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The Corporation in the Marketplace of Ideas, 51 J. Marshall L. Rev. 19 (2017)

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THE CORPORATION IN THE MARKETPLACE OF IDEAS

MATTHEW TELLEEN

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I. INTRODUCTION

The 2012 and 2016 elections are estimated to have cost more than \$6 billion.¹ The 2012 election cost roughly \$700 million more than the previous high, even after accounting for inflation.² The 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

1. Matea Gold, *2012 Campaign Set to Cost a Record \$6 Billion*, L.A. TIMES (Oct. 31, 2012), articles.latimes.com/2012/oct/31/news/la-pn-2012-campaign-costs-6-billion-20121031.

2. Center for Responsive Politics, OPENSECRETS.ORG, www.opensecrets.org/ (last visited Oct 12, 2017).

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

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, aimed to bring attention to the problem of money in politics, advocating legislation, regulation, and even Constitutional Amendments.⁶

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, otherwise known as Super PACs.¹⁰ Considering Super PACs are estimated to have spent just

4. Lindsay Young, *Outside Spenders Return on Investment*, SUNLIGHT FOUNDATION (Dec. 17, 2012), 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), articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits.

6. See Caitlin McNeal, *Citizens United Constitutional Amendments Introduced In The Senate*, HUFFINGTON POST, (June 19, 2013), www.huffingtonpost.com/2013/06/19/citizens-united-constitutional-amendment_n_3465636.html

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

8. See, e.g., *End Corporate Rule. Legalize Democracy*, MOVE TO AMEND, movetoamend.org.

9. Eduardo Porter, *Get What You Pay For? Not Always*, N.Y. TIMES (Nov. 6, 2012), 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, www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporation.html (last visited Apr. 23, 2018) (combined effort of Center for Public Integrity and Center for Responsive Politics).

under \$700 million, it does not seem that corporations were the largest 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 comment, I attempt to use the economic methodology developed by 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 concepts to enhance our understanding of the tradeoffs involved in First Amendment decisions.¹⁶

In this comment, 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

11. *Id.*

12. Peter H. Jones, *Sheldon Adelson Spent Far More On Campaign Than Previously Known*, HUFFINGTON POST (Dec. 3, 2012), 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 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); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986); see Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMPLE L. REV. 1, 11 (2003).

16. See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986).

considerations seriously, and where appropriate, incorporate them into the traditional law and economics model as developed by Posner.

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. 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. First, 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.

This comment is organized as follows: First, the roots of the marketplace of ideas analogy is examined and the significance of this concept to the application of economic principles to free speech analysis is explored. Next, the marketplace concept is employed to isolate the 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. Finally, these variables are evaluated using an economic free speech formula developed by Posner in an attempt to create a complete understanding of the issues at hand in cases involving corporate political speech.

II. 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.¹⁷

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.”¹⁸ Holmes’ basic concept is that the best available method for determining truth is to allow individuals to freely evaluate ideas and see which ideas carry the day.¹⁹

Although specific individuals may disagree, the stronger ideas will endure over time and the wisdom of the crowd will correct for individual mistakes.²⁰ 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.²¹ Discussion and debate will expose the weaknesses of bad ideas and allow the better more truthful ideas to win out.²²

The Supreme Court has often embraced the marketplace of ideas concept,²³ including in many cases dealing with corporate

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

18. 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 THOMAS JEFFERSON: WRITINGS 492, 493 (Merrill D. Peterson ed. 1984).

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

20. 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”).

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

22. 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.”).

23. 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 that 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

political speech.²⁴ 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.²⁵ It is an explicit example of the possibility of applying market concepts to activities that take place outside a recognized commercial market.²⁶

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 exists and can be discovered in some objective way.²⁷ This aligns with the general negative critique of law and economics that it asserts a false sense of objectivity.²⁸ 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 then it must have been the best and most true idea.²⁹

Another criticism is that the marketplace, like economic theory in general, relies to some degree on the ability of individuals to

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. . . .”).

24. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010) (“*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 (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)).

25. 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); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986); see Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMPLE L. REV. 1, 11 (2003).

26. Coase, *supra* note 25.

27. 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.”).

28. See JAMES R. HACKNEY, JR., UNDER THE COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2006).

29. 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.”).

make rational decisions when faced with multiple choices.³⁰ If people are not capable of choosing the “best” idea, then a marketplace of choices fails to produce the desired result.³¹

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 assertion that “maximizing true ideas” is the only possible justifications for allowing freedom of speech in a society.³² For example, this conception pays little heed to the value of self-expression in allowing individuals to understand themselves.³³ Expressed as either self-realization or self-actualization, this theory would place the value of the expression as benefitting the speaker, not the audience.³⁴ Any value to society would be secondary.³⁵

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.³⁶

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

30. See Ingber, *supra* note 27 (“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. . . .”).

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

32. Cf. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*, 15-16 (1982) (questioning the value of truth seeking as a First Amendment rationale).

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

34. *Id.*

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

36. JOHN STUART MILL, *ON LIBERTY*, reprinted in *ON LIBERTY AND OTHER ESSAYS* 5 (John Gray ed., 1998) (1859).

justified in silencing mankind.”³⁷ 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, against his will, is to prevent harm to others.”³⁸ 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.

With 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 2012.³⁹ 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.”⁴⁰

III. THE MARKETPLACE VARIABLES OF CORPORATE POLITICAL SPEECH

A. *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 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.⁴¹ The courts have generally allowed more leeway in regulating speech of “low value,” despite the broad and

37. *Id.* at 16.

38. *Id.* at 9.

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

40. Brazeal, *supra* note 19, quoting from Winston S. Churchill, *Speech Before the House of Commons* (Nov. 11, 1947), in VOL. 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 7566 (Robert Rhodes ed., 1974).

41. *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.’”).

generic protection provided by the language of the First Amendment.⁴² Pornography has been determined to have no protection under the first amendment.⁴³ Commercial speech, (speech defined by the courts as “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.⁴⁴

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 comment is the rather inelegantly phrased, “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.

In *Buckley v. Valeo*, one of the first Supreme Court cases to consider corporate political speech, 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”⁴⁵

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.”⁴⁶ Therefore, the concept of the marketplace of ideas would be designed to allow people to engage in free trade of political speech.

In the next corporate political speech case, *First National Bank of Boston v. Bellotti*, the justices 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

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

43. *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.”).

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

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

46. *Id.*

“governmental affairs” rather than “political speech”. As the Court noted:

[T]here 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 public does not depend upon the identity of its source, whether corporation, association, union, or individual.⁴⁷

In *Austin v. Michigan Chamber of Commerce*, 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.’”⁴⁸ 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.⁴⁹

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.’”⁵⁰ 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,”⁵¹ but decided instead to apply the framework from previous cases applying strict scrutiny to laws infringing on political speech.⁵²

47. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (internal citations omitted).

48. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (internal citations omitted).

49. *Id.* 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.

50. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (internal citations omitted).

51. *Id.* at 340.

52. *Id.* (“ . . . the quoted language from *WRTL* provides a sufficient

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.⁵³

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.⁵⁴ It was also at the center of a recent Supreme Court case that did not deal directly with political speech.⁵⁵ However, the Supreme Court has never directly ruled on a case involving false political speech in the context of an election or other overtly political activity.⁵⁶ 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.”⁵⁷ To defend this proposition, the Court cited *Gertz v. Robert Welch, Inc.*,⁵⁸ a case involving defamation. However, the Court also cited favorably to *New York Times Co. v. Sullivan*,⁵⁹ another defamation case in which the court ruled that defamatory statements, which are by definition false, need to be given

framework for protecting the relevant First Amendment interests in this case. We shall employ it here.”).

53. 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).

54. 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.”).

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

56. 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*.

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

58. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

59. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

“breathing space” when offered in “free debate” about political ideas.⁶⁰

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.⁶¹ 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.⁶² 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.⁶³

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.⁶⁴ “[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,”⁶⁵ said the court. However, the Supreme Court of Washington twice struck down similar laws, although the court divided bitterly.⁶⁶ 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.⁶⁷ However, Justice Sanders was more concerned with the role the state intended to play in determining

60. *Id.* at 271-72.

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

62. *Id.*

63. *Id.* at 636.

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

65. *Id.* at 577. (citing Sullivan).

66. *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* note 54; William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 (2004)).

67. *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee* 957 P. 2d 691, 699 (Wash. 1998) (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.”); *Washington ex rel.*, 957 P. 2d 691 at 701 (Talmadge, J. concurring) (“[We are] the first Court in the history of the Republic to declare First Amendment protection for calculated lies.”).

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.⁶⁸

All of these decisions are in question following the Supreme Court's decision in *U.S. v. Alvarez*.⁶⁹ 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.⁷⁰ This statement violated the Stolen Valor Act.⁷¹ The Ninth Circuit held that the Stolen Valor Act violated the First Amendment.⁷² The Tenth Circuit had upheld the Act in a separate case,⁷³ 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.⁷⁴ 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.⁷⁵ According to Kennedy, false speech, as a category, has never been accepted by the Court.⁷⁶ “This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”⁷⁷

Kennedy stressed that existing regulations of false speech focused on the specific harm caused by the false speech.⁷⁸ Many, like

68. *Id.* at 698-99.

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

70. *Id.* at 2543.

71. 18 U.S.C. § 704.

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

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

74. *Alvarez*, 132 S. Ct. at 2544.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 2545.

defamation and fraud, focus on financial loss or other harms.⁷⁹ 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.⁸⁰ But the Stolen Valor Act, according to Kennedy, “targets falsity and nothing more.”⁸¹

Justice Breyer wrote for himself and Justice Kagan provided the other votes to hold that the act violated the Constitution.⁸² However, Breyer indicated that the plurality’s approach of “strict categorical analysis” was problematic and proposed a balancing approach to regulations of false speech, which he likened to “intermediate scrutiny.”⁸³ 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.”⁸⁴

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 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.⁸⁵

79. *Id.*

80. *Id.*

81. *Id.*

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

83. *Id.*

84. *Id.*

85. *Id.* at 2556.

Justice Alito, joined by Justice Scalia and Justice Thomas, voted to uphold the Stolen Valor Act.⁸⁶ Alito argued that laws prohibiting false speech generally have “no intrinsic First Amendment value.”⁸⁷ He argued that laws restricting false speech are only problematic when they “present a grave and unacceptable danger of suppressing truthful speech.”⁸⁸ He believed that the Stolen Valor Act did not present such a threat.⁸⁹

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.⁹⁰

After Alvarez, doubts remain as to whether the Supreme Court believes false statements can be regulated in the “marketplace of ideas.”⁹¹ 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.

B. 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.

86. *Id.* at 2556 (Alito, J., dissenting).

87. *Id.* at 2560.

88. *Id.* at 2564.

89. *Id.*

90. *Id.* at 2565 (internal citations omitted).

91. See Hasen, *supra* note 54; 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).

In the history of corporate political speech cases, the Court has offered varied opinions as to the proper treatment of corporations engaged in corporate political speech.⁹² Other than the dissenting opinion of Justice Rehnquist in *Bellotti*, none of the opinions are based on a legal theory of the corporation that would limit corporations to only those rights granted to them by an individual state incorporation statute.⁹³

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.⁹⁴ 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*.⁹⁵

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.⁹⁶ He points to cases where the speech rights of students,⁹⁷

92. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting).

93. *Id.* (“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).

94. *See Bellotti*, 434 U.S. 765, 804-05 (1978) (White, J., dissenting); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Calif.*, 454 U.S. 290 (1981); *Federal Election Com’n v. National Right to Work Committee*, 459 U.S. 197, 198 (1982); *Federal Election Com’n v. National Conservative Political Action Committee*, 470 U.S. 480, 490 (1985); *Federal Election Com’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).

95. 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.

96. *Citizens United v. FEC*, 558 U.S. 310, 420 (2010) (Stevens, J., dissenting).

97. *See, e.g., Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”).

prisoners,⁹⁸ members of the armed forces,⁹⁹ foreigners,¹⁰⁰ and government employees¹⁰¹ 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.”¹⁰² 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.¹⁰³

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.”¹⁰⁴ 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 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.”¹⁰⁵

98. *See, e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (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).

99. *See, e.g., Parker v. Levy*, 417 U.S. 733, 758 (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.”).

100. *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).

101. *See, e.g., Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973) (upholding statute prohibiting Executive Branch employees from taking “any active part in political management or in political campaigns” (internal quotation marks omitted)).

102. *Citizens United v. FEC*, 558 U.S. 310, 424 (2010) (Stevens J., dissenting).

103. *Id.* at 394.

104. *Id.* at 341.

105. *Id.*

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.¹⁰⁶ The objections are many, and range from corporate theory,¹⁰⁷ to the possibility of corruption,¹⁰⁸ to the danger of corporate speech distorting the “marketplace of ideas.”¹⁰⁹

The most frequent objection relates to corporate theory and the concept of extending First Amendment rights to corporations.¹¹⁰ 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.¹¹¹

106. 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 scholarly treatment of Citizens United will be necessarily 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.).

107. 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).

108. 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); *see also* 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 (2010).

109. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 992 (2011); Sullivan, *supra* note 106. *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).

110. Reza Dibadj, *Citizens Divided on Citizens United: Campaign Finance Reform and the First Amendment: Citizens United as Corporate Law Narrative*, 16 NEXUS: J. OP. 39, 39 (2010-2011); 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); Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 225 (2011).

111. See Caitlin McNeal, *Citizens United Constitutional Amendments Introduced In The Senate*, *Huffington Post*, HUFFINGTON POST (June 19, 2013),

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 determining truth should be independent of the source of the ideas being considered. Stevens' assertion that corporations are not "part of the political community"¹¹² 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, which determines the balance of when to suppress otherwise protected speech, would be irrelevant.

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."¹¹³

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.¹¹⁴ 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.¹¹⁵

www.huffingtonpost.com/2013/06/19/citizens-united-constitutional-amendment_n_3465636.html.

112. *Citizens United v. FEC*, 558 U.S. 310, 424 (2010) (Stevens, J., dissenting).

113. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990)

114. 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.").

115. See Issacharoff, *supra* note 108.

Corruption, as traditionally defined, was at the heart of the legislation being considered in *Buckley*, the forefather of most corporate political speech cases.¹¹⁶ The legislation applied equally to individuals and corporations, so corruption was not yet a concern specifically related to the speaker's identity.¹¹⁷ *Buckley* established two ways in which corruption could justify suppressing otherwise protected speech.¹¹⁸ 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.¹¹⁹ "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."¹²⁰ The second danger results from what would be termed the "appearance of corruption", and referred to activity that would reflect poorly on the democratic system and could shake public confidence in government. "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."¹²¹

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.¹²² "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 that expenditures will be given as a quid pro quo for improper commitments from the candidate."¹²³ *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.¹²⁴ However, the legislation challenged in *Bellotti* applied only to corporate political speech about general ballot measures and not to candidate elections.¹²⁵ As the majority noted, "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public

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

117. *Id.*

118. *Id.*

119. *Id.* at 26.

120. *Id.* at 26-27.

121. *Id.* at 27.

122. *Id.*

123. *Id.* at 47.

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

125. *Id.*

issue.”¹²⁶ 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.”¹²⁷

In *Citizens United*, the majority seemed to close the door left open by the *Bellotti* footnote.¹²⁸ 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.”¹²⁹ 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 democracy.”¹³⁰ 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”.¹³¹ 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.¹³² 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.”¹³³ 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.”¹³⁴

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

126. *Bellotti*, 435 U.S. at 790.

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

128. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)

129. *Id.*

130. *Id.*

131. *See Bellotti*, 435 U.S. at 765.

132. *Citizens United*, 130 S. Ct. at 471 (Stevens, J., dissenting).

133. *Id.*

134. *Id.* at 454.

disenchantment: an increased perception that large spenders ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic governance.’¹³⁵

The anti-distortion rationale is based on concerns by some members of the Court 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.”¹³⁶ 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.”¹³⁷ *Citizens United* relied explicitly on this language.¹³⁸

Stevens maintains that the rationale in *Austin* that considered distortion to be a form of corruption, was based on an issue that Stevens asserts can be separated from equalization or leveling.¹³⁹ That rationale was based on the “corrosive effects” of corporate wealth on the political system.¹⁴⁰ According to this view, corporate wealth is corrosive because corporations can amass large “war chests” because of their “special characteristics.”¹⁴¹ 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.”¹⁴²

Because of their special advantages, critics suggest that corporations may drown out other voices and monopolize the market for political speech.¹⁴³ “[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

135. *Id.* at 472.

136. *See 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)

137. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

138. *Citizens United*, 558 U.S. at 350.

139. *Id.* (Stevens, J., dissenting).

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

141. *Id.*

142. *Citizens United*, 558 U.S. at 471.

143. *Id.*

of the public good, ... The opinions of real people may be marginalized,”¹⁴⁴ which may decrease the ability of individuals to weigh all ideas and arrive at truth.¹⁴⁵

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.”¹⁴⁶ 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 either rationale can justify the suppression of corporate political speech based on the speaker’s identity when using the normative law and economics framework below.

C. 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.¹⁴⁷ 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.¹⁴⁸

In other contexts, considerations about audience impact have led to more paternalistic practices. The Commercial Speech

144. *Id.* at 470 (internal citations omitted).

145. *Id.*

146. *Id.* at 473.

147. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

148. *Whitney v. California*, 274 U.S. 357 (1927).

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”.¹⁴⁹ This concern about audience reaction to speech was a “substantial” interest for the government, upholding the regulation to suppress speech.¹⁵⁰ 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.¹⁵¹ 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.”¹⁵²

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.¹⁵³

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.”¹⁵⁴

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 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

149. *Posadas de Puerto Rico Associates, dba Condado Holiday Inn v. Tourism Company of Puerto Rico et al.*, 478 U.S. 328 (1986).

150. *Id.*

151. *Id.*

152. *Id.*

153. *44 Liquormart, Inc.*, 517 U.S. 484, 503 (1996) (citing *Edenfield v. Fane*, 507 U.S. 761 (1993)).

154. *Id.* at 503.

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.¹⁵⁵

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.”¹⁵⁶ 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.”¹⁵⁷

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 intelligent, and will separate the wheat from the chaff.”¹⁵⁸ 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.¹⁵⁹

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

155. *Citizens United v. FEC*, 558 U.S. 310, 473 (2010).

156. *Id.* at 354 (internal citations omitted).

157. *Id.* at 335 (internal citations omitted).

158. *McConnell v. FEC*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part).

159. *Id.* at 472.

psychological understanding of human behavior.¹⁶⁰ For example, in language similar to that of Stevens above, Stanley Ingber 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.¹⁶¹

Specific concerns, reflected in the statements above, include the inability of individuals to avoid being manipulated by messages because of framing effects,¹⁶² the use of heuristics and cues to make decisions in the face of bounded rationality,¹⁶³ and the negative impact of too much information on efficient decision-making.¹⁶⁴ Many of these concerns have their origin in the work of behavioral psychology and its impact on economics and law.¹⁶⁵

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

160. 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).

161. Ingber, *supra* note 27, at 5.

162. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Robert H. Frank, *The Frame of Reference as a Public Good*, 107 ECON. J. 1832-847 (1997).

163. See, e.g., 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, *The Effect of Myopia and Loss Aversion on Risk Taking: An Experimental Test*, 112 Q. J. ECON. 647, 647-48 (1997).

164. See Bambauer, *supra* note 31, 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).

165. See 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).

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."¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

The idea that voters may use heuristics and cues to vote also runs contrary to some aspects of a rational audience assumption.¹⁶⁹ However, some have argued that economic theory actually predicts voters will act irrationally in making political choices, and that their behavior is actually rational.¹⁷⁰ 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.¹⁷¹ This has led some to refer to voter ignorance, or acceptance of the limits of their rationality, as "rationally irrational."¹⁷² 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.¹⁷³

This cuts against the assumption of a "rational" audience who can, or will, efficiently process information in the marketplace of ideas to arrive at "truth."¹⁷⁴

Behavioral economists have also challenged Scalia's pronouncement that there is no such thing as too much speech.¹⁷⁵ Experiments have found that additional irrelevant information can influence people to change a decision.¹⁷⁶ Assuming the new decision is less reflective of the true choice, the additional information leads to market inefficiencies.¹⁷⁷ According to Mark Kelman, for example, "[t]he problem is not a lack of adequate information—it is that we

166. See Bambauer, *supra* note 31, at 699.

167. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 722-43 (1999).

168. See Rubin, *supra* note 160.

169. *Id.*

170. 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).

171. CAPLAN, *supra* note 170.

172. 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.").

173. See Horowitz, *supra* note 160.

174. *Id.*

175. See Sunstein et al., *supra* note 164.

176. Mark Kelman, et al., *Context-Dependence in Legal Decision Making*, in BEHAVIORAL LAW & ECONOMICS 61 (Cass R. Sunstein ed. 2000).

177. *Id.*

cannot process the data that is already out there. Injecting additional information makes this processing problem even worse.”¹⁷⁸ 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.”¹⁷⁹ 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”).

IV. THE MARKETPLACE VARIABLES AND POSNER’S FREE SPEECH FORMULA

In the case of *United States v. Dennis*,¹⁸⁰ Justice Learned Hand proposed a formula for then the Court should allow the suppression of speech. 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”.¹⁸¹

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.¹⁸²

Reducing a rhetorical balancing test to a formula with variables highlights the individual 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 formula would look like this: regulate if $V+E < P \times L/(1 + i)^n$.¹⁸³ “ 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.¹⁸⁴ The rest of the formula is a modification to adjust “ L ” (the magnitude of the social harm) for

178. *Id.*

179. See Bambauer, *supra* note 31, at 699.

180. *United States v. Dennis*, 183 F.2d 201, 206 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951).

181. *Id.*

182. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986) (Posner B).

183. *Id.*

184. *Id.*

present value.¹⁸⁵ 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.¹⁸⁶ The larger i and n are, the smaller the harm will be.¹⁸⁷ 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.¹⁸⁸

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 do 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.

A. *Speech*

1. *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.¹⁸⁹ 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.¹⁹⁰ In other contexts, like commercial speech, the Court has agreed.¹⁹¹ Lower courts have justified upholding legislation that suppressed false political speech because it could lead to voters being misinformed.¹⁹² 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.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See *supra* note 45-52 and accompanying text.

190. 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).

191. *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.”).

192. See *supra* note 64-68 and accompanying text.

2. *Legal Error Costs (E)*

The only argument for limiting corporate political speech that considers the actual speech itself is the harm of false political speech. In *U.S. v. Alvarez* several of the Justices 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*.¹⁹³ 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, that there may be 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.

3. *Magnitude of Harm Adjusted to Present Value* $(L/(1+i)^n)$

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.

4. *Probability of Harm (P)*

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 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

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

the amount of false speech in the marketplace could impact future calculations.

5. *Determination*

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, 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.

B. Speaker

1. *Value of Information (V)*

The analysis of the first two variables, Value and Error, will look similar to the discussion of speech as a variable 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 rationale¹⁹⁴ and an anti-corruption rationale.¹⁹⁵ Both of these are based on ideas distinct from the value of the speech itself.

2. *Legal Error Costs (E)*

The error analysis would be similar regardless of whether you were considering the corruption rationale or the distortion rationale. Both would focus on why corporations are being targeted. Two rationales for targeting corporations specifically are that more speech leads to more corruption or distortion, 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 harm. The second rationale is that corporations are more likely than other speakers to seek favorable political

194. See *supra* note 136-146 and accompanying text.

195. See *supra* note 116-135 and accompanying text.

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.¹⁹⁶ Therefore, suppressing the speech of all corporations is likely to be over-inclusive with regard 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 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, then the legal error associated with targeting speakers based on corporate identity 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.”¹⁹⁷ In several contexts, the Court has discussed the concern that legal error is likely when attempting to ascertain the motive of the speaker.¹⁹⁸

3. *Magnitude of Harm Adjusted to Present Value* ($L/(1+i)^n$)

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.

196. *Citizens United v. FEC*, 558 U.S. 354 (2010) (“96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees.”).

197. *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.”).

198. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (“An intent-based standard ‘blankets with uncertainty whatever may be said,’ and ‘offers no security for free discussion.’”).

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.

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 arguments are 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.

4. Probability of Harm (P)

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.¹⁹⁹

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.

5. *Determination*

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 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.

C. *Audience*

1. *Value of Information (V)*

The value of political speech to the audience is based on the idea 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 arguments in favor of restrictions found 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

199. *See supra* note 95 and accompanying text.

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.’”²⁰⁰

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.

2. *Legal Error Costs (E)*

One consideration here is the ability of regulators to create legislation that would effectively target only 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.²⁰¹ It seems likely that regulation aimed at either improper framing methods or meant to limit 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,

200. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (citing *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)).

201. *See supra* note 157 and accompanying text.

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”.²⁰²

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.

3. *Magnitude of Harm Adjusted to Present Value*
($L/(1+i)^n$)

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 tailor 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.²⁰³ 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 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.

202. See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782-83 (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).

203. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

4. *Probability of Harm (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.²⁰⁴ This is worth noting, but there is one important counterargument. 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.²⁰⁵

5. *Determination*

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.”²⁰⁶ 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.²⁰⁷ 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.

204. See 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).

205. CAPLAN, *supra* note 170.

206. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

207. See THALER & SUNSTEIN, *supra* note 165.

V. 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 significance 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 speech valuable to the marketplace of ideas.

As insights from behavioral economics and other research 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.

It is likely that courts in future corporate political speech cases will continue to weigh the variables identified in this comment and attempt to balance the harm brought about by such speech against the loss of valuable speech brought about through suppression. This comment 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.

