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Using Feathery Birds to Disguise Hateful Speech: 
*Avatar, Hillary: The Movie, Citizens United,* and 
How Birds of the Same Feather Flock Together

By

Angela Mae Kupenda*

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* Professor of Law, Mississippi College School of Law. I greatly appreciate this opportunity to publish my ongoing work and to respond additionally through this essay to presentations made at the Pursuit of Justice Conference, a collaborative event organized by the Gonzaga University School of Law, the Gonzaga Institute for Hate Studies, and the Washington State Task Force on Race and the Criminal Justice System. This event brought together the Third International Conference on Hate Studies and the Second Conference on Race and the Criminal Justice System. The Conference was held on the campus of Gonzaga Law School, in Spokane, Washington, April 17-20, 2013. I am also grateful for the opportunities I have enjoyed engaging in legal scholarship this year with a number of my law students, including Ahmad R. Smith '13 (who also has an article published in this symposium issue), Tchanavia Bryant '13, and Jou-Chi Ho, J.D. expected '14; the former law students from my Race and First Amendment Seminar at Notre Dame Law School; and the former students from my First Amendment course at Mississippi College School of Law, especially Stephen Parks '10, Carlyn Hicks '10, and Lisa Reynolds '10 who studied the *Citizens United* opinion with me soon after it was issued by the U.S. Supreme Court. An earlier draft of this paper also benefitted from comments by constitutional law scholars participating in the Loyola Constitutional Law Colloquium in Chicago during October 2011. My work is significantly supported by pre-and post-publication grants provided by Mississippi College School of Law.
I. INTRODUCTION

In America, we are consciously and subconsciously influenced by abundantly present messages in commercial speech, television, and film viewed for entertainment purposes.1 The influence can be penetrating, even devastating, especially because of racial messages about nonwhites.2 For example, a study by university researchers found that watching television lowers self-esteem in white female children and in black children, while elevating self-esteem in white boys.3 This effect seems logical given the predominant messages in many shows. In film and television, white boys find strong images and likenesses in white men who have economic, family, and political control.4 White girls suffer a loss of self-esteem as many television shows depict white women as weak, submissive, passive, and lacking power, or even in need of being saved by white men.5 Black girls and boys confront images of actors who resemble them in color and who are in poverty, violent, imprisoned, on welfare, clown-like, and generally lacking power over their own

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2. See, e.g., Perry L. Moriearty & William Carson, Cognitive Warfare and Young Black Males in America, 15 J. GENDER RACE & JUSTICE 282, 303-04 (2012). The racial influence is especially troubling given that many whites rely on televised images to learn about nonwhites. Id. These racial affects can tremendously influence political evaluations. See generally Justin Townley, Is the Color of the Economic Crisis the Color of Presidential Fear?, 22 BERKELEY LA RAZA L.J. 51, 52-54 (2012). As whites are presently the racial majority, the effects on nonwhites are more obvious. When whites are no longer the numerical majority in the coming years, these messages may accelerate, or may continue to proliferate as in the present in maintaining current racial dynamics, or they may subside. For further discussion see Ahmad R. Smith, Saving Jamal to Save America: Presidential Authority to Decriminalize the Future Male Majority, 49 GONZAGA L. REV. (forthcoming Nov. 2013).


4. See Goldberg, supra note 3.

5. Cf. Goldberg, supra note 3 (emphasizing the prestige of white males, while not finding comparable prestige for white females).
destinies. Not surprisingly then, the message absorbed by children from media is that white males are worthwhile and are entitled to power and success, while other groups are not.

The broadcasted, and often commercial, messages do not only affect young children. The messages can also affect those trained to be critical, independent, and analytical thinkers. A number of years ago in my civil rights course, a third-year law student, who was nonblack and nonwhite, approached me after class to talk. She seemed to be quite excited about the reading she had completed for that day’s class. “Wow!” she exclaimed. “Before I completed our reading for today I did not know that any poor, minority women cared about their children.” My response was, “Oh my . . . where did you get an idea like that?” The law student, who had excellent grades, answered, “From television and from the movies. And I always thought that if it were not true, it would not be on television.” Even a future lawyer, then, can be cajoled by the power of the marketplace to facilitate skewed views of worthiness and justice. This essay is a necessary response to these subtle messages of hate and racial disdain that affect our conceptions unwittingly, as the messages become disguised as speech for entertainment or speech for commercial purposes only.

This symposium issue is a clarion call to stop, or at least reduce, the hate. The Pursuit of Justice Conference, a 2013 collaborative event organized by the Gonzaga University School of Law, the Gonzaga Institute for Hate Studies, and the Washington State Task Force on Race and the Criminal Justice System, brought together the 3rd International Conference on Hate Studies and the 2nd Conference on Race and the Criminal Justice System. The symposium addressed ways to eliminate hate and to pursue justice. This essay is my contribution—joining other symposium participants in confronting the messages encouraging injustice as the norm, and in confronting hate messages that are rampant both implicitly and explicitly.

Hate-filled messages promoting racial inequality are not just found on certain organizations’ websites, in political protests, or certain groups’ products. The messages can even slip into our hours of entertainment in front

6. Cf. Goldberg, supra note 3 (emphasizing the prestige of white males, while not finding comparable prestige for black girls and boys).


8. See Eric Lach, Vendor Pulls ‘Obama’ Target from Booth at NRA Convention, TPMLIVEWIRE (May 6, 2013), http://livewire.talkingpointsmemo.com//entry/vendor-pulls-
of the television\textsuperscript{9} or while watching movies.\textsuperscript{10} This essay is about those subtle messages and the negative influences of these messages, especially as illustrated by one film in particular—James Cameron’s \textit{Avatar}.\textsuperscript{11} But the film illustration that follows is only the first major point of this essay. The second point is that the negative influences of these racial messages in the entertainment or commercial market should be important in the formulation of freedom of speech legal jurisprudence.

How these messages may be accounted for becomes difficult given the United States Supreme Court’s controversial\textsuperscript{12} holding in \textit{Citizens United v. Federal Election Commission},\textsuperscript{13} where the Court declared that a corporation’s speech was political speech, thus giving for-profit and nonprofit corporations the same protection for political speech as provided to individuals.\textsuperscript{14} According to the Court, governmental restrictions on a corporation’s political speech must satisfy strict scrutiny, the most exacting form of judicial review of governmental actions.\textsuperscript{15}

\textsuperscript{9} obama-target-from-booth-at-nra (the National Rifle Association pulled a target from a display booth at a gun convention that appeared to bleed and was designed to resemble President Obama). Even conservative Supreme Court Justice Clarence Thomas parted ways with other conservative justices about the impact of Ku Klux Klan hate speech and burning crosses. \textit{See} Virginia v. Black, 538 U.S. 343, 388-90 (Thomas, J., dissenting). Justice Thomas, the only Black justice on the Court, stated in his lone dissent, “In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred . . . and the profane. I believe that cross burning is the paradigmatic example of the later.” \textit{Id}.

\textsuperscript{10} \textit{See} Brian Stelter, \textit{Youths Are Watching, but Less Often on TV, THE NEW YORK TIMES.COM} (February 8, 2012), http://www.nytimes.com/2012/02/09/business/media/young-people-are-watching-but-less-often-on-tv.html (Americans continue to watch a tremendous amount of television, with younger people still watching the television shows but watching them on their computers or on their phones).

\textsuperscript{11} \textit{AVATAR} (Twentieth Century Fox 2010).


\textsuperscript{14} \textit{Id} at 342-43.

\textsuperscript{15} According to the Court, strict in theory is not necessarily fatal in fact. \textit{See} Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (citing Fullilove v. Klutznick, 448 U.S. 448, 507 (1980)). Some studies are in agreement with the Court that context matters and some laws can be upheld even under, the most exacting, strict scrutiny analysis.
In *Citizens United*, a corporation’s management attempted to use *Hillary: The Movie*, a film, to influence voters to reject Hillary Clinton’s presidential candidacy. The corporation seemingly thought that Hillary Clinton would be the Democratic candidate for President in 2008, and wanted to depict her as unfit for the Presidency. The Court, over a strong dissent, broadly held that restrictions on corporate political speech must have a compelling governmental interest, and the restrictions must be narrowly tailored to that interest. This strict scrutiny of governmental regulations is an exacting level of review and is the highest protection (from government) given by the Court to speech and other individual rights.

If a corporation has the same political speech rights as an individual, the Court’s holding in *Citizens United* potentially gives broad protections to corporate falsehoods, as individual political speech can receive expansive protection even if it is false. If the law considers this corporate speech political, even though it may be commercial for-profit speech, then, under present jurisprudence, expensively funded, corporate political speech seemingly is also entitled to the highest protection, just like individual political speech. Thus, corporately funded political falsehoods can be labeled as political speech. These corporate falsehoods could then flood the market, especially the marketplace of ideas about racial minorities or nonwhites.

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17. *Id.* Although Barack Obama, not Hillary Clinton, won the Democratic nomination and the election for president, Clinton played an enormous role in Obama’s first term as president. See Kenneth Lovett, *Secretary of State Hillary Clinton Leaves Behind Enormous 20-year Legacy with Exit from Office Following Start of President Obama’s Second Term*, NYDailyNews (Jan. 21, 2013), http://www.nydailynews.com/news/national/obama-new-term-hillary-clinton-leaves-20-year-political-legacy-article-1.1244485 #ixzz2TF7AY83z.

18. Justice Stevens’s opinion concurring in part and dissenting in part was joined by Justices Ginsburg, Breyer and Sotomayor. His dissent argued that the majority opinion was misguided and manufactured “conceit that corporations must be treated identically to natural persons in the political sphere.” See *Citizens United*, 558 U.S. at 393-94 (Stevens, J., dissenting).

19. *Id.* at 340.


If we take *Citizens United* several steps further, false, misleading, and even hatefully targeted speech about race can be disguised as commercial or entertainment speech and still receive the protection given to political speech. This communication of hateful speech, seemingly as entertainment or commercialism, is quite potent as it affects us when we are unaware and simply being entertained. When instead, we are being indoctrinated to believe in continued messages about racial inferiority of nonwhites. Hence, commercial speech and film can be used as a disguise for politically, racially hateful content. This means the Court elevates racially hateful messages to receive special protection whether they are an individual's political message or the disguised mass message of a corporate giant. Therefore, the truth of racial equality about nonwhites can never be reasonably expected to win out in the marketplace, because of the corporately funded and disguised falsehoods and hate that may flood the marketplace. This hateful speech may be called commercialism or entertainment. Yet, this speech disguises hate. This speech seems to be harmless entertainment, as harmless as doves or feathery birds. However, in reality this speech drowns out the truth in the marketplace, as individuals appear to become more gullible in watching film and other commercial speech.

This essay explores this quandary by asking, and attempting to answer, four questions. First, is there any possible negative influence from commercial

22. Following the holding of *Citizens United* protecting corporate political speech from certain federal regulations, the Court protected corporate political speech from Montana state regulation. See Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012); but see FCC v. AT & T, 131 S. Ct. 1177 (2011) (the Court declined to hold that a federal law’s exemption for personal privacy applied to corporations, and did not extend the privacy rights of corporations under the federal constitution).

23. Corporately funded racial hate speech is likely more dangerous than the speech of individuals who espouse racial hate speech. Remember, corporations at one time participated in the enslavement of a people based on race, and today, corporations can cause similar injuries to certain individuals, and to all of society. See, e.g., Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections As People*, 39 W. ST. U. L. REV. 203, 212-13 (2012).

24. For example, some commercial enterprises may use minorities to convey potentially harmful commercial messages, even to other minorities. See, e.g., Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL’Y 165, 167-68, 171-72 (2010).

media, especially film, in the marketplace of ideas about nonwhites (i.e., has the truth about race and about nonwhites already won out making the points of this essay not critically necessary)? Second, what are the race messages in the film, *Avatar*, which will be used here for illustrative purposes? Further, in giving corporate political speech the same protection as individual political speech, the majority and the dissent in *Citizens United* overlooked critical First Amendment jurisprudence, as it failed to distinguish corporate commercial speech from corporate political speech. So the third question asks what is the likely, or feared, impact of *Citizens United* on corporate commercial speech, and how does this relate to the film *Avatar*? And, fourth, what can those in unity with the justice-filled messages of the Pursuit of Justice Conference do to help the truth to prevail?

We have a long way to go to promote the truth about race if we hope to become a more just society. If we do not do more, hate will continue to abound. This hate may be disguised as entertainment or commercialism, yet it is still hate which keeps us from thriving in a more civilized, and less hate-filled, society. While these hateful messages may come disguised, this writer’s message does not. The clearly, undisguised message of this writer is that First Amendment jurisprudence must respond, in a meaningful way, to this societal problem and seek to hold the marketplace of ideas about race to the truth.

II. **Hateful Influences From Commercial and Entertainment Media, Derailing the Truth in the Marketplace of Ideas**

Discussing race in America can be difficult, even in our institutions established to educate and inform persons about legal rights.26 Although, for more than twenty years of teaching I have sought to be a teacher encouraging principles of justice and equity; teaching about race presents challenges.27 I address some of these challenges by writing about my own classroom


experiences,28 writing about those of others,29 and trying to learn from them. Thus, as my scholarship is informed by my teaching, I became interested in the issues in this essay as a result of several classes I taught. My interest became more intense, later, as a result of a movie I watched. Therefore, the first part of this section will examine the abundance of negative racial influences my seminar students found in the marketplace of ideas. The second part will examine those influences by considering more specifically the popular film I watched.

A. Exploring the Marketplace Through Class Exercises

Over ten years ago, while visiting as a law professor at another law school, I speculated I might have some difficulties in the class I was scheduled to teach. The first day of the semester confirmed my thoughts about my Race and the First Amendment Seminar course for several reasons: I was the only black person in the mid-western law school classroom; the law school community was very politically and religiously conservative;30 I was assigned to teach the course just a few months after the 9/11 attacks; and on the first day of class my students vehemently resisted any discussion of race in the race-filled hypotheticals with which I had tried to start the course.31

My speculation about the pedagogical and racial difficulties I might experience with my students and this class became more real when the following exchange occurred during that first class meeting:

Nonblack female student: All black people always enjoy calling each other N________s.

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30. One of the presenters at the symposium commented on how very difficult it can be to challenge a person’s hate when that hate, racial or otherwise, is rooted in the person’s religious identity. See Tony Stewart, Social Justice as the Antidote to Hate, Prejudice, and Discrimination at Gonzaga University School of Law Conference: The Pursuit of Justice (Apr. 18-20, 2013), http://www.law.gonzaga.edu/files/PoJ-Program.pdf.
31. Hypotheticals are often used in legal education and can be very effective in facilitating racial discussions. See Kim Brooks & Debra Parkes, Queering Legal Education: A Project of Theoretical Discovery, 27 HARV. WOMEN’S L.J. 89, 111-12 (2004).
Me: I am black and I don’t, nor do many of the blacks I personally know. How do you come to your conclusion?

Nonblack female student: I know about blacks. You don’t know ... because you were not raised as an ordinary regular black, you had privilege.\(^{32}\)

Me: So, you think you have been exposed to more “ordinary regular” blacks, as you say, than I have?

Nonblack female student: Yes, you see my boyfriend is black and I hang out with him and his guy friends all the time.

Me: And, you hear the use of the N-word all the time?

Nonblack female student: Well ... not all the time ... but ... they all often call me a “N____ N Lover,” then they all laugh really hard, that means they all like the word ... because they laugh.\(^{33}\)

After this exchange, I was really glad that I had planned the course to include what I called marketplace of ideas exercises.

In First Amendment jurisprudence, the marketplace of ideas concept originates from Justice Oliver Wendell Holmes’s dissent in *U.S. v. Abrams*.\(^{34}\) That dissent is very important and possibly represents a change in Justice Holmes’s position about speech rights, even speech that opposes the government. In earlier cases prior to his *Abrams* dissent, Justice Holmes wrote the majority opinions that upheld convictions of defendants for speaking in opposition to the war or to the government.\(^{35}\)

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33. I mentally determined that at some point during the semester I needed to privately have a long talk with this student about the historical, and unfortunately current, use of the term “N-Lover,” and how perhaps she should clarify the term with her boyfriend, as it may be meant as an insult to her as a nonblack woman dating a black man. For an excellent historical and critical analysis of the N-word, see Jabari Asim, *The N Word: Who Can Say It, Who Shouldn’t, and Why* 20-29 (Houghton Mifflin Co. 2007).


In *Abrams*, though, Holmes dissented from the majority’s decision that the speech presented a clear and present danger that the government had a right to suppress and punish with imprisonment. While the *Abrams* opinion was still being prepared, Holmes suggested to other justices that he might dissent. Several justices personally visited him at his home to try to persuade him to vote with the majority to uphold the conviction and punishment of the speaker. His wife also pleaded with him to reconsider. Holmes, however, stood fast in his decision and authored his separate dissent. In his *Abrams* dissent, Holmes wrote that the truth would prevail if all speech were allowed into the marketplace. More specifically he stated, “[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” Holmes articulated this theory that has been argued for nearly one hundred years.

Analyzing the validity of Holmes’s marketplace of ideas theory and anticipating student hesitancy to openly discussing race, I had included a number of assignments in my course syllabus—marketplace of ideas exercises. The exercises were structured so students would examine a number of different forms of media, reflect on the class materials and what they observed in the medium, and determine whether they thought the truth was winning out about race in public and private ideas expressed in America. For example, in one assignment students were assigned to critically (rather than casually) watch four consecutive hours of television shows and commercials, and then write reflection papers on what ideas about race are winning out in the television entertainment marketplace. Students prepared written reflections documenting and discussing their work and their experiences doing the exercises. We had other exercises, too, dealing with other media such as film, print, and so on.

By the end of the semester, the students overwhelmingly concluded, that

37. STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES, COMMENTS QUESTIONS 11 n.a (5th ed. 2011) (citing SHeldon M. novick, Honorable Justice, the Life of Oliver Wendell Holmes 331, 331 (1989)).
38. Sheldon M. Novick, Honorable Justice, the Life of Oliver Wendell Holmes 331, 331 (1989).
40. id.
even in commercial spaces, messages about race abound that influence their views on racially underrepresented groups. In determining under Holmes’s theory whether the truth had prevailed, I left to each of them to define the truth. Still, they concluded the truth was not winning out. They thought corporate influences were continuing to perpetuate harmful racial stereotypes about underrepresented groups. As for depictions of white males, they saw some negative, misleading messages about them, too. But, they noted that there were so many other messages in which the positive or neutral prevailed, in the students’ views. In other words, commercial speech had explicit or implicit political undertones that could affect a casual viewer’s understanding of racially underrepresented groups.

Sometimes, though, we do not need a semester of work to consider marketplace messages about race. An afternoon viewing of one film, as the one discussed below, can bring some of us to a similar conclusion as my students’ semester-long project concluded for them.

B. Exploring the Marketplace Through Film

A recent controversial for-profit movie, Avatar, included various depictions, arguably depictions of people of color. The film depicts beings different from humans and living on another planet, called Pandora. The natives of Pandora are called the Na’vi. Pandora has rich, natural resources, but also has unusual atmospheric conditions in which humans cannot normally survive without oxygen tanks or by projecting their brain energies through an avatar, Na’vi-like bodies that can endure on Pandora.

So a corporation, run by white human entrepreneurs, funds the scientific creation of avatars. Through devices that resemble high technology coffins

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within which the human is connected to wires and sleeps, the brain signals of the sleeping human are transferred to the avatar bodies. These avatar bodies, controlled by the human’s brains and emotions, can then engage with the Na’vi in their own environment as one of them. The Na’vi, somehow, know they are different and call them “the sleepwalkers.”

Jake, a white American, becomes a reluctant hero. Jake’s brother has provided the DNA for an avatar body, but he suddenly dies. Jake, who is paralyzed from the waist down from a military injury, is recruited to substitute for his deceased brother. This can be done as Jake shares DNA with his twin brother. Jake’s avatar is charged with building a relationship with the Na’vi, and to acquire detailed information about the Na’vi and their resources. The white human corporate goal is to use the information Jake acquires to threaten an attack against the Na’vi, or for Jake to persuade the Na’vi to relocate so the humans can take over the natural resources of Pandora.

Initially, Jake is involved for his own self-interest; if he helps this militaristic corporation and succeeds, the corporation will pay the full cost for Jake’s expensive surgery and he will be able to walk again. Jake’s view is changed by his growing of love of Pandora and of a female native. Jake, through his avatar, falls in love with one of the Na’vi women who trained him in the ways of her people. Jake tries to get the Na’vi to move off their land for the corporate giant, lest they be slaughtered. They refuse, and lose a major battle with the humans. But Jake decides to save them, with some help from other human outsiders who work for the corporation but who do not agree with the corporate agenda.

Some say that one picture is worth a thousand words. Here though, one hundred or fewer words can communicate a million images about race that are found in *Avatar*. Consider the natives of Pandora. The Na’vi are very dark,
though blue, in color; have big flat noses; wear dreadlocked/braided hair or Mohawk hairstyles; have animal-like tails; are played by actors of color; are laughingly called monkeys or savages by some of the white humans; are scantily clothed and have computer generated facial features modeled after the faces of “exotic” ethnic women; have animal-like physical abilities; connect their tails to those of their animals they ride for transportation; and are very tall and very large in size. They are also expressively spiritual, superstitious, emotional, and unable to save themselves from white exploitation of their resources. Although the Na’vi people are closely connected with their spiritual world, these spirits favor the white human Jake in his avatar. Their spirits ordinarily do not intervene in their affairs, but Jake is beloved by the Na’vi spirits. Jake’s avatar, with the help of the Na’vi spirits, is able to conquer a huge dragon-like legend while the Na’vi warriors cannot do so. By controlling this legendary dragon, Jake’s avatar is able to call out all of the animals and people of Pandora to come fight the human corporate soldiers. Jake, riding on the back of the legendary dragon he has tamed, comes to rescue the Na’vi people as they sit weeping, praying, and chanting for help and awaiting a savior.

When I watched Avatar, I was both fascinated and disgusted by some of the racial messages. As argued by one author, such movies, though claiming to be about people of color, are really about “[w]hite redemption”; “the power and privilege resulting from whiteness”; and created by white filmmakers who design “a film about race [and] make[] that film less threatening” for white audiences, and “to comfort and amuse [w]hite viewers.” As several commentators have noted, such films make the personal political, and promote notions of the need for a smart white savior to rescue spiritual people of color. As explained by one writer,

As I sit down to write this, The Blind Side, Avatar, and Precious are all being talked about as candidates for best-picture Oscars. They are of course cinemagraphically [sic] impressive. But beyond their gloss and

60. See Rastogi, *supra* note 42.
63. *id.* at (41:13-41:36).
64. *id.* at (2:09:32).
65. *id.* at (1:56:01).
technical achievements, these films share some distressing themes. All three set up a racial hierarchy in which whites are the heroes and people of color need to be saved from (pick all that apply) illiteracy/irrationality/incest/naiyeté. Brooks (2010:A27) wrote in his New York Times column that Avatar presents us with the well-worn "White Messiah Fable" in which "[w]hite people are rationalist...while colonial victims are spiritual and athletic." He put it succinctly: "Avatar is a racial fantasy [presumably for whites] par excellence" (2010:A27). The Blind Side and Precious are even more explicit and straightforward versions of this whites-as-heroes fantasy. It is all the more troubling, no doubt, and more palatable in these days of ostensible race-enlightenment, that the whites in these films seem to care so deeply for the racialized have-nots they rescue. Indeed, it is often the very caring of the "White Messiah" that produces the transformative rescue of the Other. This subtext of racial redemption through caring relationships and personal values is the Hollywood version of "the personal is political." 69

Hence, I wondered if this "speech" (the movie Avatar for commercial profit or for entertainment) could be considered political speech; and no, I did not agree with all of the political messages it seemed to send. I started to think about other commercial or entertainment 70 treatments of racially underrepresented groups. 71 I watched Avatar many times, each time both captivated and increasingly troubled by its messages. This film makes me wonder what subtle messages are absorbed by those who casually watch the film.

Since the film conveyed such a powerful, though racially distorted, message, I wondered if commercial and entertainment speech about underrepresented racial groups could be political speech, either explicitly or implicitly, even as it perpetuates various stereotypical images and/or distortions. Also, due to the lack of varied characters of color in the commercial or entertainment media, the distortions have an even greater impact. The distortions, thus, speak to both the power and the danger of the speech. Hence, this skewed marketplace of ideas about race should certainly be considered in First Amendment jurisprudence. Nonetheless, the recent Supreme Court case,

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70. For example, in a movie I recently watched, a white American cowboy, played by Tom Selleck, thinks he has been hired to travel to Australia to kill "wild dogs" off a rich white man's land. Upon arrival, he learns he has been hired to kill dark-skinned native Aborigines to run them off the white man's claimed land. The cowboy decides to save the natives, with the help of a white female with whom he falls in love. See generally Quigley Down Under (Metro-Goldwyn-Mayer Studios, Inc. 1990).

71. See ASIM, supra note 33, at 145-46.
Citizens United, may place a barrier to necessary marketplace of ideas adjustments.

III. THE LIKELY, OR FEARED, IMPACT OF CITIZENS UNITED
AND HOW IT RELATES TO AVATAR

In the First Amendment class I teach, after I cover the core cases and principles, student groups make formal in class presentations of recent cases. Students read the full court opinions and study related law and societal issues. Soon after the lengthy Citizens United opinion was released over two years ago, I read it with a group of three quite diligent students in my course. We had several meetings going over the opinion section by section, trying to determine whether the opinion was consistent with other First Amendment rules.

By the time their group presented the case in class, we had already covered the commercial speech doctrine. Commercial speech is not given the same protection as political speech. 72 First, commercial speech is not protected if it is false and misleading. 73 Second, even if commercial speech is truthful and nondeceptive, governmental regulation of commercial speech is not subjected to strict scrutiny, the most exacting level of review. Rather, governmental regulation of commercial speech receives only a mid-tier level of protection. 74 This affords limited protection to commercial speech.

For the purposes of this essay, a simple rendition of Citizens United is all that is needed to explain the speech theories which the Court failed to address. At issue was a movie, Hillary: The Movie, about presidential candidate Hillary Clinton. 75 The movie was produced by a conservative advocacy group thinking, perhaps, that Clinton would be the Democratic candidate for the Presidential Election in 2008. The movie aimed to dissuade voters from casting votes for Clinton. The movie was to be released through video on-demand and near Election Day, but the release would have violated federal law. 76

A federal law prohibited corporations from using general treasury funds for "any broadcast, cable, or satellite communication" that 'refers to a clearly identified candidate for Federal office and is made within 30 days of a

73. See id. at 771.
76. Id. at 320-22.
primary . . . election,”77 and is “publicly distributed.”78 This movie was financed by general treasury funds of a corporation.79 The movie could have been funded and released pursuant to the corporation’s political action committee, without being in violation of the federal law, which applied to unions, for-profit corporations, and to nonprofit corporations.

The Court did not limit its opinion to nonprofit corporations.80 Rather in its sweeping opinion, the Court gave for-profit corporations the fullest protections for political speech, the same as for individuals.81 The Court opined that, though corporations could use political action committees, the federal law impermissibly burdened their political speech.82 Additionally, the Court stressed that the law was an outright ban with criminal sanctions,83 called political action committees burdensome alternatives,84 and proclaimed that political speech must prevail.85 The Court held that First Amendment protection extends to corporations,86 thus the federal law was unconstitutional under strict scrutiny review, the most exacting form of judicial review.87

So, in the question session after the students’ classroom presentations, I puzzlingly asked the student group the following: Isn’t all corporate speech actually commercial speech? Given the purpose of a for-profit corporation is to generate profit, is all corporate speech necessarily commercial speech? Therefore, is the opinion in error as all corporate speech should receive only limited protection as commercial speech, as the Court has previously stated, and not the full protections given to an individual’s political speech? If the commercial speech doctrine is relevant here, why did the Court decline to consider the rules related to commercial speech in its holding? Further, how is a for-profit corporation’s political speech distinguished from its commercial speech?

The Court’s failure to distinguish corporate political speech and corporate commercial speech really troubled me. So, I pressed the student group for answers, as the Court has not recently defined the scope of commercial speech. Some commercial speech, such as an advertisement for a specific product, is

77. Id. at 321 (quoting 2 U.S.C. § 434(f)(3)(A)(2006)).
78. Citizens United, 558 U.S. at 321 (quoting 11 C.F.R. § 100.29(a)(2)(2009)).
80. Id. at 365.
81. Id. at 342-43.
82. Id. at 338-339.
83. Id. at 337.
84. Id.
85. Id. at 340.
86. Id. at 365.
87. Id. at 340.
more clearly within this realm of a definition of commercial speech. However, other commercial speech of a profit corporation may be speech to directly promote the corporation, its interests, reputation, or its speech that indirectly promotes the profit line of a corporation, even if it promotes racial inequities.\footnote{88} Given that the officers have duties to their corporations to maximize its value in order to maximize shareholder wealth, then all corporate speech is necessarily related to profit,\footnote{89} or the commercial speech or promotion of the corporation.\footnote{90} Officers, then, cannot legitimately engage in political speech at a cost to the corporation. So all officer speech is speech to generate corporate wealth, and hence is commercial speech, not political speech. Therefore, should all corporate speech receive only limited commercial speech protections, as the Court has previously stated, and not the full protections given to an individual’s political speech?\footnote{91}

\footnote{88} Not all think Citizens United is a threat to shareholder expression. Some scholars urge that even if the fears are justified, a better approach than regulating corporate speech would be by “altering corporate law” governance changes, to regulate how “corporations speak to and about their shareholders, workers, consumers, the community at large, and government.” David G. Yosifon, Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders, 21 HEALTH MATRIX 189, 192 (2011). They claim that “generating more socially useful corporate speech, rather than constraining or silencing it through external governmental regulation,” would be a better approach. Id. at 192. Others claim that corporations should legitimately play a more expanded role in American life. See Michael R. Siebecker, A New Discourse Theory of the Firm After Citizens United, 79 GEO. WASH. L. REV. 161, 230-31 (2010).

\footnote{89} If commercial speech includes all corporate speech, one question is, what about speech of news companies, what level of review? One way to manage this, of course, is based on the language of the First Amendment special exception. See generally Akilah N. Folami, Using the Press Clause to Amplify Civic Discourse Beyond Mere Opinion Sharing, 85 Temp. L. Rev. 269, 270 (2013) (arguing that the press clause of the First Amendment should be interpreted as a separate clause giving the press and other speakers more rights where those speakers advance democratic competence).

\footnote{90} Some have argued that the distinction between corporate commercial speech and other corporate speech is quite blurred. See Larry E. Ribstein, The First Amendment and Corporate Governance, 27 GA. ST. U. L. REV. 1019, 1049 (2011); see also Stephen A. Yoder, Legislative Interventions in Corporate Governance is not a Necessary Response to Citizens United v. Federal Election Commission, 29 J.L. & Com. 1, 2 (2010) (Citizens United is not that problematic when we assume that for any political expenditures corporate decision makers will act in the best long term interest of shareholders).

\footnote{91} Cf. Randall P. Bezanson, No Middle Ground? Reflections on the Citizens United Decision, 96 IOWA L. REV. 649, 659-61 (2011). The Court could have resolved the case on other grounds; for example, it could have said that the law was overbroad and would not have had to over-analyze corporate speech. Id. On the other hand in its analysis the Court then said too little, and a huge problem was unaddressed: “How can Citizens United be reconciled with the notable more limited protection under the First Amendment for commercial speech?” Id. at 659.
Like me, the student group did not have answers. But we all agreed that the *Citizens United* Court overlooked a lot, including how the holding impacts prior cases affording commercial speech lesser protection under the First Amendment than political speech. Further, the Court overlooked the inherent problems in distinguishing between corporate political speech, which now receives more protection, and corporate commercial speech, which receives less protection.  

Other courts disagree that *Citizens United* inevitably ends, or should end, the distinction between commercial speech and political speech.

It is not surprising that many constitutional law scholars have heavily criticized *Citizens United*. Others think the negative response itself is an overreaction, claiming that the opinion causes no real danger to democracy as

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92. Some argue that *Citizens United* has, or will, end the distinction between corporate political speech and corporate commercial speech. See Bezanson, supra note 91, at 658-60; see also Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 Mich. L. Rev. First Impressions 16, 19 (2010) (questioning whether the opinion in *Citizens United* will lead to the demise of lesser protection for commercial speech, which could lead to the demise of the constitutionality of any regulations of commerce); Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. Kan. L. Rev. 163, 205 (1994) (as to corporate governance speech, regarding the distinction between corporate commercial speech and corporate political speech as “dubious”); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 Ohio St. L.J. 1, 36 (2012) (“Whether *Citizens United* sounded the death knell for commercial speech doctrine as suggested by Professors Bezanson and Piety is beyond the scope of this Article. In the limited context of legal services delivery, however, which involves bans on external investment that, in essence, function as content regulation that suppresses ideas, it is difficult to see how the Court can maintain this artificial distinction between political versus commercial speech.”).

93. See People v. Larson, 906 N.Y.S. 2d 709, 719 (N.Y. Crim. Ct. 2010). In *Larson*, the Court denied the motion to dismiss the defendants charged with showing and offering for sale condoms on a public street without a vendor license. *Id.* at 719. The defendants argued that the condoms they offered for sale was in a “message-bearing wrapper,” and hence, was entitled to full protection under the First Amendment. *Id.* at 718-19. The Court held the licensing requirement was a valid time, place, and manner regulation for commercial businesses. *Id.* at 718.

94. See, e.g., Barbara A. Cherry, *How Elevation of Corporate Free Speech Rights Affects Legality of Network Neutrality*, 63 Fed. Comm. L.J. 591, 599, 636-37 (2011) (arguing that *Citizens United* will have a negative effect on viewpoint diversity necessary to sustain a democracy because the ruling effectively elevates the free speech rights of wealthy corporations above the economic and free speech rights of individuals). *Citizens United* seems especially problematic as we consider the path American law has taken in trying to protect the voting rights of individuals. Before the “one person one vote” holding in the case of *Reynolds v Sims*, wealthy individuals holding more rural property enjoyed a greater voice in elections. 377 U.S. 533, 565. It seems then that we now come full circle, with the Court now giving a greater voice in our democracy to the voice of wealthy corporations. See, e.g., Cherry, supra note 94, at 636-37.
we know it, and will not allow wealthy corporations to drown out the political voices of non-corporate citizens.\textsuperscript{95} According to one scholar, when one examines previous commercial speech ad campaign funding cases, one will see that \textit{Citizens United} is a relatively minimal final straw.\textsuperscript{96} Whether \textit{Citizens United} is a drastic move in a new direction, a drastic move in the same direction, or just the final straw, clearly the Court overlooked its own free speech doctrines in trying to equate corporations to individuals, and corporate rights and power to individuals' rights and power.

In \textit{Citizens United}, the Court protected corporate speech in the form of a film intended to influence a presidential election labeling this speech as political speech, which is entitled to the highest protection under the First Amendment. The Court expressly ruled that it is unconstitutional to suppress political speech on the basis of the speaker's corporate identity unless the federal law meets the most exacting review.\textsuperscript{97} Political speech has not been held to the same requirements of truthfulness, as had commercial speech. So, the holding, with error, seemingly gives corporate political speech the fullest protection, even if it is not truthful or truth evoking and, yes, even if it is false and misleading.

The movie at issue in \textit{Citizens United} and \textit{Avatar} are instructive. \textit{Avatar} included various depictions, arguably depictions of people of color.\textsuperscript{98} Using \textit{Hillary} and \textit{Avatar}, it is possible then that all commercial speech,\textsuperscript{99} especially about underrepresented and historically politically disenfranchised groups, is implicitly political speech. If so, then unfortunately under \textit{Citizens United}, a corporation could intentionally flood the marketplace with false and misleading messages about underrepresented groups, label these messages as political speech, and get full First Amendment protection regardless of any resulting harm.\textsuperscript{100} But, if all such commercial speech is not political speech and commercial speech is just that, commercial speech, then perhaps both \textit{Hillary}

\textsuperscript{95} Others argue that both the opinion and the response consist of "outsized rhetoric." See Justin Levitt, \textit{Confronting the Impact of Citizens United}, 29 \textit{Yale L. & Pol'y Rev.} 217, 234 (2010).
\textsuperscript{96} \textit{Id.} at 220.
\textsuperscript{97} \textit{Citizens United}, 558 U.S. at 364-65.
\textsuperscript{98} See Rastogi, supra note 42.
\textsuperscript{99} Cf. Piety, supra note 92, at 19.
\textsuperscript{100} However, some think critics are overreacting; corporations will be concerned with the bottom line and will stay out of political debates. See Richard A. Epstein, \textit{Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have but Do Not Want}, 34 \textit{Harv. J.L. & Pub. Pol’y} 639, 660-61 (2011) (arguing that speech at issue in \textit{Citizens United} was not commercial speech, as it was not an advertisement to buy or sell some particular product, and suggesting corporations have no more power than the Tea Party).
and *Avatar*, or any film or advertising, are all birds of the same feather, potentially misleading or false commercial speech only entitled to limited protection, as all were made for commercial profit or commercial goals of the organization.\(^{101}\)

IV. CONCLUSION

The marketplace of ideas is overflowing with misconceived ideas about underrepresented racial groups that drown out the truth about the equality of these groups. This sentiment was expressed implicitly and explicitly at the Pursuit of Justice Conference.\(^{102}\) The opening speaker at the plenary argued that individuals who have been harmed want their voices to ring so that they can provide information about themselves to others.\(^{103}\) Although Dr. Barbara Perry’s talk was about the victims of specific hate crimes, her points hold true for those in racial groups who have been historically and continuously harmed by racial biases in America.\(^{104}\) In other words, as one workshop leader, Tony Stewart, explained, the antidote to hate is to continue to progress from the hundreds of years of slavery and other exploitations, though government sanctioned segregations and discriminations, through the level of just merely tolerance extended by the dominant groups today, to the actionable celebration of formerly suppressed voices.\(^{105}\)

To achieve this American culture of celebration of formerly suppressed voices, dominant voices must not continue in willful blindness of the effect of hate offenses and hate speech. This willful blindness unfortunately has been supported both by the Court’s protection of racially hateful speech and the Court’s expansion of protection for corporate voices that may perpetuate these offenses in the guise of entertainment and commercial advertisement.

When I discussed my essay with a number of scholars, some feared that my thesis would cause more harm than good, as restricting speech rights, even of corporations, could injure speech rights for individuals. I don’t completely share their fears. However, I do have fears about the present perpetuation of

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101. But if *Citizens United* is adhered to, then corporations are also entitled to First Amendment rights to not speak, rights to associate or not, which could call into question other laws, such as antitrust laws.


104. *Id.*

hate directed toward underrepresented groups, and how some white Americans tend to dismiss this effect.

For me, the main questions are: Is corporate speech about underrepresented groups political speech or commercial speech? And if it is political speech as it does convey a message, albeit often a hateful one, what are those who seek justice and equality to do? If this speech, such as in *Hillary: The Movie* and *Avatar*, is corporate commercial speech about race, it can be freely regulated. If the speech is false and misleading, the government need only meet a mid-tier level of review. On the other hand, if it is corporate political speech, then under present jurisprudence it can be protected from content regulation even if it is false and misleading, and government may regulate its content only by meeting strict scrutiny. My position is that promoting racial equality for historically underrepresented groups meets that exacting level of review. Even if it does not meet that level, there are still options, in spite of the holding in *Citizens United* and other opinions where the Court does not seem to be concerned with the impact of racial hate speech on nonwhites.

We are consciously and unconsciously influenced by racial messages abundant in commercial speech and film for entertainment. So, this negative influence should be important in freedom of speech legal jurisprudence. But how do we make it important? We could trust the marketplace of ideas theory that one day, somehow, truth will prevail. This option does not seem promising, given the level of hate expressed openly in America. We could try to educate the children and others more about equality and about critical thinking even when they are being entertained. We can also recognize that *Citizens United* gives corporations potentially too much power, and join those who seek to have it overruled or minimized. We could also seek economic avenues to motivate corporations to promote the truth about race or seek the truth about race. Some political speech is in an unprotected category; so, racial fighting words directed against underrepresented groups could be restored to unprotected categories. My other favorite is simpler—at venues like the Pursuit of Justice Conference, we can gain courage to seek to flood the marketplace of ideas with principles of equality and truth.