting *Austin*, 494 U.S. at 660).

123. *Citizens United*, 130 S. Ct. at 886, 913. Portions of *McConnell* that did not deal with this issue, however, remain good law. *Id.* at 913.

centered and hearer-centered First Amendment doctrine.¹²⁴ In a speaker-centered construction of the First Amendment, speech on religion, science, politics, and arts is protected based on the inherent right of the speaker to speak.¹²⁵ This represents a non-instrumental approach to free speech protections because the value of the speech has nothing to do with its protected status.¹²⁶ Rather, the speech is protected because of “a toleration driven respect for the dignity of the self-affirming speaker and a prophylactic refusal to permit the government to pick and choose who should be tolerated.”¹²⁷

*National Socialist Party v. Village of Skokie*¹²⁸ presents the classic example of a speaker-centered theory of the First Amendment.¹²⁹ In *Skokie*, the Court easily overturned a state injunction preventing a Nazi group from parading swastikas and distributing literature that incited hatred against people of the Jewish faith.¹³⁰ Certainly the Court did not think that there was any value to society in hearing the Nazi’s speech, but rather their right to speak on their political beliefs was protected by a constitutional commitment to toleration under a speaker-centered model of the First Amendment.¹³¹ Thus, the speaker-centered model best explains the Court’s approach under the political speech doctrine.¹³²

A hearer-centered model of free speech, however, better represents the commercial speech doctrine.¹³³ A hearer-centered model of the First Amendment expanded on the earlier speaker-centered model by recognizing and protecting the interest of hearers in hearing certain speech.¹³⁴ To do so, the court engages in the very instrumentalist analysis that it shunned under a speaker-centered model by placing a value on the speech itself and engaging in a standard cost-benefit analysis.¹³⁵ Therefore, a hearer has a First Amendment right to hear speech that will inform them or allow them to act more efficiently, but no interest or right whatsoever to hear false or harmful information.¹³⁶ *Virginia State Board of Pharmacy* represents the classic hearer-centered

124. Neuborne, *supra* note 8, at 13-28 (discussing in detail the difference between hearer-centered and speaker-centered conceptions of the First Amendment).

125. *Id.* at 25.

126. *Id.*

127. *Id.*

128. 432 U.S. 43 (1977).

129. Neuborne, *supra* note 8, at 17.

130. *Skokie*, 432 U.S. at 43-44.

131. Neuborne, *supra* note 8, at 17-19.

132. *See Skokie*, 432 U.S. at 43-44; Neuborne, *supra* note 8, at 17-18.

133. *See Neuborne*, *supra* note 8, at 28, 30.

134. *Id.* at 25.

135. *Id.*

136. *Id.* at 25-26.

model of the First Amendment applied in a commercial speech context.¹³⁷ In *Virginia State Board of Pharmacy*, the Court held that the right of pharmacists to advertise the cost of their products was constitutionally protected because of the public's interest in being better informed and thus better able to make a choice in their own best interest.¹³⁸

The distinction between a speaker-centered and a hearer-centered model of the First Amendment does not, however, clarify the blurred line between commercial and political speech.¹³⁹ Rather, the distinction between speaker-centered and hearer-centered protections of free speech become problematic when strong speaker and hearer interests run contrary to each other in the same cases, such as where there are face-to-face racial or sexual slurs.¹⁴⁰ Additional problems arise when the parties at issue fit into neither the classical speaker nor hearer categories, but are rather bystanders, conduits for speech, or government regulators.¹⁴¹ In these instances, the Court must recognize and attempt to balance the myriad of interests present, resulting in a truly blurry result.¹⁴²

Another distinction that may account for the discrepancies in the level of protection given to different types of corporate speech, as well as provide a window to the level of protection likely to be applied by a court, is the distinction between truthful speech and misleading speech.¹⁴³ Generally, the Court is extremely averse to the restriction of truthful speech in the name of protecting the public.¹⁴⁴ In the securities regulation context, this sentiment was most strongly laid out in *Basic Inc. v. Levinson*¹⁴⁵ when the Court refused to take a paternalistic

137. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Neuborne, *supra* note 8, at 30-31.

138. *Va. State Bd. of Pharmacy*, 425 U.S. at 770 (noting that this approach was preferential to the "highly paternalistic" theory that the public's access to information through advertising should be limited so they can not make poor choices for themselves, in this case opting for cheaper but sub-par pharmaceuticals).

139. See Neuborne, *supra* note 8, at 25.

140. *Id.* at 23 (citations omitted).

141. *Id.* at 24-25.

142. See *id.*

143. See *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988); see also Drury, *supra* note 8, at 780, 782.

144. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (noting that a state may regulate commercial speech to protect consumers from misleading or deceptive speech, but may not prohibit the dissemination of truthful, non-misleading speech for reasons unrelated to the preservation of a fair bargaining process); *Basic Inc.*, 485 U.S. at 234; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (noting that the State could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients").

145. 485 U.S. 224 (1988).

approach to investor protection because “[d]isclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress.”¹⁴⁶ On the other hand, the Court has been more willing to suppress misleading speech.¹⁴⁷ This is illustrated by the threshold requirement of the *Central Hudson* test that commercial speech must relate to a lawful activity and not be misleading in order to be eligible for protection under the commercial speech doctrine.¹⁴⁸ This preference for the protection of truthful speech thus provides another model for understanding when and why the Court will protect some speech more vigorously than other speech.¹⁴⁹

C. *Citizens United and a Wider View of Corporate Political Speech Protections*

It is *Citizens United* however, the most recent case to address the issue of corporate speech protections, that provides the broadest and fiercest articulation of corporate free speech to date.¹⁵⁰ By overturning two previous Supreme Court decisions, *Austin* and *McConnell*, and issuing an opinion filled with broad inclusive language expressing an inflexible view of political speech protections under the First Amendment, *Citizens United* signals an increased willingness of the Court to strike down government regulations in the name of protecting corporate political speech.¹⁵¹ Accordingly, *Citizens United* is a powerful new precedent with which to challenge virtually any form of government regulation that touches corporate political speech.¹⁵²

In *Citizens United*, the Court struck down Section 203 of the Bipartisan Campaign Reform Act of 2002 (the “BCRA”),¹⁵³ which prohibited corporations and unions from using general treasury funds for express advocacy or electioneering communication.¹⁵⁴ Electioneering communication is defined as “any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for

146. *Id.* at 234.

147. *See 44 Liquormart, Inc.*, 517 U.S. at 501; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

148. *Cent. Hudson*, 447 U.S. at 566.

149. *See Drury*, *supra* note 8, at 780.

150. *See Citizens United v. FEC*, 130 S. Ct. 876, 900, 904-05, 911-13 (2010).

151. *See id.*

152. *See id.*

153. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 441b(b)(2) (2006)), *invalidated by Citizens United v. FEC*, 130 S. Ct. 876 (2010) (holding “2 U.S.C. § 441b’s restrictions on corporate independent expenditures” unconstitutional).

154. *Citizens United*, 130 S. Ct. at 887, 917.

Federal office” and is made within thirty days of a primary or sixty days of a general election.¹⁵⁵

The government defended the statute on the same four central justifications that the Court had upheld in *Austin* and *McConnell*.¹⁵⁶ First, the government argued it had a compelling interest in regulating corporate political speech to prevent corporations from gaining “an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.”¹⁵⁷ The idea was that the massive size and resources of some corporations would allow them to distort the tenor of political debate, and that the government should be allowed to equalize the ability of individuals and groups to influence elections.¹⁵⁸ Second, the government argued that it should be allowed to regulate corporate political speech in order to prevent corruption or the appearance of corruption.¹⁵⁹ Third, the government argued it could limit the political speech of corporations in order to protect dissenting shareholders from being compelled to fund speech that they disagree with.¹⁶⁰ Fourth, the government argued it had a compelling interest in preventing foreign individuals or associations from influencing American political elections.¹⁶¹ The Court in *Citizens United*, however, found all of these same interests that had been upheld in *Austin* and *McConnell* to be insufficient to defeat the general First Amendment protections of corporate political speech.¹⁶²

The overruling of *Austin* and *McConnell* alone represents a significant shift in the Court’s attitude toward the nature of corporate political speech by stiffening one of the few areas where political speech protections had been flexible.¹⁶³ However, the extremely broad language emphasized in *Citizens United* demonstrates a still greater shift in the Court’s view of corporate political speech to one that sees corporate political speech as almost universally inviolate.¹⁶⁴ Accordingly, the

155. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(3)(A).

156. See *Citizens United*, 130 S. Ct. at 904, 908, 911.

157. *Id.* at 904 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990)) (internal quotation marks omitted).

158. See *id.* This is the so-called “antidistortion rationale.” *Id.*

159. *Id.* at 908. One response of the Court to this contention was simply to conclude that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909.

160. *Id.* at 911.

161. *Id.*

162. *Id.* at 904, 909-11.

163. See *id.* at 913, 917; Siebecker, *supra* note 11, at 636.

164. See *Citizens United*, 130 S. Ct. at 913 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

Court makes a point of repeatedly emphasizing that the government cannot suppress political speech on the basis of the speaker's corporate identity.¹⁶⁵

Further, the Court made broad statements that seem custom fit for application to the current securities regulation regime.¹⁶⁶ In debunking the antidistortion rationale of *Austin*, the Court stated:

When the Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.¹⁶⁷

In holding that the government's interest in protecting dissenting shareholders from being compelled to fund political statements averse to their own views, the Court scolded, "the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment."¹⁶⁸ The Court further noted that "[o]ur Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights."¹⁶⁹ Finally, in expressly overruling *Austin*, the Court held that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."¹⁷⁰ Taken together, these statements form an extremely rigid approach to the First Amendment that holds political speech as almost universally inviolate.¹⁷¹

Indeed, the Court only takes a reprieve from this expansive rhetoric to note a narrow band of exceptions where the government's interest in allowing its entities to function require limits on speech to the disadvantage of certain classes of persons.¹⁷² While it seems that this exception could shelter the SEC and the current securities regulation regime from constitutional challenge, the examples cited by the Court are all examples in which either the federal or state government itself is

165. *Id.* at 900, 904-05, 913.

166. *See id.* at 908, 911-13.

167. *Id.* at 908. This statement alone seems to support a constitutional challenge to the entire framework of gun jumping since gun jumping aims to do exactly what this statement forbids—it compels investors to get all of their information regarding a security from tightly censored statements in the form of prospectuses by forbidding the issuing corporation from supplying any other information to the market. *See supra* text accompanying notes 34-43.

168. *Citizens United*, 130 S. Ct. at 911.

169. *Id.* at 912.

170. *Id.* at 913.

171. *See id.* at 908, 911-13.

172. *Id.* at 899.

involved in carrying out a basic service: operating a public school, operating a prison, operating a military, and operating a postal service.¹⁷³ The SEC however, being a regulator, does not itself carry out a basic service; it does not issue or sell securities.¹⁷⁴ Rather, it looks over the shoulders of those who do, telling them what is and is not permissible.¹⁷⁵ This function is a step removed from the kinds of functions that the Court cited to as allowing for the necessary restriction of speech by the government.¹⁷⁶ Rather, the SEC's role is much closer to the role of the Federal Election Commission in *Citizens United*, a function that did not justify the government's restriction of corporate political speech.¹⁷⁷

III. GUN JUMPING AND THE FREE SPEECH PROBLEM OF SECURITY REGULATIONS

The conflict between the securities regulation regime and First Amendment protections of corporate speech presents a particularly troublesome dilemma because it pits two long-standing bodies of law with meritorious purposes against each other.¹⁷⁸ The securities regulation system is integral to the operation of an efficient and stable capital market, while First Amendment protection is a core value of American federalism.¹⁷⁹ Accordingly, a conflict between the two bodies of law essentially forces a choice between two central values of our society.¹⁸⁰ Taking into account the rigid view of corporate political speech protections under *Citizens United*, such a conflict will arise if the offering of a security is politicized.¹⁸¹ Scholars have, however, made attempts to reconcile the two with each other.¹⁸²

173. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Jones v. N.C. Prisoners Labor Union, Inc.*, 433 U.S. 119, 129 (1977); *Parker v. Levy*, 417 U.S. 733, 759 (1974); *Civil Serv. Comm'n v. Nat'l Ass'n Letter Carriers*, 413 U.S. 548, 557 (1973)).

174. See discussion *supra* Part II.A.

175. See discussion *supra* Part II.A.

176. Compare *Citizens United*, 130 S. Ct. at 899, with discussion *supra* Part II.A.

177. Compare *Citizens United*, 130 S. Ct. at 896, 913 (noting that "the FEC's 'business is to censor'" (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965))), with *supra* notes 5-6 and accompanying text.

178. Page & Yang, *supra* note 8, at 5-6 (identifying the importance of First Amendment rights within American society and the rising specter of conflict with the area of the securities law).

179. Drury, *supra* note 8, at 765 (describing the long-time goals of the securities regulation regime); Page & Yang, *supra* note 8, at 6.

180. See Page & Yang, *supra* note 8, at 3, 6.

181. See discussion *infra* Part III.D.

182. See, e.g., Drury, *supra* note 8, at 780, 785 (arguing sections of the securities laws that forbid truthful, non-misleading speech should be struck down, but areas that require disclosure upheld); Page & Yang, *supra* note 8, at 83 (arguing that Regulation Fair Disclosure should fail a constitutional challenge); Siebecker, *supra* note 11, at 651 (arguing that courts should adopt an institutional approach to First Amendment doctrine).

A. *The Court's Approach to Free Speech and Securities Regulation*

The Court has yet to substantively address the application of the First Amendment to the securities regulation laws.¹⁸³ However, a scattering of cases focused on other areas of First Amendment application that have alluded to or mentioned the issue have led some scholars to argue that a general securities exception already exists.¹⁸⁴ These cases would likely be the first line of defense to a constitutional challenge to the gun jumping provisions of the Securities Act.

*Ohralik v. Ohio State Bar Ass'n*¹⁸⁵ is the earliest indication of a general securities exception to the First Amendment.¹⁸⁶ In dictum, the *Ohralik* Court stated that:

[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.¹⁸⁷

Ohralik, however, was decided early on in the development of the commercial speech doctrine, and commercial speech protections have been applied more strictly since.¹⁸⁸ Further, the Court's statement seems to assume that all speech related to securities exists solely within the commercial speech doctrine and does not consider the conundrum that mixed political-corporate speech would pose under existing securities and First Amendment jurisprudence.¹⁸⁹

The Court's likely approach to a First Amendment challenge of the securities regulations is further informed by *Paris Adult Theatre I v.*

183. Page, *supra* note 19, at 797.

184. See, e.g., Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 COLUM. L. REV. 474, 495 (1992) (reviewing NICHOLAS WOLFSON, *CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC* (1990)); Page, *supra* note 19, at 797-802 (analyzing the Supreme Court's treatment of securities regulation under the First Amendment).

185. 436 U.S. 447 (1978).

186. *Id.* at 456.

187. *Id.* (citations omitted) (internal quotation marks omitted).

188. Page, *supra* note 19, at 798.

189. See *Ohralik*, 436 U.S. at 456.

Slaton.¹⁹⁰ In that case, the Court noted that “both Congress and state legislatures have . . . strictly regulated public expression by issuers of and dealers in securities, profit sharing ‘coupons,’ and ‘trading stamps,’ commanding what they must and must not publish and announce.”¹⁹¹ This statement is weakened, however, when taken in the context of the preceding sentence, which states that “legislators and judges have acted on various unprovable assumptions.”¹⁹² It is somewhat less than a ringing endorsement of the SEC’s ability to regulate the public expression of issuers to call it an “unprovable assumption.” Also, the dictum again fails to deal with the prospect of a politicized security offering.¹⁹³

Two more recent cases relatively on point, *SEC v. Wall Street Publishing Institute, Inc.*¹⁹⁴ and *Lowe v. SEC*,¹⁹⁵ signal a retreat from these previous absolutist views of securities regulation. Both cases involved the application of the securities laws to financial industry publications, and thus deal with situations in which the SEC is attempting to regulate behavior that does not obviously fall solely within the reach of the securities laws.¹⁹⁶ In *Lowe*, the Court skirted the constitutional question by finding that the newsletter at issue fell within a statutory exemption under the Investment Advisers Act of 1940 for “publishers of any bona fide newspaper, news magazine or business or financial publication.”¹⁹⁷ However, the Court also noted that “it is difficult to see why the expression of an opinion about a marketable security should not . . . be protected,” indicating that the First Amendment could indeed be used to at least challenge parts of the securities laws.¹⁹⁸

In *Wall Street Publishing Institute*, the D.C. Circuit indicated that it assumed that the exchange of information regarding securities received

190. 413 U.S. 49, 61-62 (1973).

191. *Id.*

192. *Id.* at 61.

193. *See id.* at 61-62.

194. 851 F.2d 365 (D.C. Cir. 1988).

195. 472 U.S. 181 (1985).

196. *See Lowe*, 472 U.S. at 183; *Wall St. Publ’g Inst.*, 851 F.2d at 366. It is notable that the cases most closely dealing with the First Amendment implications of the securities laws arose in situations in which issues of obvious concern to the SEC, namely the business of the securities industry, were intertwined with greater issues of social concern—in these cases freedom of the press. *See Lowe*, 472 U.S. at 183; *Wall St. Publ’g Inst.*, 851 F.2d at 366. While the degree to which the First Amendment limits the SEC’s ability to exercise its substantial power under the securities laws was not resolved in *Lowe* or *Wall Street Publishing Institute*, it is clearly possible that the issue will arise again in a similarly blurry set of facts, such as a case involving the issuance and promotion of securities for purely political purposes. Page, *supra* note 19, at 798-800, 802.

197. *Lowe*, 472 U.S. at 208, 211 (internal quotation marks omitted).

198. *Id.* at 210 n.58.

only limited First Amendment protection, but also noted that, in light of *Lowe*, “it would be an overstatement to assert that the First Amendment does not *limit* regulation in the securities field.”¹⁹⁹ The explicit recognition in both *Lowe* and *Wall Street Publishing Institute* that the First Amendment must limit securities regulations in some manner stands in stark contrast to the absolutist exceptions suggested by *Ohralik* and *Paris Adult Theatre I* and thus severely undermines arguments that such a universal exception already exists.²⁰⁰ Furthermore, the Court in *Wall Street Publishing Institute*, like in *Paris Adult Theatre I*, could only assume to what degree the First Amendment constrains government regulation under the securities laws, a result of the lack of any clear precedent dealing with the issue.²⁰¹ Therefore, these cases show that the degree to which the First Amendment imposes limits on securities regulation remains an open question.²⁰²

Indeed, the most recent case to touch on the issue, *Full Value Advisors, LLC v. SEC*,²⁰³ illustrates that little has changed since *Lowe* and *Wall Street Publishing Institute* were decided.²⁰⁴ In *Full Value Advisors, LLC*, an institutional investment manager challenged the SEC’s quarterly disclosure requirement on the basis that it was compelled speech in violation of the First Amendment.²⁰⁵ While the Court in *Full Value Advisors, LLC* determined that the investment manager’s claims were not ripe, it proceeded to apply a rational basis analysis to Section 13 of the Investment Advisors Act of 1940 in dicta, concluding that the requirement of disclosure to the SEC alone did not raise First Amendment concerns and that Section 13 had a rational basis in both purpose and means.²⁰⁶ In supporting this conclusion, the Court stated that “[s]ecurities regulation involves a different balance of concerns and calls for different applications of First Amendment

199. *Wall St. Publ’g Inst.*, 851 F.2d at 373. By assuming that securities regulations were subject to only limited First Amendment review, the Court was adopting an approach taken by the First Circuit years before in the Supreme Court’s decision in *Lowe*. See *id.*; *Bangor & Aroostook R.R. Co. v. Interstate Commerce Comm’n*, 574 F.2d 1096, 1107 (1st Cir. 1978) (“Though first amendment protection has lately been afforded some types of commercial speech, . . . the first amendment has not yet been held to limit regulation in areas of extensive economic supervision . . .” (citations omitted)).

200. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 61-62 (1973).

201. See *Paris Adult Theater I*, 413 U.S. at 61-62; *Wall St. Publ’g Inst.*, 851 F.2d at 373; Page, *supra* note 19, at 797.

202. See Page, *supra* note 19, at 799-800, 802.

203. 633 F.3d 1101 (D.C. Cir. 2011), *cert. denied*, 131 S. Ct. 3003 (2011).

204. *Full Value Advisors, LLC*, 633 F.3d at 1106-09.

205. *Id.* at 1104.

206. *Id.* at 1106-09.

principles.”²⁰⁷ Further, the Court upheld the validity of the disclosure requirements because they were indistinguishable from underlying disclosure requirements in other areas of the law that are necessary for the essential operation of the government.²⁰⁸

While *Full Value Advisors, LLC* appears to provide some long needed tangible guidance as to the limits imposed by the First Amendment on the securities laws, the decision is much too limited to usefully clarify the First Amendment’s implications to the general securities regulation regime. The claims at issue were not ripe and thus were not before the court.²⁰⁹ Additionally, the decision is premised on language taken from non-majority opinions and simply does not address the types of compelled and restricted speech that make up the majority of the securities regulation regime, namely speech to the public at large rather than to the SEC itself.²¹⁰ However, *Full Value Advisors, LLC* does indicate that courts today are likely to acknowledge that the First Amendment at least applies in some way to the securities laws.²¹¹ Thus, even though First Amendment challenges to the securities regulation regime have arisen in various cases, the courts have yet to directly address the issue in any meaningful way.²¹²

207. *Id.* at 1109 (quoting *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting)) (internal quotation marks omitted).

208. *Id.* at 1109 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (“[E]ssential operations of government may require [disclosure] for the preservation of an orderly society . . . ”)).

209. *Id.* at 1106-07.

210. *See id.* at 1108-09.

211. *See id.* at 1109; *see also* *Blount v. SEC*, 61 F.3d 938, 944-47 (D.C. Cir. 1995) (holding that the SEC’s anti-corruption Rule G-37 survived strict First Amendment scrutiny). *Blount* is an interesting case in that the Court actually applied the First Amendment to an SEC rule that gave rise to political speech concerns. *Id.* at 941, 944. SEC Rule G-37 was created to prevent “pay-to-play” practices in the state municipal bond markets by prohibiting broker-dealers or municipal security dealers from doing business with any public official that had received a campaign contribution from the broker-dealer within two years of a proposed issue. *Id.* at 939-40. Without deciding what the proper standard of review was, the Court found that the rule survived strict scrutiny due to a compelling state interest in preventing corruption or the appearance of corruption. *Id.* at 943-44. Thus, while many of the themes discussed in this Note run through *Blount* as well, the interests that were held to validate SEC Rule G-37 are completely different than the interests underlying the broader securities regulation regime, and specifically the gun jumping provisions of the securities laws. *See supra* notes 27, 35 and accompanying text. Additionally, the state interest in preventing corruption or the appearance of corruption was one of the very interests that was found lacking in *Citizens United*. *See supra* notes 159, 162 and accompanying text.

212. *See* *Lowe v. SEC*, 472 U.S. 181, 208, 211 (1985); *Full Value Advisors, LLC*, 633 F.3d at 1107-09; *Blount*, 61 F.3d at 943-44; *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988); *see also* *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694, 709 n.16 (S.D.N.Y. 2005) (declining to address the constitutional challenges raised as the complaint failed to state a claim).

B. Arguments that Securities Regulation Violates Commercial Speech Protections

Scholars have also argued that parts of the securities laws violate the Constitution on various grounds. Professor Burt Neuborne argues that large portions of the SEC's regulatory scheme could be susceptible to First Amendment challenges under a hearer-centered conception of First Amendment protections.²¹³ In particular, Professor Neuborne targets three areas of SEC speech regulation: the licensing and regulation of investment newsletters, the regulation of proxy solicitations, and the regulation of information in primary and secondary markets.²¹⁴

In broad form, Professor Neuborne's central First Amendment critique of the SEC's prophylactic approach to speech is merely that an allegation by the SEC that certain speech is potentially misleading simply should not be enough to justify its suppression if the public really does have a constitutionally protected interest in being better informed.²¹⁵ He further points out that the single support for the SEC's frequent choice to use more restrictive alternatives than necessary in regulating speech in the securities markets is the assumption that almost total deference should be given to SEC judgment.²¹⁶ That assumption, Professor Neuborne argues, is anathema to a hearer-centered conception of the First Amendment, and "censorship rules [that] are applied to stifle speech that would be useful to hearers today in the name of protecting hearers tomorrow" should be struck down.²¹⁷

Professor Neuborne also specifically addresses the difficulty with which the gun jumping provisions of the Securities Act can be reconciled with the First Amendment, stating that it is indeed "impossible to square existing SEC restrictions on the scope and timing of pre- and post-prospectus promotional speech involving new issues with a hearer-centered theory of free speech."²¹⁸ Despite the verve with which Professor Neuborne argues that various practices of the SEC are unconstitutional, he concludes that challenges to suspect provisions of the securities laws are unlikely to arise because everyone but the public

213. Neuborne, *supra* note 8, at 41.

214. *Id.* at 42.

215. *Id.* at 49.

216. *Id.* at 52.

217. *Id.* at 53.

218. *Id.* at 61. Professor Neuborne continues on to hypothesize that, as a result of the SEC's significant restrictions on speech, the simplification of information available to the market regarding new issues has only served to foster a black market of rumors and insider generated tips while assuring that sanctioned sources of information are of only limited use to the majority of the primary capital market. *Id.*

has a vested interest in maintaining the current system.²¹⁹ This conclusion is undercut by more recent developments in law and public policy.²²⁰

Professors Antony Page and Katy Yang argue that Regulation Fair Disclosure (“Regulation FD”)²²¹ violates the First Amendment because it targets speech directly without a requirement of harmful conduct or even a likelihood of harmful conduct, when it could have opted to target the harmful conduct itself.²²² Regulation FD requires issuers to reveal material nonpublic information that has been purposefully or accidentally revealed to certain enumerated persons that are considered likely to trade on the information.²²³ The goal of the regulation was to target trading based on selective disclosure by an issuer that fell outside of the Rule 10b-5 insider trading prohibitions.²²⁴ Professors Page and Yang note that because the speech itself is targeted, and not the resulting trading, the regulation is overinclusive, applying to speech that does not result in trading or harm as well as speech conveying information that is not used at all.²²⁵ Citing the premise that “[i]f the First Amendment means anything, it means that regulating speech must be a last, not first, resort[,]” Professors Page and Yang outline several less restrictive alternatives to the approach chosen by the SEC, such as introducing a fraud-based regulation requiring a personal benefit rather than the mere possession of information.²²⁶

This argument easily extends to the gun jumping provisions of the securities laws. Just as Regulation FD is overinclusive, the gun jumping provisions are also overinclusive because they suppress all information viewed as arousing public interest in a security in the hope of protecting the autonomous choice of simple investors, which could include virtually any positive information about a corporation, regardless of whether that

219. *Id.* at 62-63. Professor Neuborne suggests that challenges are unlikely to crop up because the current system affords the SEC an illusion of power and the public with false assurances that the markets are being “scrupulously policed.” *Id.* at 62. Corporations, meanwhile, may simply pass on the cost of regulation to the consumer. *Id.* at 62-63. This conclusion carries significantly less weight now that the public’s impression of market regulators has been shattered in the wake of the Bernard Madoff Ponzi scheme and the fall of Lehman Brothers. See Andrew Ross Sorkin, *Merrill Is Sold: Failing to Find Buyer, Lehman Set to File for Bankruptcy*, N.Y. TIMES, Sept. 15, 2008, at A1; David Stout, *Report Details How Madoff’s Web Ensnared S.E.C.*, N.Y. TIMES, Sept. 3, 2009, at B1.

220. See discussion *infra* Part III.D.

221. 17 C.F.R. § 243.100 (2011).

222. Page & Yang, *supra* note 8, at 76, 78.

223. 17 C.F.R. § 243.100(a); Page & Yang, *supra* note 8, at 11-13.

224. Page & Yang, *supra* note 8, at 10-11.

225. *Id.* at 76-77.

226. *Id.* at 78-79 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)) (internal quotation marks omitted).

information may actually be useful to, or desired by, the market.²²⁷ Less restrictive alternatives exist to the current gun jumping prohibitions. One approach would be to develop rules that allow sophisticated investors access to more information while singling out simple investors for greater protection.²²⁸ Accordingly, Professors Page and Yang's argument as to the unconstitutionality of Regulation FD applies at least as strongly to the gun jumping provisions.²²⁹

Professor Lloyd L. Drury argues that sections of the securities law, such as the gun jumping provisions, would fail under a commercial speech challenge because they limit truthful speech without substantively enhancing investor protections.²³⁰ Professor Drury notes that the suppression of truthful speech is treated as highly suspect by the Court, even in highly regulated fields afforded only the lesser protection of the commercial speech doctrine.²³¹ Additionally, Professor Drury argues that the gun jumping rules would fail the *Central Hudson* test if challenged, as the SEC would be unable to show that less intrusive means could not achieve the same goals.²³²

If the gun jumping rules likely violate the First Amendment in the context of the weaker commercial speech doctrine, then the gun jumping provisions are even more likely to violate the First Amendment in the context of higher political speech protections.²³³ Within the political speech context, the SEC would not have to merely show that the regulations are not more expansive than necessary, but that they are narrowly tailored to achieve a compelling state interest.²³⁴ This may be an insurmountable task considering the broad prophylactic approach chosen by the SEC under the gun jumping provisions.²³⁵

C. Arguments that Free Speech Protections Should Not Apply to Securities Regulations

Some scholars have attempted to counter arguments that large parts of the securities laws are unconstitutional by providing various rationales for the securities laws being excepted from First Amendment review. Professor Arthur R. Pinto, responding to Professor Neuborne, argues that

227. See Neuborne, *supra* note 8, at 54, 61; *supra* Part II.A.

228. Neuborne, *supra* note 8, at 55-56.

229. See Page & Yang, *supra* note 8, at 76, 78-79.

230. Drury, *supra* note 8, at 780-82.

231. *Id.* at 767, 782.

232. *Id.* at 782.

233. See *id.*; Siebecker, *supra* note 11, at 636.

234. See *supra* notes 92, 107 and accompanying text.

235. See Neuborne, *supra* note 8, at 61.

substantial deference should be given to the SEC's regulatory structure, essentially because of the nature of capital markets and the substantial risks associated with a breakdown in the markets.²³⁶ According to Professor Pinto, because issues of capital formation trigger important policy issues, the policing of the capital markets is difficult, and speech is inherently a part of all illegal schemes, the issue should be left to the executive branch entirely in order to avoid courts becoming "the arbiters of economic policy."²³⁷ In other words, Professor Pinto contends that these decisions should be left to the experts in the form of Congress and the SEC.²³⁸ This argument, however, runs directly contrary to the Court's anti-paternalistic view of acceptable government regulation and is therefore unlikely to save the gun jumping provisions of the securities laws upon direct challenge.²³⁹

Professor Michael R. Siebecker argues for an "institutional approach" to the First Amendment and its interaction with securities regulation.²⁴⁰ He contends that such an approach justifies the significant regulation of corporate political speech for the purpose of preserving market integrity.²⁴¹ An institutional approach to the First Amendment evaluates the importance of an institution, and then weighs the effect of a proposed change in speech protections on that institution in deciding whether to make the change.²⁴² For Professor Siebecker, the importance of securities to American life—facilitating corporate ownership and control, allowing government and businesses to raise capital, and an investment for individuals—extends to securities regulation.²⁴³ Thus, because securities are of vast importance to American society, protecting the securities market through regulation is equally important.²⁴⁴ Furthermore, Professor Siebecker argues that securities regulation depends on speech restrictions to prevent fraud, market manipulation,

236. Pinto, *supra* note 8, at 102-03.

237. *Id.* at 98-99.

238. *Id.* at 98.

239. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) ("Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress.").

240. Siebecker, *supra* note 11, at 651; *see also* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1271-73 (2005) [hereinafter *Towards an Institutional First Amendment*] (arguing for an institutional approach to the First Amendment as a whole).

241. Siebecker, *supra* note 11, at 651.

242. *Id.* at 649-50.

243. *Id.* at 651-52.

244. *Id.* at 652.

insider trading, and other issues.²⁴⁵ The combination of the importance of the securities regulation regime and its dependence on speech restrictions, according to Professor Siebecker, justifies greater speech regulation in the securities setting.²⁴⁶

Professor Siebecker's argument, however, can be seen to cut both ways. When regulation is accomplished through prohibition, the market is at risk of being cut off from the very securities that are so important to American life.²⁴⁷ Accordingly, the vast importance of securities may also be seen as a reason the courts should act as a check against overzealous and overbroad securities regulation.²⁴⁸ Additionally, the Supreme Court appears to have already forsaken this institutional analysis and is therefore unlikely to adopt it in the future.²⁴⁹

D. *Citizens United, the Politicization of Corporate Speech, and Securities Regulation*

The Court's decision in *Citizens United* greatly informs the applicability of previous arguments about the constitutionality of securities regulations today, and provides significant ammunition for arguments that sections of the securities regulations are in fact unconstitutional.²⁵⁰ Indeed, *Citizens United* has accelerated an already present trend toward the increased politicization of corporate speech, increasing the likelihood that the Court will have to address constitutional challenges to the securities regulation regime.²⁵¹ Various

245. *Id.* at 654.

246. *Id.*

247. *See* Neuborne, *supra* note 8, at 61 (stating that overregulation may lead to greater market manipulation by insiders).

248. *See* Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 777, 787 (1995) (discussing the SEC's prohibition of projections in disclosure documents); Page & Yang, *supra* note 8, at 26-27 (discussing why the selective disclosure by issuers targeted by Regulation FD may be desirable). The SEC's prohibition of projections is a particularly useful example of the ills that may be borne of an unchecked regulator. *See* Drury, *supra* note 8, at 783. Projections were originally banned because they were thought to be easily manipulated and confusing to investors. *Id.* Investors, however, placed a high value on prospective information since the value of a security to an investor is entirely based on its future performance. *Id.* Thus, the SEC had prohibited speech in the name of protecting those who most wanted to hear it. *See id.* It took the SEC ten years to rectify the policy, and the disclosure of projections is now encouraged. 17 C.F.R. § 230.175 (2011); Drury, *supra* note 8, at 784.

249. Highberger, *supra* note 11, at 2156-60 (discussing cases in which the Court seems to reject the institutional approach).

250. *See supra* notes 156-62 and accompanying text.

251. Siebecker, *supra* note 11, at 621-28 (discussing the increased mixing of commercial and political speech in the corporate context); Michael Luo, *Changes Have Money Talking Louder Than Ever in Midterms*, N.Y. TIMES, Oct. 8, 2010, at A13 (discussing the substantial increase in political spending by corporations since the *Citizens United* decision).

cases unrelated to the securities regulation regime have already demonstrated the utility of mixed commercial and political speech to corporate speakers.²⁵²

*Nike, Inc. v. Kasky*²⁵³ provides an illustrative example of the potential benefits to corporations of characterizing mixed speech as political.²⁵⁴ In *Nike*, a corporation defended against claims of false and misleading statements made about its labor practices by arguing that the First Amendment barred the claim since the statements were part of a public dialogue on a matter of public concern, thus making it protected speech.²⁵⁵ Two state courts agreed with the corporation's defense before the Supreme Court granted and then dismissed its writ of certiorari as improvidently granted.²⁵⁶ *Nike* shows, however, that corporations may have a powerful incentive to mix politics with corporate speech in order to avoid the substantial burden and cost of compliance with regulations, an incentive that would certainly apply to avoiding the securities regulations.²⁵⁷

In general, corporations likely have an incentive to engage in corporate political activities such as lobbying, making campaign contributions, and operating governmental relations offices.²⁵⁸ Empirical evidence suggests that increased corporate political activity correlates to increased firm performance.²⁵⁹ Thus, not only do corporations have an incentive to tinge their activities with political speech in order to protect themselves from regulatory action, but increased corporate political activity also appears, perhaps unsurprisingly, to increase corporate

252. See, e.g., *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929, 931-33, 942 (9th Cir. 2006) (allowing a satellite television company to escape RICO liability on grounds that demand letters it sent were protected speech); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 462-63 (4th Cir. 2000) (protecting a corporation from an injunction because statements on its website regarding a failed trademark and copyright dispute were not commercial speech and thus protected under the First Amendment); *Bernardo v. Planned Parenthood Fed. of Am.*, 9 Cal. Rptr. 3d 197, 214-15, 228-29 (Ct. App. 2004) (striking suit against a non-profit organization for publishing allegedly false statements under a state statute because the court determined that the speech at issue was political rather than commercial); *DuPont Merck Pharm. Co. v. Superior Court*, 92 Cal. Rptr. 2d 755, 758-59 (Ct. App. 2000) (determining that a corporation's lobbying and public relations efforts were political speech within the protection of a state statute). See also Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 189-92 (2005) (describing various contexts in which a corporation could claim political speech rights to avoid regulation).

253. 539 U.S. 654 (2003).

254. See *id.* at 656-57.

255. *Id.*

256. *Id.* at 656-58.

257. Siebecker, *supra* note 11, at 627-28.

258. See Sean Lux et al., *Mixing Business with Politics: A Meta-Analysis of the Antecedents and Outcomes of Corporate Political Activity*, 37 J. MGMT. 223, 223-24, 239 (2011).

259. *Id.* at 239.

profits.²⁶⁰ Now, armed with the Court's decision in *Citizens United*, corporations are likely to increase their political activities and the political speech that goes with those activities.²⁶¹ Accordingly, the prospect of corporations bringing serious challenges to a range of governmental regulations under the First Amendment, and under the strict protections of the political speech doctrine specifically, appears increasingly likely.²⁶² Therefore, the conflict between corporate political speech doctrine and the nature of the securities regulation regime is more prescient than ever.

IV. CURRENTLY, LIMITATIONS ON CORPORATE SPEECH IN THE FORM OF GUN JUMPING PROVISIONS VIOLATE THE FIRST AMENDMENT

Taken as a whole, previous arguments as to the unconstitutionality of sections of the securities regulation regime, the increased politicization of corporate speech and activity, and the Court's robust articulation of corporate free speech in *Citizens United*, require the conclusion that the gun jumping provisions of the securities laws are likely to be found unconstitutional under a political speech analysis.²⁶³ Furthermore, it is increasingly likely that such a challenge will be brought before the Court.²⁶⁴ Indeed, it is not difficult to imagine a fact pattern that would trigger a strong political speech challenge to the gun jumping restrictions.²⁶⁵

What if, for example, Bill Gates were to register a Delaware entity named "Elections are U.S., Inc.," wholly owned by Microsoft, with the stated business purpose of undertaking legal activities to influence and guide the American political process towards policies that heavily favor American technology companies?²⁶⁶ In order to further fund this cause,

260. See *id.*; Siebecker, *supra* note 11, at 627-28.

261. Lux et al., *supra* note 258, at 239.

262. See *supra* notes 252-59 and accompanying text. The fact that a similar case has recently been brought before the Massachusetts courts is further indicative of the increasing popularity of this kind of challenge. See *Bulldog Investors Gen. P'ship v. Sec'y of the Commonwealth*, 953 N.E.2d 691, 694-95 (Mass. 2011) (noting that a hedge fund sought an injunction against the Massachusetts state securities regulator on grounds that the state enforcement action violated the fund's First Amendment rights). The court in *Bulldog Investors* upheld the restriction, determining that it satisfied the *Central Hudson* test. *Id.* at 714.

263. See *Citizens United v. FEC*, 130 S. Ct. 876, 900, 903-05, 908, 911-13 (2010); Neuborne, *supra* note 8, at 61-62 (arguing that "significant aspects . . . are vulnerable to hearer-centered first amendment attack"); Page & Yang, *supra* note 8, at 83-84; Siebecker, *supra* note 11, at 674; *supra* Part III.

264. See *supra* notes 258-62 and accompanying text.

265. See Brian J. M. Quinn, *Corporate Free Speech*, M & A LAW PROF BLOG (Jan. 22, 2010), <http://lawprofessors.typepad.com/mergers/2010/01/corporate-free-speech.html>.

266. See *id.*

Gates assigns interests in the revenue streams of various profitable aspects of Microsoft's business to the new entity and starts gearing up for an imminent IPO to let all the other tech companies contribute to the cause. As part of the IPO preparations, the new entity engages in a nation-wide advertising campaign that lists the true date, price, and purpose of the soon-to-be-offered security, and directs interested buyers to contact various broker-dealers. Seeing this clear case of gun jumping by a major corporation, the SEC quickly brings an enforcement action against the new corporation and the corporation defends on political speech grounds. How would the case play out? Faced with regulations that prohibit truthful speech and the Supreme Court's strong language in *Citizens United*, a court would most likely find the gun jumping regulations unconstitutional as applied to inherently political corporate speech.²⁶⁷

A. Gun Jumping Provisions Suppress Truthful Speech

The gun jumping provisions of the securities laws are particularly vulnerable under the corporate political speech doctrine because they both compel and restrict truthful speech in the name of protecting those who would hear the speech.²⁶⁸ Accordingly, the gun jumping provisions of the securities laws would not survive the strict scrutiny standard that would be applied under a political speech analysis.²⁶⁹

Courts have repeatedly expressed distaste for the very kind of paternalistic prohibition of truthful speech that the gun jumping provisions embody.²⁷⁰ As one court phrased it, "[t]o endeavor to support a restriction upon speech by alleging that the recipient needs to be shielded from that speech for his or her own protection . . . is practically an engraved invitation to have the restriction struck."²⁷¹ The gun jumping provisions are exactly that, a restriction on corporate speech in the form of offers, as broadly defined, for the purpose of protecting the public from being persuaded to buy a potentially bad security based on information other than the prospectus information compelled by the

267. See discussion *infra* Part IV.A–B.

268. See Neuborne, *supra* note 8, at 53–54; *supra* notes 36–43 and accompanying text.

269. See *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010); *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (articulating the Court's anti-paternalistic view of speech in general, as well as in a securities setting); Page & Yang, *supra* note 8, at 83–84.

270. See *supra* notes 144–46 and accompanying text.

271. *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 70 (D.D.C. 1998), *amended by* 36 F. Supp. 2d 418 (D.D.C. 1999), *vacated in part sub nom. Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

SEC.²⁷² If “[d]isclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress,” then the gun jumping restrictions are clearly inconsistent with the congressional mandate of the securities laws.²⁷³ Accordingly, arguments to uphold the gun jumping restrictions would likely fail in the face of the Court’s distaste for paternalistic regulation.²⁷⁴

Additionally, it is unclear that restrictions on truthful speech actually benefit the market.²⁷⁵ According to the Efficient Capital Market Hypothesis, the capital markets are efficient in the processing of publically available information, almost instantaneously reflecting new information in market prices.²⁷⁶ This hypothesis has been so widely accepted by both the courts and academics that it is now accepted as the default context in which securities regulation must be discussed.²⁷⁷ Within the context of this hypothesis, the more accurate information supplied to the market the better because it means stock prices will be as accurate as possible when traders enter into a transaction.²⁷⁸ Accordingly, the SEC’s restrictions on truthful speech may in fact harm the market by reducing the amount of accurate information available, thereby reducing market efficiency.²⁷⁹ Therefore, there is even less motivation for courts to carve out a securities exception from First Amendment doctrine in the context of the gun jumping restrictions.²⁸⁰

B. Gun Jumping and the High Standard of *Citizens United*

Finally, if a challenge in a specific securities regulation case successfully triggers political speech protections, the high standard of protection articulated in *Citizens United* makes it all but impossible for a

272. See Neuborne, *supra* note 8, at 53-54; *supra* notes 37-43 and accompanying text.

273. See *Basic Inc.*, 485 U.S. at 234.

274. See *id.*; Siebecker, *supra* note 11, at 642.

275. See Chiappinelli, *supra* note 12, at 497-99; Page, *supra* note 19, at 824; Highberger, *supra* note 11, at 2170.

276. Chiappinelli, *supra* note 12, at 497-98. This version of the Efficient Capital Market Hypothesis is known as the “semi-strong form” of the hypothesis. *Id.* at 498 (internal quotation marks omitted).

277. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549-50 (1984). See also *Basic Inc.*, 485 U.S. at 241-42 (basing its discussion of the fraud-on-the-market theory on the Efficient Market Hypothesis). But see Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009 (Magazine), at 36 (describing how the recession has shaken the foundation of the economic establishment, including the Efficient Capital Market Hypothesis).

278. Chiappinelli, *supra* note 12, at 497-98.

279. *Id.* at 497-99.

280. See *id.* at 498-99.

regulation on speech to survive strict scrutiny.²⁸¹ Because the gun jumping restrictions affect such a wide swath of speech, including truthful speech, it already seems unlikely that any court would find the provisions to be narrowly tailored to the purpose of protecting the markets as required under strict scrutiny review.²⁸² Indeed, various less restrictive alternatives to the more heavy-handed restrictions put in place by the SEC have been suggested.²⁸³ When the rhetoric of *Citizens United* is added on top of this already lofty standard of protection, there appears to be no room left to rationalize a securities exception to political corporate speech protections.²⁸⁴ Indeed, what was previously seen as one of the only significant exceptions to the lofty protections of political speech was the very precedent that *Citizens United* overturned.²⁸⁵ Rather, in dealing with a politicized IPO like the one outlined in the “Elections are U.S., Inc.” example,²⁸⁶ courts would be bound to the principle that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”²⁸⁷ In the case of gun jumping regulations, restrictions on truthful speech simply cannot be squared with the Court’s opinion in *Citizens United*.²⁸⁸

While this Note has argued that the gun jumping restrictions cannot survive—and perhaps should not survive—a challenge under the political speech doctrine of the First Amendment, more worrisome is the prospect of the general disclosure sections of the securities regulation regime falling victim to a similar challenge.²⁸⁹ Indeed, the Court seems to treat all non-commercial speech as protected speech generally, regardless of whether the regulation at issue seeks to prohibit or compel

281. See *Citizens United v. FEC*, 130 S. Ct. 876, 903-905, 908 (2010); *supra* notes 165-71 and accompanying text.

282. See *supra* notes 37-43, 107 and accompanying text.

283. See Page, *supra* note 19, at 815-16 (arguing that self-regulation or optional regulation in conjunction with market forces would provide adequate protection to the capital markets); Page & Yang, *supra* note 8, at 79 (arguing that Congress and the SEC should target the trading that results from selective disclosure rather than regulating selective disclosure itself); Highberger, *supra* note 11, at 2170 (arguing that mandatory disclaimers or warnings, in conjunction with existing antifraud provisions, would be sufficient to protect the capital markets).

284. See *Citizens United*, 130 S. Ct. at 907 (“Factions should be checked by permitting them all to speak, . . . and by entrusting the people to judge what is true and what is false.” (citation omitted)).

285. See *id.* at 913 (overruling *McConnell*); Siebecker, *supra* note 11, at 636 (stating that the level of protection given to corporate political speech changes in the context of impending elections).

286. See *supra* notes 266-67 and accompanying text.

287. *Citizens United*, 130 S. Ct. at 913.

288. See *id.* at 900, 903-05, 907-08, 911-13.

289. See *supra* notes 233-35 and accompanying text.

speech.²⁹⁰ Therefore, if a corporation did manage to saturate an IPO with political speech, the corporation could possibly evade the entire securities regulation regime.²⁹¹ However, given the sordid history of predominantly unregulated markets, even those who have argued for the unconstitutionality of parts of the securities laws urge the upholding of the general disclosure regime.²⁹² Accordingly, the rigid language of corporate free speech adopted by the Court in *Citizens United* must be tempered in order to make room for a jurisprudential solution that strikes at the unnecessary prohibition of truthful speech, but still provides enough flexibility to allow securities regulators to ensure the stability and relative safety of the capital markets.

V. TOWARD A SOLUTION

First Amendment doctrine should be developed to avoid undermining the current system of securities regulation. The Court should do so by retreating from the absolutist interpretation of the First Amendment espoused by *Citizens United*, and recognizing that some governmental interests, particularly the stability of the capital markets, are substantial enough to regulate speech that may contain political qualities.²⁹³ To do so, the Court must limit *Citizens United* to its facts, or even overrule it, as the language utilized by the Court in *Citizens United* would likely prove fatal to any regulation seeking to restrict corporate political speech no matter the governmental interest.²⁹⁴ Additionally, there should be an acknowledgment within corporate political speech

290. See *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

291. See *id.*

292. See Drury, *supra* note 8, at 785-86; Neuborne, *supra* note 8, at 62; Page, *supra* note 19, at 829.

293. See *Citizens United*, 130 S. Ct. at 945-46 (Stevens, J., concurring in part and dissenting in part).

294. See *id.* at 913; *supra* notes 162-71 and accompanying text. One court has attempted to interpret *Citizens United* more narrowly. In *Western Tradition Partnership, Inc. v. Attorney General of the State of Montana*, the Supreme Court of Montana upheld the constitutionality of a state law that parallels the law held unconstitutional in *Citizens United*. 2011 WL 6888567, at *15 (Mont. Dec. 30, 2011). The court held that the unique features of the State of Montana's law, elections, and history created a compelling state interest "to impose the challenged rationally-tailored statutory restrictions." *Id.* at *5, 15. On February 17, 2012, the U.S. Supreme Court stayed the holding. *Am. Tradition P'ship, Inc. v. Bullock*, 2012 WL 521107, at *1 (Feb. 17, 2012). Justices Ginsburg and Breyer stated that this case could "give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway." *Id.*

jurisprudence that there is such a thing as too much free speech.²⁹⁵ For example, political speech would be overprotected if politically motivated individuals who instruct others to commit mass physical harm were given the same speech protections as individuals speaking before a live audience.²⁹⁶ When this kind of unreasonable equality is enforced by the courts, “serious questions arise as to whether courts have overlooked important historical, structural, economic, and cultural differences among the various channels and institutions of communication.”²⁹⁷ Clearly such questions are raised by the Court’s decision in *Citizens United*.²⁹⁸

In order to account for the many competing interests that are inevitably present in a corporate political free speech case, the Court should adopt a broad balancing standard that would enable a court to take into account the specific facts and existent interests of each case and determine the appropriate amount of protection to be afforded under the First Amendment. To do so, however, the Court need not further complicate First Amendment jurisprudence by creating yet another legal standard. Instead, the Court should simply apply the current standard of the commercial speech doctrine set forth in *Central Hudson* to corporate political speech cases.²⁹⁹

Applying the *Central Hudson* test would provide room for balancing the competing interests necessary to square First Amendment doctrine with the necessity of significant government regulation in the securities laws while still offering meaningful First Amendment protections. This is accomplished by the second, third, and fourth prongs of the *Central Hudson* test, which allow a restriction on speech to be constitutional if there exists a substantial government interest that supports the restriction, the restriction directly advances the government interest, and the restriction is no more expansive than necessary to serve the government interest.³⁰⁰ An added benefit to this approach is that by applying the *Central Hudson* standard the Court would tap into existing commercial speech doctrine precedent, thereby avoiding the period of uncertainty that would occur if corporations had to wait for courts to develop precedent interpreting a new standard.³⁰¹ Additionally, applying

295. See *Towards an Institutional First Amendment*, *supra* note 240, at 1271.

296. See *id.*

297. *Id.*

298. See *Citizens United*, 130 S. Ct. at 913; *Towards an Institutional First Amendment*, *supra* note 240, at 1271.

299. See *supra* notes 88-93 and accompanying text.

300. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

301. See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1011 (2008).

the commercial speech doctrine to corporate political speech cases makes intuitive sense, as it is consistent with the common-sense view of corporations as economic entities.³⁰²

On the other hand, the SEC can attain its goals of adequate disclosure and investor protection without using the gun jumping provisions of the securities laws in violation of the First Amendment.³⁰³ Instead, the disclosure regime already in place is sufficient in fulfilling the central purpose of the securities regulation regime, “to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”³⁰⁴ While the concern is that the mere existence of truthful speech currently banned under the gun jumping provisions could mislead investors, it is difficult to see where the damages would lie.³⁰⁵

Any purchase or sale of a security on the secondary market, according to the Efficient Capital Market Hypothesis, has already processed most publicly available information into the stock price.³⁰⁶ The only time that a stock price has not been subjected to market forces, which serve to protect investors by efficiently processing information and arriving at an accurate market price, is in the context of an IPO.³⁰⁷ However, the parties purchasing shares as part of an IPO are rarely the vulnerable investors whom the securities laws were meant to protect.³⁰⁸ Rather, underwriters allocate original IPO shares to their regular customers, generally large institutional investors who do not need the same kind of scrupulous protection that retail investors do.³⁰⁹ Accordingly, the gun jumping provisions appear to provide little protection to those who need it, while still placing a significant burden on the exercise of First Amendment rights.³¹⁰

Instead, the current regime of mandated disclosure together with increased antifraud enforcement of actual wrongdoers can still meaningfully ensure the proper functioning of the markets without impermissibly treading on corporate First Amendment rights by

302. See Editorial, *The Rights of Corporations*, N.Y. TIMES, Sept. 22, 2009, at A30.

303. See Drury, *supra* note 8, at 782.

304. See *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)) (internal quotation marks omitted).

305. See Drury, *supra* note 8, at 782.

306. See *supra* note 276 and accompanying text.

307. See Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 714-15 (2005).

308. See COX ET AL., *supra* note 6, at 6; Hurt, *supra* note 307, at 715.

309. See COX ET AL., *supra* note 6, at 266 (discussing the private offering exemption for sophisticated investors); Hurt, *supra* note 307, at 715.

310. See *supra* notes 59-66 and accompanying text.

prohibiting truthful speech through the gun jumping provisions of the securities laws.³¹¹ Such reliance on compelled disclosure is substantially less likely to run afoul of First Amendment protections.³¹² Indeed, even the Court in *Citizens United* found that the disclosure requirements of the BCRA were constitutional as applied.³¹³ If the SEC relied on the disclosure and antifraud aspects of the current securities law regime instead of the gun jumping provisions, because the SEC would no longer be banning truthful corporate speech on the basis that the speech may potentially be harmful, this approach would restore upon the SEC the “conventional regulatory burden of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”³¹⁴ Such a return to regulatory normalcy would erase the current constitutional conflict created by the gun jumping provisions of the securities laws and may even result in increased market efficiency.³¹⁵

VI. CONCLUSION

The incompatibility of much of the current securities regulation structure with the First Amendment, particularly sections like the gun jumping provisions that repress truthful corporate speech, increasingly seems less like a purely intellectual concern.³¹⁶ While the issue has yet to be directly addressed by the Court more than 120 years after constitutional protections were extended to corporations, recent events have increasingly made this topic part of the fabric of everyday life.³¹⁷ In the wake of the Great Recession of 2008, a renewed emphasis has been given to the regulation of the markets, and the SEC is quickly moving to increase its control over issuers and the capital markets.³¹⁸ Simultaneously, however, in the wake of the Court’s decision in *Citizens United*, corporations are embarking on a fete of political speech through the use of their general funds.³¹⁹ Questions as to where the limits of each rest seem inevitable.³²⁰ While the proper nature of the interplay between

311. See Drury, *supra* note 8, at 782; Highberger, *supra* note 11, at 2170.

312. See *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

313. *Id.* at 916.

314. See Highberger, *supra* note 11, at 2169 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)) (internal quotation marks omitted).

315. See *supra* notes 252-54, 278-80 and accompanying text.

316. See *supra* Part III.D.

317. See *supra* Part III.A.

318. See Mark Schoeff Jr., *Schapiro: SEC Can’t Enforce Dodd-Frank Rules Without More Bucks*, INVESTMENT NEWS (Feb. 17, 2011, 3:53 PM ET), <http://www.investmentnews.com/article/20110217/FREE/110219924>.

319. See Luo, *supra* note 251.

320. See *supra* Part III.A.

the First Amendment and securities regulations has been broached before, the articulation of a broad and irreproachable corporate political speech doctrine in *Citizens United* suggests that the Court would strike down significant portions of the current securities regulations regime.³²¹ When it comes to the gun jumping provisions, that may not be a bad thing.³²²

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321. See *supra* Part IV.

322. See discussion *supra* Parts IV.A, V.

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