

1-1-2013

The Corporation in the Marketplace of Ideas: The Law and Economics of Corporate Political Speech

Matthew W. Telleen
University of South Carolina

Follow this and additional works at: <https://scholarcommons.sc.edu/etd>



Part of the [Journalism Studies Commons](#)

Recommended Citation

Telleen, M. W.(2013). *The Corporation in the Marketplace of Ideas: The Law and Economics of Corporate Political Speech*. (Doctoral dissertation). Retrieved from <https://scholarcommons.sc.edu/etd/2348>

This Open Access Dissertation is brought to you by Scholar Commons. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

The Corporation in the Marketplace of Ideas:
The Law and Economics of Corporate Political Speech

by

Matthew W. Telleen

Bachelor of Arts
Pacific Lutheran University, 1996

Juris Doctorate
University of Minnesota, 2004

Submitted in Partial Fulfillment of the Requirements

For the Degree of Doctor of Philosophy in

Mass Communications

College of Mass Communications and Information Studies

University of South Carolina

2013

Accepted by:

Erik L. Collins, Major Professor

Jay Bender, Committee Member

Kenneth Campbell, Committee Member

David G. Owen, Committee Member

Lacy Ford, Vice Provost and Dean of Graduate Studies

Abstract

In 2010, the Supreme Court decided *Citizens United v. FEC*, and raised the ire of commentators around the country. The President even criticized the ruling during the State of the Union Address. But corporate political speech has existed at various levels throughout history, and the debate is often clouded by complex balancing tests and convoluted reasoning.

In this dissertation, the methodology of law and economics is utilized to analyze the value of corporate political speech to the marketplace of ideas. Chapter 1 introduces Tracing the history of Supreme Court decisions dealing with corporate political speech, variables can be isolated that deal with each component of speech in the marketplace, the speech itself (the product), the speaker (the producer), and the audience (the consumers).

The stated goal of the marketplace of ideas is to allow citizens to process information and arrive at efficient and true conclusions. Any regulation of corporate political speech must determine if the regulation prevents a high probability of harm in order to justify the loss of speech that may be valuable to the marketplace. Extending a formula first created by Judge Richard Posner, and accounting for new insights to decision making offered by studies in behavioral law and economics, each variable can be analyzed to determine when suppression is justified, and what actual factors should be considered by lawmakers and judges.

The conclusion is that the high legal error costs associated with attempting to suppress only that speech which can consistently be deemed to be harmful make most

efforts at restricting corporate political speech problematic. In all three instances regulations are likely to be over-inclusive and result in a chilling effect that will impact core political speech at the heart of the protections of the First Amendment.

For Chanda
for all her patience, love and support

Acknowledgements

It is humbling to realize how many people played a role in helping me complete this dissertation. First, I would like to thank my chair, Dr. Erik L. Collins, the Associated Director for Graduate Studies and Research in the School of Journalism and Mass Communications at the University of South Carolina. For three years he helped me to become a better researcher and writer and taught me how to navigate the new academic surroundings in which I found myself. He allowed me to see the best way in which to combine my legal background and my journalistic background and showed me the pleasure to be found in doing legal scholarship in the communications field. He has been a true asset to the University of South Carolina, and I hope he will remain as a mentor and advisor for the rest of my career.

Additionally, I'd like to thank professor Jay Bender, Reid H. Montgomery Freedom of Information Chair, and David G. Owen, Carolina Distinguished Professor of Law, for their invaluable legal experience and support of my scholarship and education. One reason I chose to attend the University of South Carolina was the number of legal scholars on faculty at the School of Journalism and the close working relationship between the School of Journalism and the Law School. Professors Bender and Owen embody that cooperation and I was fortunate to have them as teachers, as members of my committee, and just as sources for advice on my new career.

Several other members of the School of Journalism played a role in my success. Dr. Kenneth Campbell, was a wonderful teacher and provided valuable feedback on this dissertation and my scholarship interests in general. Dr. Sei-Hill Kim was patient with my lack of experience with quantitative research and has made me a significantly better

researcher and writer. Dr. Kathy Roberts Forde was a inspiration as scholar, writer and teacher. She pushed me to make the most of whatever ability I may have, and I hope I can live up to all of their expectations.

I would also like to thank the other members of my doctoral cohort, Brett Borton, Carolina Foster and Jack Karliss. Without their support and encouragement, there is little chance I could have survived the challenges associated with a doctoral education.

And lastly I would like to thank my family. My wife Chanda and my children Davis, Daniel and Sabrina have all sacrificed in big and small ways to allow me to pursue my goals and I hope I can repay them and make them proud.

Table of Contents

Abstract.....	ii
Chapter 1: Introduction.....	1
Chapter 2: Corporate Political Speech and the First Amendment.....	7
The Constitutional Rights of Corporations.....	7
Theories of the Corporation.....	12
Corporate Political Speech and the First Amendment.....	16
Chapter 3: Law and Economics.....	71
The Origins of Law and Economics.....	73
How Economics Applies to Law.....	86
Freedom of speech and the First Amendment.....	92
Specific Applications.....	96
Critiques of Law and Economics.....	102
Behavioral Law and Economics.....	106
Chapter 4: The Law and Economics of Corporate Political Speech.....	112
The Marketplace of Ideas.....	112
The Marketplace Variables of Corporate Political Speech.....	117
The Marketplace Variables and Posner’s Free Speech Formula.....	145
Conclusion.....	160
References.....	164

Chapter 1: Introduction

The 2012 election is estimated to have cost around \$6 billion.¹ This is roughly \$700 million more than the previous high.² One difference between 2012 and past elections was the changes in campaign finance laws brought about by the Supreme Court's decision in *Citizens United v. FEC* in 2010.³ *Citizens United*, and subsequent decisions based on its holding, were estimated to have legalized \$1.3 billion in outside independent expenditures, which is election spending that is not coordinated with a particular candidate.⁴

Many citizens were united by the decision, united in the belief that this level of political spending was problematic.⁵ Grass-roots efforts by social groups started that aimed to bring attention to the problem of money in politics, advocating legislation, regulation, and even Constitutional Amendments.⁶

¹ Matea Gold, *2012 Campaign Set to Cost a Record \$6 Billion*, L.A. Times, October 31, 2012, <http://articles.latimes.com/2012/oct/31/news/la-pn-2012-campaign-costs-6-billion-20121031>

² Id.

³ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴ Lindsay Young, *Outside Spenders Return on Investment*, Sunlight Foundation, Dec. 17, 2012, http://reporting.sunlightfoundation.com/2012/return_on_investment/

⁵ Dan Eggan, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, Washington Post, Feb. 16, 2010, http://articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits

⁶ See *infra* n.614 and accompanying text.

One of the primary complaints about the *Citizens United* decision was that it extended First Amendment protection to corporations when the corporation spent money on political advertising.⁷ This offended those who felt that the protections of the Constitution were intended for natural persons, and concerned those who felt that corporation's deep pockets would dominate the political arena and drown out the voices of other speakers in an attempt to curry favor with politicians and ensure corporate friendly election results.⁸

Although it seems clear that the new campaign finance landscape created by the *Citizens United* decision increased overall campaign spending, it is less clear if it opened the floodgates for spending by corporations rather than natural persons. Most experts who have attempted to estimate the source of political spending have admitted that it is not possible to determine what percentage of spending came from corporations.⁹ At least one estimate found by watchdog groups estimated that corporations contributed \$75 million to political action committees (Super PACs).¹⁰ Considering Super PACs are estimated to have spent just under \$700 million, it does not seem that corporations were the largest

⁷ Harry Bradford, *Americans Disagree With Mitt Romney: Corporations Aren't People*, Huffington Post, Jan. 24, 2012, http://www.huffingtonpost.com/2012/01/24/corporations-are-people-argument-rejected-most-americans_n_1228301.html

⁸ See e.g. Move to Amend, <https://movetoamend.org/>

⁹ Eduardo Porter, *Get What You Pay For? Not Always*, N.Y. Times, Nov. 6, 2012, <http://www.nytimes.com/2012/11/07/business/pitfalls-of-spending-on-politics.html?pagewanted=all>

¹⁰ Michael Beckel and Reity O'Brien, *Mystery Firm is Election's Top Corporate Donor at \$5.3 Million*, Open Secrets Blog, <http://www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporo.html> (Combined effort of Center for Public Integrity and Center for Responsive Politics)

driver of the increase in spending.¹¹ In fact, at least one individual is estimated to have spent almost twice that much on his own.¹²

Some feel this number is likely to be a low estimate, because of the incentives corporations may have not to disclose donations and laws that currently leave several avenues for corporations to donate without disclosure.¹³ However, others have argued that corporations are actually unlikely to become major political spenders, because alienating potential customers is almost always bad for business and remaining neutral seems the safest plan of action.¹⁴

Regardless of whether the fear of the influence of corporate spending on the democratic process is justified, the *Citizens United* decision placed the First Amendment rights of corporations on the front page, and the question of whether the Supreme Court should fully protect corporate political speech is an important one. In this dissertation, I attempt to use the economic methodology developed by Judge Richard Posner and others to analyze the costs and benefits of regulating corporate political speech.

Posner and other law and economics scholars have argued that economic models and concepts can be illuminating for legal analysis, even outside of traditionally market driven activities.¹⁵ Given that the First Amendment protection has long been tied to the analogy of a “marketplace of ideas”, Posner and others have attempted to use market

¹¹ Id.

¹² Peter H. Jones, Sheldon Adelson Spent Far More On Campaign Than Previously Known, Huffington Post, Dec. 3, 2012, http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election_n_2223589.html

¹³ Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 Geo. L.J. 923 (2013).

¹⁴ Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 Harv. J.L. & Pub. Pol'y 639, 639 (2011)

¹⁵ See infra n.381-415 and accompanying text.

concepts to enhance our understanding of the tradeoffs involved in First Amendment decisions.¹⁶

In this dissertation, I apply this analytic framework to corporate political speech for the first time. Additionally, I enhance the framework by incorporating the legitimate concerns and criticisms raised by the behavioral law and economics movement, concerns about the way traditional economic modeling has failed to reflect the process of actual human decision making. I take these considerations seriously, and where appropriate, incorporate them into the traditional law and economics model as developed by Posner.

Decisions about the protections of the First Amendment and regulations that suppress speech are always of significant interest to both professionals and scholars in the fields of Journalism and Public Relations. In addition to the natural interest Journalism and Mass Communication scholars have in all aspects of the First Amendment, corporate political speech is of additional interest for several reasons. First, there is the economic impact of the loosening of the regulations on media companies, with the increased money largely spent on television and radio advertising. Second, there is the role the press will play to hold politicians and corporations accountable for any spending that gives rise to corruption or the appearance of corruption.

But the most significant impact may be the concern that any future regulation of corporate political speech could include media companies and impact the ability of the traditional media to comment on political activity. Past regulation, including the regulation challenged in *Citizens United*, exempted media companies from restrictions on corporate political speech. But if future challenges were aimed at the extension of First

¹⁶ See *infra* n.416-429 and accompanying text.

Amendment rights to corporations generally, legislators would need to be sure to continue to carve out exemptions for the press. This could prove more challenging than it has in the past. Technological advancements and new media have changed the concept of the “press”, and have proved a challenge for both the courts and legislators to define. The argument has been raised that there is no special exemption for the traditional press companies under the Freedom of the Press language of the First Amendment. For this reason, the standing of corporate political speech is an important aspect of mass communications law.

Looking at corporate political speech through the framework of the “marketplace of ideas”, I will be able to isolate the many and diverse variables the Supreme Court has considered in the long line of cases that considered independent expenditures and corporate political speech. By isolating the variables and analyzing them in the market model, I can simplify and clarify exactly what is at stake when deciding whether or not to suppress political speech by corporations and what harms may result from protecting it. This can help to clarify what has become a convoluted and confusing debate. Many of the arguments raised about the regulation of corporate political speech currently are focused on the emotional concerns about the role of corporations in politics or the theoretical concerns about the way corporate political speech will impact elections. Several focus on questions that the courts have long settled, like whether money can be equated with speech or whether First Amendment protection is extended to corporations. Most of these oversimplify or misunderstand the extensive case law and the important balancing that courts must engage in when determining whether to suppress speech in the name of protecting society. Applying a law and economics framework helps to highlight the real

tradeoffs present in any such regulation and the impact of speech regulations at every level of the marketplace of ideas. This exercise is valuable in two ways; it highlights the risk of legal error involved in regulations of corporate political speech and helps focus on possible ways to mitigate said error that could either create new ways of justifying such regulation or allow opponents to anticipate and defend the value of the speech. Second, it extends the application of the law and economics framework to a significant area of speech where it has not previously been applied and allows for a better understanding of both the value and limitations of economic reasoning in legal considerations.

Chapter 2: Corporate Political Speech and the First Amendment

This chapter discusses the First Amendment protection afforded to corporations by the courts throughout history. It begins with an overview of corporate rights under the constitution generally, and then discusses the historical theories of corporate identity that have influenced both the courts and commentators when deciding whether the protections of the constitution, including the First Amendment, should extend to corporations.

The Constitutional Rights of Corporations

A threshold question to the issue of whether corporations have First Amendment rights that would limit the ability of the government to regulate corporate political speech, is whether the protections of the First Amendment, or any of the other amendments of the Bill of Rights extend to corporations. There are two different ways of addressing this question. The first is practical, to trace the history of the protection of the rights of corporations in the courts. The second is more philosophical: to examine exactly how corporations are viewed by the court and by society, and what status they hold under the law. The two cannot be neatly separated, because the second question has often, been considered in decisions that determine the constitutional rights of corporations.

The legal standing of a corporation is not central to the determination of the proper balance to bring to corporate First Amendment rights in the area of corporate political speech. Although some of the reaction to *Citizen's United* has involved activists who seek to end the treatment of corporation's as "people" for purposes of constitutional protection,¹⁷ virtually all corporate First Amendment cases have focused on the value of the speech itself and the rights of the listeners.¹⁸

However, it is instructive to discuss the debate about the status of corporations in order to understand the struggle of the courts and commentators to determine the proper understanding of a corporation, and because arguments about the special status of corporations and the role of the state in the creation of corporations arise up in the corporate political speech cases, and they mirror some of the debate about the conception of a corporation.

Early corporations were chartered by English authorities and there is little evidence that they had rights beyond the language of their charter.¹⁹ At the time of the establishment of the Constitution, there were few corporations in the colonies and

¹⁷ See Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. Pa. J. Bus. L. 209 (2011).

¹⁸ Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 Seattle U. L. Rev. 863 (2007), pointing out that none of the corporate First Amendment cases rely on Santa Clara. "Moreover, to the extent the Court has recognized First Amendment rights of corporations, corporate personhood was not central to those decisions. The Court was more inclined to rest the argument for corporate speech on the right of listeners, for whom the underlying information would be useful."

¹⁹ Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 225 (2011)

corporate speech was a relatively foreign concept.²⁰ Early charters retained much of the control exercised by the Crown prior to the Revolutionary War,²¹ even as the number of U.S. corporations grew rapidly.²²

An early 19th century Supreme Court case previewed the difficulty the Court would have deciding what rights to extend to corporations. *Dartmouth College v. Woodward*,²³ decided in 1819, protected the corporate right to contract, while simultaneously distinguishing a corporation from a person. In his opinion, Chief Justice John Marshall said, “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”²⁴ This statement would become the underpinning for the Artificial Entity theory of the corporation discussed later in this dissertation. However, in the same case, Chief Justice Marshall also said that there was a limit to the power of the state to restrict corporations, and ruled in favor of Dartmouth College. “Corporations

²⁰ See Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 Seattle U. L. Rev. 863 (2007), citing Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903).

²¹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 284 (Jonathan Elliot ed., 1836) (“The powers of corporations are defined, and operate on limited objects. Their power originates by the authority of the legislature, and can be destroyed by the same authority.”).

²² See, Winkler, *infra* note 2. “Corporations grew rapidly in the immediate aftermath of the American Revolution, with estimates of approximately 350 business corporations formed between 1783 and 1801.” Citing Oscar Handlin & Mary F. Handlin, *Origin of the American Business Corporation*, 5 J. ECON. HIST. 1, 4 (1945).

²³ 17 U.S. 518 (1819)

²⁴ *Id.* at 636

receive constitutional protection, as Dartmouth College did, in order to protect the constitutional rights of the individuals behind the artificial entity.”²⁵

The 14th Amendment, ratified by the states in 1868, guaranteed due process and equal protection to citizens. There is little evidence that the authors’ specifically intended the protections to extend to corporations, but it also did not explicitly exclude them.²⁶ Yet in 1886, the Supreme Court declared in *Santa Clara County v. Southern Pacific Railroad* that corporations were protected by the 14th Amendment.²⁷ What’s more, the Court asserted this without argument or discussion. The key language, which endures to this day, was not a part of the written opinion, but was an oral statement by Chief Justice Morrison Waite prior to oral argument. “The court does not wish to hear argument on the question whether the provision in the 14th Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”²⁸ Some commentators point to this decision as putting corporations on the same plane as individuals for purposes of constitutional protection.²⁹ But others felt the case did not intend to protect corporations from regulation.³⁰

²⁵ Winkler, *infra* note 2 at 864.

²⁶ *Id.* at 865. Winkler discusses the so-called “Conspiracy Theory” that arose when Rosco Conkling, one of the members of the congressional committee that drafted the Amendment argued before the Supreme Court on behalf of a railroad company that the drafters intended to include corporations. According to Winkler and others, no independent evidence for this exists. See Andrew C. McLaughlin, *The Court, The Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940).

²⁷ 118 U.S. 394 (1886).

²⁸ *Id.* The statement was included in the opinion by the court reporter.

²⁹ See THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 5-6 (2002). Regardless of whether it put corporations on equal footing for Constitutional protection generally, it certainly impacted the use of the Fourteenth Amendment, an amendment passed with the aim of protecting

Whatever the intent of the Court, future decisions would extend the protection of the Constitution to corporations in some cases, but not in others. The most notable exception to the protection may be the inability to claim a right against self-incrimination under the Fifth Amendment.³¹ There have been examples as well of courts allowing limitations on the right to contract for corporations that would not be acceptable for individuals.³²

Corporations have been accorded several protections that are equal to those of natural citizens, usually without significant controversy. A corporation may sue in federal courts under diversity jurisdiction.³³ A corporation is secure from unreasonable searches and seizures³⁴ and from the risks of double jeopardy.³⁵ A corporation also has the right to

emancipated slaves. For the first fifty years after the adoption of the Fourteenth Amendment, more than fifty percent of the Supreme Court cases applying the Fourteenth Amendment involved corporations, and less than one half of one percent involved race discrimination claims. *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 at 90 (1938).

³⁰ See Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 71 (1992)

³¹ See *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

³² See, e.g., *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906). Ilya Shapiro & Caitlyn McCarthy, *So What If Corporations Aren't People?*, 44 *J. Marshall L. Rev.* 701 (2011) citing Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *Geo. L.J.* 1593, 1646

³³ See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809) (jurisdiction is determined by the “real persons” coming to court under the corporate name).

³⁴ See *Hale v. Henkel*, 201 U.S. 43 (1906) (overly broad subpoena for production of corporate records constituted unreasonable search and seizure in violation of Fourth Amendment)

³⁵ See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (acquittal of corporation is not appealable because of Fifth Amendment protection against double jeopardy).

trial by jury.³⁶ It is clear that corporations currently enjoy many of the same protections as individuals, but that the treatment of the two parties is not identical.

Theories of the Corporation

Theories of the corporation reflect the thinking of judges and legal scholars as to what practical identity a corporation has under the law. Practically, a corporation is a collection of individuals, but as seen below, it takes on unique qualities that distinguish it from other organizations and groups including, most significantly, perpetual life and separation of ownership and control. These differences have given rise to several different theories of the corporation over the country's history.

The first theory of the corporation was the concession theory, or the artificial person theory.³⁷ This theory, inherited from the British tradition, held that corporations existed purely as creations of the state through the granting of their charters, and the corporation thus had only those powers and rights afforded to it through the state grant.³⁸ According to Chief Justice Marshall in *Dartmouth College*, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"³⁹

From the beginning, legal authority of the government to grant charters created problems, including concerns about bribery, political favoritism and the creation of

³⁶ *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).

³⁷ Ripken, *supra note 17* 218-219 (2011)

³⁸ William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989)

³⁹ 17 U.S. 518 (1819)

monopolies.⁴⁰ General corporation statutes proliferated throughout the states in an attempt to streamline the process and ensure access to the corporate form for everyone.⁴¹ As the chartering of corporations became less restrictive, the theory of the corporation as an artificial person that existed at the concession of the state seemed less appropriate.⁴²

Two theories emerged to replace the concession theory. One took the opposite approach to the concession theory, seeing the corporation not as a separate legal entity, but as a collection or aggregate of the individuals who formed the corporation. Under this aggregate theory, “the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.”⁴³ This theory sought to explicitly state what might seem obvious but can be obscured by other theories, corporations cannot be formed, cannot exist, and certainly cannot act without

⁴⁰ Ripken, *supra* note 17 at 220.

⁴¹ Bratton, *supra* note 38 at 1485.

⁴² Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 232 (2011) “As the structure of corporations changed and became more management controlled, corporations began to be viewed as no longer representing the rights of the individuals who composed them, but rather, as separate bodies that possessed their own values and desires independent of their shareholders”, Ripken, *supra* note 17. “The act of incorporation with the state thus became merely a formality of filing and played little role in the personhood of corporations. The idea that corporations existed only because of the concession of the state held far less force and was replaced with the belief that the corporation actually owed its existence to the individuals who formed the corporation to conduct their business”, and Bratton, *supra* note 38 “The proliferation of general corporation laws necessitated adjustments in the underlying theory of the firm.

The “legal fiction” and “artificial entity” notions were questioned because new statutes impaired their base in concession theory. With equal access to the form assured, corporations no longer seemed a product of sovereign grace. Although many still saw a reified corporate entity, widespread use of the corporate form directed attention away from juridical constructs and toward the social reality of the business and the creative energy of the individuals conducting it.”

⁴³ Ripken, *supra* note 1, at 221, citing 1 Victor Morawetz, *A Treatise on the Law of Private Corporations* 1-2 (2d ed. 1886) (stating that it is “self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. The word ‘corporation’ is but a collective name for the corporators or members who compose [it].”)

the agreement and participation of individuals, both as principals and as agents. Because, under this theory, the natural persons who make up the corporation are in fact the corporate person, there is no separate identity. This theory was consistent with the legal status of partnerships.⁴⁴

Language in the *Santa Clara* case implies that it is this theory, and not a more explicit form of corporate personhood, that provided the underlying rationale for the *Santa Clara* decision, and the Court's ruling that a corporation was a person for purposes of the 14th Amendment and could not be taxed differently from an individual.⁴⁵ "To deprive the corporation of its property . . . is, in fact, to deprive the corporators of their property [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them"⁴⁶

As corporations grew, however, it became harder to analogize them to a collection of individuals. As more control of the corporation was handed over to managers by shareholders or directors, the natural persons exercising the rights of the corporation were rarely the same individuals whose own rights had been seen as extending to the corporation under the aggregate theory.⁴⁷

⁴⁴ Horwitz, *supra* note 30, at 75. "In reaction to the grant theory, some legal writers during the 1880s began to put forth a polar opposite conception of the corporation as a creature of free contract among individual shareholders, no different, in effect, from a partnership.

⁴⁵ Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 176 (1985).

⁴⁶ Ripken, *supra* note 1, citing *The Railroad Tax Cases*, 13 F. at 747-48, appeal dismissed as moot sub nom. *San Mateo v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885); see also *Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385, 404-05 (C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886) (explaining how corporations are groups of associated people that are entitled to the same constitutional protections as individual persons).

⁴⁷ See Bratton, *supra*, note 38 at 1486. "The classical economic model did not offer a

The alternative theory attempted to recognize the difference between the collection of the individuals, and the corporation itself. This natural entity (or real entity) theory, considered the corporation a legal entity with characteristics distinct from the underlying shareholders who had created or owned the firm.⁴⁸ The disconnect between the shareholders and the managers, and the difficulty of ascribing actions taken by majority rule to all shareholders equally, made a separate corporate legal identity appealing.⁴⁹ Founded in European ideas of corporate realism, this theory held that “[t]he corporate entity was real, and group dynamics were more significant than individual contributions.”⁵⁰

Many scholars have argued that *Citizens United* was a victory for the natural entity theory. However, much of the debate over which theory of the corporation is most appropriate was abandoned in the 1920’s, when John Dewey wrote several critiques of the attempts to distinguish the theories and determined that they could be used interchangeably to argue either for or against corporate rights and government corporate control.⁵¹ Dewey preferred a practical view of corporations, and quoted favorably Frederic Maitland’s definition:

The corporation is (forgive this compound adjective) a right-and-duty-bearing unit. Not all the legal propositions that are true of a man will be

solution for this conflict. It assumed that profit-maximizing, individual entrepreneurs both owned the means of production and directed production. With the railroads, this basic assumption no longer obtained: Groups of managers and investors, rather than individual actors, became the players. Furthermore, their interests came into conflict as ownership and direction of the means of production began to separate.”

⁴⁸ E. Freund, *The Legal Nature of Corporations* (Univ. of Chicago Press 1897).

⁴⁹ Horwitz, *supra* note 30, at 89. “a theory of a separate corporate entity, ‘imput[ing]’ to the corporation the ‘will’ of the shareholders”.

⁵⁰ See Bratton, *supra*, note 38 at 1491.

⁵¹ John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655

true of a corporation. For example, it can neither marry nor be given in marriage; but in a vast number of cases you can make a legal statement about x and y which will hold good whether these symbols stand for two men or for two corporations, or for a corporation and a man.”⁵²

For Dewey, the debate about the existence of a real or fictitious corporate personality was unnecessary.

In saying that “person” might legally mean whatever the law makes it mean, I am trying to say that “person” might be used simply as a synonym for a right-and-duty-bearing unit. Any such unit would be a person; such a statement would be truistic, tautological. Hence it would convey no implications, except that the unit has those rights and duties which the courts find it to have. What “person” signifies in popular speech, or in psychology, or in philosophy or morals, would be as irrelevant, to employ an exaggerated simile, as it would be to argue that because a wine is called “dry,” it has the properties of dry solids; or that, because it does not have those properties, wine cannot possibly be “dry.”⁵³

Dewey may not have settled the debate about the legal status of corporations,⁵⁴ but he did quiet the philosophical debate about how the courts and society should think about the question of corporate identity.

Corporate Political Speech and the First Amendment

Corporate influence in the political process did not take substantial root until the middle of the 19th century. With the growth of political parties and the subsequent need to raise large sums of money to finance political campaigns, by the time of Abraham Lincoln’s second campaign for the presidency, corporations had become “an integral part of campaign financing, since government contracts provided so large a source of their

⁵² 3 The Collected Papers of Frederic William Maitland 304, 307 (H.A.L. Fisher ed., 1911).

⁵³ Dewey, *supra* note 51, at 656.

⁵⁴ See Horowitz, *supra* note 45, arguing that Dewey’s assertion of indeterminacy is incorrect because real entity theory is particularly problematic when looking at management driven corporations.

income.”⁵⁵ This caused Lincoln to complain that “[as] a result of the war, corporations have become enthroned, and an era of corruption in high places will follow.”⁵⁶

The pace of corporate expenditures for public-issue campaigns and corporate contributions to candidates accelerated during succeeding administrations as industrialists built systems of manufacturing and mass transportation. Although there had been some efforts at electoral reform at the state level in the late 1800s, Congress was not moved to action until financial transactions by major insurance companies in support of candidates and parties favorable to their activities created public controversy during the first administration of Theodore Roosevelt.⁵⁷ Congress responded to Roosevelt’s subsequent challenge to ban all corporate contributions to political committees and campaigns with the Tillman Act of 1907⁵⁸ that disallowed contributions by federally chartered corporations.

The law actually accomplished little reform, however, because it applied to only a small fraction of corporations and was easily circumvented by contributions in kind. Nonetheless, the Tillman Act and the subsequent 1910 Publicity Act⁵⁹ that required donor disclosure of large contributions (amended in 1911 to limit Senate and House candidates’ expenditures) were the opening salvos in what was to become an ongoing battle between those who support corporate contributions and expenditures for political purposes, on the

⁵⁵ Jeffrey H. Birnbaum, *The Money Men: The Real Story of Fund-raising's Influence on Political Power in America* 25-26 (Crown 2000).

⁵⁶ *Id.* at 26.

⁵⁷ See Adam Winkler, *The Corporation in Election Law*, 32 *LOY. L.A. L. REV.* 1243, 1247 (1999).

⁵⁸ Tillman Act, ch. 420, 34 Stat. 864 (1907).

⁵⁹ Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910).

one hand, and those who believe that such corporate activities encourage the corruption of the political process, on the other.

The next major attempt at the federal level to limit what some saw as the injurious effects of corporate political spending came in 1925 with the passage of the Federal Corrupt Practices Act (FCPA).⁶⁰ The FCPA tightened the reporting requirements of the earlier laws as well as setting new candidate-spending limits. The statute included restrictions on expenditures as well as contributions, but was generally interpreted to apply only to expenditures made in concert with a campaign. The Act proved toothless, however, because Congress failed to include any provisions for actually enforcing the law.⁶¹ Corporate contributions and expenditures in support of public issues and political candidates continued unabated.

Subsequent campaign finance reform efforts included the Hatch Act in 1939⁶² that was designed to limit political contributions by federal civil service workers. Additionally, the Smith-Connally Act,⁶³ enacted in 1943, banned contributions to political campaigns by labor unions during World War II. Unions often evaded the Act, however, through the simple device of expending union funds independent of any specific campaigns but were, nonetheless, intended to help elect favorable candidates.

The 1946 Taft-Hartley Act⁶⁴ attempted to close this loophole by banning “all union expenditures on political activity, including ... indirect expenditure of funds to

⁶⁰ Federal Corrupt Practices Act of 1925, Pub. L. No. 69-20, §§248-56, 44 Stat. 15.

⁶¹ Winkler, *The Corporation in Election Law*, 32 *LOY. L.A. L. REV.* 1243, 1247 (1999).

⁶² Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939).

⁶³ War Labor Disputes Act (Smith-Connally Act), ch. 144, 57 Stat. 163 (1943).

⁶⁴ Labor Management Relations Act (Taft-Hartley Act), 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159.

help candidates,”⁶⁵ the first time such a reform tactic had been tried. Immediately challenged in the courts by the unions, the case eventually reached the Supreme Court. The Court held that the law did not apply to union activities designed primarily to inform union members about political issues or where political candidates stood on such issues.⁶⁶ A subsequent 1957 case⁶⁷ involving government challenges to union political expenditures of a more general nature resulted in an eventual victory for the unions on the facts presented to the jury after the case was returned for trial by the Court.

Much discussion of problems related to the growing costs of elections and the concomitant need to raise large amounts of money from organizations and wealthy individuals continued throughout the 1950s and 1960s. However, no major legislative efforts to rein in this process survived to actually become law.

At this point, the primary reason for wishing to limit political contributions and expenditures was the fear, often legitimate, of the quid pro quo of such financial transactions between donors and donees. There was virtually no advancement of the idea that such activities could or should be curtailed based on the possibility that direct contributions or independent expenditures would drown out the voices of those with less money or fewer resources to give.

This began to change in the late 1950s, however, as the broadcast media allowed candidates to bypass the party apparatus and speak directly to the electorate. Although effective, such tactics exponentially raised the costs of campaigns, particularly at the statewide and national levels. In the late 1960s, groups like Common Cause began to

⁶⁵ Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. Gov’t. L. Rev. 1, 27 (2008).

⁶⁶ *United States v. CIO*, 335 U.S. 106 (1948).

⁶⁷ *United States v. Auto Workers*, 352 U.S. 567 (1957).

agitate for limits on both contributions and expenditures (to be compensated for by providing public funds to finance political campaigns), both as a means of limiting influence and to ensure that the “little-guy’s” voice would not be lost in the marketplace of ideas. This concept proved attractive and eventually resulted in the 1971 Federal Election Campaign Act (FECA).⁶⁸

Although the public funding provisions did not survive, the FECA placed strict limits on how much candidates could spend from their own pockets and established new rules for reporting contributions and expenditures by others. Because of these reporting requirements, the law’s drafters eliminated restrictions on how much could be expended by independent individuals, groups or corporations in support of candidates for office, but kept restrictions on direct contributions by corporations and unions.

The FECA was a major step forward in campaign finance reform, but it proved just the beginning of modern legislative efforts. Revelations about fund-raising shenanigans by the Nixon re-election team that surfaced during the Watergate scandal set in motion calls for more drastic action, culminating in the 1974 amendments to the FECA that, for all intents, created a whole new law.⁶⁹ In addition to stringent limitations on contributions, the revised FECA limited ““expenditures by individuals or groups relative to a clearly identified candidate’ to \$1,000 per candidate per election,”⁷⁰ specifically including corporations and unions as subject to these restrictions.

These limitations, along with other provisions of the amended law calling for the establishment of the Federal Elections Commission and overall limits on campaign

⁶⁸ As amended at 2 U.S.C. §§431-455 (2000).

⁶⁹ Urofsky, *supra* note 14, at 56.

⁷⁰ *Id.*

spending, were almost immediately challenged by a variety of aggrieved parties. The result was the decision by the Supreme Court in the seminal case of *Buckley v. Valeo*.⁷¹

1. *Buckley v. Valeo*

Challenges to the 1974 revised version of the FECA were raised by an unlikely coalition of office holders, candidates for office and a variety of public-interest groups.⁷² Their complaint, filed in the United States District Court for the District of Columbia, “sought both a declaratory judgment that the major provisions of the Act were unconstitutional and an injunction against enforcement of those provisions.”⁷³ What followed was a ping-pong-like procedural path between the trial court and the United States Court of Appeals for the District of Columbia Circuit.

Eventually returning to the Court of Appeals for final disposition, the majority found avoiding corruption of the electoral process to be “a clear and compelling interest.”⁷⁴ On that basis, the court upheld most of the provisions of the law, including its limitations on contributions and expenditures.

On appeal, the majority *per curiam* opinion of the Supreme Court noted that “[t]he Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.”⁷⁵ In addition, the Court said, “[t]he

⁷¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷² *Id.* (Among the plaintiffs were “a candidate for the Presidency of the United States, a United States Senator who [was] a candidate for re-election, ... the Committee for a Constitutional Presidency - McCarthy ‘76, ... the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., [and] the American Conservative Union”).

⁷³ *Id.* at 8-9.

⁷⁴ *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C.Cir. 1975).

⁷⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976). (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

constitutional right of association explicated in *NAACP v. Alabama*, stemmed from [that] Court’s recognition that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association” [citations omitted].⁷⁶

Having established to their own satisfaction that “contribution and expenditure limitations . . . implicate fundamental First Amendment interests,”⁷⁷ the justices in the majority then turned their attention to analyzing whether the government restrictions on each, nonetheless, would pass constitutional muster. The verdict proved favorable for limitations on contributions, but unfavorable for restrictions on independent expenditures.

Section 608(b) of the FECA “provides . . . that ‘no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000.’”⁷⁸ In line with the arguments advanced for almost seven decades of

established by our Constitution.” Therefore, “[t]he First Amendment affords the broadest protection to such political expression”)

⁷⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976). (Of importance to corporate interests, the Court added that “‘freedom to associate with others for the common advancement of political beliefs and ideas’ [is] a freedom that encompasses ‘[t]he right to associate with the political party of one’s choice.’” Having established the important constitutionally protected speech and association rights present in the case, the Court turned its attention to examining the rationales advanced by the government and its supporters for the need to regulate nonetheless. The lower court had upheld the limits on contributions, in part, on the theory that regulation of such expenditures constituted limits on conduct and not speech, following the logic of the Court’s earlier decision in *United States v. O’Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).. The Supreme Court demurred. “We cannot share the view that the present Act’s contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O’Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card.” The Court gave similar short shrift to the government’s argument that the FECA’s restrictions were no more than legitimate time, place or manner regulations.)

⁷⁷ *Id.* at 23.

⁷⁸ 2 U.S.C. §§431-455 (2000) (The statute defines ‘person’ broadly to include ‘an individual, partnership, committee, association, corporation or any other organization or

campaign finance regulation prior to *Buckley*, the Court found the possibility of corruption or appearance of corruption of the electoral process caused by allowing unlimited contributions of funds to political campaigns sufficient rationales for upholding the \$1,000 campaign contribution limits of the FECA.

By contrast, the Act's limitations on expenditures, according to the Court, "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" ⁷⁹ The Court noted that "[t]he plain effect of [the statute] is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views ..." ⁸⁰ Undoubtedly, the Court noted, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign ... reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." ⁸¹

Although the court of appeals had approved the limitations on expenditures as only "a loophole-closing provision" ⁸² designed to prevent contributions being funneled to political races in circumvention of the limits on contributions, the Supreme Court felt this limitation was more restrictive of speech. "The markedly greater burden on basic

group of persons." This "limitation upon the amount that any one person or group may contribute to a candidate or political committee," said the Court, "entails only a marginal restriction upon the contributor's ability to engage in free communication.")

⁷⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976) at 71, (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (Section 608 (e) (1) of the FECA states that no "person" may make a contribution "relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.")

⁸⁰ *Id.* at 39-40.

⁸¹ *Id.* at 19.

⁸² *Id.* at 44.

freedoms caused by [the FECA's limitations on independent expenditures] ... cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations," said the Court. "We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the FECA's] ceiling on independent expenditures."⁸³ The Court added, "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."⁸⁴

The Court also rejected another potentially compelling interest that it called "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections"⁸⁵ as justification for restrictions on independent expenditures. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," said the Court, "is wholly

⁸³ *Id.* at 45.

⁸⁴ *Id.* at 48. (Those in favor of such restrictions, said the Court, "contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Id.* at 46. Although such maneuvers might legitimately be limited under the campaign contribution provisions of the FECA, the Court noted that "limits [on] expenditures for express advocacy of candidates made totally independently of the candidate and his campaign [are] ... [u]nlike contributions [and] may well provide little assistance to the candidate's campaign and indeed may prove counterproductive [which] ... alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." "[w]hile the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," said the Court, "it heavily burdens core First Amendment expression.")

⁸⁵ *Id.*

foreign to the First Amendment, which was designed to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’⁸⁶

The constitutional protections of freedom of speech “against governmental abridgment of free expression,” concluded the Court, “cannot properly be made to depend on a person’s financial ability to engage in public discussion.” The Court added, “[F]or the reasons stated, we conclude that [the FECA’s] independent expenditure limitation is unconstitutional under the First Amendment.”⁸⁷

Seven of the justices participating in the decision joined in striking down limits on independent campaign expenditures found in § 608(e) of the FECA. Only Justice White dissented from this view (Justice Stevens took no part in the decision).

Although most members of the Court agreed that the need to protect the sanctity of the electoral process by limiting the corrupting influence (or possibility of corruption) of direct contributions was compelling enough to justify the FECA’s restrictions, seven agreed that this argument, and the “ancillary argument” in “equalizing the relative ability of individuals and groups to influence the outcome of elections,”⁸⁸ were less than compelling when raised to justify limitations on independent expenditures.⁸⁹

⁸⁶ *Id.* at 49, quoting *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), which is quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957)

⁸⁷ *Id.* at 50.

⁸⁸ *Id.* at 54.

⁸⁹ Of particular interest to the discussion of *Austin v. Michigan Chamber of Commerce* later in this article, the word “corporation,” other than in the name of a case, appears in *Buckley* only in the quote from the statute defining the entities covered by the FECA and in the Court’s discussion of disclosure requirements. There is little doubt that the Court’s actions invalidating limitations on campaign expenditures were intended to be across the board, applying to individuals, corporations and other organizations and associations as well. This understanding was confirmed in the majority opinion by Justice Kennedy in *Citizens United*. Although the Court in *Buckley* technically “did not consider [the

Four months after the *Buckley* decision, Congress reenacted parts of the stricken statute.⁹⁰ Interpreting *Buckley* as having invalidated all limitations on independent expenditures, the revision included § 441b that once again attempted to restrict such expenditures specifically for corporations and unions.

2. *First National Bank of Boston v. Bellotti*

In *First National Bank of Boston v. Bellotti*,⁹¹ the Court again dealt with political speech, specifically independent expenditures made by corporations. Massachusetts had proposed a constitutional amendment that called for a progressive personal income tax. Two banks, including First National, and three companies wanted to speak out through media advertisements against the amendment's potential passage. Afraid that such actions might subject them to a state criminal statute that prohibited corporations from spending money to influence the vote on questions put to the voters unless the question had a material effect on their business,⁹² they queried the state Attorney General (Bellotti) as to whether he intended to enforce the criminal statute against them. When the answer

FECA's] § 610 separate ban on corporate and union independent expenditures" in addition to the limitations in § 608(e), "[h]ad §610 been challenged in the wake of *Buckley*," said Justice Kennedy, "it could not have been squared with the reasoning and analysis of that precedent." Justice Kennedy went on to note that the "expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions and some of the prevailing plaintiffs in *Buckley* were corporations [citations omitted]." In addition, "[t]he *Buckley* Court did not invoke the First Amendment's overbreadth doctrine to suggest that § 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals." Finally, said Kennedy, the *Buckley* majority opinion "cited with approval the *Automobile Workers* dissent, which argued that § 610 was unconstitutional."

⁹⁰ Federal Election Campaign Act Amendments of 1976, [Pub. L. No. 94-283, 90 Stat. 475 \(1976\)](#).

⁹¹ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁹² Mass. Gen. Laws Ann., ch. 55 § 8 (West Supp. 1977).

came back in the affirmative, the corporate leaders sought to have the statute declared unconstitutional.

The Massachusetts Supreme Court determined that it could see no objection sufficient to take such action and upheld the statute.⁹³ Petitioners then appealed to the Supreme Court of the United States.

This case, unlike *Buckley*, dealt with state law, so the Court could have distinguished the case on those grounds. Also, unlike *Buckley*, the statute limited only the expenditures of corporations, and was not concerned with candidate elections, but only with referendum and ballot measures. However, the prohibition was very similar to the language of § 608(e) of the FECA overturned by the Court in *Buckley*. The state law stated that corporations could not “directly or indirectly give, pay, expend or contribute ... any money or other valuable thing for the purpose of ... influencing or affecting the vote on any question submitted to the voters.”⁹⁴

Significantly for the future of independent campaign expenditure restrictions, *Bellotti* struck down such limitations as unconstitutional. The vote, however, was 5-4 (the vote in *Buckley* was 7-1 on the provision regarding expenditures). Justice Powell delivered the opinion of the court, joined by Chief Justice Burger, Justice Stewart, Justice Blackmun and Justice Stevens (who did not participate in *Buckley*).

For the majority, the issue was clear: “The proper question ... must be whether § 8 [of the Massachusetts law] abridges expression that the First Amendment was meant to protect.”⁹⁵ The Court noted that “[i]f the speakers here were not corporations, no one

⁹³ First Nat’l Bank of Boston v. Attorney Gen., 359 N.E.2d 1262 (Mass. 1977).

⁹⁴ First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

⁹⁵ *Id.* at 776.

would suggest that the State could silence their proposed speech.”⁹⁶ The type of speech limited here, wrote Justice Powell, “is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”⁹⁷

The lower court had determined that although the First Amendment is applicable to the states through the 14th Amendment, corporations do not have the right to liberty that the 14th Amendment guarantees to individuals. The Court disagreed. “Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations,” said Justice Powell.⁹⁸

Once the Court determined that the identity of the speaker was irrelevant to the analysis of the case, the Court applied strict scrutiny to determine if the state was justified in prohibiting speech “intimately related to the process of governing.”⁹⁹ Massachusetts argued that “[p]reserving the integrity of the electoral process, preventing corruption and ‘sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’” necessitated the state’s efforts.¹⁰⁰

The Court majority, conceding that these are interests of high importance, nonetheless remained as unmoved as their brethren had been to similar rationales

⁹⁶ *Id.* at 777.

⁹⁷ *Id.*

⁹⁸ *Id.* (The Court found “no support in the First or the Fourteenth Amendment ... for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation”)

⁹⁹ *Id.* at 786.

¹⁰⁰ *Id.* at 788-789, quoting *United States v. United Automobile Workers*, *supra*, 352 U.S., at 575, 77 S.Ct., at 533.

advanced in *Buckley*. The argument that the speech paid for by corporations should be limited because it may influence the result of referenda is unconvincing, said the Court, because “the fact that advocacy may persuade the electorate is hardly reason to suppress it”¹⁰¹

Justice White dissented from the holdings in *Buckley/Bellotti* that government limits on independent campaign expenditures for candidates or issues are unconstitutional. He stuck to that opinion in each subsequent case.

In *Buckley*, Justice White observed that “this case depends on whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the *incidental effects* [italics added] that the limitations visit upon the First Amendment interests of candidates and their supporters.”¹⁰² Justice White believed they did.

Justice White advanced two principal and related justifications for his opinion. He first argued that the majority should not have overridden what he termed the “congressional judgment,” that limitations on expenditures would “counter the *corrosive effects* [italics added] of money” on campaigns for federal office.¹⁰³

Justice White also disagreed with the majority’s determination that limits on expenditures would seriously curtail protected speech. “[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much,” he said.¹⁰⁴ Furthermore, “it should be unnecessary to point

¹⁰¹ *Id.* at 791.

¹⁰² *Id.* at 260 (White, J. dissenting).

¹⁰³ *Id.* (White, J. dissenting).

¹⁰⁴ *Id.* (White, J. dissenting).

out, money is not always equivalent to or used for speech,” said Justice White, “even in the context of political campaigns”¹⁰⁵

Consistent with his views in *Buckley*, Justice White, in an opinion joined by Justices Brennan and Marshall, also dissented from the majority opinion in *Bellotti*. His approval of the Massachusetts expenditure-limits statute in *Bellotti* was predicated not only on his dollars-do-not-equal-speech view, but also on the differences between corporations and individuals. Although conceding that some forms of corporate communications are protected by the First Amendment, Justice White noted that “what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”¹⁰⁶

Unlike individuals, “[c]orporations are artificial entities created by law for the purpose of furthering certain economic goals,” Justice White noted.¹⁰⁷ “The *special status of corporations* [italics added] have placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.”¹⁰⁸

Perhaps in an attempt to distinguish his argument from the “level-playing-field” rationale rejected by the majority in both *Buckley* and *Bellotti*, Justice White argued that curtailment of corporate independent expenditures could be justified because it was “not [based on] ... equalizing the resources of opposing candidates or opposing positions,” but

¹⁰⁵ *Id.* at 263 (White, J. dissenting).

¹⁰⁶ *First Nat. Bank of Boston v. Bellotti*, 434 U.S. 765, 804-805 (1978) (White, J. dissenting).

¹⁰⁷ *Id.* at 809 (White, J. dissenting).

¹⁰⁸ *Id.* (White, J. dissenting).

rather on “preventing institutions which have been permitted to amass wealth as a result of *special advantages* [italics added] extended by the State ... from using that wealth to acquire an unfair advantage in the political process”¹⁰⁹ Justice White also suggested that protecting the rights of minority shareholders who do not support the corporation’s speech would be a sufficient rationale for the state’s restrictions on corporate expenditures on public issues.¹¹⁰

Perhaps as important as the consistent (and non-negotiable) logic of Justice White’s arguments for the Court’s ultimate holding in *Austin v. Michigan Chamber of Commerce*¹¹¹ favoring independent campaign limitations was the development of the rhetoric used to express these arguments. The three phrases that eventually surfaced as key justifying language in *Austin* were the creation of political “war chests,” the “special advantages” of corporations and the “corrosive effects” of expenditures, all of which first appeared in dissenting opinions by Justice White in *Buckley* or *Bellotti*.¹¹²

Justice Rehnquist was part of the majority opinion in *Buckley*. His dissenting opinion in *Bellotti* suggests, however, that the primary reasons for joining the *Buckley per curiam* opinion were based on the application of the independent expenditure limitations

¹⁰⁹ *Id.* (White, J. dissenting).

¹¹⁰ Justice White’s shareholder-protection rationale subsequently was picked up and advanced in opinions by Justice Brennan and others in later cases, but was never adopted by a majority of the Court.

¹¹¹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).

¹¹² The concept that the failure to limit independent expenditures by entities with great wealth would enable them to create a “war chest” of funds to overwhelm the marketplace of ideas first surfaced in an opinion by Justice Frankfurter in the 1957 case of *United States v. Auto Workers*. Justice White adopted this concept as his own in his dissent in *Buckley* and, as will be seen, the term soon began to appear as language in majority opinions. Similarly, the phrase “special advantages” twice appeared in Justice White’s dissent in *Bellotti*, but was then adopted by the majority in subsequent opinions. The term “corrosive” also emerged in Justice White’s dissent in *Buckley*. This language would later be picked up by Justices Brennan and Marshall in majority opinions.

in § 608(e) of the FECA to all types of speakers, individuals and corporations, and that it was a statute directed toward actions by the federal government.

In *Bellotti*, citing Chief Justice Marshall for the proposition that “[a] corporation ... [b]eing the mere creature of law ... possesses only those properties which the charter of creation confers upon it ...,” Justice Rehnquist stated, “I can see no basis for concluding that the liberty of ... corporation[s] to engage in political activity with regard to matters having no material effect on [their] business ... ” would be within the “purposes for which the [state] permitted these corporations to be organized”¹¹³

Combining the rationales advanced in the dissenting opinions in *Buckley* and *Bellotti* suggested that in future challenges to unlimited, independent corporate campaign expenditures, Justice White would always favor such restrictions and Justice Rehnquist would likely favor restrictions if limited to corporations. It also suggested that at least some of the arguments advanced by Justices White and Rehnquist in *Bellotti* related to restrictions on corporations might help persuade Justices Brennan and Marshall to join in upholding expenditure limits, especially if such limitations could be based on rationales other than preventing corruption of the electoral process or leveling the marketplace-of-ideas playing field, both soundly rejected by the majorities in *Buckley* and *Bellotti*

3. *Citizens Against Rent Control v. Berkeley*

The court next dealt with the issue of corporate political speech with a challenge to the Election Reform Act of 1974, adopted by the voters of Berkeley, California. The

¹¹³ *First Nat. Bank of Boston v. Bellotti*, 434 U.S. 765, 804-805 (1978) (Rehnquist, J. dissenting), citing [Dartmouth College v. Woodward](#), 4 Wheat. 518, 636, 4 L.Ed. 629 (1819).

act placed a \$250 limitation on contributions to committees “formed to support or oppose ballot measures submitted to popular vote.”¹¹⁴

Citizens Against Rent Control (CARC), an organization formed to oppose a ballot measure that would impose such an ordinance, accepted contributions in excess of legal limits. The Berkeley Fair Campaign Practices Commission, in accordance with § 604 of the Election Reform Act, ordered the organization to pay the excess funds to the city treasury.

CARC challenged the order, asking a California Superior Court judge for injunctive relief against the enforcement of the ordinance. Eventually, the California Supreme Court upheld the Commission’s action, finding that it had a compelling interest to ensure that such interest groups would not be able to “corrupt” the election process by spending “large amounts to support or oppose a ballot measure.”¹¹⁵

Chief Justice Burger authored the majority opinion in CARC’s appeal of the California court decision, joined by Justices Brennan, Powell, Rehnquist and Stevens. Acknowledging the long tradition of First Amendment protection both for “persons sharing common views banding together to achieve a common end” and of “a marketplace for the clash of different views and conflicting ideas,”¹¹⁶ the Court found the ordinance adopted by the city had materially affected both of these protected rights. Overturning the lower court’s decision, the Court concluded that “[p]lacing limits on

¹¹⁴ *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Calif.*, 454 U.S. 290 (1981).

¹¹⁵ *Id.* at 293.

¹¹⁶ *Id.* at 295.

contributions which in turn limit expenditures, plainly impairs freedom of expression,” which the Court held, violated both *Buckley* and *Bellotti*.¹¹⁷

Justice Rehnquist concurred in the majority opinion, but was careful to note his vote was based on the over-inclusiveness of the ordinance. Had the law been designed to regulate only corporate contribution limits, Rehnquist’s opinion suggests, he likely would have upheld the constitutionality of the ordinance.

Justice Marshall concurred reluctantly on the basis that, although he thought it highly likely that corruption of the electoral process might occur, there was no actual evidence to demonstrate that the contributions prohibited by the ordinance justified the California court’s decision. Not surprisingly, Justice White registered the dissenting vote, noting that the city ordinance actually limited contributions and not independent expenditures. In addition, he reiterated his view that both *Buckley* and *Bellotti* had been wrongly decided.

Although *CARC* did not involve limitations on independent campaign expenditures for candidates, one can see the solidifying of positions by those justices troubled by the decisions in *Buckley* and *Bellotti*. This process would continue in *FEC v. National Right to Work Committee*, the Court’s next foray into the thicket of attempted corporate political speech regulation.¹¹⁸

¹¹⁷ *Id.* at 299. (Justices Blackmun and O’Connor concurred in the judgment, finding simply that the city “neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgment of protected activity.”)

¹¹⁸ *Federal Election Com’n v. National Right to Work Committee*, 459 U.S. 197 (1982).

4. *FEC v. National Right to Work Committee*

The Federal Election Campaign Act of 1971 (as amended in 1974) prohibited corporations and labor unions from making contributions to or expenditures in relation to federal elections. As discussed above, although such restrictions were arguably stricken in *Buckley* on First Amendment grounds, Congress re-enacted them almost immediately in § 441b of the revised law. However, § 441b allowed unions and corporations to spend money on elections if it came from “separate segregated funds.”¹¹⁹ These segregated funds had severe restrictions on their use, including specific regulations of who could make contributions to such funds.

The National Right to Work Committee (NRWC), a corporation without capital stock, solicited contributions for its segregated funds from approximately 267,000 people who in some way had contributed to the organization in the past. The FEC said this was in violation of § 441b(b)(4)(C) because solicitations were not from “members.”¹²⁰

The NWRC sought injunctive and declaratory relief in a complaint filed in a Virginia federal trial court, while the Commission filed an enforcement proceeding one month later in a federal court in the District of Columbia. The suits were consolidated in the D.C. district court that “granted summary judgment in favor of the Commission on

¹¹⁹ [2 U.S.C. § 441b\(a\)](#) (1971)

¹²⁰ *Federal Election Com’n v. National Right to Work Committee*, 501 F.Supp. 422, 424. (D.C.D.C. 1982).

the basis of stipulated facts.”¹²¹ The Court of Appeals for the District of the Columbia reversed and the Supreme Court granted *certiorari*.¹²²

Rather than decide the case on the relatively straightforward basis that *Buckley* made any expenditure limits codified in any part of § 441b a moot point,¹²³ Justice Rehnquist, writing for a unanimous Court, focused on the narrow definitional issues discussed in the lower courts. The basic question, said the Court, “ultimately comes down to whether respondent National Right to Work Committee ... limited its solicitation of funds to ‘members’ within the meaning of [the federal statute].”¹²⁴

While answering in the negative, Justice Rehnquist also discussed at length the limitations on general corporate expenditures contained in § 441b. Agreeing with the FEC, Justice Rehnquist noted that the purpose of § 441b was “to ensure that substantial aggregations of wealth amassed by the *special advantages* [italics added] which go with the corporate form of organization should not be converted into political ‘*war chests*’ [italics added] which could be used to incur political debts from legislators who are aided by the contributions.”¹²⁵

Characterizing § 441b as prohibiting corporate independent expenditures in federal elections, Justice Rehnquist indicated that the reason for examining the NRWC’s actions was to determine if the limitations should be applied to the organization’s solicitations because the statute did permit “some participation of ... corporations in the

¹²¹ *Id.*

¹²² Federal Election Com’n v. National Right to Work Committee, 456 U.S. 914 (1982).

¹²³ Noted almost 30 year later by Justice Kennedy in the majority opinion in *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

¹²⁴ Federal Election Com’n v. National Right to Work Committee, 459 U.S. 197, at 198 (1982).

¹²⁵ *Id.* at 207.

federal electoral process by allowing [them to create] ... ‘separate segregated fund[s],’ which may be ‘utilized for political purposes.’”¹²⁶

Justice Rehnquist then provided a multi-page history of governmental attempts to regulate campaign contributions and expenditures pre-*Buckley* to suggest (his long-held view) that limitations on corporate expenditures might pass constitutional muster. Thus, although the Court actually only decided the case on the narrow point as to whether the NRWC’s definition of “member,” in terms of solicitation of funds, matched the definition of the statute, Justice Rehnquist was able to plant logical and rhetorical seeds that grew into the ultimate revocation of the *Buckley/Bellotti* decisions that disfavored regulation of corporate independent campaign expenditures.¹²⁷

5. *FEC v. National Conservative PAC*

Justice Rehnquist again assumed the role of opinion writer in the Court’s next major election campaign case, *FEC v. National Conservative PAC*.¹²⁸ The case involved the Presidential Election Campaign Fund Act (Fund Act)¹²⁹ that allows candidates for president to receive public financing for their general election campaigns if they represent major political parties. Section 9012(f) of the statute says that independent political

¹²⁶ *Id.* at 201.

¹²⁷ Linda Greenhouse, *The Revolution Next Time?*, N.Y. Times, December 18, 2010, <http://opinionator.blogs.nytimes.com/2010/12/16/the-revolution-next-time/?ref=lindagreenhouse>. (Greenhouse called Justice Rehnquist a “master of the long game” for his ability to foresee the impact his opinions could possibly have on future decisions, even when writing in dissent. “What he excelled at was seeing around corners to which others appeared oblivious, planting little seeds in little cases where the seeds could germinate and grow while waiting for the big case to come along. It happened in one doctrinal area after another: religion, equal protection, criminal law. Years later, there would be a Rehnquist opinion to cite for a proposition more sweeping than the context in which the case had originally appeared.”)

¹²⁸ *Federal Election Com’n v. National Conservative Political Action Committee*, 470 U.S. 480 (1985).

¹²⁹ Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1972)

committees cannot spend more than \$1,000 on a candidate who has decided to accept public financing.

This provision was challenged by the National Conservative Political Action Committee (NCPAC) and the Fund for a Conservative Majority (FCM), which announced they planned to spend large amounts of money in the next campaign for president.¹³⁰

On appeal, faced with a provision of a federal statute limiting independent campaign expenditures that did not apply only to corporations, Justice Rehnquist, joined by Chief Justice Burger and Justices Blackmun, Powell and O'Connor, first determined that both the NCPAC and the FCM were political organizations (PACs) with their "primary purpose [being] ... to attempt to influence directly or indirectly the election or defeat of candidates for federal, state, and local offices by making contributions and by making [their] own expenditures."¹³¹ Clearly, said the Court, "the PACs' independent expenditures at issue in this case are squarely prohibited by [the challenged statute], and we proceed to consider whether that prohibition violates the First Amendment."¹³²

¹³⁰ *Democratic Party v. National Conservative Political Action Comm.*, 578 F.Supp. 797 (E.D.Pa.1983) (aff'd in part and rev'd in part by *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)). The Democratic Party, the Democratic National Committee and Edward Mezvinsky (chairman of the Pennsylvania Democratic State Committee) filed the lawsuit against the two organizations hoping to establish that § 9012(f) could prohibit the PACs from their spending plans. Ultimately, a federal court of appeals held that § 9012(f) was in violation of the First Amendment and, therefore, unconstitutional because "it is substantially overbroad, and ... cannot permissibly be given a narrowing construction to cure the overbreadth."

¹³¹ *Federal Election Com'n v. National Conservative Political Action Committee*, 470 U.S. 480, 490 (1985).

¹³² *Id.* at 492. (noting that, in *Buckley*, Justice Rehnquist said, the Court held that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression").

Justice Rehnquist was quick to emphasize that, despite their corporate form, the Court's decision in *NRWC* did not disqualify the organizations in this case from First Amendment protection. “[*NRWC*] turned on the special treatment historically accorded corporations” and the “*special advantages* [italics added] the state confers on the corporate form,”¹³³ wrote Justice Rehnquist, quoting his own words in that earlier case, although skipping over the fact that *NRWC* actually was decided on a very narrow, definitional point of law.

Further distinguishing *NRWC*, Justice Rehnquist noted that although “NCPAC and FCM are ... formally incorporated; these are not ‘corporations’ cases because 9012(f) applies not just to corporations but to any ... ‘organization’ ... that accepts contributions or makes expenditures in connection with electoral campaigns.”¹³⁴ Besides, said Justice Rehnquist, these are not corporations that might corrupt the process through “the influence of political *war chests* [italics added] funneled through the corporate form.”¹³⁵

In striking down the law's application to the PACs, Justice Rehnquist's overbreadth analysis reeled in both Justices Brennan and Stevens for these issues. Justice White, as expected, dissented on grounds similar to his objections in *Buckley*.

Of particular importance for the Court's decision in *Austin* five years later, Justice White's unwavering opposition to objections to limits on corporate independent

Even though they “spend substantial amounts of money in order to communicate their political ideas,” such actions, said the Court, are clearly protected by the First Amendment. “[F]orbid[ding] the expenditure of more than \$1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.”)

¹³³ *Id.* at 495.

¹³⁴ *Id.* at 496.

¹³⁵ *Id.* at 501.

campaign expenditures apparently finally won over Justice Marshall. Dissenting in *NCPAC*, Justice Marshall, in a straightforward rejection of relatively recent precedent, simply announced that “[a]lthough I joined the portion of the *Buckley per curiam* that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance.”¹³⁶

6. *FEC v. Massachusetts Citizens for Life, Inc.*

One of the challenges the court and the legislature would face in limiting the corporate political speech of corporations would be the ability to distinguish which types of corporations restrictions would apply to. Even when corporate political speech was still being protected by the *Bellotti* decision, the court began to address this issue with the decision in the case of *FEC v. Massachusetts Citizens for Life, Inc.*¹³⁷

Massachusetts Citizens for Life (MCFL) was incorporated under Massachusetts law as a nonprofit, non-stock corporation. Its stated corporate purpose was “[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn”¹³⁸ MCFL raised funds through fundraising activities and donations of members, past contributors or supporters. The organization did “not accept any contributions from business corporations or unions.”¹³⁹

In January 1972, MCFL began publication of a newsletter distributed mainly to contributors, but also to supporters when funding permitted. Recipients of the newsletter were typically encouraged to contact decision makers to express their opinions. The organization published a special edition of the newsletter in September 1978 before the

¹³⁶ *Id.* at 519 (Marshall, J. dissenting).

¹³⁷ *Federal Election Com’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

¹³⁸ *Id.* at 241.

¹³⁹ *Id.* at 242.

state's primary elections to be held in November. The issue listed all the candidates running in Massachusetts for every state and federal office in each voting district. Readers were encouraged to vote for pro-life candidates.¹⁴⁰

The FEC received a complaint that the special edition was in violation of § 441b of the FECA because it “represented an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates.”¹⁴¹ The FEC subsequently found that “probable cause existed”¹⁴² that the MCFL had indeed violated the statute. Attempts at conciliation failed, and the FEC filed a complaint in federal district court. The Court of Appeals for the First Circuit disagreed with the trial court over the applicability of the statute to the MCFL, but “affirmed the District Court’s holding that the statute as so applied was unconstitutional.”¹⁴³

The Supreme Court first held that § 441b limitations on independent corporate expenditures did apply to MCLF’s special edition newsletter calling for support or opposition to various candidates for office, a position agreed upon by all the members of the Court. Justice Brennan, writing for himself and four others, then determined that the First Amendment interests of this special-interest organization in corporate form outweighed the government’s reasons for wishing to limit its activities. In the process, Justice Brennan carefully crafted an opinion that set the stage for the Court’s holding in *Austin* four years later, by leaving the protections provided by the *Bellotti* decision in place but changing the reasoning and limiting the scope.

¹⁴⁰ *Id.* at 243 (because “[n]o pro-life candidate can win in November without your vote in September.”).

¹⁴¹ *Id.* at 244.

¹⁴² *Id.* at 245.

¹⁴³ *Id.* (citing *Federal Election Com’n v. Massachusetts Citizens for Life, Inc.*, 769 F.2d. 13 (C.A.1 1985)).

In the *MCLF* case, said Justice Brennan, expenditures by organizations like MCLF “do not pose ... danger of corruption [because] MCFL was formed to disseminate political ideas, not to amass capital.”¹⁴⁴ Its “capital” reflects “not a function of its success in the economic market-place,” but “its popularity in the political marketplace.”¹⁴⁵ Therefore, said Justice Brennan, MCFL is not the kind of organization “that has been the focus of regulation of corporate political activity.”¹⁴⁶

In addition to the determination that allowing the MCFL’s expenditures would not create the unfairness in the marketplace potentially caused by allowing such activity by a for-profit corporation, Justice Brennan also argued that contributions to the MCFL were designed for strictly political purposes. Therefore, such contributions would not be “using an individual’s money for purposes that the individual may not support.”¹⁴⁷

Although noting what Justice Brennan called “the legitimacy of Congress’ concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace,” he also had to acknowledge that this “concern [about the] ... application of § 441b to commercial enterprises ... [is] a question not before us”¹⁴⁸ Nonetheless, Justice Brennan proceeded to create a three-part test to determine which corporations could be regulated and which could not.

Applying the test to the MCFL, he found first that “it was formed for the express purpose of promoting political ideas, and cannot engage in business activities.”¹⁴⁹

¹⁴⁴ *Id.* at 259.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 260. This argument would show up again in Justice Brennan’s concurring opinion in *Austin*.

¹⁴⁸ *Id.* at 263.

¹⁴⁹ *Id.* at 264.

Second, “it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings.”¹⁵⁰ Finally, said Justice Brennan, “MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.”¹⁵¹

In supporting its position, the FEC’s arguments had picked up language used by Chief Justice Rehnquist’s in an earlier case that the special characteristics of corporations necessitate careful regulation. Justice Brennan observed that this argument “relies on the long history of regulation of corporate political activity as support for the application of § 441b to MCFL. Evaluation of the Commission’s argument [therefore] requires close examination of the underlying rationale for this longstanding regulation.”¹⁵²

Justice Brennan then quoted from both pre-*Buckley* and post-*Buckley* decisions about “the influence of political *war chests* [italics added] funneled through the corporate form” and “the effect of aggregated wealth on federal elections.”¹⁵³ He also cited language from earlier cases expressing concerns about “those who exercise control over large aggregations of capital” and “substantial aggregations of wealth amassed by the *special advantages* [italics added] which go with the corporate form of organization.”¹⁵⁴

Adopting the “corrosive influence” language first originated by Justice White in his

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Federal Election Com’n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, at 256-257 (1986).

¹⁵³ *Id.* at 257.

¹⁵⁴ *Id.* It should be noted that Justice Brennan failed to point out, however, that none of this language was ever the basis of a previous Court’s decision and reflected nothing other than the legislative intent behind the statute’s limitations which the holding in *Buckley* called into constitutional question.

dissent in *Buckley*, Justice Brennan concluded that all this “reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”¹⁵⁵ In contradiction to the language in the *Buckley* decision that said that “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others,”¹⁵⁶ Justice Brennan indicated that “[d]irect corporate spending on political activity ... may ... provide an unfair advantage in the political marketplace.”¹⁵⁷

Chief Justice Rehnquist, in a dissent joined by Justices White, Blackmun and Stevens, would have upheld the FEC’s regulation of the MCFL on the straightforward basis that it was a corporation and “that the special characteristics of the corporate structure require particularly careful regulation.”¹⁵⁸ The Chief Justice, argued that previous decisions were based on “rid[ding] the political process of the corruption and appearance of corruption that ... expenditures for candidates from corporate funds [allows]” and “... protect[ing] the interests of individuals who pay money into a corporation or union for purposes other than the support of candidates for public office.”¹⁵⁹

¹⁵⁵ *Id.*

¹⁵⁶ *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976) at 48-49.

¹⁵⁷ *Federal Election Com’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, at 257 (1986). Justice Brennan noted that although an “availability of funds is after all a rough barometer of public support ... [t]he resources in the treasury of a business corporation ... are not an indication of popular support for the corporation’s political ideas. They reflect instead,” he suggested, “the economically motivated decisions of investors and customers.” This argument would show up again in Justice Brennan’s concurring opinion in *Austin*.

¹⁵⁸ *Id.* at 266 (Rehnquist, C.J. dissenting) (quoting *Federal Election Com’n v. National Right to Work Committee*, 459 U.S. 197 (1982)).

¹⁵⁹ *Federal Election Com’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, at 267 (1986) (Rehnquist, C.J. dissenting). (Arguing that the decision in *NCPAC* was based on

The Chief Justice concluded that “[t]he distinction between contributions and independent expenditures is not a line separating black from white. I would defer to the congressional judgment that corporations are a distinct category with respect to which this sort of regulation is constitutionally permissible.”¹⁶⁰ Justice White, joining Chief Justice Rehnquist’s dissent, also added that he continued to believe that striking down limits on independent campaign expenditures in *Buckley* and *Bellotti* had been wrongly decided.

7. *Austin v. Michigan Chamber of Commerce*

In *Austin v. Michigan Chamber of Commerce*,¹⁶¹ the Supreme Court was asked to consider the constitutionality of the Michigan Campaign Finance Act (MCFA).¹⁶² This statute prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. Corporations were allowed to spend money from segregated funds designated solely for political purposes.

In 1985, Michigan held a special election to fill a vacancy in the Michigan House of Representatives. The Michigan Chamber of Commerce, a nonprofit corporation composed of more than 8,000 members, decided to use general treasury funds for

the inclusion of entities other than corporations, the Chief Justice suggested that limiting corporate expenditures was “an acceptable distinction, grounded in the judgment of the political branch, between political activity by corporate actors and that by organizations not benefiting from ‘the corporate shield which the State [has] granted to corporations as a form of quid pro quo’ for various regulations.”)

¹⁶⁰ *Id.* (Rehnquist, C.J. dissenting).

¹⁶¹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). The statute was modeled after the §441b of the Federal Election Campaign Act. The Chamber sought an injunction against the enforcement of the Act on the grounds that the Act violated the First and Fourteenth Amendments of the U.S. Constitution.

¹⁶² [M.C.L. § 169.254](#)

newspaper advertisements supporting a particular candidate. Fearing that the statute limiting expenditures might be interpreted as applicable to this course of action, the Chamber sought an injunction against the possible enforcement of the Act. A federal district court upheld the statute, but the Sixth Circuit reversed on First-Amendment grounds. The state appealed to the Supreme Court.

Justice Marshall delivered the opinion of the Court. He was joined by the quartet of Justices (Brennan, White, Rehnquist and Stevens) who were on record as opposing either all independent expenditures or at least those made by for-profit corporations. Justice Blackmun joined the majority opinion as well.

Conceding at the outset that “the use of funds to support a political candidate is ‘speech,’” Justice Marshall suggested that the basic questions in *Austin* were “whether [the statute] burdens the exercise of [this] speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.”¹⁶³ The Court answered the first question affirmatively, concluding that the Michigan statute’s requirement that a corporation could only make such campaign expenditures from segregated political funds “burden[s] expressive activity.”¹⁶⁴ Thus, the only questions remaining for the Court, said Justice Marshall, must deal with whether there exists a compelling state interest justifying the limitations imposed by the statute and whether the statute is narrowly tailored to serve that interest.

¹⁶³ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).. The Michigan statute was very similar to the Massachusetts law considered in *Bellotti*. The primary distinction was that the Michigan law dealt with expenditures in support of or in opposition to any “candidate” whereas the Massachusetts statute prohibited the spending of money on speech directed at referenda proposed to the electorate. However, this distinction eventually played no role in the analysis of the issues presented in the case by the Court.

¹⁶⁴ *Id.* at 658.

The Court suggested that the government’s efforts to restrict “the influence of political *war chests* [italics added] funneled through the corporate form”¹⁶⁵ based on the rationale of avoiding possible corruption of the electoral process could, in some circumstances, conceivably create the basis for finding a compelling state interest. Although “this Court has distinguished these [independent] expenditures from direct contributions in the context of federal laws,” wrote Justice Marshall, the Court also has “recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections,”¹⁶⁶ citing language in a footnote in *Bellotti*.

Such a distinction is unnecessary in this case, however, said Justice Marshall, because “Michigan’s regulation aims at a different type of corruption.”¹⁶⁷ The corruption at issue here is “the *corrosive* [italics added] 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.”¹⁶⁸ Justice Marshall added that “the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54 [of the MCFA]; rather, the unique

¹⁶⁵ *Id.* (citing *Federal Election Com’n v. National Conservative Political Action Committee*, 470 U.S. 480, 490 (1985)).

¹⁶⁶ *Id.* (citing *First Nat’l. Bank of Boston v. Bellotti*, 434 U.S. 765, 788 n. 26 (1978)). (Justice Kennedy, in *Citizens United*, pointed out that this was mere dicta “supported only by a law review student comment which misinterpreted *Buckley*.”)

¹⁶⁷ *Id.* at 659-660.

¹⁶⁸ *Id.* at 660.

state-conferred corporate structure that facilitates the amassing of large treasuries”¹⁶⁹ justifies the state in limiting the corporation’s independent expenditures.¹⁷⁰

“Corporate wealth,” said Justice Marshall, “can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.”¹⁷¹

Justice Marshall then addressed the issue, raised by the Michigan Chamber of Commerce, that the law as applied to this organization was overbroad. Finding the law to be “precisely targeted to eliminate the distortion caused by corporate spending,” Justice Marshall disagreed, noting that corporations still had the ability to make such contributions via political action committees. Justice Marshall similarly rejected the Chamber’s argument that the act was over-inclusive. “Although some closely held

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Having created a new compelling reason for limiting independent expenditures by for-profit corporations, the next question, said Justice Marshall, is whether this compelling interest should be applied to the Chamber. Employing Justice Brennan’s three-part definitional test from *MCFL*, Justice Marshall noted that the MCFL, unlike the Chamber, was formed expressly for the purpose of promoting political ideas. The Chamber’s bylaws, in contrast, “set forth more varied purposes, several of which are not inherently political.” A second differentiation between the MCFL and the Chamber is that the MCFL had no shareholders. This distinction is important because, said Justice Marshall, shareholders may have an “economic disincentive for disassociating with it if they disagree with its political activity.” According to the Court, “[a]lthough the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber’s political expression, because they wish to benefit from the Chamber’s nonpolitical programs and to establish contacts with other members of the business community.” The final distinction was that the MCFL was independent from the influence of business corporations while the Chamber was not, because many of the members of the Chamber were for-profit corporations. The Court saw this as particularly problematic, because for-profit corporations could use the Chamber as a “conduit for corporate political spending.”

¹⁷¹ *Id.* at 660.

corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth,” said Justice Marshall, “they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies 54(1)’s general applicability to all corporations.”¹⁷²

Justice Brennan contributed a concurring opinion in *Austin* that focused extensively on what he saw as the plight of corporate shareholders forced to support the speech actions of their corporation’s managers. Justice Brennan envisioned the limitations on independent campaign expenditures as not only reducing the threat of their corrosive effects, but as a means of limiting runaway corporate executives as well.¹⁷³

Justice Scalia, in dissent, focused on Justice Marshall’s rationale that independent expenditures by corporations can be restricted because of the “unique state conferred corporate structure ... [that] facilitates the amassing of large treasuries.”¹⁷⁴ According to Justice Scalia, “[t]his analysis seeks to create one good argument by combining two bad ones.”¹⁷⁵

The simple fact that one receives “special advantages” from the state, wrote Justice Scalia, is not bad in and of itself and certainly is not enough to justify limiting the protection of the First Amendment. “The State cannot exact as a price of ... *special*

¹⁷² *Id.* at 661.

¹⁷³ *Id.* Justice Brennan also noted the exception provided in the Michigan law that allowed corporations to spend money on speech through PACs. This distinction was significant, according to Brennan, because it helps to distinguish this statute from the one invalidated in *Bellotti*.

¹⁷⁴ *Id.* at 679 (Scalia, J. dissenting).

¹⁷⁵ *Id.* (Scalia, J. dissenting).

advantages [italics added] the forfeiture of First Amendment rights.”¹⁷⁶ The second bad argument, said Justice Scalia, is that corporations “amas[s] large treasuries.”¹⁷⁷

According to Justice Scalia, the accumulation of such funds “alone is also not sufficient justification for the suppression of political speech.”¹⁷⁸ Justice Scalia continued, “[n]either of these two flawed arguments is improved by combining them”¹⁷⁹

Treating the majority opinion as a sub rosa overturning of *Buckley*, Justice Scalia argued that the logic of “*Buckley*... should not be overruled because it is entirely correct.”¹⁸⁰ He continued, “[t]he advocacy of . . . entities that have ‘amassed great wealth’ will be effective only to the extent that it brings to people’s attention ideas which – despite the invariably self-interested and probably uncongenial source – strike them as true.”¹⁸¹

Justice Kennedy’s dissenting opinion, joined by Justices Scalia and O’Connor, suggested that the majority opinion validates “not one censorship of speech but two.”¹⁸² In upholding the statute, Justice Kennedy noted, “the Court upholds a direct restriction on the independent expenditure of funds for political speech for the first time in its history.”¹⁸³ Justice Kennedy argued that the proper analysis for the case would have been to “follow our cases on independent expenditure.”¹⁸⁴ *Buckley* “invalidated a federal limitation on independent expenditures because they had no tendency to corrupt,” he

¹⁷⁶ *Id.* (Scalia, J. dissenting).

¹⁷⁷ *Id.* at 680 (Scalia, J. dissenting).

¹⁷⁸ *Id.* (Scalia, J. dissenting).

¹⁷⁹ *Id.* (Scalia, J. dissenting).

¹⁸⁰ *Id.* at 683 (Scalia, J. dissenting).

¹⁸¹ *Id.* at 684 (Scalia, J. dissenting).

¹⁸² *Id.* at 695 (Kennedy, J. dissenting).

¹⁸³ *Id.* (Kennedy, J. dissenting).

¹⁸⁴ *Id.* at 702 (Kennedy, J. dissenting).

said.¹⁸⁵ *Bellotti* and *NCPAC* followed suit. To Justice Kennedy, this meant the “specter of corruption ... is missing,” which required the majority to invent a new compelling interest, the “corrosive effect,” to justify regulation.¹⁸⁶

The only justifiable rationale for limiting contributions or expenditures, said Justice Kennedy, citing the *NCPAC*, is to prevent the possibility of corruption when “elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain.”¹⁸⁷ The object in limiting independent expenditures by the majority in *Austin*, Justice Kennedy said, is “the impermissible one of altering political debate by muting the impact of certain speakers.”¹⁸⁸

8. *McConnell v. Federal Election Commission*

With the *Austin* decision in place, the Court revisited federal campaign finance reform in 2003. Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA),¹⁸⁹ in an attempt to target “soft money”, meaning money not subject to disclosure requirements and amount and source limitations in the Federal Election Campaign Act (FECA). But it also extended the FECA limitations discussed in *NRWC*, which prohibited corporations and unions from spending general treasury funds on “express advocacy”. The BCRA extended the prohibition to include all “electioneering communications”.

¹⁸⁵ *Id.* at 703 (Kennedy, J. dissenting).

¹⁸⁶ *Id.* (Kennedy, J. dissenting).

¹⁸⁷ *Id.* (Kennedy, J. dissenting) (citing *Federal Election Com’n v. National Conservative Political Action Committee*, 470 U.S. 480, 490 (1985)).

¹⁸⁸ *Id.* (Kennedy, J. dissenting).

¹⁸⁹ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.A. (West Supp. 2003)).

The legislation was challenged immediately, with eleven actions filed challenging twenty BCRA provisions on a variety of constitutional grounds, including the First Amendment.¹⁹⁰ A three-judge panel heard the suits in the U.S. District Court. The result was a lengthy two-judge per curium opinion and three individual opinions that ruled unconstitutional several provisions of BCRA, but left much of the law intact.¹⁹¹

After *Bellotti*, there was a distinction between the protection for express advocacy and issue ads.¹⁹² The question for the Supreme Court on appeal was whether the BCRA changes would allow for issue ad expenditures, as *Bellotti* had, or whether it would begin to capture all political speech by corporations and unions. To the extent that some of the ads that mentioned candidates and were run in the 60-day period leading up to the election were in fact genuine “issue ads”, the BCRA extension would be overinclusive and suppress speech.¹⁹³

The lower court debated devoted significant energy to debating this question, and seemed to disagree about the amount of speech affected.¹⁹⁴ But on appeal in *McConnell v. FEC*, a majority of the Supreme Court felt spent little time weighing the balance between issue ads and advocacy, declaring without appeal to evidence that enough of the speech was advocacy to justify the limitations imposed by the BCRA extension of FECA.¹⁹⁵

The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no

¹⁹⁰ See *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

¹⁹¹ *Id.*

¹⁹² *Bellotti*, 435 U.S. at 770.

¹⁹³ *McConnell*, 251 F. Supp. 2d., 367-73 (D.D.C.)

¹⁹⁴ *McConnell*, 251 F. Supp. 2d., 367-73 (D.D.C.) (Henderson, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part*, 124 S. Ct. 619 (2003)

¹⁹⁵ *McConnell v. FEC*, 540 U.S. 93 (2003).

electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose.¹⁹⁶

The majority also spent little time establishing that the federal government had a compelling interest in suppressing the speech of corporations and unions.¹⁹⁷ Relying on the language from *Austin* that the government has a compelling interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form”, the Court upheld the provisions of the BCRA that impacted corporate political speech.¹⁹⁸

9. *Federal Election Commission v. Wisconsin Right to Life, Inc.*

The Court, in the 2007 case of *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL)*,¹⁹⁹ determined that an “as applied” challenge to §203 of the BCRA was acceptable in regard to ads suggesting voters “Contact Senators Feingold and Kohl and tell them to oppose” the filibustering of nominees for federal court appointments.²⁰⁰ The federal statute prohibited so-called “sham” advocacy advertising and marketing messages, ostensibly about an issue or controversy but in reality intended to help or hurt a candidate for office, but the definition of such electioneering communications was not clearly spelled out.²⁰¹ Fearing that its messages might be interpreted as falling within the confines of the act, WRTL brought suit to determine its potential liability.

¹⁹⁶ *Id.* at 206 (citations omitted).

¹⁹⁷ *Id.* at 205 (citing *Austin*, 494 U.S. at 660).

¹⁹⁸ *Id.*

¹⁹⁹ 551 U.S. 449, 127 S.Ct. 2652 (2007)

²⁰⁰ *Id.* at 459.

²⁰¹ *Id.*

First determining that *McConnell* did not rule out this form of “as applied” challenge, the Chief Justice, in an opinion joined by Justice Alito, went on to find that the ads in question were not the kinds of advocacy of a particular candidate suggested by the Court’s specific language in *Buckley*.²⁰² They were joined by Justices Scalia, Kennedy and Thomas who argued that both *Austin* and *McConnell* should simply be overruled on the issue of limitations of independent campaign expenditures.²⁰³ Justices Stevens, Souter, Ginsburg and Breyer dissented, contending that restrictions on WRTL’s ads were examples of electioneering communications the Court had approved in *McConnell*.²⁰⁴

10. *Citizens United v. FEC*

In 2006, Citizens United, a nonprofit corporation with a multi-million dollar annual budget supplied mostly from donations by individuals, but also partly funded by for-profit corporations, produced a film entitled *Hillary: The Movie*.²⁰⁵ The 90-minute documentary about Hillary Clinton was clearly unsympathetic to the senator, who was seeking to become the 2008 Democratic Party nominee for president.²⁰⁶

In addition to showings in theaters, Citizens United sought to distribute the movie through a video-on-demand provider.²⁰⁷ In so doing, however, the organization became concerned that it might run afoul of BCRA §203, which had amended §441b “to prohibit any ‘electioneering communication’ defined as ‘any broadcast, cable, or satellite

²⁰² Id. at 470 (“WRTL’s three ads are plainly not the functional equivalent of express advocacy.”)

²⁰³ Id. at 490 (“*Austin* was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided”) and at 504 (“I would overrule that part of the Court’s decision in *McConnell* upholding § 203(a) of BCRA”)(Scalia, J, concurring)

²⁰⁴ Id. at 504 (Souter, J. dissenting)

²⁰⁵ *Citizens United v. FEC*, 130 S.Ct. 876, at 887 (2010)

²⁰⁶ Id.

²⁰⁷ Id.

communication that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.” §434(f)(3)(A).²⁰⁸

Seeking clarification of its status, Citizens United went to federal court seeking a declaratory judgment that §441b should not be applicable to *Hillary: The Movie*. The District Court denied Citizens United’s request and subsequently granted the FEC’s motion for summary judgment.²⁰⁹ The case was first argued on its merits at the Supreme Court, which then asked the parties to file supplemental briefs addressing whether “either or both *Austin* and the part of *McConnell*” should be overruled.²¹⁰

In the re-argued case, Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Alito, Scalia and, in part, Justice Thomas.²¹¹ The Chief Justice added a concurring opinion, joined by Justice Alito, addressing the issue of stare decisis.²¹² Justice Scalia, joined by Justice Alito and, in part, by Justice Thomas, also filed a concurring opinion.²¹³ Justice Stevens contributed a dissenting opinion, joined by Justices Ginsburg, Breyer and Sotomayor.²¹⁴ Justice Thomas dissented from part IV of the majority opinion.²¹⁵

Justice Kennedy began his opinion by noting that “Section 441b’s prohibition on corporate independent expenditures is ... a ban on speech. As a ‘restriction on the amount of money a person or group can spend on political communication during a campaign,’ that statute ‘necessarily reduces the quantity of expression by restricting the

²⁰⁸ Id. at 887, quoting [2 U.S.C. §434\(f\)\(3\)\(A\)](#).

²⁰⁹ *Citizens United v. Federal Election Com'n*, 2008 WL 2788753.

²¹⁰ *Citizens United v. FEC*, 130 S.Ct. 876, 888 (2010)

²¹¹ Id.

²¹² Id. at 917.

²¹³ Id. at 925.

²¹⁴ Id. at 929.

²¹⁵ Id. at 979.

number of issues discussed, the depth of their exploration, and the size of the audience reached.”²¹⁶ Thus, said Justice Kennedy, “Its purpose and effect are to silence entities whose voices the Government deems to be suspect.”²¹⁷

According to Justice Kennedy, such a law raises significant constitutional issues. “The First Amendment protects speech and speaker, and the ideas that flow from each. We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”²¹⁸

In addition, said Justice Kennedy, “[t]he Court has recognized that First Amendment protection extends to corporations (citations omitted). This protection has been extended by explicit holdings to the context of political speech.”²¹⁹ Citing *Bellotti*, Justice Kennedy noted that “[t]he Court has ... rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment”²²⁰

Justice Kennedy next turned to the issue of efforts to restrict independent campaign expenditures generally. “The *Buckley* Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures,” said Justice Kennedy, and “invalidated §608(e)’s restrictions on independent expenditures”²²¹

²¹⁶ Id. at 898 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612 (1976))

²¹⁷ Id.

²¹⁸ Id. at 899.

²¹⁹ Id.

²²⁰ Id. at 900 (Citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, at 776(1978))

²²¹ Id. at 901-02. (*Buckley* did not consider §610’s separate ban on corporate and union independent expenditures, Had §610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that case)

Although “*Bellotti*,” he continued, “did not address the constitutionality of [Massachusetts’] ban on corporate independent expenditures to support candidates, ... that restriction would have been unconstitutional under *Bellotti*’s central principle: that the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”²²²

Turning to the Court’s decision in *Austin* which, according to Justice Kennedy, “up[held] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history,”²²³ he noted that “the *Austin* Court identified a new governmental interest in limiting political speech: an anti-distortion interest” defined as “preventing ‘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.’”²²⁴ The Court is thus confronted,” continued Justice Kennedy, “with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”²²⁵

Observing that “the Government does little to defend” *Austin*’s anti-distortion rationale, Justice Kennedy also gave it little credence.²²⁶ “The rule that political speech cannot be limited based on a speaker’s wealth,” he said, “is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political

²²² *Id.* at 903.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 904.

speech based on the speaker's identity.”²²⁷ In addition, “[i]t is irrelevant for purposes of the First Amendment that corporate funds may ‘have little or no correlation to the public’s support for the corporation’s political ideas.’”²²⁸

Saying that “[f]or the most part [the government] relinquishe[s] the anti-distortion rationale” as the basis for its justification of independent expenditures, Justice Kennedy turned his attention to the two other main rationales advanced by the government.²²⁹ “[T]he Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest “sufficiently important” to allow limits on contributions but did not extend that reasoning to expenditure limits.”²³⁰ Similarly, that interest “is not sufficient to displace the speech here in question. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”²³¹ As for the government’s argument about unfairness to dissident corporate shareholders, Justice Kennedy, citing *Bellotti*, suggested that “[t]here is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”²³² If “Congress finds that a problem exists,” Justice Kennedy observed, “we must give that finding due deference. . . .”²³³ However, he continued, “the remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the

²²⁷ Id. at 905.

²²⁸ Id. (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990))

²²⁹ Id. at 908.

²³⁰ Id.

²³¹ Id. at 908-09.

²³² Id. at 911 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, at 794(1978))

²³³ Id.

governing rule. An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.”²³⁴

The Court’s *Citizen United* decision²³⁵ was immediately controversial.²³⁶ The decision provoked severe criticism by President Barack Obama,²³⁷ political commentators and editorialists. Legislative proposals to restrict independent campaign expenditures were introduced in Congress, but all failed to pass.²³⁸ Now, nearly three years later, the uproar continues, and the impact of the decision on political campaigns continues to be discussed routinely in newspapers²³⁹ and blogs,²⁴⁰ as well as in legal

²³⁴ *Id.*

²³⁵ 130 S. Ct. 876 (2010).

²³⁶ See Ronald Dworkin, *The “Devastating” Decision*, N.Y. Rev. Books, Feb. 25, 2010, at 39, Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010), <http://www.slate.com/id/2242209/pagenum/all>. Jeffrey Toobin, *Bad Judgment*, New Yorker (Jan. 22, 2010), available at <http://www.newyorker.com/online/blogs/newsdesk/2010/01/campaign-finance.html>, Editorial, *The Court’s Blow to Democracy*, N.Y. Times, Jan. 22, 2010, at A30, available at <http://www.nytimes.com/2010/01/22/opinion/22fri1.html>.

²³⁷ Jackie Calmes & Carl Hulse, *Obama Assails Republicans on Campaign Finance*. The N.Y. Times, July 27, 2010, at A10.

²³⁸ See Michael A. Menoli, *Disclose Act fails to advance in Senate*, Los Angeles Times (Sept. 24, 2010) available at <http://articles.latimes.com/2010/sep/24/nation/la-na-disclose-act-20100924>, Paul Blumenthal, *Congressional Democrats Seek Corporate Disclosure Post-Citizens United*, Huffington Post (July 13, 2011), available at http://www.huffingtonpost.com/2011/07/13/congressional-democrats-corporate-disclosure_n_897404.html.

²³⁹ See George Will, *Super Pacs Can’t Crown a King*, Wash. Post, Feb. 29, 2011 accessed at http://www.washingtonpost.com/opinions/super-pacs-cant-crown-a-king/2012/02/28/gIQAAX0AjR_story.html, Gail Collins, *Who Wants to be a Millionaire?*, N.Y. Times, Jan. 13, 2011 at A21.

²⁴⁰ See Richard L. Hasen, *The Numbers Don’t Lie*, Slate, March 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending.html; Dan Abrams, *The Media’s Shameful, Inexcusable Distortion of the Supreme Court’s Citizens United Decision*, Mediate, Feb. 8, 2012, <http://www.mediaite.com/online/the-medias-shameful-inexcusable-distortion-of-the-supreme-courts-citizens-united-decision/>.

scholarship.²⁴¹ It also has been debated in legislatures²⁴² and courthouses²⁴³ around the country, and it is possible the issue will find itself before the Supreme Court once again.²⁴⁴

11. *SpeechNow.org v. FEC*

The next significant decision after *Citizens United* was *SpeechNow.org v. FEC*²⁴⁵ (“*SpeechNow*”). This case was directly responsible for the so-called “Super-PACs” that have received much of the criticism from campaign-finance-reform advocates during the 2012 presidential primary season.²⁴⁶

Although individuals were allowed to make unlimited individual expenditures prior to the *Citizens United* ruling, groups categorized by the FECA as a “political committee” were subject to specific provisions that limited the amount of money any one person could contribute.²⁴⁷ The limit for contributions from an individual to a political committee was \$1,000 per committee, with a possible total of \$69,900 for contributions

²⁴¹ See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581 (2011), Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations should Have but do not Want*, 34 Harv. J.L. & Pub. Pol’y 639 (2011).

²⁴² *Citizens United v. FEC Constitutional Remedies: List of local, state and federal resolution efforts*, People for the American Way, <http://www.pfaw.org/issues/government-the-people/citizens-united-v-fec-constitutional-remedies-list-of-local-state-and-f>.

²⁴³ Editorial, *Montana Takes on Citizens United*, N.Y. Times, Jan. 23, 2012, at A26.

²⁴⁴ Ed Kilgore, *Court Gets Second Chance on Citizens United*, Washington Monthly, Feb. 22, 2012, http://www.washingtonmonthly.com/political-animal-a/2012_02/court_gets_second_chance_on_ci035574.php

²⁴⁵ 599 F.3d 686 (D.C.Cir.2010)

²⁴⁶ Sam Stein, *2012 Campaign Super Pac Mega-Donors Feel Burn of Political Spotlight*, Huffpost, March 14, 2012, http://www.huffingtonpost.com/2012/03/14/super-pac-2012-campaign-donors_n_1344932.html

²⁴⁷ *SpeechNow.org v. FEC*, 599 F.3d 686 at 691 (D.C.Cir.2010).

to all political committees.²⁴⁸ *SpeechNow* involved a challenge to these provisions as being unconstitutional in that they limited an individual's ability to make independent expenditures on political issues.²⁴⁹

An individual's right to make independent expenditures on political speech had been established in *Buckley*²⁵⁰ and was not at issue in *Citizens United*.²⁵¹ Therefore, not surprisingly, the trial court opinion in *SpeechNow*, which was initiated before *Citizens United*, was not dependent on that decision for its opinion.²⁵² However, the subsequent ruling by the Court of Appeals for the District of Columbia came after the *Citizens United* decision, and that court relied heavily (in fact almost exclusively) on *Citizens United*.²⁵³

The appellate court ruled that contribution limits must be closely drawn to serve a sufficiently important interest, and that the Supreme Court has "recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption."²⁵⁴ In *Citizens United*, Justice Kennedy's majority opinion stated specifically that "independent expenditures ... do not give rise to corruption or the appearance of corruption."²⁵⁵ According to the court in *SpeechNow*, "this simplifies the task of

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ 424 U.S. 1 (1976)

²⁵¹ *Citizens United v. FEC*, 130 S.Ct. 876 (2010)

²⁵² See *SpeechNow.org v. Federal Election Com'n*, 567 F.Supp.2d 70 (D.D.C., 2008)

²⁵³ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C.Cir.2010)

²⁵⁴ Id. at 692.

²⁵⁵ Id. at 694, quoting *Citizens United*, 130 S.Ct. at 909.

weighing the First Amendment interests implicated by contributions to *SpeechNow* against the government’s interest in limiting such contributions.”²⁵⁶

In overturning the trial court’s decision, the appellate court essentially said that something always outweighs nothing. If “independent expenditures do not give rise to corruption,” any level of burden would be inappropriate when justified on the basis of possible corruption. And if the corruption interest is the only compelling interest the government has for burdening political speech, as was the case in *SpeechNow*, all such burdens of political speech are, by definition, unconstitutional.²⁵⁷

12. *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*

The second post-*Citizens United* decision that has affected the balance between campaign finance reform and free speech also relied heavily on *Citizens United*. In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*²⁵⁸ (“*Arizona Free Enterprise Club*”), the Supreme Court considered the constitutionality of Arizona’s matching funds provisions for political candidates. At issue were provisions of Arizona’s Clean Elections Act (ACEA).²⁵⁹ Under the Act, political candidates who received a minimum number of five-dollar donations from Arizona voters were allowed to opt to receive public funding for their campaigns.²⁶⁰ By choosing public funding, candidates agreed to limit the amount of their own, private campaign funding in return for a set amount of public money.²⁶¹

²⁵⁶ *Id.* at 695.

²⁵⁷ *Id.*

²⁵⁸ 131 S.Ct. 2806 (2011)

²⁵⁹ [Ariz.Rev.Stat. Ann. § 16–940 et seq.](#) (West 2006 and Supp.2010)

²⁶⁰ [Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806](#), at 2813-14 (2011)

²⁶¹ *Id.*

How much money any one candidate would receive from the state depended on a number of factors, including provisions of the Act which called for “equalizing” or matching funds.²⁶² This provision mandated that if another candidate chose to opt out of public financing and use private funds, that amount would dictate how much money the publicly funded candidate would receive.²⁶³ If the privately funded candidate exceeded the public-funding allotment, § 16-952(B) of ACEA provided additional money to the publicly funded candidate in an attempt to equalize funding.²⁶⁴ If a privately funded candidate was running against a number of publicly funded candidates, each would receive equalizing funds.²⁶⁵

In addition to matching money spent by the privately funded candidate, ACEA would match funds spent on behalf of that candidate by independent groups.²⁶⁶ Once the public funding limit was surpassed, any additional money spend either by or on behalf of the privately funded candidate would result in additional money being given to any publicly funded candidate in the same race.²⁶⁷

Citizens United and SpeechNow focused more on whether the burdening of speech by the challenged regulation was justified by a compelling interest. Both the Supreme Court and the DC Circuit Court said they were not. *Arizona Free Enterprise Club*, on the other hand, focused more on whether the underlying regulation actually burdened speech at all. The Court of Appeals for the Ninth Circuit held that ACEA posed only a minimal burden to speech because privately financed candidates could still spend

²⁶² Id.

²⁶³ Id.

²⁶⁴ Id.

²⁶⁵ Id. at 2816.

²⁶⁶ Id.

²⁶⁷ Id.

unlimited funds on political speech and upheld the Arizona law as constitutional.²⁶⁸ The Supreme Court disagreed, and, in a 5-4 decision, held that the relevant provisions of the ACEA violated the First Amendment.²⁶⁹

According to Chief Justice Roberts' majority opinion, "the matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].'"²⁷⁰ The provision "forces the privately funded candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."²⁷¹

Once establishing that the provision imposed a burden, the Court was left to consider whether there was a compelling governmental interest sufficient to justify the infringement of First Amendment rights. The parties in *Arizona Free Enterprise Club*, however, failed to agree about which government interest was at issue in the case.²⁷² The plaintiffs believed the ACEA was aimed at "leveling the playing field" in terms of candidate resources.²⁷³ Possibly because of the precedent against considering an equalizing interest as a compelling one, defendants countered that the government

²⁶⁸ *McComish v. Bennett*, 611 F.3d 510, (9th Cir.(Ariz.)2010)

²⁶⁹ *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011)

²⁷⁰ *Arizona Free Enterprise* at 2818, quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2002) (Davis overturned the so called "Millionaire's Amendment, which permitted the opponent of a candidate who spent over \$350,000 of his personal funds to collect triple the normal contribution amount, while the candidate who spent the personal funds remained subject to the original contribution cap, declaring that it unconstitutionally forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.").

²⁷¹ *Id.*

²⁷² *Id.* at 2824-25.

²⁷³ *Id.*

interest being served by the ACEA actually was the elimination of corruption or the appearance of corruption.

The Court first rejected the idea that leveling the playing field is a compelling government interest.²⁷⁴ In fact, in an earlier campaign finance case, the Court held that “discriminatory contribution limits meant to ‘level electoral opportunities for candidates of different personal wealth’ did not serve ‘a legitimate government interest’ let alone a compelling one.”²⁷⁵ Leveling the playing field, added the Court, had also been dismissed as a compelling interest in *Buckley* and *Citizens United*.²⁷⁶ “The Court is troubled by the fact that efforts to level the playing field means allowing the government to have an impact in the choice over who governs, and this is ‘a dangerous enterprise that cannot justify burdening protected speech.’”²⁷⁷

Prior to *Citizens United*, the defendants’ arguments about the elimination of corruption might have had a chance. Although the Court discussed in some detail whether the ACEA is actually aimed at eliminating corruption,²⁷⁸ in the end, because the Court held that the provisions limit or burden independent expenditures (as opposed to contributions), the same language from *Citizens United* that was controlling in *SpeechNow* was controlling here.²⁷⁹ In other words, if independent expenditures cannot

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 2825, quoting *Davis*, 554 U.S. at 741.

²⁷⁶ *Buckley v. Valeo*, 424 U.S. 1, at 56, *Citizens United v. FEC*, 130 S.Ct. 876, at 904-905.

²⁷⁷ *Arizona Free Enterprise* at 2826.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

give rise to corruption or the appearance of corruption, then any provision aimed at limiting or burdening these expenditures will fail under this justification.²⁸⁰

13. Caperton v. A.T. Massey Coal Co., Inc.

The case of *Caperton v. A.T. Massey Coal Co., Inc.*²⁸¹ was not about a restriction relating directly to corporate political, but it may have implications for such. Decided before *Citizens United*, the case involved a decision by a West Virginia Supreme Court of Appeals judge who declined a recusal motion. The decision would be discussed by both the majority and the dissent in *Citizens United* and may provide additional reasoning applied to future corporate political speech cases.

In 2002, the A.T. Massey Coal Co. (hereafter “Massey”) was found liable for fraudulent misrepresentation and other charges and ordered to pay \$50 million in compensatory and punitive damages to Hugh Caperton and other plaintiffs (hereafter “Caperton”). Massey appealed to the Supreme Court of Appeals of West Virginia. Before the appeal was heard, West Virginia held judicial elections in 2004. Don Blankenship, Massey’s chairman, donated \$2.5 million to a PAC organized to support Brent Benjamin, an attorney challenging Supreme Court of Appeals Justice Warren McGraw. In addition, Blankenship spent \$500,000 on independent expenditures in support of Benjamin, who ultimately won the election.

In 2005, before the Supreme Court of Appeals heard the case, Caperton moved to have Justice Benjamin disqualified under the Due Process Clause. Justice Benjamin denied the motion, and later joined a 3-2 majority that voted to reverse the judgment against Massey. Caperton sought rehearing and asked for Benjamin and one other justice

²⁸⁰ Id.

²⁸¹ 556 U.S. 868 (2009)

to disqualify themselves. Massey, additionally, sought disqualification for a justice who voted against reversal. The other justices agreed to disqualify themselves, but Justice Benjamin refused. The court submitted a modified version of the earlier opinion, which was again joined by Justice Benjamin and one other justice, resulting in a 3-2 reversal. The U.S. Supreme Court granted certiorari, and by a 5-4 vote reversed and remanded the decision.

As in *Citizens United*, Justice Kennedy wrote the *Caperton* opinion. Notably, he was joined by the four justices who had dissented in *Citizens United*, while the four justices who had joined him in *Citizens United* dissented in *Caperton*. In *Caperton*, Kennedy held that there are “objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”²⁸² While the majority is careful to point out that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal,”²⁸³ they also explain precisely what makes this an exceptional case: “The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”²⁸⁴ The court concludes “that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.”²⁸⁵

²⁸² Id. at 2257 quoting [Withrow v. Larkin, 421 U.S. 35](#) (1975).

²⁸³ *Caperton*, 556 U.S. 868 at 2263.

²⁸⁴ Id. at 2264.

²⁸⁵ Id.

The “significant and disproportionate influence” language is repeated several times in the majority opinion.²⁸⁶ This is distinct from proving that “Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory,” which is not the issue.²⁸⁷ This case turned on the “significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case,” leading the court to conclude that “[o]n these extreme facts the probability of actual bias rises to an unconstitutional level.”²⁸⁸

Unlike *Citizens United*, where there is a debate as to what extent the holding can be viewed as an “as applied” decision, *Caperton* is quite clearly a case decided on its “extreme facts.”²⁸⁹ This is a major concern for the dissent, who feels that “[t]he Court’s new ‘rule’ provides no guidance to judges and litigants about when recusal will be constitutionally required.”²⁹⁰ While not using the significant and disproportionate influence language from the majority, the dissent characterizes the standard as one related

²⁸⁶ Id. at 2263-64 (““We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a *significant and disproportionate influence* in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent” (emphasis added); at 2264 “Applying this principle, we conclude that Blankenship's campaign efforts had a *significant and disproportionate influence* in placing Justice Benjamin on the case” (emphasis added); and “In an election decided by fewer than 50,000 votes (382,036 to 334,301), ... Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a *significant and disproportionate influence* on the electoral outcome.” (emphasis added)(citations omitted); at 2265 “We find that Blankenship's *significant and disproportionate influence*—coupled with the temporal relationship between the election and the pending case— “ ‘offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.’ ” ” (emphasis added)(citations omitted) (quoting another source).

²⁸⁷ Id. at 2264.

²⁸⁸ Id. at 2265

²⁸⁹ Id.

²⁹⁰ Id. at 2267 (J. Roberts, dissenting)

to bias and feels that “the standard the majority articulates—‘probability of bias’—fails to provide clear, workable guidance for future cases.”²⁹¹ The dissent raises 40 specific questions courts will now have to answer with regard to judicial recusal.²⁹²

There is at least one additional question of interest not raised by the dissent: whether the same standard of “significant and disproportionate influence” in an election could be used in contexts other than judicial disqualification for purposes of measuring the “possibility of bias.” The dissent in *Citizens United* argues that the *Caperton* decision is proof that “at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of quid pro quo corruption.”²⁹³ The majority disagreed, and held that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”²⁹⁴

The majority’s distinction appears to mean that the corruption risk of independent expenditures is not a compelling state interest for purposes of justifying regulations that limit or forbid speech, but that the same interest may justify other actions, including requiring judicial disqualification. This would allow those who fear that independent expenditures raise the risk of quid pro quo corruption, including congress and the FEC, to pursue rules and regulations focused on the quo of favor rather than the quid of speech.

The majority opinion in *Caperton* spends significant energy detailing the “extreme” nature of the facts before the court. It is unclear if the court would find the facts as compelling in a case outside the judiciary, or where the alleged bias was less clear than a vote regarding a specific financial judgment. However, the very vagaries that

²⁹¹ Id. at 2269 (J. Roberts, dissenting)

²⁹² Id. at 2269-72 (J. Roberts, dissenting)

²⁹³ *Citizens United v. FEC*, 130 S.Ct. 876, at 967 (2010)(J. Stevens, dissenting)

²⁹⁴ Id. at 910.

concern the dissent regarding where the line has been drawn can benefit opponents of independent expenditures on corporate political speech.

Chapter 3: Law and Economics

Economics has enjoyed a cultural renaissance in recent years. The recession of 2007 has heightened public awareness of the importance of economics as a discipline, and books like *Moneyball*²⁹⁵ and *Freakonomics*²⁹⁶ have demonstrated the possibility of the application of economic analysis to things beyond financial policy and fiscal performance.

One non-traditional application of economic analysis that has continued to grow in popularity is the relationship between law and economics. This chapter discusses the intellectual history of the study of law and economics, the related and sometimes competing field of behavioral law and economics and some of the external criticisms of combining economics with law. The chapter concludes by tracing the application of economics to specific legal issues, most notably free speech and the First Amendment.

²⁹⁵ MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

²⁹⁶ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 181-208 (2009).

Economics can suffer from something of an identity crisis at times. It is most often taught in business schools at major universities, but it is also a social *science*, and, as such aspires to more rigorous application of the scientific method than disciplines like management or marketing.²⁹⁷ “Economics flaunts its ties with natural science, the last surviving authority since God’s recent death. The economists claim that their approach is scientific, rational, consistent, unenslaved by tradition.”²⁹⁸ However, like most social sciences, it often lacks the verifiable results of repeatable experiments that characterize studies like biology and physics.²⁹⁹ When a character in Thomas Love Peacock’s novel *Crotchet Castle* refers to political economy as the “science of sciences”, the main character sums up the skeptical view of economics as a science nicely: “Premises assumed without evidence, or in spite of it; and conclusions drawn from them so logically, that they must necessarily be erroneous.”³⁰⁰

Because it assumes at its heart that people are rational actors, economics is based on an assumption, and “an assumption is not a finding.”³⁰¹ Because of this, economics is on many levels, more like a philosophy.³⁰² Many economists, however, find the label of

²⁹⁷ See for example the work of the Cowles Foundation for Research in Economics. (“The motto “Theory and Measurement,” first adopted in 1952, succinctly captures the mission of the Cowles Foundation: development and application of rigorous logical, mathematical, and statistical methods of analysis in economics and related fields.”) <http://cowles.econ.yale.edu/about/index.htm>

²⁹⁸ Robert Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 *UCLA L. Rev.* 1260 (1982).

²⁹⁹ Alexander Rosenberg, *If Economics Isn’t Science, What is It?*, 14 *Phil. Forum* 296 (1983).

³⁰⁰ THOMAS L. PEACOCK, *CROTCHET CASTLE* (T. HOOKHAM, 1831).

³⁰¹ RICHARD A POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (8TH ED)(2011).

³⁰² SEE E.G., *THE PHILOSOPHY OF ECONOMICS* (DANIEL M. HAUSMAN, ED., 1984)(Seeking to answer the question of whether economics can be considered a science in the same

philosophy to be pejorative, because this characterization makes it something less than a science.³⁰³ Nonetheless, when asking how economics can apply to law, it is helpful to think of it as a way of viewing the world; as a set of assumptions and questions that should be at the front of one's mind when undertaking legal analysis.

The Origins of Law and Economics

Ronald Coase's³⁰⁴ work in the 1960's is the reason many have called him the founding father of law and economics.³⁰⁵ However, many scholars agree that the ideas and concepts that are the foundation for this methodological approach emerged long before Coase and his work at the University of Chicago. There are three possible precedent movements that are worthy of discussion, although not everyone is in agreement as to the impact each movement had on the development of the law and economics approach.

1. The philosophers

The study of the concept of a political economy inspired writers like Adam Smith,³⁰⁶ David Hume³⁰⁷ and Adam Ferguson³⁰⁸ to consider the role of law in society and

sense as the natural sciences); Rupert Reed, *Economics is Philosophy, Economics is not Science*, 1 Int. J. Green Economics 3/4, 307 (2007).

³⁰³ See e.g., Douglas W. Hand, *What Economics is Not, An Economist's Response to Rosenberg*, 51 Phil. of Sci. 3, 495 (1984)

³⁰⁴ CHARLES K. ROWLEY & FRANCISCO PARISI (EDS.), *THE ORIGINS OF LAW AND ECONOMICS*, DEDICATION (2005).

³⁰⁵ See e.g.; Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 Mich. L. Rev. 2229, 2230 (1996), Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost In Translation: The Economic Analysis of Law in the United States and Europe*, 44 Colum. J. Transnat'l L. 602 (2006), Oren Gazal-Ayal, *Economic Analysis of Law and Economics*, 35 Cap. U. L. Rev. 787 (2007).

³⁰⁶ SEE ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS I-III*, LONDON, PENGUIN BOOKS, 1999; ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV-V*, LONDON, PENGUIN BOOKS, 1999.

in the protection of liberty. Central to this consideration were the concepts of ownership of private property, freedom to contract and protection by the law of private rights. Smith in particular considered property ownership to be the central question when determining the proper role of the rule of law.³⁰⁹ According to Smith, without property, a person can harm another but can rarely benefit from such harm in a direct way.³¹⁰ With property, often the benefit to the person committing the crime is equal to or greater than the harm to the victim.³¹¹

Another writer whose works foretold of linking the basic concepts of law and economics was Jeremy Bentham.³¹² Bentham's axiom that "it is the greatest happiness of the greatest number that is the measure of right and wrong" is perfectly in line with the economic concepts of rational maximization and equilibrium.³¹³ Although this concept predated Bentham's writing, he was among the first to suggest that this axiom could be best brought about through legislation.³¹⁴

Bentham believed that the creation of laws should assist individuals in acting so as to maximize their own happiness.³¹⁵ He did not believe this could be left to the markets in a laissez-faire manner. As Charles K. Rowley points out, Bentham believed

³⁰⁷ SEE FOR EXAMPLE DAVID HUME, A TREATISE OF HUMAN NATURE (2ND ED), OXFORD, CLAREDON PRESS, 1978; DAVID HUME, IDEA OF A PERFECT COMMONWEALTH, IN DAVID HUME (ED), ESSAYS, MORAL, POLITICAL AND LITERARY, INDIANAPOLIS, LIBERTY FUND, 1987, P 512.

³⁰⁸ ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 119 (FANIA OZ-SALZBERGER ED., CAMBRIDGE UNIV. PRESS 1995) (1767).

³⁰⁹ SMITH, *supra* n.22.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT XLI (LONDON, P. ELMSLY AND E. BROOKE 1776).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

that “[s]elf interest would only lead to the greatest happiness if the laws were correctly devised.”³¹⁶

These philosophical influences are seen in much of the development of law and economics, and there is little debate that Bentham and Smith paved the way for the works of Coase and others. There is more debate about the influence of the other antecedent movements.

2. The First Law and Economics Movement

Some trace the early application of economics to the law to work by European and American economists at the end of the 19th century.³¹⁷ As American legal theory began to develop, several, including Oliver Wendell Holmes Jr. predicted that more methodologically rigid practices resembling math and economics would begin to replace the classic legal theories employed in the 1800s.

For the rational study of the law, the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³¹⁸

This was a different time in the study of economics, and many of the assumptions upon which later law and economics scholars would rely, were still being debated.³¹⁹

³¹⁶ CHARLES K. ROWLEY, AN INTELLECTUAL HISTORY OF LAW AND ECONOMICS: 1739-2003, IN THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 17 (FRANCESCO PARISI & CHARLES K. ROWLEY EDS., 2005).

³¹⁷ See Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

³¹⁸ Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897)

³¹⁹ Hovenkamp, *supra* n.317 at 998. “Famous essays in law & economics, such as Henry Carter Adams's *The Relation of the State to Industrial Action* (1887), began by debating such basic assumptions as whether human beings act rationally to maximize their individual interests, and whether these interests reliably coincide with the interests of

Institutional Economics, as it came to be called, rejected many of the assumptions of classical and neoclassical economics and focused instead on the effect that legal institutions had on property ownership.³²⁰ The primary divergence from the neoclassical approach dealt with the rational assumptions of actors and the presumption of common traits among all individuals and organizations. “According to the institutionalists, economics could not generalize about the behavior of business firms or other organizations, or even about the influence of particular sets of legal concepts such as contract or property. Each had its own motives and working rules, which required individual study.”³²¹

Institutional Economics is sometimes called Evolutionary Economics, because institutionalists were heavily influenced by Charles Darwin and the theory of evolution.³²² John R. Commons identified the economic approach to the study of common law rules as Darwinian: “From the economist's approach, the common law is a special case of Darwin's ‘artificial selection,’ by the courts in this instance, of what are deemed to be good customs, and the rejection and penalization by the courts of what are deemed to be bad customs”.³²³

Institutionalists believed that time and history influenced economic decision-making and felt that classic price theory from neoclassical economics failed to account

society”, (internal footnotes omitted).

³²⁰ *Id.* at 1014.

³²¹ *Id.*

³²² Ejan Mackaay, History of Law and Economics, in 1 *Encyclopedia of Law and Economics* 66 (Boudewijn Bouckaert et al. eds., 2000)

³²³ John R. Commons, *Law and Economics*, 34 *YALE L.J.* 371, 372 (1925) .

for this because it treated decision-making as if it happened in a vacuum.³²⁴ However, institutionalists were not always in agreement about what should replace the rational choice of marginal utility as a theory for economic methodology, and as a result, substituted a variety of alternative theories of human behavior that had little success in winning over economists.³²⁵ Eventually, traditional economists felt the methodology of institutionalists was lacking in consistency.³²⁶

‘A much better description of the working methodology of institutionalists is storytelling ... Storytelling makes use of the method that historians call colligation, the bundling together of facts, low-level generalizations, high level theories, and value judgements [sic] in a coherent narrative, held together by a glue of an implicit set of beliefs and attitudes that the author shares with his readers’³²⁷

Coase took issue with the methodology of institutionalism and rejected the idea that it heavily influenced the later application of economics to the law. “The American institutionalists were not theoretical but anti-theoretical, particularly where classical economic theory was concerned. Without a theory they had nothing to pass on except a

³²⁴ Heath Pearson, *Origins of Law and Economics: The Economists' New Science of Law, 1830-1930* (1997)

³²⁵ Mackaay, *supra* n. 322. (“[s]ome members of the movement let themselves be tempted to explore explanations that strayed increasingly away from the strictly individualist rational choice model to ‘holist concepts’ such as ‘national spirit’, ‘socio-psychic motives’ and ‘collective will’ (Commons) or to ‘the psychological-moral life of nations’ (Schmoller)”).

³²⁶ Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 *Minn. L. Rev.* 805, 853 (2000). (“Indeed, institutionalism’s inability to devise testable, general hypotheses explains why it failed to capture the minds of the young economists of the 1930s and later. Institutionalists were always doing elaborate empirical studies about single firms, industries or other institutions, but all of the conclusions seemed quite descriptive and idiosyncratic, with no unifying theory to hold them together.”)

³²⁷ Mark Blaug, *The Methodology of Economics, or How Economists Explain* (2d ed. 1992)

mass of descriptive material waiting for a theory, or a fire”.³²⁸ For this and other reasons, many believe that intuitionism died out in the 1930s.³²⁹

3. Legal Realism

If institutionalism failed to carry the day among economists (and as a result failed to make a lasting impact on legal theory), it shared some foundational beliefs with a more purely legal theory called legal realism, which developed in the early 20th century.³³⁰

Where institutionalism rejected formal economic assumptions about rational actors, legal realism rejected legal formalism and the assumption that judges develop the common law based on a straight forward interpretation of precedent.³³¹ Legal realists believed that legal formalism failed to account for the actual process of judicial decision-making.³³²

“By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be or wished to be or as one feels they ought to be.”³³³ According to Holmes, who is often considered the grandfather of legal realism; the law is “[t]he prophecies of what the courts will do in fact, and nothing more pretentious.”³³⁴

The central premise of legal realism is that the law is indeterminate, in that one can often derive different and conflicting legal responses to the same question.³³⁵

Reliance on human logic and laws and rules that are often ambiguous or even

³²⁸ Ronald H. Coase, *The New Institutional Economics*, 140 J. Institutional & Theoretical Econ. 229 (1984)

³²⁹ Hovenkamp, supra n. 326, 853.

³³⁰ Laura Kalman, *LEGAL REALISM AT YALE: 1927-1960* (1986)

³³¹ Id. at 20.

³³² Id. at 49.

³³³ Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931).

³³⁴ Oliver W. Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 173 (1920)

³³⁵ Kalman, supra n. 330.

contradictory, and the ability, particularly of judges, to understand a “true” meaning of the law was questioned.³³⁶ Concepts like “reasonableness” or “duress” are subject to broad interpretation.³³⁷ Reasonable people familiar with all the legal precedents can disagree about what they meant, and therefore predicting judicial outcomes on the basis of an understanding of legal precedent is unreliable.³³⁸

A second form of indeterminacy is found in the distinction between holding and dicta in judicial decisions.³³⁹ Karl N. Llewellyn, one of the leading legal realists, believed that judges had such great latitude in determining what was essential to past decisions and they could and often did choose which parts of earlier decisions upon which to rely.³⁴⁰ Legal realists argue that after a time, a common law judge would face two distinct lines of precedent that treat similar facts differently based on different interpretations of the language in the original decision. This would leave both the judge and the parties involved in an indeterminate state in which predicting the “correct” outcome was nearly impossible.³⁴¹ For this reason, they believe that legal rules were of limited use in predicting judicial decisions, and that judicial decision-making is idiosyncratic and unpredictable.³⁴²

Legal realists looked to “social context, the facts of the case, judges' ideologies, and professional consensus” to see how they influence not just individual decisions but

³³⁶ Michael Steven Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1918 (2005)

³³⁷ Kalman, *supra* n. 330.

³³⁸ *Id.*

³³⁹ See Karl N. Llewellyn, *THE BRAMBLE BUSH: CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* (Oxford Univ. Press 2008) (1930).

³⁴⁰ *Id.*

³⁴¹ See Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986).

³⁴² *Id.*

patterns of decisions over time.³⁴³ Considering these factors help to improve the predictability of law.³⁴⁴

In addition to describing and defining these forms of legal indeterminacy, legal realists attempted to understand legal rules in terms of their social consequences.³⁴⁵ In this way, legal realism is also normative, in that many of the scholars who have written about legal realism wanted to make judicial decision-making more predictable by focusing on social reality rather than legal doctrine. To accomplish this, they have attempted to unify law and social sciences.³⁴⁶ According to John Dewey, judges had a duty to choose legal rules that have desirable social consequences.³⁴⁷ But they also had an obligation “to enable persons in planning their conduct to foresee the legal import of their acts”.³⁴⁸ This requires decisions that “possess the maximum possible ... stability and regularity”.³⁴⁹

Some argue that legal realism died in the 1960’s, most notably because of a critique of legal realism offered by H.L. Hart.³⁵⁰ Lighter argues that “Hart's devastating critique of the Realists in Chapter VII of *The Concept of Law* rendered Realism a

³⁴³ Joseph W. Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465 (1988), citing Karl Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960)(reviewing Laura Kalman, *LEGAL REALISM AT YALE: 1927-1960* (1986))

³⁴⁴ Llewellyn, *supra* n. 343.

³⁴⁵ Kalman, *supra* n. 330.

³⁴⁶ *Id.*

³⁴⁷ John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ H.L.A. Hart, *THE CONCEPT OF LAW* 124-164. (2d ed. 1994). See also Altman, *supra* n. 341 (arguing contemporary legal philosophers agree with Hart's critique of realism); Green, *supra* n. 336 (arguing that to philosophers of law “realism is dead, mercifully put to rest by H.L.A. Hart's decisive critique of ‘rule-skepticism’ in the seventh chapter of *The Concept of Law*). But see Leiter, *infra* n. 351. (arguing that Hart goes to far and mischaracterizes the legal realists concept of indeterminacy).

philosophical joke in the English-speaking world.”³⁵¹ Hart believed the realist view of indeterminacy led to circular reasoning that argued judges used the law to predict their own decision, but that the law was nothing but a justification for their own decision.³⁵²

Legal realism, however, proved to be a major influence on legal philosophy and several other schools of legal theory, including critical legal studies, which is discussed below.³⁵³ However, there is some debate about whether it should be considered an influence on law and economics. To the extent that it advocates a normative approach that sought to maximize the law’s effectiveness, the two theories have something in common.³⁵⁴ In addition, as Posner argues, judicial behavior is unpredictable and is often based on the external factors including social context.³⁵⁵

One may be able to give reasons for liking or disliking the decision ... and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But that is just a form of words. The problem ... is that there are certain to be equally articulate, “reasonable” people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is such a person) to decide who is right.³⁵⁶

³⁵¹ Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex. L. Rev.* 267, 270 (1997)

³⁵² *Id.* (“For example, according to the Predictive Theory, a judge who sets out to discover the “law” on some issue upon which she must render a decision is really just trying to discover what she will do, since the “law” is equivalent to a prediction of what she will do! These, and other manifestly silly implications of the Predictive Theory, convinced most Anglo-American legal philosophers that Realism was best forgotten.”)

³⁵³ Posner, *infra n.* 357 at 393-944.

³⁵⁴ See Brian Leiter, *Is There an ‘American’ Jurisprudence?*, 17 *Oxford J. Legal Stud.* 367, 381 (1997) (arguing that law-and-economics scholars are realists), but see Posner, *infra n.* 357 at 2-3. (“The law and economics movement owes little to legal realism....”) and Mackaay, *supra n.* 322 (

³⁵⁵ Richard A. Posner, *The Supreme Court, 1994 Term-Foreword: A Political Court*, 119 *Harv. L. Rev.* 31 (2005).

³⁵⁶ *Id.* at 40-41. (arguing that on constitutional matters, the Supreme Court is an inherently political animal)

As much as that may sound like an endorsement of some of the legal indeterminacy of legal realism, Posner, in other contexts took pains to distinguish law and economics from legal realism. “The ‘crits’ worry that the practitioners of law and economics will contest with them the mantle of legal realism. They need not worry. We economic types have no desire to be pronounced the intellectual heirs of Fred Rodell, or for that matter of William Douglas, Jerome Frank, or Karl Llewellyn.”³⁵⁷ Elsewhere, Milton Friedman, another scholar associated with the law and economics movement remarked that the first tenured economist at the Chicago Law School, Henry Simons, “was opposed to almost everything that the institutionalists and legal realists stood for.”³⁵⁸

4. The Chicago School

After Henry Simons, the next tenured economist at the Chicago Law School was Aaron Director.³⁵⁹ Director was the first editor of the *Journal of Law and Economics*, created in 1958.³⁶⁰ Earlier, Director led the way to the merger of law and economics by applying economic insights to legal cases, in particular antitrust law.³⁶¹ After the depression and the New Deal, many people believed that industry had to be closely

³⁵⁷ Richard A. Posner, *OVERCOMING LAW* 3 (Harvard Univ. Press 1995), Mackaay, *supra* n. 322 at 73. (“While it shares with [legal realism] the view that for a better understanding of law one must rely on the social sciences and on empirical study, practitioners of law and economics are much more precise than were the realists about where to borrow - from economics; from other social sciences to the extent that they adopt the rational choice model - and about the agenda for empirical research flowing from that position.”)

³⁵⁸ Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 *J.L. & Econ.* 163 (1983)

³⁵⁹ *Id.* at 240

³⁶⁰ Mackaay, *supra* n. 322 at 72.

³⁶¹ Neil Duxbury, *PATTERNS OF AMERICAN JURISPRUDENCE* 343-344 (1995).

supervised and regulated in order to be effective.³⁶² Director tried to show “this conclusion in most cases to be unwarranted, indeed counterproductive: monopoly was more often alleged than it was effectively present and detrimental to consumer interests.”³⁶³

At the same time Director was looking at antitrust law, many scholars began looking at legal subjects with clear economic connotations, like corporate law, bankruptcy, taxation and public utilities. Posner and others refer to this body of scholarship as “old law and economics”. It was groundbreaking in continuing the tradition from the institutionalists of applying economic concepts to legal questions, but limited itself to explicitly economic subjects in which supply and demand was clearly a component of analysis.

Posner and others would argue that Coase, who succeeded Director as the editor of *The Journal of Law and Economics*, ushered in the new era of law and economics with his article entitled “The Problem of Social Cost”.³⁶⁴ The article was intended to be a defense of an earlier article he had written, which had been criticized by some economists.³⁶⁵ The larger purpose of the article was to discuss “those actions of business firms which have harmful effects on others”.³⁶⁶ According to Coase, the basic understanding of these actions was mistaken, because people fail to recognize the reciprocal nature of the problem:

³⁶² Id.

³⁶³ Mackaay, supra n. 322 at 72.

³⁶⁴ Ronald H Coase, *The Problem of Social Cost*, 3 J Law & Econ 1 (1960).

³⁶⁵ Ronald H. Coase, *The Federal Communications Commission*, 2 J. Law & Econ, 26-27 (1959).

³⁶⁶ Coase, supra n.33 (1960).

The traditional approach has tended to obscure the nature of the choice that has been made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.³⁶⁷

The original approach, according to Coase, arose from economists' loyalty to Pigou's work *The Economics of Welfare*.³⁶⁸ Coase's new approach attempted to take the utility maximization present in the work of Smith and others and combine it (when appropriate) with Bentham's approach to the role of legislation and the courts. According to Coase, the courts should "understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account".³⁶⁹ Government's role should be to legislate only when it is in a position to more efficiently account for the cost of market transactions which may prevent the rearrangement of legal rights.³⁷⁰

This approach was novel in application to law because the reciprocal approach contracted with the traditional causality approach. The Coase approach calls on the legal system to place the burden on the least cost avoider, even if that person did not cause the harm.³⁷¹ This approach has ramifications in many areas of law, including a few that have not traditionally been associated with economic analysis, like tort law. Another significant paper from the same era would address just that topic.

³⁶⁷ *Id.* at 2.

³⁶⁸ ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1ST ED. 1920).

³⁶⁹ Coase, *supra* n. 33, at 19 (1960).

³⁷⁰ *Id.* at 17-18.

³⁷¹ ROWLEY, *supra* n.32 at 17.

Guido Calabresi published an article in 1961 focusing on risk distribution.³⁷² Although this article is not explicitly about the application of economic concepts, “the tenor of his paper is that tort law should be regarded as a regulatory regime for the control of externalities.”³⁷³ In this approach, the damage awards of tort cases play the role that taxes or regulation play for regulation of external costs.³⁷⁴

In addition to Director and Coase, another economist in Chicago at the time was Gary Becker. Becker, who studied under Milton Friedman,³⁷⁵ did not explicitly apply economics to legal questions, but he may have influenced Coase and others with his novel application of economics to non-traditional subjects and with his belief that economics is a methodology, and not a subject area.³⁷⁶ For Becker, any application of the rational actor assumptions that underlie neo-classical economics was appropriate, regardless of whether the subject was traditionally one associated with markets.³⁷⁷

In 1973, influenced by Coase and Becker, Richard A. Posner published his textbook *Economic Analysis of Law*.³⁷⁸ Almost 40 years later, Posner remains “the most

³⁷² GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970)

³⁷³ ROWLEY, *supra* n.32 at 18.

³⁷⁴ *Id.*

³⁷⁵ Gary S. Becker, Preface, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR*, (Mariano Tommasi & Kathryn Ierulli eds., 1995).

³⁷⁶ See e.g., Gary S. Becker, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* (2d ed.1975); Gary Becker, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 *J. Pol. Econ.* 9 (1962); Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 *J. Pol. Econ.* 1 (1962); Gary Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 178 (1968)

³⁷⁷ Gary Becker, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976)

³⁷⁸ POSNER, *supra* n.301.

important scholar in law and economics”.³⁷⁹ His text not only addresses traditional areas of law and economics like property rights, contract and torts, but expands the approach to look at family law, antitrust law, criminal law and the legal process generally, and most notably, to constitutional law, and specifically the First Amendment.³⁸⁰ Posner’s text, which is still in print and widely used today, and his numerous law review articles have continued to expand the scope and assert the value of the study of law and economics.

How Economics Applies to Law

One may be surprised that the scholarly disciplines of law and economics which existed independently for hundreds of years before scholars began using one to inform the other. Although it may be just as likely that one is more surprised that the two disciplines would ever complement each other. As others have pointed out, they often have viewed the world in different ways. Economics was traditionally “logically positivist, scientifically rigorous, and generally indifferent to normative issues.”³⁸¹ Law on the other hand was traditionally “morally oriented” and the concept of the rule of law

³⁷⁹ ROWLEY, *supra* n.32, at 20. See, e.g., Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972); Richard A. Posner, A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law, 9 Hofstra L. Rev. 775 (1981); Richard A. Posner, The Economic Approach to Law, 53 Tex .L. Rev. 757 (1975); Richard A. Posner, Utilitarianism, Economics, and Legal Theory , 8 J. Legal Stud. 103 (1979); Richard A. Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980); Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 19 (1986). (This is a necessarily small sample. Posner’s prolific publishing is newsworthy; in fact the New York Times wrote an article about his publishing record in 2008, and at that time the author commented that that he had written “over 40 books” and refused to count the number of articles, saying “I stopped counting when I reached 150 and saw that I still had 20 pages of listings to go.” His C.V. provided by the University of Chicago, was last updated in May, 2010, and the publications list was over 40 pages long. Barry Gewen, A Brief Readers Guide to Richard Posner, N.Y. TIMES, July 9, 2008, retrieved at <http://artsbeat.blogs.nytimes.com/2008/07/09/a-brief-readers-guide-to-richard-posner/>)

³⁸⁰ POSNER, *supra* n.301.

³⁸¹ HENRY G. MANNE, THE ECONOMICS OF LEGAL RELATIONSHIPS VIII (1975).

implied “that we should not try to specify in advance the particular result we want to reach in resolving a certain kind of legal dispute, even if science offers us the methods for reaching any stated goal.”³⁸²

Economics starts with a basic assumption: that people are rational actors.³⁸³ Not just in economic transactions, but in all choices and actions.³⁸⁴ As rational actors, people seek to maximize their own utility because resources are limited in relation to human wants.³⁸⁵ This does not assume that people consciously weigh the cost and benefit of every decision, nor does it assume that their assessment of the cost and benefit would be accurate were they to undertake such an analysis.³⁸⁶ Rather, people subconsciously make choices they believe will maximize their utility, given the information they have about the costs and benefits.³⁸⁷

When rational choices are made in a marketplace, economists believe that the law of supply and demand will result in competition and eventually in an equilibrium, resulting in an efficient distribution. Efficient competitive markets result in three distinct positive outcomes. First, efficient markets allow for perfect allocation of resources.³⁸⁸ Second, efficient markets allow for maximization of utilization of resources,³⁸⁹ and third, competitive markets allow innovation and technology to efficiently diffuse throughout society.³⁹⁰

³⁸² *Id.*

³⁸³ GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

³⁸⁴ POSNER, *SUPRA* N.301.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ EDWIN MANSFIELD, *MICROECONOMICS, THEORY AND APPLICATION* 1 (3d ed. 1979).

³⁸⁹ *Id.*

³⁹⁰ Kohler, *infra* n.397

1. The law of demand: The inverse relationship between the price of a good and the demand for that good. As price goes up, demand goes down. (Fig. 1) Of course, demand can be affected by things other than price, so you can have situation where demand goes up and this drives prices up. But understanding the relationship between price and demand is significant for legal analysis that may impact price structure through the assignment of legal rights.³⁹¹
2. Equilibrium: This is the state of economic systems when supply and demand are equal. In the market, this can happen through competition where a price is determined where manufacturer's supply equals the demand of buyers. (See Fig. 2). Legal systems are external influences that can impact equilibrium. Absent other external influences, legal rules and regulations can tend to inhibit equilibrium, but given the existence of other external influences, laws can be used to assist the attainment of equilibrium.³⁹²
3. Tendency of resources to gravitate toward their most valuable uses: Equilibrium is significant because economists believe resources tend to gravitate toward their most valuable uses, which is desirable. When all resources are being utilized in their most valuable way, i.e. by the person who values them the most, that is said to be an efficient use.³⁹³
4. Opportunity cost: This describes the basic relationship between scarcity and choice. It is necessary to the application of law and economics because it is an area where law can neglect the true costs of a transaction. As an example, the

³⁹¹ *Posner, supra n.301*

³⁹² *Id.*

³⁹³ *Id.*

true cost of a college education is not just the tuition, but also the wages you could have earned by working and not attending college. It is inaccurate to say that it costs a person \$20,000 to attend college for a year, if in attending full-time they forego an opportunity to make an additional \$20,000. Time is a scarce resource, and the choice of college precludes the choice of the job. So the true cost is the cost of the choice made (\$20,000 tuition) and the loss of the benefit from the choice not made (\$20,000 salary), so the total cost is \$40,000. For the law to properly assign rights and obligations, it must understand the true cost of choices, including opportunity cost.³⁹⁴

Applying economic principles to law thus leads to analyzing legal rules to determine how best to allow for rational choices in a market.³⁹⁵ If markets were perfect, the job of the law would simply be to establish a starting point (initial ownership for property, basic rights for individuals) and get out of the way of transactions.³⁹⁶ However, economists are aware that markets are rarely perfect.³⁹⁷ Imperfections arise both in the ability of individuals to make rational choices and in the ability of markets to sustain equilibrium in all situations. Some of the most significant market imperfections for which economists must account include:

1. Monopolies: When only one supplier controls the market, the incentives for the supplier to continue to produce until equilibrium is reached changes.³⁹⁸ Reduced supply can raise prices and leave profits unaffected,

³⁹⁴ *Id.*

³⁹⁵ See RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

³⁹⁶ *Id.*

³⁹⁷ See HEINZ KOHLER, *MICROECONOMICS* (1992).

³⁹⁸ *Id.* at 283. (A monopoly is “a single seller [which] offers an item for which no good

but the market will be less than optimally efficient.³⁹⁹ Monopolies can result from legal rules, but they can also arise naturally and thus need to be controlled by legal rules.⁴⁰⁰ Anti-trust laws, one of the first places where the study of economics was applied to law, seeks to limit the ability of natural and legislative monopolies to manipulate markets.⁴⁰¹

2. Externalities: An externality is an impact of a market transaction on an outside party, and can be either good or bad.⁴⁰² The classic example of negative externalities is pollution.⁴⁰³ Absent regulation, the supplier will produce goods and consumers will purchase goods, even if the production of goods results in pollution, because the benefit of the transaction is stronger for the supplier and the purchaser, where the cost of the pollution is born by society at large.⁴⁰⁴ This is inefficient if the economic model that measures the value of the original transaction does not account for the harm done by the pollution, and can be corrected by regulations which

substitutes are available and into which the entry of other sellers is severely restricted or even impossible”)

³⁹⁹ See Posner, *supra* n.301 at 271-84.

⁴⁰⁰ Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548, 548 (1969) (“If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it.”).

⁴⁰¹ See RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* (2d ed. 1981).

⁴⁰² Kohler, *supra* n.397 at 509.

⁴⁰³ *Id.* at 507-539; Coase, *supra* n.364

⁴⁰⁴ Jerry Ellig, *The Economics of Regulatory Takings*, 46 *S.C. L. REV.* 595, 597 (1995) (“The true cost of producing the factory’s goods includes not only the expense of materials, labor, and machinery, but also the cost that the pollution imposes on people in the surrounding neighborhood.”).

attempt to internalize the externality by forcing either the supplier or the purchaser to bear the cost, usually through taxes or fees.⁴⁰⁵

3. Information Barriers: Information is necessary for rational choices.⁴⁰⁶

However, parties can be prevented from obtaining perfect information by a variety of market imperfections. One is asymmetry of information.⁴⁰⁷ If the supplier knows more about the transaction, because it drafted the contract or understands the market better, the buyer may make an imperfect choice, which can hurt equilibrium.⁴⁰⁸ One reason buyers may have imperfect information is because of the transaction costs associated with obtaining the information.⁴⁰⁹ High costs may discourage consumers from finding the information and may lead to inefficiencies.⁴¹⁰ Consumer protection laws are often aimed at accounting for these types of information barriers.⁴¹¹

4. Public Goods and Free Riders: It is inefficient for private companies to control the supply of goods that cannot benefit some without benefitting others.⁴¹² The most obvious example is national defense.⁴¹³ If national

⁴⁰⁵ Id.

⁴⁰⁶ Kohler, supra n.397 at 255-256.

⁴⁰⁷ Robert H. Lande, Chicago Takes It On The Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World, 62 ANTITRUST L.J. 193, 194-95 (1993).

⁴⁰⁸ See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 42 (3d ed. 2000).

⁴⁰⁹ See Coase, supra n.364; Lee Anne Fennell, *The Problem of Resource Access*, 126 Harv. L. Rev. 1471 (2013).

⁴¹⁰ See Coase, supra n.364.

⁴¹¹ Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 Wm. & Mary L. Rev. 1635, 1657-58 (2006) (“[S]ome firms ... plac[e] unfavorable terms in small print, or perhaps in the middle of a sea of fine print, to reduce the likelihood that consumers will read the terms”).

⁴¹² Kohler, supra n.397 at 556-60.

defense were privatized, some citizens may feel it was important to pay for a powerful military that could defend the nations borders. However, it would be impossible for the military to defend only those individuals who had paid for the service, and a logical consumer would be unwilling to pay for the service if she could wait for others to pay and receive the benefit without the cost. All the people benefitting from the good without paying are called free-riders.⁴¹⁴ Laws can account for this problem by making certain goods public goods and spreading the cost for the good out to the society at large, usually through taxation.⁴¹⁵

Economic analysis allows legal scholars and lawmakers to understand the impact of regulation and legal rulings on market transactions, and to consider the concepts from economics that can help design laws that maximize efficiency in specific markets. This is why classic law and economics analysis tended to arise in analysis of areas of law that were most obviously market driven.

Freedom of speech and the First Amendment

The first amendment provides that “Congress shall make no law ... abridging freedom of speech, or of the press ...”.⁴¹⁶ In 1919, Judge Oliver Wendell Holmes Jr. wrote an impassioned dissent in which he said:

⁴¹³ See Richard L. Hasen, *Lobbying, Rent Seeking, and the Constitution*, 64 Stan. L. Rev. 191, 248 (2012). (“National defense is an appropriate example because many conservatives recognize it as a public good which must be supplied even by a smaller government.”)

⁴¹⁴ Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 558 (1991).

⁴¹⁵ See Hasen, supra n.413

⁴¹⁶ The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁴¹⁷

At first blush, this dedication to vigilance may seem incongruous with an economic analysis. As described above, such an analysis would engage in a balancing approach, weighing costs and benefits, and attempt to maximize utility, even if that came at the expense of speech.

This conflict is not necessarily problematic, however. As is evident even in Justice Holmes proposition in the above dissent, the protection of speech is not absolute and therefore some balancing is necessary. That he would feel that it would only be appropriate to restrict speech in the context of “an immediate check,” does not mean that he is not engaging in a balance. It simply means that Holmes saw the costs of restrictions on speech as extremely high as compared to the benefits, unless the benefits involve the prevention of an immediate harm.

This strong defense of freedom of speech would later be echoed in the majority opinion of Learned Hand in the case of *United States v. Dennis*.⁴¹⁸ Here the court of appeals held that the speech of a group of communist party organizers would have been protected even though it advocated a political philosophy that would have eliminated the freedom of speech after coming to power. “The First Amendment relating to freedom of

freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” [U.S. Const. amend. I](#).

⁴¹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁴¹⁸ 183 F.2d 201, 206 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

speech protects all utterances, individual or concerted, seeking constitutional changes, however revolutionary, by the processes which the Constitution provides.”⁴¹⁹

However, Hand went on to say that the speech here did more than simply advocate change by the approved processes, and upheld the convictions of the speakers on the ground that their speech presented a “clear and present danger” to the government.⁴²⁰ This amounted to a balancing test, as Hand stated: “[N]o longer can there be any doubt, if indeed there was before, that the phrase, ‘clear and present danger,’ is not a slogan or a shibboleth to be applied as though it carried its own meaning; but that it involves in every case a comparison between interests which are to be appraised qualitatively.”⁴²¹ He proposed a formula, wherein the question is “whether the gravity of the ‘evil’ i.e., if the instigation sought to be prevented or punished succeeds, discounted by its improbability, justifies such an invasion of speech as is necessary to avoid the danger”.⁴²² Posner proposes that this balancing test can be expressed as a formula:

In symbols, regulate if but only if $B < PL$, where B is the cost of the regulation (including any loss from suppression of valuable information), P is the probability that the speech sought to be suppressed will do harm, and L is the magnitude (social cost) of the harm.⁴²³

Reducing a rhetorical balancing test to a formula with variables highlights the individuals weights being given to the various factors under consideration.

Posner then suggests expanding the formula to better reflect the component parts and to account for additional externalities that Hand’s formula ignores. Posner’s

⁴¹⁹ *Id.* at 206.

⁴²⁰ *Id.* at 213

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *Suffolk U. L. Rev.* 1, 8 (1986) (Posner B)

formula would look like this: regulate if $V+E < P \times L/(1+i)^n$.⁴²⁴ “V” is the social loss from suppressing valuable information and “E” is the legal-error costs incurred in trying which information is valuable and which isn’t.⁴²⁵ The rest of the formula is a modification to adjust “L” (the magnitude of the social harm) for present value.⁴²⁶ Here “i” is an interest or discount rate for translating future social cost into present dollar and n is the number of periods between the speech and the harm.⁴²⁷ The larger i and n are, the smaller the harm will be.⁴²⁸ According to this formula, government should regulate only where the social loss (including error costs) is less than the harm caused by the speech, accounting for the probability of the speech actually causing harm and adjusting for present value of the harm.⁴²⁹

This example is illustrative in two ways. First, it shows that applying the insights of law and economics is not a radical change from traditional legal reasoning. Although doubtful that Hand would have described his approach as economic, nonetheless, he was balancing costs and benefits and even devised a formula to attempt to categorize the variables under consideration. Second, it shows that a more conscious consideration of the economic perspective may allow an observer to account for additional variables that may be overlooked in a less complex balancing approach. Economics is not necessary to create a thorough or complex balancing test, but focusing on economic factors allows the legal

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

system to more accurately reflect the goals that the test is being designed to meet.

Here is how the test would be applied to two important types of speech that currently receive different protection from the courts.

Specific Applications

1. Defamation

A defamatory statement is a false statement that tends to harm the reputation of another.⁴³⁰ The courts have generally held that this speech is not worthy of protection,⁴³¹ and its reasoning has been fairly consistent with the application of a balancing test similar to the one from *Dennis* above.⁴³² There is a high cost in the damage done to reputation (L). And there is a high probability of defamatory statements because they are inexpensive to the speaker (P). On the other side, the cost to society of restricting the speech is generally considered to be low, because defamatory statements are false and therefore of little value (B).⁴³³

Applying the more complex Posner formula may change things slightly.

Two of the variables are not particularly effected, because the harm to reputation is usually immediate so time does not discount the likely damage. But the addition

⁴³⁰ See [RESTATEMENT \(SECOND\) OF TORTS § 559 \(1977\)](#).

⁴³¹ See generally 2 Fowler V. Harper, et al., Fleming James, Jr., & Oscar S. Gray, *The Law of Torts* 5.0, at 2-10 (2d ed. 1986) (stating that all states apply a strict liability legal regime against authors of defamatory statements); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 127 S.Ct. 2372 (2007) (“[S]peech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”).

⁴³² *Dennis*, supra n.73.

⁴³³ See *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958 (1976) (“[I]naccurate and defamatory reports of facts [are] matters deserving no First Amendment protection”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974) (“[T]here is no constitutional value in false statements of fact.”).

of the variable which consists of the legal-error judgment of which speech is valuable and which isn't may be significant. Although it is true that all defamation is false, and that false speech is generally of little value, the challenge here is that the speaker may not know the statement is false when the statement is made. Although we may normally be fine with allocating this risk to the speaker, meaning that the speaker should ensure that the statement is true or be aware that the liability for any resultant harm is theirs to bare, this may not always be the most efficient scheme. As the court ruled in *New York Times v. Sullivan*, certain information is valuable to the political process, and should be encouraged, though it may sometimes be false.⁴³⁴ The imposing of liability for inadvertent false statements that may harm the reputation of another may result in speakers being overly cautious and choosing not to make statements they believe to be true because the truth cannot be guaranteed and the risk of liability is too high.⁴³⁵ These statements, if actually true, could be valuable to society, and thus the cost to society is the lack of access to this information because of the structure of legal liability.⁴³⁶

This is exactly the kind of problem that economic analysis was designed to account for, and while the *Sullivan* decision would again be unlikely to be characterized as economic, it incorporates all of the elements of the economic

⁴³⁴ [376 U.S. 254, 279-280 \(1964\)](#).

⁴³⁵ *Id.*

⁴³⁶ *Id.* See also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678 (1989) (“Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of ‘breathing space’ ” so that protected speech is not discouraged.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

approach. In weighing the costs and benefits of restricting defamatory speech, the court considered that certain speech, speech about public figures, was valuable enough that the loss of some true speech over fears of liability was a greater cost than the benefit of avoiding some false, defamatory speech.⁴³⁷ This externalized the cost of this speech onto the defamed individual.⁴³⁸ Whether this is efficient or not is a matter of interpretation,⁴³⁹ but it is clear that this is an attempt to account for externalities, in this case the chilling of speech because of a fear of liability, by redistributing risk to the plaintiff and expanding the protection of the defendant. This in theory is exactly how the economic analysis of law should proceed.

2. Copyright

Copyright law grants a time-limited exclusive right to creators of works of expression like music, books, paintings and films.⁴⁴⁰ This type of intellectual property differs from traditional property in that it is generally inexhaustible and nonexcludable. To account for the nonexcludable nature of these goods, copyright grants the exclusive right to the creator. Without this right, copiers would be able

⁴³⁷ *New York Times Co. v. Sullivan*, 376 U.S. , at 271. (“[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need * * * to survive,’”)(quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

⁴³⁸ POSNER, *supra* n.301, at 43.

⁴³⁹ See Ray Ibrahim, *Giving the Internet an Acid Bath of Economics: Electronic Defamation Viewed Through a New Lens*, 2 Va. J.L. & Tech. 5 (1997) (arguing the *Sullivan* distribution is appropriate and further cases that limited this distribution to public figures was a missed opportunity), but see also Posner, *supra* n.301, at 42-43 (arguing that this distribution of risk to individuals does not allow for the spreading of costs or the insurance against damage, and arguing *Sullivan* and subsequent cases actually allowed for too much protection in cases involving private individuals).

⁴⁴⁰ Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 Tul. L. Rev. 187, 192 (2006)

to reproduce the good at a lower cost than the creator by eliminating the creation costs. If there is competition among copiers, the price for the good will eventually be reduced to the reproduction cost, meaning the creator cannot sell the good profitably once the creation cost is accounted for. Creators expecting profit from their creation will thus have no incentive to create content without the protection of an exclusive right.

The above analysis could be seen as some of the variables from the formula similar to the ones discussed above. The countervailing consideration would be the costs associated with the granting of an exclusive right to content creators.⁴⁴¹ A few of those costs are:

- i. Monopoly power and thus monopoly pricing: It was mentioned above that creative intellectual property is both inexhaustible and nonexcludable.⁴⁴² The nonexcludability was discussed above as a factor that supported the creation of copyright. The inexhaustibility of the creation tends to cut the other way.⁴⁴³ Because it is inexhaustible, all consumers who were interested in consuming the product could do so with competitive pricing.⁴⁴⁴ Unlike a physical good, like a car, which can only be sold to one person, intellectual property can be sold

⁴⁴¹ WENDY J. GORDON & ROBERT G. BONE, COPYRIGHT, IN 2 ENCYCLOPEDIA OF LAW AND ECONOMICS: CIVIL LAW AND ECONOMICS 189 (BOUDEWIJN BOUCKAERT & GERRIT DE GEEST EDS., 2000)

⁴⁴² Sag, *supra* n.102.

⁴⁴³ GORDON & BONE, *supra* n.103, at 194.

⁴⁴⁴ *Id.*

to numerous people at the low cost of duplication.⁴⁴⁵ One consequence of monopoly pricing is usually that not everyone who would be willing to purchase the good does, because the price does not reach equilibrium.⁴⁴⁶ When the alternative would be a low cost equilibrium because of the inexhaustibility of the product, this cost is particularly high.⁴⁴⁷

- ii. Chilling future creativity: Sullivan was concerned that defamation liability would prevent some people from publishing information because of the fear that it could be defamatory and that this fear would cost society access to non-defamatory information that would have created a social benefit.⁴⁴⁸ The same argument can be made here. Future content creators who may wish to build on previously existing work may be less likely to create works for the fear that they could infringe on copyright and thus create liability on behalf of the creator.⁴⁴⁹ Copyright attempts to account for this cost by limiting the protection to the expression and providing no protection for the underlying ideas.⁴⁵⁰

⁴⁴⁵ In the author's opinion, this is one reason why efforts by content creators (like the motion picture industry) to equate copyright piracy of intellectual property with traditional theft fail. Much of the audience may be able to understand that from a moral perspective there is no difference, but from a practical perspective it seems quite different in that their piracy does not deny anyone of their use of the music or movie.

⁴⁴⁶ GORDON & BONE, *supra* n. 103, at 194.

⁴⁴⁷ *Id.*

⁴⁴⁸ Sullivan, *supra* n.99.

⁴⁴⁹ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 332-44 (1989)

⁴⁵⁰ *Id.*

Other costs include transaction costs affiliated with granting licenses⁴⁵¹ and the cost of administration and enforcement.⁴⁵² These costs are balanced against the benefits to society from granting the exclusive right, and the legislature (as copyright is a legislative creation) and the courts interpreting the copyright regulations have attempted to strike a balance. Two important aspects of copyright law work to balance the costs of the grant of copyright: the limited duration of copyright and exceptions to the protection, most notably the fair use exception.

The limited duration is justified on the fact that the social cost increases the longer the exclusive right is granted.⁴⁵³ One reason for this increase may be the additional transaction costs associated with locating copyright holders after a greater passage of time.⁴⁵⁴ Another justification is the fact that the effect on ex ante incentives (meaning the desire to create the work initially) is dramatically lessened with the passage of time, as most creators would discount future economic return to present value.⁴⁵⁵

The other notable balance against the social cost of copyright grants is the exception for fair use.⁴⁵⁶ Fair use is a defense that can be raised against claims of copyright infringement and is available in situations where the use is seen as being of specific benefit to the public, yet it would be unrealistic or impractical for the market to determine the value of the use.⁴⁵⁷ Market failure means that the granting of a provisional license through the fair use exception should allow the use of the material without

⁴⁵¹ GORDON & BONE, *supra* n.103, at 194.

⁴⁵² *Id.*

⁴⁵³ Landes & Posner, *supra* n.449.

⁴⁵⁴ *Id.*

⁴⁵⁵ GORDON & BONE, *supra* n.103, at 194.

⁴⁵⁶ *Id.* at 200

⁴⁵⁷ *Id.*

substantial cost to the creator, since the market was unlikely to exist or be particularly lucrative.⁴⁵⁸ Examples include use of protected material for news broadcasts, educational purposes or parody.⁴⁵⁹ Each of these uses is an example where the traditional licensing market may not be efficient.⁴⁶⁰ News use often has to happen in a timely manner, and the users are unlikely to have time to contact copyright holders and negotiate use.⁴⁶¹ Educational use is often limited in scope, and the transaction costs associated with seeking copyright permission is likely to outweigh the benefit to the educator of a specific use.⁴⁶² And lastly, parody can often put the material or even the creator in a negative light, and therefore copyright holders may be more reluctant to grant licenses.⁴⁶³ Yet parody (like the other uses above) is considered a socially useful and is thus encouraged.⁴⁶⁴

Critiques of Law and Economics

Several scholars are critical of or have reservations about the application of economics to law. From a philosophical standpoint, the school of Critical Legal Studies (CLS) developed largely as a response to the claimed objectivity and neutrality of the law and economics movement.⁴⁶⁵ CLS attempted to adapt from the legacy of the Legal Realists the idea that law is indeterminate. However, CLS goes further than pointing out ambiguity in legal language, and believes that the basic idea of rational determinacy is

⁴⁵⁸ *Id.* at 201

⁴⁵⁹ Sag, *supra* n.102, at 247.

⁴⁶⁰ *Id.*

⁴⁶¹ Landes & Posner, *supra* n.449.

⁴⁶² GORDON & BONE, *supra* n. 103, at 202.

⁴⁶³ Sag, *supra* n.102, at 248.

⁴⁶⁴ *Id.*

⁴⁶⁵ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

false.⁴⁶⁶ Legal reasoning and decisions are not separate from political beliefs and dialogue, and as such, the law is a political tool that cannot be understood as distinct from other forms of subjective value determinations like politics.⁴⁶⁷ CLS sees an inherent conflict between law and rules that protect individual freedom and a system that supports communal security.⁴⁶⁸ As such, many CLS scholars advocate for dramatic change in approaches to legal rules and recognition of the fact that law is inferior and subordinate to social theory.⁴⁶⁹

CLS scholars were critical of the “individual choice” focus of law and economics and of the focus on individual maximization.⁴⁷⁰ The battle between CLS and Law and Economics has been the subject of much study,⁴⁷¹ and CLS is interesting in its own right,

⁴⁶⁶ See Jonathan Turley, *Roberto Unger's Politics: A Work in Constructive Social Theory: Introduction: The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 Nw. U. L. Rev. 593, 594 (1987) (“At its most basic level, the CLS movement challenges society to consider some ultimate questions about the validity of its own institutions and to reconsider some past ‘ultimate answers’ upon which those institutions are based.”)

⁴⁶⁷ MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)

⁴⁶⁸ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-12 (1979).

⁴⁶⁹ See Kelman, *supra* n.467.

⁴⁷⁰ See e.g. Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 *The New Palgrave Dictionary of Economics and the Law* 465 (1998) (highlighting distributional implications of mainstream law and economics thought generally); Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 58 (2004) (“Law and economics in its early form asked legislators and, most often, judges to make decisions on the basis of efficiency, while critical legal studies asked them to base their decisions on a concern for social justice.”); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

⁴⁷¹ See e.g. Gary Minda, *The Law and Economics and Critical Legal Studies Movements in American Law*, in *Law and Economics* 87 (Nicholas Mercuro ed., 1989); Linda A. Schwartzstein, *Austrian Economics and the Current Debate Between Critical Legal Studies and Law And Economics*, 20 Hofstra L. Rev. 1105, 1105-07 (1992).

⁴⁷² but I choose here to focus in more depth on other criticisms of law and economics. If one agrees with the CLS assertion that law cannot be developed as a rationally determined body with some objective and agreeable truth, than there is little point in continuing to discuss how economic ideas can make law more efficient. So I choose to focus on concerns that are more about the way we conceptualize law and economics, because these critiques are significantly altering the way law and economics is applied, but do not leave us feeling that the application is futile.⁴⁷³

Before I address the specific criticisms of behavioral law and economics, I would also like to address one other concern about law and economics. At a base level, as we mentioned in the introduction, economics walks a fine line between philosophy and science. To the extent that economic analysis claims superiority on the basis of being more “scientific”, there are valid criticisms.⁴⁷⁴

Science is often thought of as a process where knowledge is gradually added to better understand a phenomena. In his landmark book, *The Structure of Scientific*

⁴⁷² Critical legal studies contains several interesting ideas and is closely related to other important social theories like critical race theory. For a bibliography of Critical Legal Studies, see Duncan Kennedy and Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 461 (1984).

⁴⁷³ This approach is justified by recent evidence that Critical Legal Studies is fading from legal scholarship; Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1490 (2012). “In contrast to the staying power of law and economics, the critical legal studies (“CLS”) and critical race theory (“CRT”) movements have faded in acceptance.”; Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845 (2009) (“The ‘Law and ...’ wave has, it is true, crested. Many of the new fields of the 1970s have either disappeared (in the case of critical legal studies), or stalled, as in the case of constitutional theory, feminist law, and critical race theory.”)

⁴⁷⁴ Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of the Law and a Review of the Major Books*, 29 UCLA L. Rev. 1260, 1261 (1981) (“Economics flaunts its ties with natural science, the last surviving authority since God’s recent death. The economists claim that their approach is scientific, rational, consistent, unenslaved by tradition.”)

Revolutions,⁴⁷⁵ Thomas Kuhn pointed out that, at any given period in time, scientific knowledge is accumulated and viewed within a present paradigm.⁴⁷⁶ The problem, is that these paradigms tend to undergo periodic revolutionary change that creates a new paradigm where much of what has been “learned” or “understood” is debunked or falsified.⁴⁷⁷ An additional concern is that Kuhn found that the prevailing paradigm at any time is not determined by logical deduction but by a mix of sociology, enthusiasm and scientific promise.⁴⁷⁸

This concern over the cloak of objectivity often surrounding disciplines perceived as scientific has troubled legal scholars who fear that the application of economics to legal theory is appealing in large part because of this perceived objectivity.⁴⁷⁹ Of particular concern is the fact that the perceived objectivity of economics is obscuring a paradigm with regards to political or ideological views regarding distribution of wealth and the role of government.⁴⁸⁰ Therefore, all applications of economic theory to law must proceed with the humility brought on by understanding that current assumptions about economic models may prove to be false or may need to adjust for changes in our

⁴⁷⁵ THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3D ED. 1996)

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ See e.g., JAMES R. HACKNEY, JR., *UNDER THE COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY* (2006); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *Ind. J. Global Legal Stud.* 383, 412 (2003) (“In the United States today, law and economics has been finally unseated from the throne of legal objectivity, so that its normative recipes need a new contingent and local legitimization in order to compete with those of a variety of opposite political strategies.”); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. Pa. L. Rev.* 685, 689-90 (1985).

⁴⁸⁰ *Hackney, supra n.479.*

understanding of human behavior. Law and Economics is currently going through just such a paradigm shift, and the implications of that movement are discussed below.

Behavioral Law and Economics

The next set of related criticisms involve the underlying assumption at the heart of economic analysis: rational choice. Advocates for law and economics believe that the law should use the basic assumption that people are autonomous rational actors that make choices to maximize their satisfaction to model legal decision and legislation. But what if that underlying assumption about people is wrong?

In 1979 Daniel Kahneman and Amos Tversky wrote an article entitled *Prospect Theory*, which was modeled as a more accurate predictor of behavior than one built on expected utility.⁴⁸¹ This theory helped to explain why people will behave differently depending on whether they are seeking to reap gain or avoid losses.⁴⁸² This distinction in how the actor “frames” the event will impact the choice the person makes, even though the two choices may be logically inconsistent.⁴⁸³ Essentially, losses hurt more than gains feel good.⁴⁸⁴ One example would be that people are more likely to insure against a 1% chance of losing \$1000 than they are to purchase a 1% chance to gain \$1000. Under expected utility, the person would only be concerned about absolute wealth and would not be more averse to losing \$1000 than to gaining \$1000.⁴⁸⁵

⁴⁸¹ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979).

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ Robert H. Frank, *The Frame of Reference as a Public Good*, 107 *Econ. J.* 1832-1847 (1997).

This idea of framing would become a key concept in the growing field of behavioral economics. It mirrors in many respects research about framing effects from communications and media research. Research has identified both media and individual frames. The media actively set the frames of reference that readers or viewers use to interpret and discuss public events,⁴⁸⁶ and the audience employs cognitive devices that operate as categories into which any future news content can be filed.⁴⁸⁷ The communications research does not describe the behavior of the media as intentionally manipulative or the behavior of the audience as irrational. However, many of the concepts that Kahneman and others found in human decision making are reflected in literature on the choices of media consumers, and the concerns expressed later about corporate political speech reflect the ability, if not the intention, of speakers to manipulate messages to impact behavior.⁴⁸⁸

Kahneman in particular would continue his research into the psychology of choice and apply it to behavioral economics in his work with Richard Thaler.⁴⁸⁹ In addition to

⁴⁸⁶ Gaye Tuchman, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* ix (1978).

⁴⁸⁷ Robert E. Entman, Framing: Towards Clarification of a Fractured Paradigm, 43 *J. Commun.* 51, 54 (1993).

⁴⁸⁸ For more on media framing theory see Entman, *supra* n.487; William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinions on Nuclear Power: A Constructionist Approach*, 95 *Am. J. Soc.* 1 (1989); Erving Goffman, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (Ne. Univ. Press 1986) (1974);

⁴⁸⁹ See for example Daniel Kahneman, Jack Knetsch & Richard Thaler, *Fairness and the Assumptions of Economics*, 59 *J. Bus.* S285, S290 (1986); Daniel Kahneman, Jack Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 *Am. Econ. Rev.* 728 (1986); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. Pol. Econ.* 1325 (1990); Daniel Kahneman & Richard H. Thaler, *Economic Analysis and the Psychology of Utility: Applications to Compensation Policy*, 81 *Am. Econ. Rev.* 341-46 (1991); Richard H. Thaler, Amos Tversky, Daniel Kahneman & Alan Schwartz,

his work with Kahneman, Thaler made several other contributions to the field of behavioral economics, including two books that outlined further problems with the rational actor assumption.⁴⁹⁰ These books pointed out issues like herd behavior, where people imitate the actions of others rather than trusting their own information and status quo bias, that people prefer to maintain the status quo rather than choosing another path which would bring about change, even if that change has a high likelihood of being positive.⁴⁹¹

Legal scholars began to take these insights and apply behavioral economics to the construction of law.⁴⁹² In a relationship that recalls the work of Posner and Becker, Thaler then worked with a lawyer, Cass Sunstein, on a book that focused on how law can account for the way that human decision-making consistently deviates from the rational choice model.⁴⁹³ Their work, and the work of others incorporating the ideas of behavioral economics have become known as Behavioral Law and Economics.⁴⁹⁴

The Effect of Myopia and Loss Aversion on Risk Taking: An Experimental Test, 112 Q. J. Econ. 647, 647-48 (1997).

⁴⁹⁰ RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

⁴⁹¹ THALER, *THE WINNERS CURSE*, SUPRA.

⁴⁹² SEE, E.G., *BEHAVIORAL LAW AND ECONOMICS* (CASS SUNSTEIN ED., 2001).

⁴⁹³ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Sunstein was appointed to Obama's staff similar to the time of the release of the book, See Jonathan Weisman & Jess Bravin, *Obama's Regulatory Czar Likely to Set a New Tone*, Wall St. J., Jan. 8, 2009, at A4, available at <http://online.wsj.com/article/SB123138051682263203.html>

⁴⁹⁴ Much as economics has enjoyed a renaissance in the popular media, so has behavioral economics and behavioral law and economics, see THALER AND SUNSTEIN, supra n.493; See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 239 (Rev. ed. 2009); CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* (2010); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

Behavioral law and economics attempted to add to the basic assumptions of law and economics several other key understandings of human behavior.⁴⁹⁵ One of these is bounded rationality.⁴⁹⁶ Simply put, bounded rationality describes the fact that human beings do not have infinite cognitive ability and therefore their choices will be made with limited understanding of costs and benefits.⁴⁹⁷ This means that any model that assumes choices made with perfect information will fail to predict human behavior.⁴⁹⁸ A similar concept is the concept of bounded willpower.⁴⁹⁹ People may at times act in a manner that is not utility maximizing, because of a disconnect between their intellectual desires and their physical desires.⁵⁰⁰ This helps to explain why a person would pay money to join a gym, yet never attend and exercise, or why a person who has paid to undertake a program to quit smoking would continue to smoke in defiance of the program they voluntarily paid for.⁵⁰¹ A final limitation is bounded self-interest.⁵⁰² While rational actor theory may suppose that people will act in their own best interest, often people do act contrary to their own best interest in order to benefit others.⁵⁰³

Behavioral law and economics took a normative approach similar to that of traditional law and economics, and Thaler and Sunstein coined the phrase “libertarian

⁴⁹⁵ *SEE SUNSTEIN.*

⁴⁹⁶ CHRISTINE JOLLS, CASS R. SUNSTEIN, & RICHARD H. THALER, A BEHAVIORAL APPROACH TO LAW AND ECONOMICS, 13, IN BEHAVIORAL LAW AND ECONOMICS (CASS SUNSTEIN ED., 2001)

⁴⁹⁷ See Herbert A. Simon, A Behavioral Model of Rational Choice, 69 Q.J. Econ. 99, 99 (1955).

⁴⁹⁸ JOLLS, SUNSTEIN & THALER, *supra n.496.*

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

paternalism”.⁵⁰⁴ This seemingly oxymoronic idea represented the role of the government in accounting for bounded rationality and other cognitive biases.⁵⁰⁵ In their view, legal interventions should both (1) increase the individual's economic welfare by accounting for the limitations of his cognitive biases and (2) change the individual's behavior without limiting his choices. Regulation should improve economic welfare by more closely aligning each individual's actual choices with his unbiased preferences without reducing the choices available to him.⁵⁰⁶

Although some traditional law and economics scholars have debated the true value of the behavioral law and economics insights to regulation,⁵⁰⁷ several have acknowledged that these insights do not render the study of law and economics obsolete,⁵⁰⁸ nor do the two concepts need to be contradictory.⁵⁰⁹ All of them can be accounted for with a proper understanding of the legitimate role law and economics has to play. The initial criticisms simply warn against believing that law and economics is somehow objective and therefore superior to other legal theories. As discussed above, when law and economics is properly seen as a philosophy, the concerns about cloaking

⁵⁰⁴ Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 Am. Econ. Rev. 175, 179 (2003); THALER AND SUNSTEIN, *supra* n.493.

⁵⁰⁵ THALER AND SUNSTEIN, *supra* n.493

⁵⁰⁶ THALER AND SUNSTEIN, *supra* n.493

⁵⁰⁷ Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033 (2012).

⁵⁰⁸ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1551-75 (1998) (“I don't doubt that there is something to behavioral economics, and that law can benefit from its insights. The phenomena [discussed] under the rubric of behavioral economics are real, and some of them challenge at least the simplest rational-choice models.”).

⁵⁰⁹ Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. Rev. 43, 62-65 (2011) (“Over the last twenty years, law and economics has largely internalized behavioral critiques of the rationality assumption.”)

law and economics scholarship in a false cover of objectivity or science should be accounted for.

The later observations of prospect theory and behavioral economics can be seen as simply adding to the nature of our understanding of what a rational actor is.⁵¹⁰ As mentioned above, rational need not mean perfect or omniscient, and law and economics need not fail as a philosophy because it cannot accurately predict all behavior.⁵¹¹ To the extent that traditional law and economics analysis ignored concepts like risk aversion, herd behavior or bounded rationality, future models should be constructed to account for these aspects of human behavior.⁵¹² But as concepts they do not contradict the idea of a rational actor as much as they highlight certain ways in which psychology can affect our understanding of what is rational. In our next section, we will incorporate the lessons of behavioral law and economics into the traditional law and economics assessment of Free Speech developed by Posner, and apply the adjusted model to the corporate political speech at issue in cases like *Citizens United*.

⁵¹⁰ Russell B. Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1051-1143 (2000)

⁵¹¹ Wright and Ginsburg, *surpa* n.507. (“the model of perfect competition was not designed for the purpose of describing the competitive activities of economic agents.”)

⁵¹² See *THE LAW & ECONOMICS OF IRRATIONAL BEHAVIOR*, F. PARISI & V. SMITH (eds.) (2005).

Chapter 4: The Law and Economics of Corporate Political Speech

This chapter builds on research applying economic principles to speech generally and then uses these principles to identify and define the variables courts and commentators have considered in debating the application of the First Amendment protection to corporate political speech. First, the marketplace of ideas concept is revisited and then the significance of this concept to the application of economic principles to free speech analysis is examined. Next, the marketplace concept is employed to isolate the various aspects of corporate political speech that courts and commentators have used to justify their position on regulation of such speech. This analysis is specifically focused on three key variables that are consistently mentioned in decisions and commentary and that fit within the market of ideas framework: the speech itself, the speaker, and the audience. This chapter concludes with the plugging of these variables into Posner's free speech formula in an attempt to create a complete and simplified understanding of the issues at hand in cases involving corporate political speech.

The Marketplace of Ideas

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the 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. That at any rate is the theory of our Constitution.⁵¹³

The “marketplace of ideas” as a model for First Amendment analysis was first suggested by Oliver Wendell Holmes, Jr. in the above quotation, with his language about a “free trade in ideas.”⁵¹⁴ Holmes’ basic concept is that the best available method for determining truth is to allow individuals freely to evaluate ideas and see which ideas carry the day.⁵¹⁵

Although specific individuals may disagree, the stronger ideas will endure over time and the wisdom of the crowd will correct for individual mistakes.⁵¹⁶ Free from government regulation, ideas, even ideas that people find abhorrent, evil and offensive, can compete and be evaluated on their merits and the truth embodied within them.⁵¹⁷

Discussion and debate will expose the weaknesses of bad ideas and allow the better more truthful ideas to win out.⁵¹⁸

⁵¹³ Abrams, 250 U.S. at 630 (Holmes, J. dissenting).

⁵¹⁴ A similar sentiment can be found much earlier in the first inaugural address of Thomas Jefferson. “If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in Writings 492, 493 (Merrill D. Peterson ed. 1984).

⁵¹⁵ Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. Cal. Interdisc. L.J. 1 (2011)

⁵¹⁶ See Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 Comm. L. & Pol’y 21, 24-29 (2012) (arguing that in order “[t]o properly function, public discussion must exist in an open, self-regulating marketplace”).

⁵¹⁷ W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 40 (1996).

⁵¹⁸ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Calif. L. Rev. 2353, 2363 (2000) (“The theory of the marketplace of ideas focuses on ‘the truthseeking function’ of the First Amendment.”).

The Supreme Court has often embraced the marketplace of ideas concept,⁵¹⁹ including in many cases dealing with corporate political speech.⁵²⁰ Although the justices have rarely applied it with specific reference to economic reasoning, the concept has naturally proven attractive to many legal scholars, particularly those in the law and economics tradition.⁵²¹ It is an explicit example of the possibility of applying market concepts to activities that take place outside a recognized commercial market.⁵²²

As critics have pointed out, the validity of the concept of a marketplace of ideas requires several assumptions. First and foremost is the idea that “truth” as a concept,

⁵¹⁹ See, e.g., *Smith v. United States*, 431 U.S. 291, 320-21 (1977) (Stevens, J., dissenting) (“we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from what which is ugly or worthless”); *Whitney v. California* 274 U.S. 357, 375 (1927) (Brandies, J., concurring) (praising the “power of reason as applied through public discussion”); *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) (“The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.”); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011). (Breyer, J. dissenting)(“These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail....”).

⁵²⁰ See e.g. *Citizens United v. FEC*, 130 S.Ct. 876, 908 (“*Austin* interferes with the “open marketplace” of ideas protected by the First Amendment.”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 494 (2007)(“Under these circumstances, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”(Scalia, J. concurring)(quoting *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)(“Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.” (White, J. dissenting).

⁵²¹ See Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & Econ. 1 (1964); R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1974); Posner, *supra* n.423; See Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMPLE L. REV. 1, 11 (2003).

⁵²² Coase, *supra* n.521.

exists and can be discovered in some objective way.⁵²³ This aligns with the general negative critique of law and economics that it asserts a false sense of objectivity.⁵²⁴ Some have argued that information is not inherently true, and that this type of reasoning can result in post-hoc rationalization that if an idea wins the day than it must have been the best and most true idea.⁵²⁵

Another criticism is that the marketplace, like economic theory in general, relies to some degree, like economic theory in general, on the ability of individuals to make rational decisions when faced with multiple choices.⁵²⁶ If people are not capable of choosing the “best” idea, than a marketplace of choices fails to produce the desired result.⁵²⁷ Some of the specific theories for the failure of individuals to make these choices are discussed above in the discussion of behavioral law and economics, and will be revisited in the section on the audience for corporate political speech below.

Even if it is assumed that truth is attainable, and, more importantly, attainable by the rational choices of individuals, there is still an objection to the idea that “maximizing true ideas” is the only possible justifications for allowing freedom of speech in a

⁵²³ See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J., 1, 31 (‘Truth and understanding are actually nothing more than preconditioned choice.’)

⁵²⁴ See Hackney, *supra* n.479.

⁵²⁵ Benjamin S. Duval, *Free Communication of Ideas and the Quest for Truth*, 41 GEO. WASH. L. REV. 161, 191 (1972)(‘The difficulty is that any proof that existing beliefs are more accurate than past beliefs is inherently circular.’).

⁵²⁶ See Ingber, *supra* n.523 (“citizens must be capable of making determinations that are both sophisticated and intricately rational if they are to separate truth from falsehood. On the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind. . . .”)

⁵²⁷ Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649 (2006).

society.⁵²⁸ For example, this conception pays little heed to the value of self-expression in allowing individuals to understand themselves.⁵²⁹ Expressed as either self-realization or self-actualization, this theory would place the value of the expression as benefitting the speaker, not the audience.⁵³⁰ Any value to society would be secondary.⁵³¹

One strong advocate of the value of speech for the sake of self-realization and individual liberty was John Stuart Mill. According to Mill, the domain of human liberty

comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.⁵³²

Mill therefore gave great deference to the right of an individual to express ideas, even ideas rejected by the rest of society. “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”⁵³³ This did not mean that the government could never suppress speech. Mill allowed that suppression could be necessary to avoid harm. “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community,

⁵²⁸ Cf. Frederick Schauer, *Free Speech: A Philosophical Enquiry* 15-16 (1982)(questioning the value of truth seeking as a First Amendment rationale).

⁵²⁹ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

⁵³⁰ *Id.*

⁵³¹ C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976-77).

⁵³² John Stuart Mill, *On Liberty*, reprinted in *On Liberty and Other Essays* 5 (John Gray ed., 1998) (1859).

⁵³³ *Id.* at 16.

against his will, is to prevent harm to others.”⁵³⁴ Mill, therefore, approaches the value of freedom of speech from an individual liberty perspective and still determines that the value must be balanced against potential harm to others, with great deference to the importance of freedom of speech.

A final question from critics of the marketplace model is the asks, if the marketplace is in ideas, should protection apply to only political ideas or should creative, scientific and other ideas should be included?⁵³⁵ If creative ideas need to be allowed to compete, how would that align with the court’s treatment of obscenity, for example?⁵³⁶

With all of these concerns about the appropriateness and feasibility of a marketplace model, why has it endured? It has been invoked many times in Supreme Court decisions, most recently in 2012.⁵³⁷ Perhaps the “marketplace of ideas” is an imperfect model for the value of the First Amendment, but perhaps it is less imperfect than the alternatives. One commentator analogized to Winston Churchill’s famous remark about democracy, “[I]t has been said that democracy is the worst form of Government—except all those others that have been tried from time to time.”⁵³⁸

The Marketplace Variables of Corporate Political Speech

1. Speech

The particular product involved in a market transaction can have a significant influence on the view the law takes of the value of the transaction. The sale of bread is

⁵³⁴ *Id.* at 9.

⁵³⁵ Baker, *supra* n.531 at 25.

⁵³⁶ Ingber, *supra* n.523 at 22-25.

⁵³⁷ U.S. v. Alvarez, 132 S.Ct. 2537 (2012)(plurality opinion)

⁵³⁸ Brazeal, *supra* n.515, quoting from Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 Winston S. Churchill: His Complete Speeches, 1897-1963, at 7566 (Robert Rhodes ed., 1974).

treated differently from the sale of firearms, which are treated differently from the sale of marijuana. Not all products are seen as socially useful, and the law has stepped in to regulate the market more directly when the item involved has potential social harm.

The marketplace of ideas is no different. While the products in the marketplace can all broadly be labeled speech, certain types of speech are seen as less socially useful, and as a result, have been more heavily regulated.⁵³⁹ The courts have generally allowed more leeway in regulating speech of “low value”, despite the broad and generic protection provided by the language of the First Amendment.⁵⁴⁰ Pornography has been determined to have no protection under the first amendment.⁵⁴¹ Commercial speech, (speech “doing no more than proposing a commercial transaction”), has been granted limited protection, and although the standard has shifted, has consistently been afforded less protection than more valuable forms of speech of more societal value.⁵⁴²

The most valuable form of speech, according to consistent reasoning used by the Supreme Court in a variety of contexts, is political speech. It is for this very reason that the subject of this dissertation is the rather inelegantly phrased as “corporate political speech”, because it relates to the attempts by legislators and members of the executive branch to limit speech of a political nature, when spoken by certain speakers.

⁵³⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 432 (1992), citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). (“[S]uch expression constitutes ‘no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.’”)

⁵⁴⁰ *Id.* (“...the ordinance bars only low-value speech, namely, fighting words.”)

⁵⁴¹ *U.S. v. Williams*, 553 U.S. 285, 288 (2008). (“We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.”)

⁵⁴² See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

In *Buckley*, the only one of our cases above that affected individuals as well as corporations, the political nature of the speech is the most significant and controlling aspect of the case.

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ... Although First Amendment protections are not confined to "the exposition of ideas," ... "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates" ⁵⁴³

This language not only gives strong preference to political speech, it implies that political speech may be considered the only type of speech that qualifies as "the exposition of ideas". ⁵⁴⁴ Therefore, the concept of the marketplace of ideas would be designed to allow people to engage in free trade of political speech.

As discussed above, the justices in *Bellotti* believed the nature of the speech was controlling as well, and highlighted that the speech in question was of the most important category, although the term used was "governmental affairs" rather than "political speech". As the Court noted:

"there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the

⁵⁴³ *Buckley*, 424 U.S. at 14 (internal citations omitted)

⁵⁴⁴ *Id.*

public does not depend upon the identity of its source, whether corporation, association, union, or individual.⁵⁴⁵

In *Austin*, in which limitations on corporate political speech were upheld, the Court began by stating that the threshold question was whether the legislation burdened political speech. “Certainly, the use of funds to support a political candidate is “speech””; said the Court and indicated that independent campaign expenditures were “political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”⁵⁴⁶ Because the speech was political in nature, the Court subjected the legislation to strict scrutiny, and only upheld the legislation because of concerns about special characteristics of the corporate speakers.⁵⁴⁷

In *Citizens United*, the Court again highlighted the idea that political speech is the most significant form of speech under the First Amendment. “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus” said the Court, “is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’”⁵⁴⁸ In fact, the Court raised the suggestion that “it might be maintained that political speech simply cannot be banned or restricted as a categorical matter”,⁵⁴⁹ but decided instead to apply the framework from previous cases applying strict scrutiny to laws infringing on political speech.⁵⁵⁰

⁵⁴⁵ Bellotti, 435 U.S., at 776-777 (internal citations omitted).

⁵⁴⁶ Austin, 494 U.S. at 657 (internal citations omitted).

⁵⁴⁷ See supra n.161-204 and accompanying discussion.

⁵⁴⁸ Citizens United, 558 U.S. at 339 (internal citations omitted).

⁵⁴⁹ Id. at 340.

⁵⁵⁰ Id. (“the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.”)

Commentators have generally agreed that political speech is of the highest value. In fact, several commentators have argued that political speech may be the only type of speech that deserves protection, and that once speech is no longer contributing to the goal of using the “marketplace of ideas” to improve democracy, the question of whether the First Amendment applies at all is much closer.⁵⁵¹

Because of the normative aspect of law and economics, it is not enough to ask if the Court has protected political speech. The proper question is whether protecting political speech actually assists the stated goal, which, under the “marketplace of ideas” framework, is the discovery of truth. With this goal in mind, the next question is how the courts should treat false political speech. Does political speech only have value in the market if it is true? Can the market be expected to account for the truth or falsity of speech?

Truth was at the center of much of the discussion during the 2012 Presidential election.⁵⁵² It was also at the center of recent Supreme Court case that did not deal directly with political speech.⁵⁵³ However, the Supreme Court has never directly ruled on a case involving false political speech in the context of an election or other overtly

⁵⁵¹ See e.g. Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491 (2011); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1948); C. Edwin Baker, *Is Democracy a Sound Basis?*, 97 Va. L. Rev. 515 (2011); C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. 251 (2011); James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 Const. Comment. 361, 366 (2011).

⁵⁵² See Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53 (2013) (“It is perhaps no coincidence that the recent election season saw both a rise in the amount of arguably false campaign speech and the proliferation of journalistic “fact checkers” who regularly rate statements made by candidates and campaigns.”)

⁵⁵³ U.S. v. Alvarez, 132 S.Ct. 2537 (2012)

political activity.⁵⁵⁴ In dicta from one case, the Supreme Court does state that “demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.”⁵⁵⁵ To defend this proposition, the Court cited *Gertz v. Robert Welch, Inc.*,⁵⁵⁶ a case involving defamation. However, the Court also cited favorably to *New York Times Co. v. Sullivan*,⁵⁵⁷ another defamation case in which the court ruled that defamatory statements, which are by definition false, need to be given “breathing space” when offered in “free debate” about political ideas.⁵⁵⁸

State courts and appellate courts have split on whether First Amendment protection applies to false political speech. In 2011, the Eighth Circuit considered a Minnesota law that made it a crime to engage in false campaign speech.⁵⁵⁹ The court rejected the idea that false speech received less protection and remanded the proceedings to see if the Minnesota law could meet the strict scrutiny test reserved for fully protected speech.⁵⁶⁰ The court said:

We do not, of course, hold today that a state may never regulate false speech in this context. Rather, we hold that it may only do so when it satisfies the First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.⁵⁶¹

⁵⁵⁴ The legislation in Alvarez could have applied in political contexts, and the Court’s discussion of this will be part of the discussion of Alvarez.

⁵⁵⁵ *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

⁵⁵⁶ 418 U.S. 323 (1974).

⁵⁵⁷ 376 U.S. 254 (1964).

⁵⁵⁸ *Id.* at 271-272.

⁵⁵⁹ *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), cert. denied, 133 S. Ct. 61 (2012).

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 636.

Twenty years prior to the Eighth Circuit's opinion, the Sixth Circuit upheld provisions of an Ohio statute that allowed for the reprimand of candidates who made false statements with actual malice.⁵⁶² “[Supreme Court] cases indicate that false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth,”⁵⁶³ said the court. However, the Supreme Court of Washington twice struck down similar laws, although the court divided bitterly.⁵⁶⁴ Among the rationales on both sides, was language similar to the discussion of the marketplace of ideas found elsewhere. Two different opinions questioned the value of “calculated lies,” and determined that such statements were not entitled to protection of the First Amendment.⁵⁶⁵ However, Justice Sanders was more concerned with the role the state intended to play in determining what constituted a lie, and preferred to trust the “marketplace”. He said:

Ultimately, the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic It assumes the people of the state are too ignorant or disinterested to investigate, learn and determine for themselves the truth or falsity in political debate, and it is the proper role of the government itself to fill this void.⁵⁶⁶

⁵⁶² *Pestak v. Ohio Elections Commn.*, 926 F.2d 573 (6th Cir. 1991).

⁵⁶³ *Id.* at 577. (citing Sullivan).

⁵⁶⁴ *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998); *Rickert v. Wash. Pub. Disclosure Commn.*, 168 P.3d 826 (Wash. 2007) (For a full discussion of the cases and the opinions see Hasen, *supra* n.552, William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. Pa. L. Rev. 285 (2004).

⁵⁶⁵ *119 Vote No! Comm.*, 957 P.2d at 699 (Guy, J. concurring)(“Calculated lies are not protected political speech. The elected representatives of the people have the right to pass laws which make malicious lying illegal in political campaigns; we have no constitutional duty to strike down such laws.”); at 701 (Talmadge, J. concurring)(“[We are] the first Court in the history of the Republic to declare First Amendment protection for calculated lies.”).

⁵⁶⁶ *Id.* at 698-699.

All of these decisions are in question following the Supreme Court’s decision in *U.S. v. Alvarez*.⁵⁶⁷ Although that case did not involve political speech, the language of the Court’s plurality opinions have much to say on the general standing of false statements under the First Amendment. Alvarez had publicly stated that he had been awarded the Congressional Medal of Honor, which was false.⁵⁶⁸ This statement violated the Stolen Valor Act.⁵⁶⁹ The Ninth Circuit held that the Stolen Valor Act violated the First Amendment.⁵⁷⁰ The Tenth Circuit had upheld the Act in a separate case,⁵⁷¹ and the Supreme Court granted certiorari to resolve the split.

Justice Kennedy, in an opinion joined by three other justices, began by listing the categories of speech that can be restricted based on their content.⁵⁷² Content-based restrictions on speech have been permitted only for a few historic categories of speech, said Kennedy, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.⁵⁷³ According to Kennedy, false speech, as a category, has never been accepted by the Court.⁵⁷⁴ “This comports with the common understanding that some false statements are inevitable if there is to be

⁵⁶⁷ *U.S. v. Alvarez*, 132 S.Ct. 2537 (2012).

⁵⁶⁸ *Id.* at 2543.

⁵⁶⁹ 18 U.S.C. § 704.

⁵⁷⁰ *U.S. v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) , 638 F.3d 666 (9th Cir. 2011)

⁵⁷¹ *U.S. v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012)

⁵⁷² *Alvarez*, 132 S.Ct. at 2544.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”⁵⁷⁵

Kennedy stressed that existing regulations of false speech focused on the specific harm caused by the false speech.⁵⁷⁶ Many, like defamation and fraud, focus on financial loss or other harms.⁵⁷⁷ The laws prohibiting false testimony, giving false statements to the government and falsely claiming to be a government officer, all protect the integrity of the government.⁵⁷⁸ But the Stolen Valor Act, according to Kennedy, “targets falsity and nothing more.”⁵⁷⁹

The analysis may be different if the speech was aimed at financial or other gain. “Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment,” said Kennedy, “it is well established that the Government may restrict speech without affronting the First Amendment.”⁵⁸⁰ But in *Alvarez*, the harm was more in the way of general perception. Apparently Kennedy believes that the market can correct for the false statement. “The Government has not shown, and cannot show, why counter-speech would not suffice to achieve its interest.”⁵⁸¹

Justice Breyer, writing for himself and Justice Kagan, provided the other votes to hold that the act violated the Constitution.⁵⁸² However, Breyer indicated that the plurality’s approach of “strict categorical analysis” was problematic and

⁵⁷⁵ Id.

⁵⁷⁶ Id. at 2545.

⁵⁷⁷ Id.

⁵⁷⁸ Id.

⁵⁷⁹ Id.

⁵⁸⁰ Id. at 2547.

⁵⁸¹ Id. at 2549.

⁵⁸² Id. at 2551 (Breyer, J., concurring in judgment).

proposed a balancing approach to regulations of false speech, which he likened to “intermediate scrutiny”.⁵⁸³ This test would consider “the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so.”⁵⁸⁴

Breyer agreed with the plurality that certain limitations on false speech are justified because of the specific harm they seek to prevent, like fraud and defamation.⁵⁸⁵ He also agreed with the dissent that, in many contexts, any regulation aimed at prohibiting false speech would be particularly problematic, specifically “restricting false statements about philosophy, religion, history, the social sciences, [and] the arts.”⁵⁸⁶ After engaging in his balancing test, he found the Stolen Valor Act to be far too broad, because it would apply to statements made even in private settings and personal conversation.⁵⁸⁷

Significantly, for our purposes, Breyer included a paragraph about the possibility of such a law being constructed that would attempt to limit false political speech.

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, e.g., *United We Stand America, Inc. v. United*

⁵⁸³ Id.

⁵⁸⁴ Id.

⁵⁸⁵ Id. at 2554

⁵⁸⁶ Id. at 2552

⁵⁸⁷ Id. at 2555.

We Stand, America New York, Inc., 128 F.3d 86, 93 (C.A.2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 150 Mich.App. 617, 389 N.W.2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie.⁵⁸⁸

Justice Alito, joined by Justice Scalia and Justice Thomas, voted to uphold the Stolen Valor Act.⁵⁸⁹ Alito argued that laws prohibiting false speech generally have “no intrinsic First Amendment value”.⁵⁹⁰ He argued that laws restricting false speech are only problematic when they “present a grave and unacceptable danger of suppressing truthful speech.”⁵⁹¹ He believed that the Stolen Valor Act did not present such a threat.⁵⁹²

Alito acknowledged that the at times subjective nature of truth can make such laws particularly dangerous.

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree ... the potential for abuse of power in these areas is simply too great.⁵⁹³

⁵⁸⁸ Id. at 2556.

⁵⁸⁹ Id. at 2556 (Alito, J. dissenting).

⁵⁹⁰ Id. at 2560.

⁵⁹¹ Id. at 2564.

⁵⁹² Id.

⁵⁹³ Id. at 2565 (internal citations omitted).

After *Alvarez*, doubts remain as to whether the Supreme Court believes false statements can be regulated in the “marketplace of ideas”.⁵⁹⁴ Clearly any legislation would have to be written narrowly and deal with statements that can be objectively measured as true or false. Even in this circumstance, there may be members of the Court who feel that the risk of a chilling effect is greater than the risk that the false speech will distort the market, particularly given the faith of some of the Court that the market can correct for false statements. When considering speech as its own variable, it is clear that political speech is considered extremely valuable to the marketplace of ideas, even if it is false.

2. Speaker

After establishing the extremely high value placed on political speech, it may be surprising that there has been such a divide amongst both judges and scholars on the issue of corporate political speech. The divide is rarely, if ever, about the value of the speech itself, rather the divide is over the specific producer of the speech and how the First Amendment should apply when the producer is a corporation.

The chapter on the history of corporate political speech cases discussed at length the varied opinions offered by the Court as to the proper treatment of corporations engaged in corporate political speech.⁵⁹⁵ Other than the dissenting opinion of Justice Rehnquist in *Bellotti*, none of the opinions are based on a legal theory of the corporation

⁵⁹⁴ See Hasen, *supra* n.552; Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 Minn. L. Rev. 1047 (2013).

⁵⁹⁵ *Bellotti*, 435 U.S. at 824 (Rehnquist, J. dissenting).

that would limit corporations to only those rights granted to them by an individual state incorporation statute.⁵⁹⁶

Instead, most of the discussion focuses on how the “special advantages” of corporations allow for the accumulation of financial “war chests” which can have “corrosive effects” on the marketplace of ideas.⁵⁹⁷ This language first appears in Justice White’s dissent in *Bellotti*, and eventually carried the day in *Austin*, before being struck down in *Citizens United*.⁵⁹⁸

In *Citizens United*, Justice Stevens, in an opinion joined by Justices Breyer, Ginsburg, and Sotomayor, dissented, raising several of the arguments for regulation from *Austin*, but additionally discussing the Court’s history of determining the extent of First Amendment protection based on the speaker’s identity.⁵⁹⁹ He points to cases where the speech rights of students,⁶⁰⁰ prisoners,⁶⁰¹ members of the armed forces,⁶⁰² foreigners,⁶⁰³

⁵⁹⁶ (“Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, . . . our inquiry must seek to determine which constitutional protections are “incidental to its very existence.”) (internal citations omitted).

⁵⁹⁷ See supra n.71-234 and accompanying text.

⁵⁹⁸ See supra n.71-234 and accompanying text.

⁵⁹⁹ *Citizens United*, 558 U.S. at 420 (Stevens, J. dissenting).

⁶⁰⁰ See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”).

⁶⁰¹ See, e.g., *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (“In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system” (internal quotation marks omitted)).

⁶⁰² See, e.g., *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (“While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections”).

⁶⁰³ See, e.g., 2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).

and government employees⁶⁰⁴ have been limited and had the limits upheld by the Court. Stevens bases at least part of his argument on “corporate personhood” grounds.

“Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the ‘speakers’ are not natural persons, much less members of our political community, and the governmental interests are of the highest order.”⁶⁰⁵ He continued:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.⁶⁰⁶

The majority responded that the examples proffered by Stevens of restrictions based on the speaker’s identity are united by the idea that “there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech.”⁶⁰⁷ The political process, the government function affected by corporate political speech, said the majority, is not such a government function and, in fact, “it is inherent in the

⁶⁰⁴ See, e.g., *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding statute prohibiting Executive Branch employees from taking “any active part in political management or in political campaigns” (internal quotation marks omitted)).

⁶⁰⁵ *Citizens United*, 558 U.S. at 424 (Stevens J., dissenting).

⁶⁰⁶ *Id.* at 394.

⁶⁰⁷ *Id.* at 341.

nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”⁶⁰⁸

Unlike the discussion about the value of political speech, which finds support in both the relevant case law and scholarly discussion, the legal academy has been much more divided about whether the *Citizens United* stance of equivocation with regard to corporations and individuals is prudent.⁶⁰⁹ Objections are many, and range from corporate theory,⁶¹⁰ to the possibility of corruption,⁶¹¹ to the danger of corporate speech distorting the “marketplace of ideas.”⁶¹²

⁶⁰⁸ Id.

⁶⁰⁹ See e.g. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 156-57 (2010) (Several articles will be cited throughout this discussion, but any discussion of scholarly treatment of *Citizens United* will be necessary selective, the case has been cited in more than 1,400 law review articles since it came down in 2010. In fact the term “*Citizens United*” has appeared in the *title* of almost 200.

⁶¹⁰ See David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. Rev. 1197, 1219 (2011); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 584 (2012); Wayne Batchis, *Citizens United and the Paradox of “Corporate Speech”*: *From Freedom of Association to Freedom of The Association*, 36 N.Y.U. Rev. L. & Soc. Change 5, 39 (2012); Jessica A. Levinson, *We the Corporations? The Constitutionality of Limitations on Corporate Elections Speech after Citizens United*, 46 U.S.F. L. Rev. 307, 323-24, 329-30 (2011); Jarrod L. Schaeffer, Note, *The Incorporation of Democracy: Justice Kennedy's Philosophy of Political Participation in Citizens United*, 91 B.U. L. REV. 1783; But see e.g. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701 (2011)

⁶¹¹ See Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118 (2010) (arguing for a reorientation of concept of corruption to focus on avoidance of “clientelist” relation between elected officials and interested parties); Ofer Raban, *Constitutionalizing Corruption: Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns*, 46 U.S.F. L. Rev. 359, 382 (2011) (interpreting the Court's decision as the “constitutionalization of political corruption”); but see Stephen E. Sachs, *Corruption, Clients, and Political Machines: A Response to Professor Issacharoff*, 124 Harv. L. Rev. F. 62, 63 (Nov. 2010)

⁶¹² Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 Ga. St. U. L. Rev. 989, 992 (2011); Sullivan, *supra* n.609; but see Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 Mo. L. Rev. 143, 160-63 (2010).

This is not an exhaustive list of the criticisms, but does reflect the most prominent arguments raised by critics and highlighted in case law. These three arguments vary in their application to corporations and, therefore, play different roles when considering the role of the speaker in the marketplace.

The most frequent objection relates to corporate theory and the concept of extending First Amendment rights to corporations.⁶¹³ This, more than any other aspect of *Citizens United* and the debate over corporate political speech, has captured the popular imagination, resulting in attempts to pass legislation or even a Constitutional amendment that would explicitly state that Constitutional guarantees are intended for natural persons.⁶¹⁴

Although this is an important debate, it is less clear how it applies to the marketplace of ideas. Without compelling evidence that the identity of the speaker leads to specific harm, the marketplace goal of truth assertion should be independent of the source of the ideas being considered. Stevens' assertion that corporations are not "part of the political community"⁶¹⁵ is rarely echoed in other decisions and seems inconsistent with the marketplace of ideas concept that seeks to allow speech to be evaluated on its own merits.

At the same time, if the Court or a legislature succeeded in establishing that corporations are not protected by the First Amendment, then Posner's economic calculus,

⁶¹³ Reza Dibadj, *Citizens United as Corporate Law Narrative*, 16 *Nexus: Chap. J.L. & Pol'y* 39, 39 (2010-2011); Ripken, *supra* n.17; Marcantel, *supra* n.19.

⁶¹⁴ See Caitlin McNeal, *Citizens United Constitutional Amendments Introduced In The Senate*, *Huffington Post*, June 19, 2013, http://www.huffingtonpost.com/2013/06/19/citizens-united-constitutional-amendment_n_3465636.html,

⁶¹⁵ *Citizens United*, 558 U.S. at 424 (Stevens J., dissenting).

which determines the balance of when to suppress otherwise protected speech, would be irrelevant. For this reason, more attention is given to other arguments that recognize the First Amendment protection of corporations but maintain that suppression is appropriate in the context of corporate political speech.

There are two remaining objections to unregulated corporate political speech that relate to the speaker's identity. One is the risk of corruption, and the other is the risk of distortion. At the outset, it is necessary to explain that these are two distinct harms. Justice Marshall, writing in *Austin*, combined the two, when he stated that "Michigan's regulation aims at a different type of corruption in the political arena: 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."⁶¹⁶

It is possible to respect the harm caused by distortion without equating it to corruption, a term that has traditionally been defined by the court quite differently.⁶¹⁷ As commentators have pointed out, Marshall's definition of corruption is problematic.

This view defines corruption poorly, and makes corruption appear as a "derivative" problem from broader societal inequalities. As formulated in *Austin v. Michigan State Chamber of Commerce*, the only case to adopt squarely the distortion of electoral outcomes view of corruption, the inequities born of wealth are compounded by the unnatural ability of corporations to amass wealth more readily than can individuals. This argument logically extends to all disparities in electoral influence occasioned by differences in wealth.⁶¹⁸

⁶¹⁶ *Austin*, 494 U.S. at 659-60.

⁶¹⁷ See *Austin*, 494 U.S. at 684 (Scalia J., dissenting) ("The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political "corruption," as English speakers understand that term. Rather, it asserts that that concept (which it defines as " 'financial *quid pro quo* ' corruption," *ante*, at 1397) is really just a narrow subspecies of a hitherto unrecognized genus of political corruption.")

⁶¹⁸ See Issacharoff, *supra* n.611.

Corruption, as traditionally defined, was at the heart of the legislation being considered in *Buckley*, the forefather of most corporate political speech cases.⁶¹⁹ The legislation applied equally to individuals and corporations, so corruption was not yet a concern specifically related to the speaker’s identity,⁶²⁰ *Buckley* established two ways in which corruption could justify suppressing otherwise protected speech.⁶²¹ The first is the real danger of quid-pro-quo arrangements between politicians and those who would either contribute money directly or spend money independently to support a candidate.⁶²² “To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders,” said the majority, “the integrity of our system of representative democracy is undermined.”⁶²³ The second danger results from what would be termed the “appearance of corruption”. “Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”⁶²⁴

The majority in *Buckley* found the danger of corruption or the appearance of corruption compelling for limiting campaign contributions, but rejected it as a compelling rationale for limiting independent expenditures.⁶²⁵ “The absence of prearrangement and coordination of an expenditure with the candidate or his agent” said the Court, “not only undermines the value of the expenditure to the candidate, but also alleviates the danger

⁶¹⁹ *Buckley*, 424 U.S. at 1.

⁶²⁰ *Id.*

⁶²¹ *Id.*

⁶²² *Id.* at 26.

⁶²³ *Id.* at 26-27.

⁶²⁴ *Id.* at 27.

⁶²⁵ *Id.*

that expenditures will be given as a quid pro quo for improper commitments from the candidate.”⁶²⁶ *Buckley* stands for the proposition that independent expenditures, regardless of the speaker’s identity, do not give rise to corruption or the appearance.

The Court in *Bellotti* also refused to suppress political speech through independent expenditures based on an argument for the possibility of corruption, even when the restriction was limited to corporations.⁶²⁷ However, the legislation challenged in *Bellotti* applied only to corporate political speech about general ballot measures and not to candidate elections.⁶²⁸ As the majority noted, “The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.”⁶²⁹ The possibility of *corporate* political speech leading to corruption was mentioned in dicta in *Bellotti*, when the court noted in a footnote that “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”⁶³⁰

In *Citizens United*, the majority seemed to close the door left open by the *Bellotti* footnote.⁶³¹ Specifically mentioning the footnote, the *Citizens United* majority held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁶³² The fact “[t]hat speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this

⁶²⁶ *Id.* at 47.

⁶²⁷ *Bellotti*, 435 U.S. at 765.

⁶²⁸ *Id.*

⁶²⁹ *Bellotti*, 435 U.S. at 790.

⁶³⁰ *Bellotti*, 435 U.S. at 788, n. 26.

⁶³¹ *Citizens United*, 558 U.S. at 357.

⁶³² *Id.*

democracy.”⁶³³ Justice Kennedy, writing for the majority, specified “those made by corporations” as an aside, but spent little energy on the distinctions between corporations and individuals articulated by *Austin* and Stevens in his *Citizens United* dissent.

Those distinctions, as noted above, were based on the alleged “special characteristics” of corporations that allow them to establish political “war chests”.⁶³⁴ Stevens, in his dissent in *Citizens United*, as well as several subsequent commentators, disagree with the conclusion of the *Citizens United* majority, arguing that the speaker’s corporate identity gives special weight to the probability of corruption.⁶³⁵ Stevens asserted that corporations “are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure.”⁶³⁶ According to Stevens, corporations have several features that increase the likelihood of actual corruption. “The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.”⁶³⁷

In addition to an increased risk of actual corruption, Stevens highlights the concerns regarding the appearance of corruption brought on by corporate political speech, noting that:

A Government captured by corporate interests, [the public] may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders “call the

⁶³³ Id.

⁶³⁴ See supra n.71-234 and accompanying text.

⁶³⁵ Id. at 471 (Stevens J., dissenting).

⁶³⁶ Id. at 471 (Stevens J., dissenting).

⁶³⁷ Id. at 454.

tune” and a reduced “willingness of voters to take part in democratic governance.”⁶³⁸

The anti-distortion rationale is based on concerns by some members of the Court who fear that economic power might be transformed into political power through the political marketplace. This argument has also been called the “leveling the playing-field” rationale, although some proponents of the rationale may believe that there is a distinction between leveling the playing field and limiting distortion.

The Court has explicitly refused to recognize this rationale as a potential compelling interest. In a later case, the Court noted that “[t]his Court has repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.”⁶³⁹ The majority opinion in *Buckley* had rejected this idea from the beginning, when it said that the Court had no interest, compelling or otherwise, “in equalizing the relative ability of individuals and groups to influence the outcome of elections.”⁶⁴⁰ *Citizens United* relied explicitly on this language.⁶⁴¹

Stevens maintains that the rationale in *Austin* that considered distortion to be a form of corruption, was based on an issue that Stevens maintained can be separated from equalization or leveling.⁶⁴² That rationale was based on the “corrosive effects” of corporate wealth on the political system.⁶⁴³ According to this view, corporate wealth is

⁶³⁸ *Id.* at 472.

⁶³⁹ *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down public financing scheme providing for equalizing funds to match independent expenditures)

⁶⁴⁰ *Buckley*, 424 U.S. at 48.

⁶⁴¹ *Citizens United*, 558 U.S. at 350.

⁶⁴² *Id.* (Stevens, J. dissenting).

⁶⁴³ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).

corrosive because corporations can amass large “war chests” because of their “special characteristics.”⁶⁴⁴ In this view, “[t]he majority’s unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations’ ‘war chests’ and their special ‘advantages’ in the legal realm, ... may translate into special advantages in the market for legislation.”⁶⁴⁵

Because of their special advantages, critics suggest that corporations may drown out other voices and monopolize the market for political speech.⁶⁴⁶ “[W]hen corporations grab up the prime broadcasting slots on the eve of an election,” said Stevens, “they can flood the market with advocacy that bears ‘little or no correlation’ to the ideas of natural persons or to any broader notion of the public good, ... The opinions of real people may be marginalized,”⁶⁴⁷ which may decrease the ability of individuals to weigh all ideas and arrive at truth.⁶⁴⁸

According to Stevens, “*Austin*’s ‘concern about corporate domination of the political process,’ ... reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas ... the marketplace in which the actual people of this Nation determine how they will govern themselves.”⁶⁴⁹ Despite the language in *Citizens United* declaring that corporate expenditures on political speech do not give rise to corruption, and despite the language stating that “antidistortion” is not a compelling interest, the question remains whether

⁶⁴⁴ *Id.*

⁶⁴⁵ *Citizens United*, 558 U.S. at 471.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 470 (internal citations omitted).

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 473.

either rationale can justify the suppression of corporate political speech based on the speaker's identity using the law and economics framework below.

3. Audience

The “marketplace of ideas” analogy puts a premium on the effect that speech has on others. The underlying rationale for allowing speech is that it may be of some value for those who hear it in allowing them to arrive at truth. Therefore, the audience (i.e. the “consumers” in the marketplace) are possibly the most important players when considering the effects of speech regulation.

The Court has considered the audience an important variable in First Amendment cases in several contexts. In cases regarding incitement, for example, the Court has determined that the likelihood of the speech to bring about specific negative responses from the audience is the determining factor in whether the speech can be suppressed. In an early incitement case that used the clear and present danger standard, Justice Brandeis argued that given time, the audience could filter through harmful speech and arrive at truth.

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

In other contexts, considerations about audience impact have led to more paternalistic practices. The Commercial Speech Doctrine, has often considered the effect of speech on listeners. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld a ban on casino gambling advertising that was based on the assumption that advertising would entice residents to gamble, proving harmful to their

collective “health, safety and welfare”. This concern about audience reaction to speech was a “substantial” interest for the government, upholding the regulation to suppress speech. The Court rejected the argument that the less burdensome solution to combating the problems associated with gambling advertising would have been to rely on the marketplace of ideas. The Court left it “up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.”

Other commercial speech cases have also discussed the impact of the speech on the audience, but have followed the trust-of-audience rationality found in the traditional rationale for the “marketplace of ideas”. For example, in *44 Liquor Mart, Inc.*:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.⁶⁵⁰

The Court concluded that “[p]recisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.”⁶⁵¹

In the corporate political speech debate, both sides invoke the rights of the audience as rational for either upholding or overturning limitations on corporate political speech. Justice Stevens, in *Citizens United*, argued that there must be a balance between

⁶⁵⁰ *44 Liquormart, Inc.*, 517 U.S. 484, 503, citing *Edenfield v. Fane*, 507 U.S. 761 (1993).

⁶⁵¹ *Id.* at 503.

the right of the corporate speakers and the right of the audience to hear a variety of views.

According to Stevens:

[concern about corporate domination] reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral “marketplace” of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to “First Amendment principles” depends almost entirely on the listeners’ perspective, it becomes necessary to consider how listeners will actually be affected.⁶⁵²

On the other side of the debate, Justice Kennedy’s concern is the suppression of corporate political speech that would itself lead to the electorate being “deprived of information, knowledge and opinion vital to its function.”⁶⁵³ According to Kennedy:

When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”⁶⁵⁴

Even if both sides rely at times on the assumption of rationality from the audience, there is a distinction in how each feels about the potential of a high volume of speech to allow audiences to arrive at truth. Justice Scalia sums up the position that the marketplace is better served by more speech by noting. “[t]he premise of our system is that there is no such thing as too much speech—that the people are not foolish but

⁶⁵² Citizens United, 558 U.S. at 473.

⁶⁵³ Citizens United, 558 U.S. at 354 (internal citations omitted).

⁶⁵⁴ Id. at 335 (internal citations omitted).

intelligent, and will separate the wheat from the chaff.”⁶⁵⁵ Stevens on the other hand, is concerned about the impact of high volume of speech on the market.

If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound.⁶⁵⁶

A number of scholars have expressed reservations about the faith the Court has shown in the audience to process information and have argued that faith in the rationality of the audience is nothing but faith, often divorced from statistical evidence and psychological understanding of human behavior.⁶⁵⁷ For example, in language similar to that of Stevens above, Stanley contends that the audience is less capable of making informed decisions regarding the information in the marketplace than the model suggests.

[R]eal world conditions...interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda ... all conflict with marketplace ideals.⁶⁵⁸

⁶⁵⁵ *McConnell v. FEC*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part).

⁶⁵⁶ *Id.* at 472.

⁶⁵⁷ See e.g. Paul H. Rubin, *How Humans Make Political Decisions*, 41 *Jurimetrics J.* 337, 343 (2001); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetrical Paternalism,”* 151 *U. PA. L. REV.* 1211, 1219-23 (2003); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 *Temp. L. Rev.* 1, 6-7 (2003); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 *UCLA L. Rev.* 1141 (2003).

⁶⁵⁸ Ingber, *supra* n.523 at 5.

Specific concerns, reflected in the statements above, include the inability of individuals to avoid being manipulated by messages because of framing effects,⁶⁵⁹ the use of heuristics and cues to make decisions in the face of bounded rationality,⁶⁶⁰ and the negative impact of too much information on efficient decision-making.⁶⁶¹ Many of these concerns have their origin in the work of behavioral psychology and its impact on economics and law, as discussed in chapter three.⁶⁶²

Scholars assert that framing can be used to manipulate public opinion. According to Derek Bambauer, for example, “[t]he marketplace of ideas model holds that people arrive at truth regardless of how it is framed or presented, but the radically different success of reforms of the “estate tax” and the “death tax,” ... demonstrate[s] the falsity of this conclusion.”⁶⁶³ In the area of commercial speech, scholars have long argued that sophisticated speakers can manipulate messages to take advantage of the framing biases found in the average audience.⁶⁶⁴ With an economic motive to maximize return on investment, there are reasons to believe that political advertisements from corporations and others can have the same manipulating impact.⁶⁶⁵

The idea that voters may use heuristics and cues to vote also runs contrary to some aspects of a rational audience assumption.⁶⁶⁶ However, some have argued that

⁶⁵⁹ See supra n.481-489 and accompanying text.

⁶⁶⁰ See supra n.497-506 and accompanying text.

⁶⁶¹ See Bambauer, supra n.527 at 697; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159, 1196 (2003) ; see also GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 62, 80 (1988).

⁶⁶² See supra n.481-506 and accompanying text.

⁶⁶³ See Bambauer, supra n.527 at 699.

⁶⁶⁴ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 722-743 (1999)

⁶⁶⁵ See Rubin, supra n.657

⁶⁶⁶ Id.

economic theory actually predicts voters will act irrationally in making political choices, and that their behavior is actually rational.⁶⁶⁷ Gaining information is costly, at least in terms of the time spent and the opportunity costs associated with that time, and the likelihood of a single vote deciding an issue is low.⁶⁶⁸ This has led some to refer to voter ignorance, or acceptance of the limits of their rationality, as “rationally irrational.”⁶⁶⁹ Regardless of whether the ignorance is rational or not, it means that political decisions may be based on cues and heuristics rather than careful consideration of the merits of arguments.⁶⁷⁰ This cuts against the assumption of a “rational” audience who can efficiently process information in the marketplace of ideas to arrive at “truth.”⁶⁷¹

Behavioral economists have also challenged Scalia’s pronouncement that there is no such thing as too much speech.⁶⁷² Experiments have found that additional *irrelevant* information, can influence people to change a decision.⁶⁷³ Assuming the new decision is less reflective of the true choice, the additional information leads to market inefficiencies.⁶⁷⁴ According to Mark Kelman, for example, “[t]he problem is not a lack of adequate information—it is that we cannot process the data that is already out there.

⁶⁶⁷ See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-76 (1957); see also BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 94 (2007).

⁶⁶⁸ CAPLAN, *supra* n.667.

⁶⁶⁹ See Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 928 (2006) (citing “[a] vast body of empirical studies demonstrat[ing] citizens' lack of political knowledge,” but observing that public choice theory explains why “the public's ignorance is rational”).

⁶⁷⁰ See Horowitz, *supra* n.657.

⁶⁷¹ *Id.*

⁶⁷² See Sunstein et al., *supra* n.661.

⁶⁷³ Mark Kelman, et al., Context-Dependence in Legal Decision Making, in BEHAVIORAL LAW & ECONOMICS, *supra* n.492.

⁶⁷⁴ *Id.*

Injecting additional information makes this processing problem even worse.”⁶⁷⁵ Although technology has greatly expanded access for speakers and opened markets to new information, the ability to process information has not accelerated at the same rate. As Bambauer notes, “We are shifting between scarcities: from scarcity of communications media (such as newspapers or broadcast frequencies) to scarcity of attention.”⁶⁷⁶ Both proponents and opponents of restrictions on corporate political speech appeal to the impact of such speech on the audience (or the “consumers” in the “marketplace of ideas”).

The Marketplace Variables and Posner’s Free Speech Formula

Posner reformulated Learned Hand’s balancing provision created in *Dennis* to look like this: $V+E < P \times L/(1+i)^n$.⁶⁷⁷ V represents social loss from suppressing valuable information. E is the legal-error costs incurred in trying to determine whether the information in question is valuable. P is the probability that the speech being restricted will result in harm and L is the magnitude of harm with a formula to adjust future harm to present value.

Posner proposes that speech should be restricted only when $P \times L$ is greater than $V+E$. Having identified the variables considered by the courts and the commentators when discussing corporate political speech, the question is what impact to regulations of corporate political speech have on the “marketplace of ideas” when these variables are plugged into the Posner formula, as modified where appropriate by the concerns of behavioral law and economics.

⁶⁷⁵ See Bambauer, *supra* n.527 at 697.

⁶⁷⁶ *Id.* at 699.

⁶⁷⁷ See Posner, *supra* n.423 and accompanying discussion.

1. Speech

a. Value of Information (V)

Courts and scholars are in agreement that political speech, as a concept, is at the core of First Amendment values and, therefore, any limitation of political speech will result in significant social harm.⁶⁷⁸ Very few of the justifications for suppressing corporate political speech have been predicated on the lack of value such speech adds and the Court has rarely considered the probability of harm to be significant enough to justify the suppression of truthful political speech.

However, commentators have expressed concern that false speech is not as valuable.⁶⁷⁹ In other contexts, like commercial speech, the Court has agreed.⁶⁸⁰ Lower courts have justified upholding legislation that suppressed false political speech because it could lead to voters being misinformed.⁶⁸¹ The marketplace of ideas framework would place a lower value on any speech that would make the discovery of truth more difficult, including false political speech

b. E (Legal Error Costs)

The only basis for limiting corporate political speech that considers the actual speech itself is limiting false political speech. In *U.S. v. Alvarez* several of the Justices

⁶⁷⁸ See supra n.543-550 and accompanying text.

⁶⁷⁹ See Colin B. White, Comment, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J.L. & Tech. 1, 5 (2009).

⁶⁸⁰ *Nike, Inc. v. Kasky*, 539 U.S. 654, 666 (2003) (“the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech”).

⁶⁸¹ See supra n.562-566 and accompanying text.

joined opinions that specifically expressed concern about the difficult task of crafting effective legislation that would address false speech while giving political debate the “breathing space” the Court has defended since *Sullivan*.⁶⁸² This indicates that even when considering false political speech, there is reason to believe that the speech has value that would result in social loss if suppressed and, more importantly, there are significant legal error costs associated with attempting to suppress only the false speech with the least value and the most harm. Determining truth has traditionally been problematic for outside groups, and the chilling effect on speech where the truth is difficult to determine could lead to significantly over-inclusive regulation.

c. $L/(1 + i)^n$ (Magnitude of harm adjusted to present value)

The argument is rarely advanced that truthful political speech is harmful in and of itself. False political speech, however, can cause harm to the extent that it can confuse voters and mislead people. False speech in other contexts has been determined to be harmful enough to justify suppression, including defamatory and commercial speech. It is also likely that the harm caused by false speech would be imminent because political speech is so concentrated around times when individuals make political decisions

d. P (Probability of harm)

The likelihood of harm from false political speech could be impacted by the strength of disclosure laws that would require speakers, including corporations, to be associated with any false political speech they produce and the ability of the press and other independent groups to create accountability for producers of false speech. Although there are arguments that corporations are not likely to engage in false political speech

⁶⁸² U.S. v. Alvarez, 132 S.Ct. 2537 (2012).

because it could prove negative from a public relations perspective, this would be dependent on the ability of the marketplace to internalize the external harm produced by false political speech and force the speakers to bear this cost. Whether disclosure laws and watchdog groups can do this efficiently is unclear and additional data about the amount of false speech in the marketplace could impact future calculations.

e. Conclusion

Applying the Posner formula to the speech itself in the case of corporate political speech, we can see that the Court has placed high value on political speech, even false political speech, and therefore, it is likely that the Court would be leery of suppressing such vital information. The Court would have to consider the likelihood of harm to be significant enough to offset the high legal error costs associated with attempting to isolate only that speech which is truly harmful and of low value to the public debate. Because Posner's formula would rarely lead to the suppression of corporate political speech on the basis of the speech itself and, therefore, such regulation would need to be justified on the basis of increased harm brought on by either the speaker's identity or the impact of the speech on the audience.

2. Speaker

a. V (Value)

The first two variables will look similar to the discussion of speech above. This is still political speech which has been long established as having high value that would result in significant social loss if suppressed. An argument that political speech produced by corporations is likely to be of less value than other political speech is rarely considered by the courts. The two rationales used consistently by commentators and

judges for suppressing speech on the basis of corporate identity are an anti-distortion rationale⁶⁸³ and an anti-corruption rationale.⁶⁸⁴ Both of these are based on ideas distinct from the value of the speech itself.

b. E (Legal Error Costs)

The error analysis would be distinct, depending on whether you were considering the corruption rationale or the distortion rationale. The corruption analysis would focus on why corporations are being targeted. Two rationales for targeting corporations specifically are that more speech leads to more corruption and, therefore, if corporations are in a unique position to produce the most political speech, then they are the most likely candidates for bringing about the corresponding corruption. The second rationale is that corporations are more likely than other speakers to seek favorable political treatment in return for political speech in support of a candidate or party.

There is disagreement over whether corporations are in a unique position to produce large quantities of political speech. Justices opposed to suppression of corporate political speech have pointed out that corporations that actually have significant political “war chests” are the exception and that most corporations are small and lack significant resources.⁶⁸⁵ Therefore, suppressing the speech of all corporations is likely to be over-inclusive with regards to how many speakers it impacts, which is the equivalent of a legal error cost.

However, it would be worth considering what percentage of corporate political speech comes from small corporations and what percentage comes from large

⁶⁸³ See supra n.639-649 and accompanying text.

⁶⁸⁴ See supra n.619-638 and accompanying text.

⁶⁸⁵ *Citizens United*, 558 U.S. at 354 (“96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees”).

corporations that have access to the “war chests” that are used to justify the suppression. If “war chest” corporations actually “produce” the vast majority of corporate political speech, than the actual legal error cost is less, because the suppression of small corporation political speech would be more hypothetical than actual.

When considering the increased likelihood that corporations would seek favorable political treatment, the courts would need to make assumptions about the motivations of speakers or regulate on a case-by-case basis. For the most part, the Court has been hesitant to consider speaker motivation. “[While] a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”⁶⁸⁶ In several contexts, the Court has discussed the concern that legal error is likely when attempting to ascertain the motive of the speaker.⁶⁸⁷

When considering distortion, the main rationale for limiting the suppression of political speech by corporations is the relationship between quantity of speech and the distortion. There is little argument that corporate speech is more distorting in and of itself, separate from the quantity produced. As with corruption, any regulation based on the speaker’s identity is likely to be over-inclusive, as a small percentage of corporations are actually in the position to have a uniquely distorting effect on the market. This regulation could be justified if it is demonstrated that although the regulation is over-inclusive in the number of speakers it effects, the majority of the speech that is produced

⁶⁸⁶ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (“ But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment”).

⁶⁸⁷ *WRTL*, 551 U.S. at 468 (“An intent-based standard ‘blankets with uncertainty whatever may be said,’ and ‘offers no security for free discussion’”).

by corporations comes specifically from the types of corporations that are in a position to distort the marketplace. However, a regulation based on speaker's identity will also be under-inclusive to the extent that some individuals have a significant amount of money that could be used to produce large amounts of political speech that has the same distorting effects.

c. $L/(1 + i)^n$ (Magnitude of harm adjusted to present value)

In *Citizens United*, the Court rejected both the anti-corruption and the anti-distortion arguments as compelling interests. However, both have found favor in previous decisions, and the normative nature of law and economics requires that they be considered on their own merits.

Evidence could be presented (and some argue has been presented) that shows that parties that spend significant amounts of money on political speech can extract preferential treatment from political actors. This would be a serious harm, and even if the favoritism happened in the future, the magnitude of the harm would be high enough to merit serious consideration. Although it is unlikely the harm itself would be more significant based on the speaker's corporate identity, the corporate identity might increase the probability of the harm as discussed below.

It is more difficult to establish a reason for considering the speaker's corporate identity when analyzing the anti-distortion rationale. Ignoring the Court's consistent rejection of any rationale that appears to be based simply on "leveling the playing field", the argument would have to be based on the notion that corporate speakers are particularly problematic when it comes to distorting the marketplace of ideas. Most distortion rationale is based on the imagery of "flooding the marketplace" and "drowning

out” other voices. The harm would result from the information barriers created when speakers or listeners cannot participate in a marketplace that includes all possible viewpoints. This could prevent the marketplace from efficiently arriving at truth. Unlike the corruption harm, which is harm to the political system that does not directly detract from the functioning of the marketplace of ideas, the harm of distortion goes to the heart of the marketplace of ideas goal of efficiency in the quest for truth.

The argument that the risk of harm is increased by the speaker’s corporate identity has only one possible rationale when considering distortion rather than corruption. The distortion argument by its nature is related to the quantity of speech produced. Evidence that corporations are in a unique position to produce large quantities of speech likely to overwhelm the marketplace and reduce the total number of ideas could be used to show a high probability of harm if corporations have the right to engage in unlimited political speech.

d. P (Probability of harm)

Does the speaker’s corporate identity significantly increase the probability of the harm of corruption? As mentioned above, there are two arguments that could be made that it does. The first is that the probability of corruption increases in correlation with the quantity of political speech. If this is true, any speaker who “produces” a significant amount of political speech could bring about the likely harm of corruption. If corporations are in a unique position to “produce” a significant amount of political speech, then increasing the probability of harm from corporate political speech could be justified. This is the heart of the “special characteristics” and “war chests” language

accepted by several Justices and commentators and, if accepted, creates a fairly strong argument for repression.⁶⁸⁸

Another possible rationale for limiting political speech based on the speaker's corporate identity would be to establish that corporate speakers are more likely to seek favorable treatment from politicians and therefore the danger of corruption is higher when the speaker is a corporation. Following this rationale, the link between corruption and corporate identity would not be based on the resources of the corporation relative to other potential speakers, but rather, based on an assumption about corporate motives and the likelihood corporations would seek or secure favoritism.

e. Conclusion

Corporations do not have a monopoly on the channels of political speech which would give rise to concerns. The concerns are, therefore, based on the "unique" ability of corporations to amass political "war chests" that lead to corruption and distortion. A balancing test on this basis will require very careful consideration and analysis of actual production of corporate political speech in the marketplace in order to avoid high legal-error costs and the chilling of otherwise valuable speech.

To avoid high legal-error costs in the formula, regulations would need to be drawn to avoid suppressing the speech of small corporations and to include wealthy individuals because the rationale of corruption and distortion are both reliant on the ability to produce a large quantity of speech. Such regulation ceases to be limited to corporations and is distinct from any corporate political speech regulation previously accepted by the Court. This type of limitation seems very similar to the "leveling the

⁶⁸⁸ See supra n.112 and accompanying text.

playing field” argument that the Court has consistently rejected. If a regulation were only aimed at corporations, one would need to show a large probability of significant harm in order to balance the high legal-error cost of an over/under inclusive regulation.

3. Audience

a. V

The value of political speech to the audience is in the fact that more political speech will allow consumers to make informed political decisions by weighing all sides of an issue. This is why political speech has been held consistently to be of high value.

However, the value of the speech to the audience is based on the assumption that the members of the audience are rational consumers of information who can use political speech efficiently to arrive at “true” or “correct” decisions. The two possible audience-based restrictions that have been reflected in both case law and commentary are: 1) suppressing speech that is aimed at misleading an audience that is predictably irrational in certain respect with regards to the way messages are framed; 2) suppressing speech in an effort to avoid “flooding” the market, which, if it occurs, will increase the use of heuristics and limit the efficiency of information processing.

The first argument would be predicated on the idea that speech that seeks to manipulate audience psychology can be deemed to be less valuable. The problem with this is that the Court has been skeptical of regulations aimed at speech because it is likely to be effective in influencing voter conduct. “To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy

may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’⁶⁸⁹

It is unclear whether the evidence from behavioral economics is strong enough to contradict the assumptions from *Bellotti* and other cases that persuasive speech is effective, but not manipulative. If clear data suggest that people can be manipulated by particular framing methods, speech using these methods arguably could have less value to the consumers in the marketplace of ideas.

If the evidence that additional information can reduce efficient decision making is accepted, the social loss from suppressing political speech would also be lessened if it could be demonstrated that the speech was already represented in the marketplace, and that the additional information was redundant or superfluous. Speech that is clearly “irrelevant” could be limited with little social loss. The challenge would come in limiting regulation to just this type of speech, as discussed below in legal error costs.

b. E

One consideration for regulation that seeks to suppress speech because it could manipulate audience irrationality is the ability of regulators to create legislation that would effectively target only the problematic speech without chilling or suppressing otherwise valuable political speech. In the context of corporate political speech, this is the heart of Justice Kennedy’s concern regarding speakers who choose not to speak rather than risk being considered in violation of a regulation on a case-by-case basis.⁶⁹⁰ It seems likely that regulation aimed at either improper framing methods or meant to limit

⁶⁸⁹ *Bellotti*, 435 U.S. 790 (citing *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)).

⁶⁹⁰ See *supra* n.654 and accompanying text.

redundant or irrelevant speech could have significant legal error costs to add to the social loss from suppressing political speech.

Both potential limitations based on the impact of speech on the audience would have to overcome an additional factor related to legal error. To the extent that human beings are consistently irrational in predictable ways, there is no reason to assume that legislators or judges would not be equally prone to errors. In fact, experiments on the impact of irrational biases on decision making have found that “[c]ompared to other actors, judges were just as susceptible to anchoring, hindsight bias, and egocentric bias”.⁶⁹¹

In an article that advocated for regulations that would consider the impact of information on irrational audiences, the principle example was the information provided by the Bush administration in justification of the invasion of Iraq.⁶⁹² Although this may have been an effective example of the biases that can lead individuals to irrational conclusions when processing information, it does not support government intervention to limit information and avoid the bias. To the contrary, the misleading information that led to the arguably irrational decision was being supplied by the government and the only reason the conclusions of the population can be identified as irrational in hindsight is

⁶⁹¹ Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 782-83, 783 (2001) (collecting citations for proposition that “empirical studies demonstrate that cognitive illusions plague assessments that many professionals, including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists, make. Even lawyers fall prey to cognitive illusions.”); See also Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does-- Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 Emory L.J. 83, 118-38 (2002) (discussing heuristics judges employ in order to avoid complexity).

⁶⁹² See Bambauer, *supra* n.527 at 649.

because of the large quantity of competing information that questioned the governments evidence.

These are two examples that lead to the conclusion that legal error costs of attempting to suppress speech in an attempt to facilitate rational decisions could be prohibitively high. At a minimum, the corresponding probability of harm would need to be extremely high to justify the suppression of speech in this context.

c. L

The marketplace of ideas framework may allow for more leeway in justifying suppression because the harm can be measured in terms of the impact on the ability of the “buyers” in the marketplace to arrive at true ideas. The harm would come from either manipulating the irrationality of the audience through framing or by harming the efficiency of the marketplace through excessive information that is either redundant or irrelevant.

In the first instance, the harm of such speech would be that it would manipulate audience members by anticipating the ways in which they would react irrationally and tailoring messages to take advantage of this. Basically it is the reverse of the positive manipulation advocated by Thaler and Sunstein in their popular book on behavioral law and economics.⁶⁹³ This would be harmful, if it prevented the efficient working of the marketplace. And the harm would be imminent to the extent it was used to influence voting behavior in the time leading up to elections and other political decisions.

In the second instance, the harm of the speech would be that it would prevent efficient decision making by creating information barriers that could prevent consumers

⁶⁹³ Id.

from getting the information they require for political decisions. In the same way that holding relevant information back can lead to inefficient decisions, burying relevant information in a mass of irrelevant speech could create a lack of perfect information that the marketplace of ideas strives for when operating at peak efficiency.

d. P

Evidence from behavioral law and economics is largely tangential to actual political decision-making and the impact of political speech. However, the findings of behavioral economists may be generalized to electoral decision-making and provide some hard evidence that actual inefficiencies are likely to be created by messages framed to take advantage of irrational decision making and by high quantities of speech that raise information barriers that limit the ability of consumers to find relevant information.

Some critics have argued that the irrational behavior that has been consistently demonstrated in experiments has not been established in real world conditions.⁶⁹⁴ This is worth noting, but there are two counter arguments. The first is that the argument is premised on the idea that people have stronger motivations to avoid irrational decisions outside the controlled environment of an experiment. However, as mentioned above, there is some evidence that the motivation of voters to become informed about political decisions is also low so it is possible the experimental results would be consistent with real world decision making with low motivation.⁶⁹⁵

The second counter argument is the more general observation that there is irony in questioning the quantitative data used to justify behavioral research when so much of the underlying logic for law and economics is based on assumptions about behavior and

⁶⁹⁴ See Wright and Ginsburg, *supra* n.507.

⁶⁹⁵ CAPLAN, *supra* n.667.

theory rather than data. Strong data about actual human decision-making are relevant because the logic of applying economic theory to law is based on the superior ability of economics to comply with human decision making. If there is actual data demonstrating that the findings of irrationality by behavioral economists are incorrect, this finding could be considered in future weighing of speech regulations.

e. Conclusion

For the marketplace of ideas to function, there must be an audience that receives the ideas and processes them. As Justice Brennan put it, “It would be a barren marketplace of ideas that had only sellers and no buyers.”⁶⁹⁶ Any decision about whether to allow regulation that impacts speakers and suppresses speech, must consider the impact, positive or negative, on the audience for that speech.

In other contexts, scholars have advocated for understanding the limits of rationality and then adjusting regulations and legislation to best position people to make rational decisions.⁶⁹⁷ This idea is more complicated if regulations would result in the infringements of a First Amendment right. The high legal error costs associated with attempting to craft legislation that suppresses problematic or excessive information is particularly problematic when there is little reason to assume that legislators or judges are any better at avoiding the problematic irrational behavior than the rest of the consumers in the marketplace of ideas.

⁶⁹⁶ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

⁶⁹⁷ See THALER & SUNSTEIN, *supra* n.493.

Conclusion

Law and economics does not necessarily lead to the simple conclusion advocated in some judicial decisions that more speech is always better. In certain circumstances, this approach suggests it is appropriate to suppress speech because the high probability of significant and imminent harm outweigh the loss of valuable speech. This is consistent with most understandings of the value of free speech from Mill to Holmes, Jr.. But one of the most important aspects of Posner's balancing test is the explicit calculation of legal error costs.

In almost every instance above, the high likelihood of legal error brought about by trying to target only specific speech that is deemed problematic, while allowing valuable political speech to reach the marketplace, leads to a conclusion that efficient regulation is difficult if not impossible. For this reason, regulation of corporate political speech is unlikely to be justified because the valuable loss of information and the error costs associated with such regulation will outweigh the benefits of keeping some harmful speech from the marketplace.

One does not need Posner's formula for this realization. Almost every First Amendment case balances the need to suppress the speech with the possibility of a limitation being either too broad or too narrow. The chilling effect of legislation is an excellent example of an economic externality, and the likelihood that a restriction would end up suppressing too much speech has long been the best rationale for striking down

regulations on First Amendment grounds. But applying the law and economics methodology and viewing the regulation through the marketplace of ideas framework show that legal error is consistently a problem when trying to justify suppression based on the speech, the speaker, or the audience.

Although on each individual level, the legal error cost seems to make justifying regulation difficult, an argument can be made that isolating the variables downplays the significant of the problem. After all, past regulations were not based just on the speech, or the speaker, or the audience, but on a combination of all three. When the harm brought about by potentially false political speech, made by speakers with a unique ability to bring about corruption, and the high likelihood of distortion, leading to irrational decisions and inefficient political action is considered, this combination perhaps increases the harm to a level where it could outweigh the suppression of valuable speech. The problem is that combining the variables does not simply multiply the harm; it also multiplies the legal error. In order to avoid being over-inclusive, the regulation would now need to target the problematic speech, from the problematic speaker, that has the negative effect, all without including or chilling other valuable speech valuable to the marketplace of ideas.

As insights from behavioral economics and other places continue to add to the understanding of consumer behavior in the marketplace of ideas, it is important to revisit assumptions and update calculations. However, paternalistic regulations aimed at

improving decision-making will always have to overcome the criticism that the regulators are no less irrational than the audience they are trying to protect.

Although the overall conclusion from the application of the Posner balancing test to regulation of corporate political speech is that such regulation is not justified, this could change with additional evidence. An increase in false political speech would reduce the value of the speech. Additional evidence of corruption would increase the harm produced by such speech. So would additional information about individual decision-making that demonstrates that corporate political speech is uniquely likely to lead to irrational political choices and inefficient political decision-making. Some justices have argued that the regulation of corporate political speech is not dependent on the presence or absence of quantitative evidence attempting to prove corruption or distortion, but rather on a law and economics approach that considers such evidence relevant to the weight given specific variables.

Regardless of whether the Court ever explicitly adopts a law and economics framework, it is likely that courts in future corporate political speech cases will continue to weigh the variables identified in this dissertation and attempt to balance the harm brought about by such speech against the loss of valuable speech brought about through suppression. This dissertation makes clear that the legal error costs of attempting to target specific speech without being over or under-inclusive should and likely will always play a prominent role in the future consideration of corporate political speech issues. Additionally, it is clear that there are arguments within the existing rationale accepted by

the courts for protecting and suppressing corporate political speech, but that future cases should be centered on evidence of actual behavior by both corporate speakers and audience members that allow for an appropriate valuation of both the speech and the harm. Arguments about the extension of First Amendment protections to corporations and distinct legal standing of corporations should be replaced by more specific arguments about the actual impacts of corporate political speech on the marketplace of ideas and the ability of regulation to lead to more efficient results for all involved.

References

Legal Cases

281 Care Comm. v. Arneson, 638 F.3d 621 (8th Cir. 2011)

Abrams v. United States, 250 U.S. 616, 630 (1919).

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806 (2011).

Associated Press v. United States, 326 U.S. 1 (1945)

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809)

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)

Brown v. Hartlage, 456 U.S. 45, 60 (1982)

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

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009).

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkley, Calif., 454 U.S. 290 (1981).

Citizens United v. FEC, 558 U.S. 310 (2010).

Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973)

Dartmouth College v. Woodward, 17 U.S. 518 (1819)

Davenport v. Washington Educ. Ass'n, 551 U.S. 177 (2007)

Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

Federal Election Com'n v. National Right to Work Committee, 459 U.S. 197 (1982).

Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

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

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

Hale v. Henkel, 201 U.S. 43 (1906)

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988)

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977)

Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003).

McDaniel v. Paty, 435 U.S. 618 (1978)

NAACP v. Button, 371 U.S. 415 (1963)

New York Times v. Sullivan, 376 U.S. 254 (1964)

Nike, Inc. v. Kasky, 539 U.S. 654, 666 (2003)

Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906)

Parker v. Levy, 417 U.S. 733 (1974)

Pestak v. Ohio Elections Commn., 926 F.2d 573 (6th Cir. 1991)

R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992)

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)

Rickert v. Wash. Pub. Disclosure Commn., 168 P.3d 826 (Wash. 2007)

Ross v. Bernhard, 396 U.S. 531, 542 (1970).

Roth v. United States, 354 U.S. 476 (1957)

Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886).

Smith v. United States, 431 U.S. 291 (1977)

Sorrell v. IMS Health Inc., 131 S.Ct. 2653 (2011)

SpeechNow.org v. FEC, 599 F.3d 686 (D.C.Cir.2010).

State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998)

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958 (1976)

U.S. v. Alvarez, 132 S.Ct. 2537 (2012)

U.S. v. Strandlof, 667 F.3d 1146 (10th Cir. 2012)

U.S. v. Williams, 553 U.S. 285, 288 (2008)

United States v. Auto Workers, 352 U.S. 567 (1957).

United States v. CIO, 335 U.S. 106 (1948).

United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950).

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)

United States v. O'Brien, 391 U.S. 367 (1968).

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

Whitney v. California 274 U.S. 357 (1927)

Wilson v. United States, 221 U.S. 361 (1911)