

On Commercial—and Corporate—Speech

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ON COMMERCIAL— AND CORPORATE—SPEECH

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I. INTRODUCTION

The modern First Amendment law of commercial speech (that is, commercial advertising) displays an internal contradiction. Advertising regulation falls into two categories: (1) regulation on the ground that the speech is false or misleading and (2) everything else. When government seeks to regulate commercial advertising on the ground that it is false or misleading, the law gives it broad freedom of action and the power to regulate in ways—and for reasons—that would never pass muster in the political arena.¹ On the other hand, the Supreme Court has been

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1. See *infra* Part III.

moving ever more strongly to the posture that governments may not restrict advertising on any ground *other* than that it is false or misleading; when it seeks to do so, it is subject to the same restrictions that apply when it seeks to regulate political speech.² But the Court has never adequately justified this distinction, and it does not look easily justifiable.³

In this Article I suggest that we can better understand the divide in modern commercial speech law by looking to a larger issue: the law's treatment of speech by for-profit corporations. In general, the Court has told us, corporate speech is entitled to the same protection as that uttered by individuals.⁴ The Supreme Court cases initially articulating that rule are contemporaneous with, and share reasoning in common with, the ones initially disapproving regulation of commercial speech.⁵ Both sets of cases stress the informational value of the speech in question, so that for the government to restrict the speech would deprive us all of the information and views it conveys.⁶ Both express concern about the power of government through selective regulation to skew the marketplace of ideas.⁷

At the same time, the First Amendment law of corporate speech betrays a countertheme: the concern, manifested in *Austin v. Michigan Chamber of Commerce*,⁸ that unrestrained corporate speech can skew and distort the marketplace of ideas. That theme runs parallel to the commercial-speech concern that misleading advertising can lead consumers astray in ways that the marketplace of ideas will not be able to counteract. In both contexts, the law approves government actions that some might consider paternalistic in order to protect an adequately functioning speech marketplace.

In the context of corporate speech, the *Austin* concern for "distortion" or skew⁹ ended up gaining little traction, and for good reason.¹⁰ Taken to its logical extreme, it might support an argument that corporate speech should have no First Amendment protection whatsoever. But it's hard to make that argument work. In thinking

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.B.

5. *See infra* Part IV.B.

6. *See infra* Parts II, IV.B.

7. *See infra* Parts II, IV.B.

8. 494 U.S. 652 (1990).

9. *Id.*

10. *See infra* Part IV.B.

about the informational value of for-profit corporations' speech, there's no good way of drawing the line between those corporate media entities whose speech we value for the benefits it brings the rest of us and those corporate entities whose speech we might seek to restrain as distorting the marketplace of ideas. And a legislative rule seeking to restrict corporate speech so as to minimize distortion, outside of the specialized context of candidate elections, would have to be hugely sweeping if it were to be meaningful at all. The resulting political system would not be one we would recognize.

In the commercial-speech context, by contrast, the obstacles to regulation are not so unmanageable; we can construct a limited domain that acknowledges the truth that the marketplace of ideas does not always function as advertised. It is not plain, though, that that domain should be limited to the category of false or misleading speech. On the contrary, there is a good argument that when it comes to regulation of true, nonmisleading commercial speech as well the courts should apply a standard of scrutiny more forgiving than that applied to regulation of speech generally.

In Parts II and III, I will examine the contradiction between the ordinary First Amendment law of (nonmisleading) commercial advertising and the law relating to misleading or confusing advertising and trademarks. In Part IV, I will explore a contradiction within the law of political speech by corporations. In Part V, I will argue that the rifts within both the law of commercial speech and that of corporate speech are parallel, deeply rooted, and reflect a fundamental dichotomy within American jurisprudence. In Part VI, I will return to the law of corporate speech, and in Part VII, I will build on those insights to suggest that the Supreme Court has taken the law of commercial speech in the wrong direction.

II. THE ROAD TO *SORRELL*

U.S. constitutional law before 1975 saw commercial advertising as falling wholly outside the First Amendment. Advertising was the “promot[ion] or [pursuit of] a gainful occupation” and not speech at all.¹¹ When the Court found itself divided over a state's ban on door-to-door magazine selling, the Justices agreed that “of course” a seller of “gadgets or brushes” or “pots” could raise no First Amendment claim—

11. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). The Court in *Chrestensen* upheld an ordinance prohibiting the distribution of advertising handbills in the streets. *Id.* at 55.

he was engaging in commercial activity, not speech.¹² The Justices followed that understanding in the *Capital Broadcasting* case, summarily affirming a ruling upholding Congress' prohibition of cigarette advertising in broadcast media.¹³ That view of commercial advertising contributed as well to the Court's ruling in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, upholding an ordinance forbidding newspapers from organizing employment ads into sex-segregated categories.¹⁴

Things began to change, though, in the 1975 case of *Bigelow v. Virginia*.¹⁵ This case, decided a couple of years after *Roe v. Wade*,¹⁶ concerned a state statute making it illegal to "encourage or prompt the procuring of abortion."¹⁷ The State of Virginia had criminally charged an alternative weekly publisher for running an ad beginning "UNWANTED PREGNANCY LET US HELP YOU—Abortions are now legal in New York" and offering, for a fee, to place women with New York hospitals and clinics performing abortions.¹⁸ The Court treated the speech as protected; while it was commercial advertising related to the marketplace of products and services, the Court found that its contribution to the marketplace of ideas outweighed Virginia's interest in suppressing information about a constitutionally protected service legally offered in another state.¹⁹

The big doctrinal shift came the following year: in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court considered a statute banning pharmacists from advertising their prices for prescription drugs.²⁰ Ruling law indicated that Virginia's ban should be treated as a regulation of commercial transactions, with no further significance—but the Court disagreed.²¹ This was a First Amendment case, Justice Blackmun explained, in part because drug price information was important to consumers and vital to the well-being of the poor, sick, and aged, and in part because "the free flow of

12. *Breard v. Alexandria*, 341 U.S. 622, 641 (1951); *id.* at 650 n.* (Black, J., dissenting).

13. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 583–84 (D.D.C. 1971), *aff'd mem.*, *Capital Broad. Co. v. Acting Attorney Gen.*, 405 U.S. 1000 (1972).

14. 413 U.S. 376, 391 (1973).

15. 421 U.S. 809 (1975).

16. 410 U.S. 113 (1973).

17. *Bigelow*, 421 U.S. at 812–13 (quoting VA. CODE ANN. § 18.1-63 (1960)).

18. *Bigelow v. Commonwealth*, 191 S.E.2d 173, 174 (Va. 1972), *rev'd*, 421 U.S. 809 (1975).

19. *Bigelow*, 421 U.S. at 818–29.

20. 425 U.S. 748, 749–50 (1976) (quoting VA. CODE ANN. § 54-524.35 (1974)).

21. *Id.* at 758–70.

commercial information is indispensable” if resources are to be properly allocated in our economy.²² Economic theory, after all, predicts that market allocation will be inefficient if not driven by informed consumer decisions.²³

It’s worth noting how odd those arguments were from a First Amendment perspective. That a ban on drug price advertising will cause the elderly to pay too much for drugs is an important policy argument, but the desirability of inexpensive drugs for the elderly seems like a matter for legislators to weigh; it’s not a *First Amendment* goal trumping the collective decision-making process.²⁴ Whatever values are understood to underlie speech’s privileged constitutional status—whether they relate to self-government, the communicative participation necessary for democratic legitimacy, the search for truth, or individual self-realization—those values don’t include the availability of cheap medications or consumer products.²⁵ And it’s hard to argue that widespread dissemination of price information is constitutionally mandated by virtue of its value in promoting efficient market allocation given that the Constitution doesn’t mandate that any particular sector of the economy utilize market allocation at all, efficient or otherwise.²⁶ It leaves these issues as policy questions for the policy process.²⁷

The *Virginia Board* opinion, though, also phrased its concerns in a way more in line with traditional First Amendment thinking. Justice Blackmun stressed the difficulty of drawing lines adequately distinguishing advertising from other speech, and he suggested that commercial advertising might contain information relevant to political debate (if only the question of how the state should regulate the activity being advertised).²⁸ Government, in blocking that information, was keeping information from the citizenry using an explicitly content-based mechanism.²⁹ That was censorship of information in the public sphere—no matter that it was merely information about product pricing—and it

22. *Id.* at 762–65.

23. *Id.* at 765.

24. See Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 6–7 (1979).

25. *Id.* at 7–25.

26. See *id.* at 32.

27. See *id.* at 34. But see *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480 (1997) (Souter, J., dissenting) (stating that advertising is “an essential ingredient of the [economic] competition that our public law promotes” is part of its First Amendment value).

28. See *Va. State Bd. of Pharmacy*, 425 U.S. at 764–65.

29. *Id.* at 770–71.

therefore implicated the First Amendment.³⁰ “[P]eople will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”³¹

The Court in *Virginia Board* emphasized that government could still ban advertising that contained false statements, or statements that were not provably false but were nonetheless deceptive or misleading.³² Returning to the metaphor of the free flow of commercial information, Justice Blackmun said the state had the right to ensure that the “stream . . . flow[s] cleanly.”³³ Commercial advertising, he suggested, might be more easily verifiable by its distributor than other speech and was less likely to be chilled.³⁴ Accordingly, it was “less necessary to tolerate inaccurate statements” in this arena.³⁵ At the same time, he stressed, the state could not achieve its commercial goals through the mechanism of keeping people in ignorance.³⁶ In particular, it could not “completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.”³⁷

That condemnation of regulators “suppress[ing] . . . truthful information”³⁸ seemed clear-cut, but in *Central Hudson Gas & Electric Corp. v. Public Service Commission*³⁹ five years later, the Court took an ambiguous step back. The case involved a New York rule banning advertising by electric utilities promoting the use of electricity on the theory that New Yorkers would be better off if they weren’t motivated to consume quite so much electricity.⁴⁰ The Court didn’t seem to have a problem with the state’s larger approach. It explained that in contrast to the usual First Amendment rule—that government can regulate speech on content-based grounds only in exceptional cases where strictly necessary to vindicate a “compelling” state interest—content-based

30. *Id.* at 770.

31. *Id.*

32. *Id.* at 770–73.

33. *Id.* at 771–72.

34. *Id.* at 772 n.24.

35. *Id.*

36. *Id.* at 770.

37. *Id.* at 773. The Court distinguished *Capital Broadcasting* as involving “the special problems of the electronic broadcast media.” *Id.*

38. *Id.* at 772 n.24.

39. 447 U.S. 557 (1980).

40. *Id.* at 558–60 (citing STATE OF N.Y. PUB. SERV. COMM’N, STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES (1977)).

regulation of advertising was fine so long as it satisfied a less demanding test that the rule directly advanced some “substantial” interest and was no broader than it needed to be.⁴¹

The Court offered no explanation for why it selected that standard of scrutiny, and it offered no case law support.⁴² It declined to rely on either *Capital Broadcasting* or *Pittsburgh Press*.⁴³ To the contrary, it noted that “in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.”⁴⁴ The Court’s willingness to adopt a less demanding test seems to have been driven by its general sense that commercial speech was simply “of less constitutional moment than other forms of speech.”⁴⁵

In the end, the Court struck down the New York statute: it found that the law banned the advertising of energy-efficient products and services that would actually promote energy savings and, consequently, was too broad.⁴⁶ Its willingness to scrutinize the law closely,⁴⁷ and a footnote indicating that courts should “review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy,”⁴⁸ suggested some discomfort with the state’s mode of regulation. Nonetheless, the Court’s announced test, and the structure of its opinion, indicated that it was willing to approve state attempts to influence consumers’ behavior by limiting the advertising they received.⁴⁹

41. *Id.* at 564.

42. It did cite its decision three years earlier in *Carey v. Population Services International*, 431 U.S. 678 (1977), which it characterized, expansively, as holding open the possibility that the state might impose carefully drawn restrictions on contraceptive advertising for reasons such as minimizing offensiveness and protecting children. *See Cent. Hudson*, 447 U.S. at 565–66.

43. The Court did not mention *Capital Broadcasting* at all, and it distinguished *Pittsburgh Press* as involving “speech related to illegal activity.” *Cent. Hudson*, 447 U.S. at 564. In so doing, it followed *Virginia Board*, which characterized *Pittsburgh Press* as a case where “the transactions proposed in the forbidden advertisements are themselves illegal.” *Va. State Bd. of Pharmacy*, 425 U.S. at 772. That was a stretch, though. *See infra* notes 456–62 and accompanying text.

44. *Cent. Hudson*, 447 U.S. at 566 n.9; *see also supra* note 43.

45. *Id.* at 562 n.5.

46. *Id.* at 569–71.

47. *See* Archibald Cox, *The Supreme Court Term, 1979—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 34–36 (1980).

48. *Cent. Hudson*, 447 U.S. at 566 n.9.

49. Justices Blackmun’s separate opinion noted this view and expressly declined to endorse it. *Cent. Hudson*, 447 U.S. at 573–74 (Blackmun, J., concurring) (“[E]nergy conservation is a goal of paramount national and local importance. I disagree with the Court,

A year later, in *Metromedia, Inc. v. City of San Diego*, the plurality emphasized the “subordinate position” and “lesser protection” of commercial speech.⁵⁰ It stated that it was within a city’s power to ban all commercial advertising via billboard, notwithstanding the Justices’ doubts whether a similar ban would be constitutional for noncommercial messages,⁵¹ and it held that government could draw content-based lines *between* different advertising messages given mere rational basis in a way that would be impermissible for noncommercial speech.⁵²

The Court’s willingness to approve commercial speech regulation reached a high point in *Posadas de Puerto Rico Associates v. Tourism Co.*⁵³ The legislature in that case had restricted the advertising of casino gambling to Puerto Rico residents by virtue of its view that advertising would cause residents to gamble more and

[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.⁵⁴

The Court upheld the law.⁵⁵

But later on, the ground shifted again. In *44 Liquormart, Inc. v. Rhode Island*, the Court struck down a Rhode Island law banning the price advertising of alcoholic beverages.⁵⁶ Although the majority could not unite behind a single holding, four of the Justices took a firm stand against the constitutionality of any law restricting the dissemination of

however, when it says that suppression of speech may be a permissible means to achieve that goal.”).

50. 453 U.S. 490, 506–07 (1981) (plurality opinion) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); *Central Hudson*, 447 U.S. at 562–63).

51. *See id.* at 503–17.

52. *See id.*

53. 478 U.S. 328 (1986).

54. *Id.* at 330, 341 (quoting Brief for Appellees’ at 37, *Posadas*, 478 U.S. 328 (No. 84-1903)).

55. *Id.* at 348; *see also* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding a ban on direct-mail solicitation of personal injury victims for thirty days following an accident on the grounds that such solicitations invade victims’ privacy and tranquility and reflect poorly on the profession); *United States v. Edge Broad. Co.*, 509 U.S. 418, 421, 436 (1993) (upholding a federal law allowing the advertisement of state-run lotteries only in publications published in, or broadcasters licensed to, the relevant state).

56. 517 U.S. 484, 489 (1996).

advertising messages unless the messages were false, misleading, or presented the risk of coercion or undue influence.⁵⁷ Three of the four urged that strict scrutiny was appropriate because such government rules are paternalistic: “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”⁵⁸ One of the four would have dispensed with strict scrutiny, holding such rules unconstitutional *per se*.⁵⁹ Four other Justices saw no need to go so far but indicated that government cannot ban advertising when it can achieve its goals more directly by regulating purchases of the advertised product.⁶⁰

The Court vacillated in the years that followed. In *Greater New Orleans Broadcasting Ass’n v. United States*, considering a federal ban on broadcast casino-gambling advertising that could be received in states without casinos, seven or eight Justices seemed to view as legitimate the states’ interests in ameliorating the costs of casino gambling by prohibiting advertising, and thus limiting demand.⁶¹ But a five-Justice majority rejected that approach in *Thompson v. Western States Medical Center*.⁶² There, the Court considered federal law governing compounding pharmacies (that is, pharmacies that prepare customized medications not available from pharmaceutical companies, for example, by preparing a medication in a nonstandard dosage or in liquid rather than pill form).⁶³ The law exempted compounding pharmacies from Food and Drug Administration (FDA) “new drug” regulation (which would have required them to prove the safety and efficacy of their formulations through clinical trials) but imposed

57. *See id.* at 501–04 (plurality opinion); *id.* at 518 (Thomas, J., concurring in part and in the judgment).

58. *Id.* at 503 (plurality opinion).

59. *Id.* at 518 (Thomas, J., concurring in part and in the judgment).

60. *Id.* at 530–31 (O’Connor, J., concurring in the judgment). This approach, also visible in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995), has been described as “replicat[ing] strict scrutiny without saying so.” Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 S. CT. REV. 123, 145.

The ninth Justice was Justice Scalia. His opinion suggested that First Amendment protection of commercial speech was questionable given the national consensus in favor of advertising regulation at the times the First and Fourteenth Amendments were enacted. *44 Liquormart*, 514 U.S. at 517–18 (Scalia, J., concurring in part and concurring in the judgment).

61. 527 U.S. 173, 189 (1999). The interest, put another way, was one in avoiding situations where citizens of noncasino states would “hear [the speech] and make rash or costly decisions.” *Id.* at 194. The Court struck down the law as inadequately tailored to the goals it sought to advance. *Id.* at 195–96.

62. 535 U.S. 357 (2002).

63. *Id.* at 360–61.

restrictions including a ban on promoting or advertising the compounding of particular drugs.⁶⁴

The Court held the statute unconstitutional.⁶⁵ Four dissenting Justices urged that the absence of FDA-required testing made compounding pharmacy products more risky than other drugs,⁶⁶ and they saw the statute as well tailored to the goal of avoiding advertising-driven demand for compounding-pharmacy products on the part of patients whose needs could be otherwise served.⁶⁷ There was no need for demanding scrutiny, they urged.⁶⁸ Advertising restrictions “do not often repress individual self-expression; they rarely interfere with the functioning of democratic political processes; and they often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment.”⁶⁹ For the majority, though, the dissenters’ argument was flawed at the root: it was no more than the “fear that people would make bad decisions if given truthful information.”⁷⁰

Finally, five years ago, the Court decided *Sorrell v. IMS Health, Inc.*⁷¹ *Sorrell* involved a Vermont restriction on the use, for marketing purposes and without a doctor’s permission, of pharmacy-collected lists of the drugs each doctor prescribed.⁷² Drug companies were using that information to tailor their one-on-one marketing pitches to doctors, and the Vermont legislature felt that those tailored pitches were sufficiently effective as to cause doctors to overprescribe expensive brand-name drugs and underprescribe generics.⁷³ Without that detailed information, when it came time for pharmaceutical representatives to make their sales pitches and offer the doctors free drug samples (over \$11 billion worth industry-wide every year⁷⁴), along with “gifts, free meals, and

64. Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296, 2328–30 (initially (but no longer) codified at 21 U.S.C. § 353a (Supp. 1997)).

65. *Thompson*, 535 U.S. at 377.

66. *See id.* at 382–83 (Breyer, J., dissenting).

67. *Id.* at 379.

68. *Id.* at 387–89.

69. *Id.* at 388.

70. *Id.* at 374 (majority opinion).

71. 131 S. Ct. 2653 (2011).

72. *Id.* at 2659.

73. *Id.* at 2661.

74. *IMS Health, Inc. v. Ayotte*, 490 F. Supp. 2d 163, 167 (D.N.H. 2007), *rev’d*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 557 U.S. 936 (2009).

other inducements,”⁷⁵ the legislature concluded, doctors would find the industry’s pitches for expensive proprietary drugs less appealing.⁷⁶

The Supreme Court approached the case as a restriction on commercial speech and, by a 6–3 majority, struck down the law.⁷⁷ The majority mentioned *Central Hudson* only once.⁷⁸ The fact that the law singled out for regulation the use of certain information in connection with for-profit advertising, while leaving untouched its use in connection with other speech, the Court said, mandated strict scrutiny.⁷⁹ The fact that the restriction intended to “suppress” the advertisers’ message that doctors should prescribe their brand-name products made it impermissible without more.⁸⁰ Narrow tailoring was irrelevant because the state’s concerns about drug-company marketing were “incompatible with the First Amendment.”⁸¹

It’s fair to say, I think, that *Central Hudson* is no longer good law. The *Sorrell* Court purported to follow *Central Hudson*, but it turned it on its head: it described that case as standing for the proposition that government, in regulating advertising, may not “seek to suppress a disfavored message.”⁸² According to the *Sorrell* Court, a law that regulates advertising—although not other speech—should by virtue of that fact alone be deemed both content- and speaker-based and, therefore, subject to heightened scrutiny.⁸³ All the more, when government restricts advertising because it disfavors a particular commercial message (as it did in *Central Hudson*), it violates the general rule forbidding government to regulate speech “because of disagreement with the message it conveys”—a rule for which “[c]ommercial speech is no exception.”⁸⁴ Thus, after *Sorrell*, there is no room left in the law for *Central Hudson*’s view that—in principle—the

75. *Id.* at 168.

76. *See id.* at 171–73.

77. The dissenters (Justices Breyer, Ginsburg, and Kagan) disagreed that this was a commercial speech matter; they urged that the state was only restricting the use of information gathered pursuant to regulatory mandate and not implicating the First Amendment at all. To the extent that there was a commercial speech restriction here, they continued, it satisfied the *Central Hudson* test. *See Sorrell*, 131 S. Ct. at 2673 (Breyer, J., dissenting).

78. *Id.* at 2668 (majority opinion).

79. *Id.* at 2663–64.

80. *See id.* at 2667–72.

81. *Id.*

82. *Id.* at 2668.

83. *See id.* at 2663–64, 2667.

84. *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

state has the power to limit an industry's advertising on the theory that more extensive advertising would lead to greater consumption of a disfavored product.⁸⁵

Now, state regulation disfavoring a particular advertising message does not necessarily constitute "paternalism" as that term is usually understood.⁸⁶ When New York in *Central Hudson* banned utilities from running ads promoting electricity use, it didn't do so because it believed that people would respond to the ads by doing something personally destructive or against their own interests; rather, it believed that increased electricity consumption might be in individuals' own interests but not in those of society as a whole.⁸⁷ In *Virginia Board*, similarly, the concern was not that price information would lead consumers to make ill-advised choices but that the pressures of price competition would lead pharmacists to act as merchants rather than professionals.⁸⁸

Both of these were instances of classic regulation, seeking to achieve a public good by lessening the incidence of self-interested private action. When the Court has struck down commercial speech regulation, indeed, it has almost always been because the government sought by the speech restriction to discourage persons from doing things that were in fact in their individual self-interest (though not, it was thought, in the interest of society as a whole). Whatever that is, it isn't paternalism.⁸⁹

Nevertheless, cases like *Bigelow*, *Virginia Board*, and *44 Liquormart* demonstrate the appeal of the argument that government regulation of commercial speech constitutes impermissible censorship burdening the thinking process of the public. The idea that government should not be

85. See *United States v. Caronia*, 703 F.3d 149, 162–64 (2d Cir. 2012). See generally Hunter B. Thomson, Note, *Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health*, 47 COLUM. J.L. & SOC. PROBS. 171 (2013). But see, e.g., *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 769–70 (D.N.J. 2011) ("*Sorrell* did not explicitly overrule *Central Hudson* . . ." (emphasis added)).

86. Daniel Hays Lowenstein, "*Too Much Puff*": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1237 (1988).

87. See *id.* at 1241.

88. See *id.* at 1238; see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 484–89 (1985) (discussing *Central Hudson*). Indeed, when Rhode Island in *44 Liquormart* banned liquor price advertising, its primary concern was not that people would learn about low liquor prices and be inspired to drink more than was good for them. It was that price advertising would lead liquor stores to compete on price grounds and sell their product more cheaply—again, something in the stores' own interests but something the legislature deemed to be contrary to those of society as a whole. See *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7–9 (1st Cir. 1994), *rev'd*, 517 U.S. 484 (1996).

89. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 43–44, 50–53 (2000). On paternalism, see generally Bill New, *Paternalism and Public Policy*, 15 ECON. & PHIL. 63 (1999).

seeking to manipulate individual action by limiting the information available to people—whether paternalistically or not—strikes a deep First Amendment chord. Justice Stevens once put it this way:

Any “interest” in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.⁹⁰

First Amendment lawyers’ alarm bells typically go off the most loudly whenever the fact that somebody might be informed or convinced by speech is offered as a reason for regulating it.⁹¹ And that, after all, was the fact pattern of many of the commercial speech cases, including *Central Hudson*. A First Amendment philosophy premised on the belief that government cannot be trusted to decide what arguments citizens should be exposed to, and what they should be allowed to know, will reject this sort of commercial speech regulation—without regard to whether the advertising’s subject matter is of core First Amendment concern and without regard to the identity of the speakers.⁹²

III. THE CHALLENGE OF DECEPTIVE ADVERTISING

At the same time the Court was articulating this libertarian understanding of commercial speech law, though, it maintained its

90. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

91. *See, e.g., Kingsley Int’l Pictures Corp. v. Regents of the Univ.*, 360 U.S. 684, 688–89 (1959) (“New York has . . . prevent[ed] the exhibition of a motion picture because that picture advocates an idea Yet the First Amendment’s basic guarantee is of freedom to advocate ideas. . . . [I]t protects expression which is eloquent no less than that which is unconvincing.”); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) (“The government may not suppress speech on the ground that it is too persuasive.”).

92. Kathleen Sullivan points out that this approach, identifying as the most pernicious threats to free speech government “paternalistic protection of listeners” and government restrictions on private actors’ use of their own resources for speech, reflects a particular understanding of the First Amendment. Kathleen M. Sullivan, *The Supreme Court Term, 2009—Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155–63 (2010). She contrasts that approach, which she calls free-speech-as-liberty, with the competing one she calls free-speech-as-equality. *Id.* at 163–66. The latter—at least as well-rooted in the case law—instead stresses government’s obligation to protect dissenters and to open public resources for speech by rich and poor alike. *See id.* at 146–55; *see also* Victoria Baranetsky, Note, *The Economic-Liberty Approach of the First Amendment: A Story of American Booksellers v. Hudnut*, 47 HARV. C.R.-C.L. L. REV. 169, 171, 176–79 (2012). That dichotomy can be seen to parallel the one introduced *infra* Part V.

support for government regulation of false and misleading advertising—something more problematic from a traditional First Amendment standpoint than is generally realized. Let’s look at a few examples of advertising law as it is practiced.

When Johnson & Johnson decided to name an antacid product “Mylanta Night Time Strength,” the Third Circuit said no.⁹³ The product’s effects, the court noted, did not last all night—and surveys showed that the name had led a minority of consumers to believe that it would.⁹⁴ When Tropicana sought to advertise its orange juice as “pure, pasteurized juice as it comes from the orange,” using an image of an Olympic athlete squeezing an orange into a Tropicana carton, the Second Circuit said no.⁹⁵ The court found the slogan misleading because the juice was—as explicitly stated—pasteurized, and thus not “as it comes from the orange.”⁹⁶ Notwithstanding that any claim of literal falsity would have been dubious, the court noted based on survey results that “a not insubstantial number of consumers were clearly misled.”⁹⁷

When General Motors (GM) advertised a car at the NCAA men’s basketball tournament by first pointing out that Lew Alcindor (by then known as Kareem Abdul-Jabbar) had been three times voted MVP at that tournament and then stating that the Oldsmobile Eighty-Eight had been three times named to the Consumers Digest Best Buy list, the Ninth Circuit saw a sufficient possibility of consumer confusion as to leave it to a jury whether GM should have to pay damages to Abdul-Jabbar.⁹⁸ Again, there was plainly no literal falsity; but the context, the court felt, could cause the viewer to infer an endorsement that Abdul-Jabbar had not made.⁹⁹

These examples could be multiplied indefinitely. Not every false advertising case ends in an injunction limiting speech based on a mere

93. *Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharm. Co.*, 290 F.3d 578, 583 (3d Cir. 2002).

94. *Id.* at 590–95. The court also explained that the brand name implied that the product had been “specially made to work at night,” notwithstanding that it was in fact merely a more powerful version of the ordinary Mylanta product. *Id.* at 589.

95. *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 314 (2d Cir. 1982).

96. *Id.* at 318.

97. *Id.* at 317. The court added as further support for its holding the fact that Tropicana’s juice was sometimes frozen—not merely “squeezed, heated and packaged.” *Id.* at 318.

98. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996); *see also White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1399–1402 (9th Cir. 1992).

99. *Abdul-Jabbar*, 85 F.3d at 410–13.

possibility of confusion.¹⁰⁰ The key point to take away here, though, is that conventional consumer protection law can lead to bans on speech even in the absence of literal falsity, even where there is no direct evidence that the speaker intended to mislead consumers, based on after-the-fact conclusions drawn from the survey-measured experience of actual consumers, and without regard to the fact that most of those consumers were not misled at all.¹⁰¹

Sometimes disputes over the legality of advertising require courts to make challenging determinations—is it misleading for a company to describe its vegan (eggless) condiment as “Just Mayo”?¹⁰² In order to give consumers a predictable framework in which to buy consumer products, government regulation proscribes statements that—absent the regulatory action—could not reliably be considered misleading at all. The U.S. Department of Agriculture (USDA) thus has promulgated a complex definition of what it means for a food to be “organic”; the definition incorporates such components as a list of approved non-organic ingredients that the agency deems to be without reasonably

100. See, e.g., *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 57 (2014).

101. In *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883 (7th Cir. 2000), *amended on rehearing* by 209 F.3d 1032, *cert. denied*, 531 U.S. 917 (2000), Judge Easterbrook took the position that a false-advertising claim should not lie simply because a substantial number of consumers misunderstood a statement that was straightforwardly correct, given the dictionary meanings of its constituent words. *Mead Johnson*, 209 F.3d at 1034. A statement, he argued, does not “impl[y] something that is false” merely because consumers misunderstand it. *Id.* But this is not the majority view; indeed, it is “fundamentally at odds with the accepted uses of extrinsic state of mind evidence of deception in advertising cases.” Richard J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Cases: Surveys, Dictionaries, Judicial Edicts and Materiality Tests*, 95 TRADEMARK REP. 615, 628 (2005). Rather, notwithstanding that an advertising statement may be “literally true and grammatically correct,” the question of deception turns on “what does the person to whom the advertisement is addressed find to be the message?” *Am. Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). See generally Shari Seidman Diamond & David J. Franklyn, *Trademark Surveys: An Undulating Path*, 92 TEX. L. REV. 2029 (2014); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449 (2012).

102. See Stephanie Strom, *F.D.A. Allows Maker of Just Mayo to Keep Product's Name*, N.Y. TIMES, Dec. 18, 2015, at B2, <http://www.nytimes.com/2015/12/18/business/fda-allows-maker-of-just-mayo-to-keep-products-name.html> [<https://perma.cc/CTV8-BJZ9>]. Similarly, is it misleading for a company to refer to seaweed-based carageenan as “gelatin”? Does it matter that ordinary consumers (surveys reveal) don't know how “gelatin” conventionally is made and thus arguably cannot be confused by the characterization? See Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 236 (2007) (discussing *Kraft Gen. Foods, Inc. v. Del Monte Corp.*, 28 U.S.P.Q. 2d 1457 (S.D.N.Y. 1993)).

available organic substitutes.¹⁰³ That list, and other elements of the definition, involves contested policy choices.¹⁰⁴ The law treats it as uncontroversial that the government can rely on those choices to set its own definition of what it means to be “organic” and bar as “misleading” any alternative uses of the word.

The FDA has taken the position that it may be misleading—and therefore unprotected by the First Amendment—for a milk producer to (accurately) label its milk as “from cows not treated with rbST.”¹⁰⁵ Without “proper context,” the agency has explained, such statements may misleadingly imply that milk from untreated cows is safer or better than milk from treated cows.¹⁰⁶ The agency therefore recommends that any such statement be accompanied by statements such as a disclaimer that “[n]o significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows.”¹⁰⁷

This is not how things work in the world of ordinary speech. The first notable point here is the irrelevance of intent in advertising regulation.¹⁰⁸ There is no scienter requirement under the federal Lanham Act that governs false advertising and trademark claims, nor is there under state consumer protection statutes.¹⁰⁹ Similarly, suits for defamation and commercial disparagement are not subjected to the *Sullivan* or *Gertz* standards if the offending statements are deemed to be commercial speech.¹¹⁰

The First Amendment, though, ordinarily disfavors regimes under which “an honest speaker[] . . . may accidentally incur liability for

103. Tushnet, *supra* note 102, at 241 (citing 7 C.F.R. §§ 205.300 to .301 (2007)).

104. *See id.*

105. Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6280 (Feb. 17, 1994).

106. *Id.*

107. *Id.* In *International Dairy Foods Association v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2010), the Sixth Circuit struck down an Ohio law prohibiting compositional claims including “from cows not treated with rbST.” It upheld the power of the state, however, to require disclaimers such as the one suggested by the FDA. *Id.* at 650.

108. Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial Speech Doctrine*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 294, 308 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

109. *See id.*

110. *See* U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914, 928 (3d Cir. 1990). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974), ruled that a state cannot impose defamation liability for a statement the defendant reasonably believed to be true. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), held that a state cannot impose liability for defamation of a public official or a public figure except in cases where the speaker knew that his statements were false or acted in reckless disregard of whether they were false.

speaking.”¹¹¹ Even literally false and socially harmful statements will often be protected if uttered innocently—as the Court explained in *New York Times Co. v. Sullivan*, that protection is part of the “breathing space” that freedom of expression needs in order to survive.¹¹² The Constitution forbids the state to sanction political candidates, even for plain falsehoods, if they are made in good faith.¹¹³ When it comes to subversive advocacy, speech is protected unless it is “*intended*, and likely, to incite imminent lawless action.”¹¹⁴ In defamation or privacy actions, the Court has stated, states cannot impose liability without *mens rea*; the alternative would risk “serious impairment of the indispensable service of a free press.”¹¹⁵ In *Virginia v. Black*, the Supreme Court saw it as the *sine qua non* of constitutionality for a state cross-burning statute that it require direct evidence of intent to intimidate.¹¹⁶

Ordinary First Amendment law, moreover, is hostile to any regime in which it is difficult to predict whether speech will incur legal sanction. Speech can be regulated only by “a precise statute ‘evincing a legislative judgment that certain specific conduct be . . . proscribed.’”¹¹⁷ Uncertainly-bounded prohibitions may “trap the innocent”,¹¹⁸ alternatively, the fear of liability will chill speakers from engaging in speech that the legislature had not felt it necessary to prohibit, and that indeed the legislature could not have prohibited even had it wanted to.¹¹⁹

111. *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). Leslie Kendrick has suggested that the importance given to speakers’ intent is connected to autonomy theories of free speech; that might mesh with the law’s de-emphasizing intent in commercial speech regulation where autonomy-based theories do not play a role. See Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1278–86 (2014).

112. 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

113. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 61–62 (1982).

114. *Alvarez*, 132 S. Ct. at 2544 (plurality opinion) (emphasis added).

115. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

116. 538 U.S. 343, 347–48 (2003). Similarly, in *United States v. Elonis*, No. 13-983, slip op. at 13–17 (U.S. June 1, 2015), the Supreme Court relied on statutory interpretation to reverse a lower court’s ruling that a speaker violates 18 U.S.C. § 875(c) (2012) simply by transmitting in interstate commerce a statement that a reasonable person would see as a threat to injure the person of another.

117. *Grayned v. City of Rockford*, 408 U.S. 104, 109 n.5 (1972) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963)).

118. *Id.* at 108.

119. See generally Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989); Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101, 1169 (1993).

Contemporary regulation of misleading advertising, however, shows little of this concern for predictability. One cannot say with any assurance whether the Federal Trade Commission (FTC) will find an advertisement to contain a misleading claim.¹²⁰ Examples of prohibited speech, from the Tushnet & Goldman advertising law casebook, include “[a]n ad portraying a broken, hard-to-find toy being replaced because the toy had been purchased with a particular credit card, when the credit card company did not replace broken goods but merely refunded the purchase price”;¹²¹ “[a]dvertisements for a pain reliever that, in claiming to have twice as much pain reliever as the leading analgesic, implied that it had twice as much pain reliever as all commonly available pain relievers”;¹²² and “[c]laims that Geritol would cure tiredness caused by ‘iron deficiency anemia,’ when most tired people have no such deficiency.”¹²³ None of these results can be derived mechanically.

First Amendment law does not typically decide whether speech is protected by embarking on a post hoc inquiry about the actual effects of a given message on segments of its target audience.¹²⁴ In defamation cases, the courts ask whether a “reasonable person” could understand a statement as asserting a statement of verifiable fact, not whether actual people in fact did.¹²⁵ Yet as I noted earlier, suits by one competitor against another for false advertising routinely are driven by survey results¹²⁶—how did consumers in fact respond to the advertisement in question? That approach has the important benefit of zeroing in on false advertising law’s core concern—are consumers being confused?—but it does so by subordinating concerns about predictability that dominate in ordinary First Amendment law.

Part of the challenge of false advertising law is that, in a world of distracted and inattentive consumers, almost any statement may leave some consumers with the wrong impression.¹²⁷ The law, thus, does not

120. See *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), in which the advertiser unsuccessfully makes this argument, although not in a First Amendment context.

121. REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASE AND MATERIALS* 306 (2d ed. 2014).

122. *Id.* at 307.

123. *Id.*

124. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (plurality opinion); Lyrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 803–04.

125. See, e.g., *Gilbrook v. City of Westminster*, 177 F.3d 839, 861–63 (9th Cir. 1999), *cert. denied*, 528 U.S. 1061 (1999).

126. See *supra* note 97 and accompanying text.

127. See Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C.

provide for liability if only a trivial number of consumers are confused. Its threshold, rather, is confusion on the part of a “substantial number” of consumers—a figure commonly set at 15%–20%.¹²⁸ Thus, if an advertiser states that its product cures tiredness caused by “iron deficiency anemia” and as much as 15%–20% of its target audience understand the statement, in context, to convey the false message that the product will cure their own tiredness, then the statement may be actionable under the Lanham Act. But that is not the approach of conventional First Amendment thinking, which would see the fact that 80%–85% of consumers were *not* confused as an ironclad argument that the speech was constitutionally protected.¹²⁹

More fundamentally, it is a commonplace of ordinary First Amendment law that government can regulate speech on the basis of its content only in cases of extreme necessity—only where the interests the government seeks to serve are compelling and the speech restriction is the unavoidable, “actually necessary,” least restrictive means to vindicate those interests.¹³⁰ Regulation of blatantly false commercial speech seems to satisfy that test.

But it is hardly “necessary” for the government to adopt elaborate rules to prescribe, say, whether a beer can be labeled “organic” if made with non-organic hops, and then to punish brewers who describe their product in a way that diverges from the government’s judgments. It is, I think, useful and indeed desirable for government to do so—absent some definitional enterprise like the one the government has engaged in, consumers would be hard-pressed in evaluating producer claims that their products are organic and in using that criterion to choose among different products.¹³¹ The USDA definition, while arbitrary, gives consumers something to work with and producers a standard to live up to. But it is not the only possible means the government could have

L. REV. 737, 743 (2007).

128. See Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63, 98 n.127 (2009); see also *Proctor & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 345–46 (S.D.N.Y. 2008); *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 249 (S.D.N.Y. 2005). But see *Mobileye, Inc. v. Picitup Corp.*, 928 F. Supp. 2d 759, 777 (S.D.N.Y. 2013) (9.2% is not “insubstantial as a matter of law”).

129. Daniel J. Gervais & Julia Latsko, *Who Cares About the 85 Percent? Reconsidering Survey Evidence of Online Confusion in Trademark Cases*, 96 J. PAT. TRADEMARK OFF. SOC’Y 265, (2014) (urging that trademark law should not ignore the interests of non-confused consumers).

130. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2548–51 (2012) (plurality opinion).

131. For a more sophisticated discussion, see Tushnet, *supra* note 102, at 238–48.

chosen to address this problem, and it would not pass a strict scrutiny test.

Nor do other aspects of consumer protection law follow in ordinary First Amendment tracks. Only because the usual First Amendment rules are suspended can a Treasury Department regulator reject proposed labels for “King of Hearts” or “St. Paula’s Liquid Wisdom” beer (the latter featuring an image of the 1898 painting *The Conversion of Paula by Saint Jerome*) on the ground that those names and labels imply forbidden health or medical claims.¹³²

The FTC routinely requires firms to provide substantiation for their advertising claims on the theory that “a firm’s failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair or deceptive act or practice” under § 5 of the FTC Act.¹³³ But for government to require speakers to establish the truth of their claims reverses the usual First Amendment burden of proof.¹³⁴

The challenges don’t abate when we shift our attention from false advertising law to ordinary trademark law. Trademark infringement involves a person’s use of a word or mark in a way “likely to cause

132. See Tim Mak, *Meet the Beer Bottle Dictator*, DAILY BEAST (Aug. 12, 2014), <http://www.thedailybeast.com/articles/2014/08/12/meet-the-beer-bottle-dictator.html> [<https://perma.cc/RQ6Z-PXV6>].

133. FTC Policy Statement Regarding Advertising Substantiation, *as reprinted in In re Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984); *see also* *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 7–8 (1st Cir. 2010).

134. I could go on. Ordinary First Amendment law calls upon government to interfere with speech to the least extent possible and, thus, even some commercial speech cases state that government should not simply ban speech where mandating a disclaimer would do the job less intrusively. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *see also infra* note 147 and accompanying text. But commercial speech does not follow this rule consistently. Courts, after all, will rely on survey evidence in private Lanham Act litigation that a firm’s advertising is misleading notwithstanding that the surveys didn’t test the effect of disclosures. *See* Tushnet, *supra* note 127, at 754.

Ordinary First Amendment law calls for independent appellate review of lower-court findings that speech is sanctionable; commercial speech law includes no comparable doctrine. *See* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1196–97 (1988).

The trademark cause of action for dilution does not require that speech be false or misleading at all, and its constitutionality is at the very least questionable. *See* Mary LaFrance, *No Reason to Live: Dilution Laws as Unconstitutional Restrictions on Commercial Speech*, 58 S.C. L. REV. 709, 709–10 (2007); Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212, 294–97 (2013); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 561 (2008). But I’ll not stress that point here. Part of the tension I emphasize in this Article is that false advertising and trademark law, in general, are both substantively desirable and inconsistent with ordinary First-Amendment thinking. By contrast, I do not see dilution law as a good thing.

confusion . . . or to deceive” consumers about the origin or sponsorship of the speaker’s goods or services.¹³⁵ Trademark infringement is thus “a specific type of false advertising.”¹³⁶ The Supreme Court has found trademark law unexceptional because the “Government constitutionally may regulate ‘deceptive or misleading’ commercial speech.”¹³⁷

Perhaps unsurprisingly, thus, trademark law does not play by the usual First Amendment rules.¹³⁸ Once again, as with the law of false advertising, one can be held liable for trademark infringement despite having had no intention to deceive or mislead.¹³⁹ Indeed, because trademark law ties liability to a defendant’s use of a mark in circumstances creating a *likelihood* of confusion, a court can find liability for speech even where there is neither evidence that the defendant intended to confuse, nor evidence that any flesh-and-blood consumer in fact was confused.¹⁴⁰ This is utterly unexceptional in trademark law but ought to raise an eyebrow among First Amendment lawyers.

I said earlier that First Amendment law does not rely on audience reaction to decide whether speech is protected.¹⁴¹ At the same time,

135. 15 U.S.C. § 1125(a)(1)(A) (2012).

136. Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1475 (2009).

137. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 n.12 (1987) (quoting *Friedman v. Rogers*, 440 U.S. 1, 9–10 (1979); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

138. I’m here referring to routine, everyday applications of trademark law, not simply those challenges that seem especially First Amendment-y because they involve the incidental use of trademarks in expressive works. For one of those, see *Radiance Foundation, Inc. v. NAACP*, 786 F.3d 316, 319 (4th Cir. 2015).

139. In practice, a finding of bad faith intent-to-confuse is almost always fatal to a trademark defendant’s case. Courts, however, commonly find infringement even in the absence of bad faith. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1610, 1611 tbl.4 (2006). Courts routinely ask, as one of several factors to be balanced in trademark infringement cases, whether bad intent was present, but of the cases in the study sample finding a likelihood of confusion, approximately one-third found the “intent” factor to be neutral or to favor the defendant. *Id.*

140. See *id.* at 1604. Of the cases in Beebe’s sample in which the court found for plaintiff on the similarity-of-the-marks factor but found no evidence of bad faith intent or actual confusion, plaintiff prevailed in roughly half. *Id.* Key considerations in the courts’ ultimate likelihood-of-confusion determinations were the proximity of the goods (e.g., if plaintiff sells computers, the public is more likely to be confused if defendant sells computer accessories under a mark similar to plaintiff’s than if it sells food products under the same mark) and the strength of plaintiff’s mark (i.e., whether the mark is intrinsically well-suited to uniquely identifying a particular firm—the public is more likely to be confused as to the source if both products are called Quixip than if both are called Quality). *Id.* at 1606 fig.3.

141. See *supra* note 124 and accompanying text.

First Amendment jurisprudence usually looks for bad consequences before imposing *sanctions* on speech.¹⁴² Thus, it disfavors presumed damages for defamation.¹⁴³ Absent a showing of bad intent, we do not rely on any “likelihood” that defamation caused harm to reputation; First Amendment law in that context calls for a showing of actual harm.¹⁴⁴ The Justices in the *Pentagon Papers* case, similarly, rejected judicial relief based on mere “surmise or conjecture that untoward consequences may result” from the papers’ release.¹⁴⁵ Circumstances where ordinary First Amendment law both dispenses with bad intention and is willing to presume harm without a separate requirement of proof fall in the realm of dire emergency or grievous injury—child pornography, say, or revealing “the sailing dates of transports” during wartime.¹⁴⁶ The use of a trademark in circumstances where consumer confusion is deemed “likely” is not that. Indeed, the disparity is all the more clear given that trademark law forbids trademark uses even in cases where any confusion that might take place will have no effect on actual consumer purchasing decisions.¹⁴⁷

142. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974) (concluding courts may not award presumed damages in defamation cases absent a showing that defendant published the offending statement with knowledge of its falsity or in reckless disregard of the truth).

143. See *id.*

144. See *id.* In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985), to be sure, a splintered Court held that presumed damages were permissible without a heightened scienter showing where the offending speech was credit reporting disseminated to a small number of subscribers and not involving “matters of public concern.” In doing so, though, the plurality emphasized the similarity of that speech to commercial speech. *Id.* at 758 n.5, 762.

145. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 725–26 (1971) (Brennan, J., concurring). Notably, the *Pentagon Papers* case involved the legitimacy of an injunction against speech—a so-called prior restraint. That does not undercut my point, though. Prior restraints are disfavored in First Amendment law in part precisely because they may be entered without any showing of actual harm (necessarily so, because the feared harm has not happened yet). See Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49 (1981) (“When adjudication precedes initial dissemination, the communication cannot be judged by its actual consequences The adjudicative assessment of speech value versus social harm must be made in the abstract, based on speculation or generalizations . . .”). And notably as well, trademark and false-advertising injunctions may also be classed as prior restraints.

146. *Pentagon Papers*, 403 U.S. at 726–27 (Brennan, J., concurring) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). The well-known *Brandenburg* test for subversive advocacy (i.e., speech advocating violence) does incorporate the likelihood that violence will result but also requires affirmative intention to bring about that violence. See *supra* note 114 and accompanying text.

147. See generally Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark*

We might imagine that First Amendment law does not apply in the trademark context because trademarks are property. But the mere claim of property rights does not “render free speech issues invisible.”¹⁴⁸

Free speech guarantees can’t be avoided simply by characterizing a speech restriction as an “intellectual property law.” . . . [A] bill introduced in the 104th Congress would have declared the United States flag copyrighted, and would have imposed “criminal penalties for the destruction of a copyrighted flag.” Congress can’t get around the First Amendment merely by characterizing otherwise protected speech as treading on a property interest, as the flag copyright bill sought to do. One still has to ask whether these intellectual property laws are unconstitutional speech restrictions¹⁴⁹

Courts have referred to reputation as a property right,¹⁵⁰ but that has not stood in the way of First Amendment limitations on the tort law cause of action designed to vindicate individual interests in reputation.¹⁵¹

The disjunction between ordinary First Amendment law and the laws of trademark and false advertising, moreover, is deeper. In the ultimate analysis, advertising (and trademark) regulation is based on an understanding of how people respond to speech that is fundamentally different from that of ordinary First Amendment law.¹⁵² “The premise of the First Amendment is that the American people are neither sheep nor fools.”¹⁵³ Ordinary First Amendment law assumes that listeners will

Law, 98 VA. L. REV. 67 (2012).

Further, notwithstanding the usual First Amendment rule that government should interfere with speech to the least extent possible (so that even some commercial speech cases state that government should not simply ban speech where mandating a disclaimer would do the job less intrusively), *see supra* note 134, courts’ default response to trademark infringement is a ban on the offending speech, not an order requiring an appropriate disclaimer. *See Tushnet, supra* note 127, at 748.

148. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182 & n.163 (1998) (quoting Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 (1993)).

149. *Id.* at 182–83 (footnotes omitted).

150. *See id.* 182 & n.164.

151. *See id.*; *see also* Christine Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1123 (2010); Tushnet, *supra* note 127, at 746. Indeed, the property analogy is imperfect on its own terms because the law of trespass to chattels at least requires a showing of actual harm to the property in which plaintiff claims an interest. Bohannon, *supra*, at 1125–26.

152. *See Tushnet, supra* note 102, at 254–57.

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

respond to speech in rational ways.¹⁵⁴ That is why, we believe, “discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.”¹⁵⁵ That is why we say “that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.”¹⁵⁶

Ordinary First Amendment doctrine rests on the model of the rational listener¹⁵⁷ because it is rational listeners who populate our aspirational marketplace of ideas in which “who ever knew Truth put to the wors[t?]”¹⁵⁸ The marketplace metaphor assumes that people process speech on a rational level, and make reasoned judgments about it, rather than responding confusedly or irrationally.¹⁵⁹ The assumed marketplace-of-ideas participant is “a robust, self-determining agent fully capable of placing true information in whatever context might be necessary in order to decide whether or not to act upon it.”¹⁶⁰ Indeed, some argue, failure to incorporate this understanding of the listener into First Amendment law is to reject the idea of rational self-governance itself and, thus, the democratic ideal.¹⁶¹

By contrast, consumer protection and trademark law are explicitly paternalistic. The law prohibits misleading commercial speech where it appears likely that even a minority of consumers will be confused.¹⁶² Yet “[i]magine . . . the moderator at a Meiklejohnian town meeting ruling a speaker out of order because his ideas were ‘misleading.’”¹⁶³ Far from taking for granted the “imagined supremely competent audience”¹⁶⁴ of ordinary First Amendment law, consumer protection law assumes that “the public lacks sophistication”¹⁶⁵—that “the buying

154. Lidsky, *supra* note 124, at 815–16.

155. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

156. *Id.*

157. Lidsky, *supra* note 124, at 809–16.

158. JOHN MILTON, *AREOPAGITICA* (1644), reprinted in *IV THE WORKS OF JOHN MILTON* 293, 347 (Frank A. Patterson et al. eds., 1931).

159. Weinberg, *supra* note 119, at 1143–44 (quoting Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 135 (1989)).

160. Sullivan, *supra* note 60, at 156.

161. See, e.g., Lidsky, *supra* note 124, at 840.

162. See *supra* notes 135–40 and accompanying text.

163. See Post, *supra* note 89, at 36.

164. Tushnet, *supra* note 102, at 257.

165. *In re R.M.J.*, 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977)) (suggesting that the public in particular lacks sophistication regarding legal services).

public will [not] exercise great selectivity and caution in what they choose to believe of what they hear and read.”¹⁶⁶

In order to protect confused members of the buying public, the law imposes liability without fault, in a manner difficult to predict, often in contexts where it could not be said that liability is unavoidable to vindicate compelling state needs.¹⁶⁷ “[T]he consumer is not expected to have the competence or access to information needed to question the advertiser’s claim, and correction is not to be left to competitors and mere government counterspeech.”¹⁶⁸

Recall my earlier discussion of the complex USDA definition of what it means for a food to be organic.¹⁶⁹ How is government to embark on that sort of project? Because organic has no predefined meaning, government has to pour meaning into the word in order to protect consumers from vendors using it fraudulently, and the only way to do that is for government to figure out what organic *should* mean—what a sensible, intelligent, informed consumer who values organic food would want it to mean. But by definition here government is not taking consumers as it finds them. It has to decide what a right-thinking consumer ought to expect from an organic-labeled food based on its own evaluation of what is meaningful about being organic and what isn’t. There is no way to avoid the paternalism in that project.¹⁷⁰

Justice Blackmun’s explanation for false advertising law’s apparent First Amendment free pass was that commercial advertising might be more easily verifiable by its distributor than other speech and is less likely to be chilled.¹⁷¹ But neither of these rationales holds up on examination. Whether advertising is misleading, and thus unprotected, is in fact not easily verifiable at all; “distinguishing deceptive from nondeceptive advertising . . . may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.”¹⁷² Is “Glass Wax” a misleading name for a car polish that contains no wax? Nothing in the advertiser’s special

166. Sullivan, *supra* note 60, at 156 n.121 (quoting *United States v. Articles of Drug, etc.*, 263 F. Supp. 212, 216 (D. Neb. 1967)).

167. *See supra* notes 139–40 and accompanying text.

168. Sullivan, *supra* note 60, at 156.

169. *See supra* note 103 and accompanying text.

170. *See* Tushnet, *supra* note 102, at 243.

171. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

172. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 645 (1985).

knowledge provides an answer to this question.¹⁷³ Even the issue of whether advertising is factually false may not be at all clear. An advertiser may be sanctioned for scientific claims that do not relate to its own product at all, but rather to a competitor's.¹⁷⁴ Other noncommercial speech that *is* easily verifiable—say, statements about the flatness of the earth or purported photographs of the President meeting with space aliens—is not subjected to a different First Amendment standard on that account.¹⁷⁵

Nor is there much to the argument that commercial advertising is unusually durable or resilient.¹⁷⁶ Yes, advertising is an essential tool in the pursuit of profit, but so is the noncommercial speech embodied in for-profit television broadcasting, book publishing, or movie making. Speech about religion, say, might also be thought to be durable. Nor does commercial advertising's purported durability explain why judges should suddenly shift away from an ordinary First Amendment model in which consumers must be given the autonomy to weigh purportedly misleading speech for themselves.¹⁷⁷

One response to this contradiction might be for the Court to hold—as some academics have urged—that government lacks power to regulate misleading advertising.¹⁷⁸ But the Court has shown no interest in doing that.¹⁷⁹ And that's a good thing. While some features of current trademark law are undesirable,¹⁸⁰ and some aspects of current consumer protection law are over the top,¹⁸¹ both trademark law and consumer protection law on balance work well. And they could not exist in anywhere near their current form if we applied conventional First Amendment rules.

The reality is that if the law left sellers free to engage in the “sophisticated deception” of “innuendo, indirect intimations, and

173. See Tushnet, *supra* note 102, at 232.

174. See, e.g., *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230 (5th Cir. 2014).

175. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635–37 (1990); Post, *supra* note 89, at 37; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1218 & n.37 (1983).

176. See Kozinski & Banner, *supra* note 175, at 637–38; Shiffrin, *supra* note 175, at 1218.

177. See Kozinski & Banner, *supra* note 175, at 634–38; Shiffrin, *supra* note 175, at 1218.

178. See, e.g., Post, *supra* note 89, at 35–41. Dean Post would allow regulation in limited contexts where the evaluation of commercial information “requires unusual expertise” or there is special reason to doubt consumer autonomy. *Id.* at 41.

179. See *supra* notes 32–37 and accompanying text.

180. See *supra* note 139 and accompanying text.

181. See *supra* note 132 and accompanying text.

ambiguous suggestions,”¹⁸² it would leave the public worse off. The theory of the marketplace of ideas, in which consumers are mythological “idealized speech-evaluators,”¹⁸³ does not describe how consumers in fact respond to speech. In a world without effective bars against misleading advertising, intelligent consumers would eventually avoid deception by learning that nothing said in an advertisement was to be trusted, but that wouldn’t be a good result either: it would only deny the producers of superior products any way to distinguish themselves via their speech to the public.¹⁸⁴

The moral—as Rebecca Tushnet has emphasized¹⁸⁵—is that the law of speech used to sell commercial products can protect the interests of consumers or it can conform to conventional First Amendment rules, but it cannot do both. We have chosen a body of law that, by and large, promotes accurate consumer understanding even where doing so effectively requires ordinary First Amendment doctrine to give way. Not all aspects of that body of law are perfect; but it has been in place for many decades, and it works tolerably well. From a policy perspective, it seems straightforward. From the standpoint of First Amendment law, though, it presents a paradox. That’s the knot we have to unravel.

IV. CORPORATE SPEECH

We can better understand the commercial speech puzzle if we look at it in the context of the law of corporate speech in general. Here, the foundational case is *First National Bank v. Bellotti*,¹⁸⁶ decided just two years after *Virginia Board*.¹⁸⁷ But to understand *Bellotti*, we need to take a step back and consider how the free speech rights of corporate entities came to be at issue.

Corporate speech is a hot issue these days because a few years ago, in *Citizens United v. FEC*,¹⁸⁸ the Supreme Court struck down a federal law restricting for-profit corporations’ ability to speak in connection

182. *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

183. See Tushnet, *supra* note 108, at 312.

184. See Tushnet, *supra* note 102, at 253; see also Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 99–129 (2006); George A. Akerlof, *The Market for “Lemons”*: *Qualitative Uncertainty and the Market Mechanisms*, 84 Q.J. ECON. 488 (1970).

185. See Tushnet, *supra* note 102, at 257.

186. 435 U.S. 765 (1978).

187. 425 U.S. 748 (1976).

188. 558 U.S. 310 (2010).

with candidate elections.¹⁸⁹ The law, the Court told us, was baldly unconstitutional, impermissibly depriving a corporation of “the right to use speech . . . to establish worth, standing, and respect for the speakers’ voice.”¹⁹⁰ The majority and the dissenters in *Citizens United* differed over whether the First Amendment forbade Congress to restrict speech by for-profit corporations, paid for with corporate treasury funds, that advocates the election or defeat of a political candidate and is disseminated via broadcast, cable, or satellite immediately before an election.¹⁹¹ But they agreed about corporations’ ability to rely on the

189. *Id.* at 372. The statutory provision, 2 U.S.C. § 441b (2006), on its face imposed restrictions on both for-profit and nonprofit corporations. The Court had interpreted the provision, though, to exempt nonprofit corporations that were “formed for the express purpose of promoting political ideas,” had no shareholders with a claim on their assets or earnings, and received no contributions from for-profit corporations or unions. *FEC v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 264 (1986); *see also* *McConnell v. FEC*, 540 U.S. 93, 209–11 (2003) (quoting *MCFL*, 479 U.S. at 264). The key impact of the law, thus, was on for-profit corporations, unions, and entities funded by for-profit corporations and unions.

190. *Citizens United*, 558 U.S. at 340–41.

191. I do not intend in this Article to spend any significant time on the merits of the *Citizens United* decision. I will say here that in my view the dissenters had the better side of the debate—that Congress had power to enact its regulation even assuming the full First Amendment status of corporate speech. That matter has been addressed in many other places at far greater length than here. *See, e.g.*, ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133 (2011) (calling the Court’s conflation of individual and corporate speech rights “dangerously oversimplified”). Very briefly: the restriction at issue in *Citizens United* addressed the dissemination, via broadcast, cable, or satellite, in the time period shortly before an election, of communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” by for-profit corporations using their general treasury funds (or by other entities that were the recipients of those funds). *Citizens United*, 558 U.S. at 319–25 (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 469–70 (2007)); *see also* 2 U.S.C. § 434(f)(3) (2006); *id.* § 441b(b)(2)(C) (drawing a distinction between treasury and political action committee (PAC) funds); *Wis. Right to Life*, 551 U.S. at 465–69 (explaining when speech should be deemed “the functional equivalent of express advocacy”); *MCFL*, 479 U.S. at 263–65 (holding that the law does not apply to nonprofit advocacy groups accepting no contributions from business corporations, even where the nonprofit groups take corporate form). The Court majority began its condemnation of the law by explaining that the First Amendment “[p]rohibit[s]” any “restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United*, 558 U.S. at 340. As the dissenters explained, though, this is unfounded: government imposes different speech restrictions on the incarcerated and the free, the military service member and the civilian, the government employee and the member of the private sector, the student and the nonstudent, the foreigner and the citizen. *Id.* at 420 (Stevens, J., concurring in part and dissenting in part). Indeed, if government could not distinguish between corporate and individual speakers, then well-established federal securities law would be called into question. *See* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 871 (2007). While a variety of distinctions can be offered to justify different treatment of individuals and corporations speaking with treasury funds, it is sufficient at this juncture to point to the so-far-at-least well-

First Amendment in the first place¹⁹²: Justice Stevens in dissent felt it necessary to note that “[o]f course . . . no one suggests” that speech falls outside First Amendment protection simply because it comes from a corporation.¹⁹³

Post-*Citizens United*, others have challenged that consensus. Some scholars have urged that corporations shouldn’t be seen as First Amendment rightsholders at all—that they are not “persons” within the meaning of the Fourteenth Amendment and should not be able to assert First Amendment claims.¹⁹⁴ Other scholars have characterized the Supreme Court’s regard for for-profit corporations’ First Amendment rights as a revival of *Lochner* for the modern age.¹⁹⁵ So what about that? Why should corporations’ speech be protected? After all, as Justice Stevens put it, corporations “have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of ‘We the People.’”¹⁹⁶

I should be clear that the real debate here is over expenditures by *for-profit, non-media* corporations. Few today would contest that speech by organizations such as the League of Conservation Voters should enjoy First Amendment protection, notwithstanding the

accepted ban on corporate contributions to political candidates, and to Congress’s understanding that corporate electioneering expenditures are viewed by donors, candidates, and the general public alike as functionally indistinguishable from contributions, raising the same danger of a corrupt relationship between government and business. See *Citizens United*, 558 U.S. at 447–60 (Stevens, J., concurring in part and dissenting in part). “A democracy cannot function effectively when its constituent members believe laws are being bought and sold.” *Id.* at 453; see also *infra* notes 309–10 and accompanying text. But see *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc) (suggesting that *Citizens United* leaves the ban on corporate contributions to political candidates “on shaky ground”). See generally Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397 (2015) (arguing that the corporate contribution ban should be upheld as reinforcing limits on individual contributions and protecting the rights of dissenting shareholders).

192. See *Citizens United*, 558 U.S. at 337–41 (majority opinion); *id.* at 445 (Stevens, J., concurring in part and dissenting in part).

193. *Id.* at 445 (Stevens, J., concurring in part and dissenting in part).

194. See, e.g., 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, 39–51 (2012); Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221 (2011).

195. See, e.g., Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1148 (2015); Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2388–91 (2014); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198–203 (2014).

196. *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part).

organization's status as a corporation.¹⁹⁷ Speech undertaken by an association of individuals who have come together for the purpose of promoting political ideas, and funded solely by those individuals, raises none of the issues that motivate public concern about for-profit corporations' speech.¹⁹⁸ Indeed, Supreme Court case law champions individuals' ability to associate for just those political and advocacy purposes.¹⁹⁹

For-profit corporations, though, might present a different story. The separation of ownership and control in the modern corporation means that—at least for the estimated 10% of American corporations, employing about half of the workforce, that are not closely held²⁰⁰—it is much less plain whether the entity's expenditures for speech can or should be seen as emanating from the shareholders, whom we are to suppose have associated for purposes of funding this speech. The shareholders are not directing this speech; they may or may not agree with it; except in the most unusual of cases, they could not stop it if they tried; and their contribution of funds to the entity has nothing to do with its speech activities.²⁰¹

Just as First Amendment protection for nonprofit corporations is uncontroversial, it is uncontroversial that members of the news media should be able to assert First Amendment protections.²⁰² That is so even when they are organized as for-profit corporations.²⁰³ That point was adequately settled fifty years ago in *New York Times v. Sullivan*, when

197. See *MCFL*, 479 U.S. 238, 263 (1986) (concluding that “the concerns underlying the regulation of corporate political activity are simply absent” when it comes to voluntary political associations in nonprofit corporate form).

198. See *id.*

199. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 805 (White, J., dissenting).

200. See Alison Griswold, *How Many People Could the Hobby Lobby Ruling Affect?*, SLATE: MONEYBOX BLOG (June 30, 2014, 2:32 PM), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations.html [<https://perma.cc/W84W-W4AX>]. On the distinction between closely held and other corporations, see *infra* notes 415–17 and accompanying text.

201. See Anthony Kammer & Liz Kennedy, *Who Decides When a Corporation Spends Money in Politics?*, DEMOS (June 19, 2013), <http://www.demos.org/publication/who-decides-when-corporation-spends-money-politics> [<https://perma.cc/3NX8-UZZR>].

202. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966).

203. The statutory provision struck down in *Citizens United*, thus, made plain that it did not restrict the media distribution of “any news story, commentary, or editorial.” 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006). The legislative history indicates that Congress included that language in the statute so as to “assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. REP. NO. 93-1239, at 4 (1974).

the Court rejected the claim that the for-profit activity of the *New York Times* (a corporation) lessened its First Amendment protection against defamation liability.²⁰⁴ I'll return to this question later on: Can we really so easily distinguish between media entities and other for-profit corporations?²⁰⁵ For now, though, I'll focus on the constitutional protection of expenditures by *for-profit, non-media* corporations for the purpose of disseminating speech.

A. The Significance of “Persons”

I'll get one issue quickly out of the way: at least as a textual matter, it won't work to make the issue of constitutional protection for corporations' speech depend on whether corporations are “persons.”²⁰⁶ Stepping back from the First Amendment and looking to the Constitution as a whole, it seems plain that corporations should be able to assert some constitutional claims. If a state law oversteps the Constitution's federalism-based limitations on state power, such as the so-called Dormant Commerce Clause²⁰⁷ or the Article I, Section 10 limitations on state authority,²⁰⁸ then it's hard to imagine why a corporation ought not to be able to challenge that action. The Supreme Court heard such claims by corporations early on.²⁰⁹ The Court even earlier allowed a corporation to argue that a state had unconstitutionally impaired the obligation of contracts; that decision came in 1819, just thirty years after the Constitution came into force.²¹⁰

204. 376 U.S. 254, 265–66 (1964).

205. See *infra* notes 406–12 and accompanying text.

206. For a contrary approach, see David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Part, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643 (2011).

207. See U.S. CONST. art. I, § 8, cl. 3.

208. *Id.* art. I, § 10.

209. See, e.g., *Steamship Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867); *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864).

210. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); see also *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). The Contracts Clause was the most frequently litigated section of the Constitution during the nineteenth century. See *Barnitz v. Beverly*, 163 U.S. 118, 121 (1896).

In the *Dartmouth College* case, a 1769 charter had incorporated a corporate body under the name “The Trustees of Dartmouth College,” and it was that body that brought suit. *Trs. of Dartmouth Coll.*, 17 U.S. at 624–26. Under the law of the time, the trustees acting in their official capacities were constituted as a body corporate. See *id.* at 635–39. They were not acting to preserve their individual property; none of them had individual rights in the property of the corporation. See *id.* at 639–43. Rather, the corporation filed suit to vindicate its own rights. *Id.* at 626–27.

While the federal government didn't exercise its eminent domain power before the 1870s,²¹¹ and the Fifth Amendment's Takings Clause wasn't deemed to constrain the states until the very end of the nineteenth century,²¹² state courts at least as early as 1828 extended to corporations the benefit of the general principle that "compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent."²¹³

Immunizing state governments from corporations' legal attacks, when they enact protectionist laws and impose trade barriers, would pointlessly undercut substantive constitutional law principles. It would be odd to say that whether a protectionist state law is unconstitutional depends on whether the interstate businesses that it disadvantages take individual or corporate form. And allowing governments arbitrarily to seize a corporation's property without compensation would hurt shareholders in a way inconsistent with constitutional values.

At the same time, corporations aren't entitled to the same constitutional protections as individual human beings. Most obviously, they're not "citizens of the United States" within the meaning of the Fifteenth Amendment and cannot vote.²¹⁴ They can't assert a Fifth

211. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709 n.78 (1985).

212. *Compare* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233–41 (1897), with *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 539–40 (1837) (stating that absent a contracts clause violation, states did not violate the federal Constitution merely because they extinguished "antecedent vested rights of property" (quoting *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834))).

213. *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Conn. 28, 49 (1828); see also *White River Tpk. Co. v. Vt. Cent. R.R.*, 21 Vt. 590, 595 (1849) (stating that plaintiffs comprising a corporation and complaining of a taking of the corporation's property "are entitled to the same constitutional protection to their property, that an individual would be"). Note that in these cases—in contrast to *Trustees of Dartmouth College*, 17 U.S. 518—the courts addressed what we would today characterize as for-profit, closely held corporations and saw no distinction between the property of the corporation and that of the individuals who constituted it.

214. Nor is a corporation a "citizen" within the meaning of Article IV's Privileges and Immunities Clause, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), or the Fourteenth Amendment's parallel provision, *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888). A corporation can take advantage of Article III diversity jurisdiction, which by its terms is limited to controversies "between Citizens of different States"—but even in so ruling, Chief Justice Marshall was emphatic "[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen." *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

Amendment privilege against self-incrimination.²¹⁵ Granting corporations the right to vote in public elections would contravene basic constitutional values. Reading the Constitution so that individuals were immunized from giving testimony that would incriminate their corporate employers would extend the Fifth Amendment privilege in ways that don't follow from its underlying goals.²¹⁶

Should we draw the line between those contexts in which corporations may assert constitutional claims, and those in which they may not, by asking whether the constitutional clause in question specifies rights in “persons”? Well, no. The First Amendment doesn't refer to “persons” at all—it simply provides that Congress may not make a “law . . . abridging the freedom of speech.”²¹⁷ So the argument that corporations shouldn't have First Amendment rights because they're not “persons” has no textual basis: from a textual perspective, the extent to which Congress can restrict corporate speech has nothing to do with their personhood. The question is simply whether such legislation “abridg[es] the freedom of speech.”²¹⁸

Now, the Fourteenth Amendment Due Process Clause does grant rights to “persons,”²¹⁹ and therefore, the standard textual justification for imposing any Bill of Rights provision as a restriction on state governments requires that the rightsholder be a “person.”²²⁰ But it would be an odd sort of federalism, in 2014, that held that the national government faces constitutional restrictions in limiting corporate speech while the states do not. Rather, the pervasive message of the modern incorporation cases is that the national government and the states are subject to identical Bill-of-Rights-derived constraints.²²¹

215. *Hale v. Henkel*, 201 U.S. 43, 82–83 (1906). On constitutional protections for corporations, see generally Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629.

216. See Henning, *supra* note 215, at 816–21; Pollman, *supra* note 215, at 1648–49; see also *Hale*, 201 U.S. at 69–70.

217. U.S. CONST. amend. I.

218. *But see infra* note 414.

219. U.S. CONST. amend. XIV, § 1.

220. See *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 188–89 (1888).

221. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))); cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–25 (1995) (finding that federal and state governments are subject to

I will suggest much later in this Article that the question whether we should view corporations as “persons” isn’t entirely misplaced.²²² For now, though, the better question is whether allowing corporations to assert claims under a given constitutional provision advances the goals that that provision was designed to serve—put another way, whether restrictions on corporations’ speech abridge “the freedom of speech” that the amendment was designed to protect.²²³ That suggests that we should ask here whether treating corporations as First Amendment rightsholders advances First Amendment goals and what effect that constitutional understanding has on the overall system of free expression.

B. Corporations and First Amendment Values

So how should we understand for-profit, nonmedia corporations’ speech? Would it make sense simply to declare it entirely outside the bounds of the First Amendment so that government could restrict it at will, perhaps even on content-based grounds? After all, we don’t read the Constitution to provide blanket protection to anything at all that involves words and communication: otherwise, statutes criminalizing conspiracy, solicitation of crime, perjury, and espionage would be constitutionally problematic.²²⁴ Our First Amendment rules, rather, identify protected speech by looking to First Amendment values.²²⁵

We protect speech in part because of its connection to individual self-fulfillment—because of the idea that that speech is crucial to the full realization of each individual’s character and potential as a human being.²²⁶ Put another way, we protect speech because it is a

the same equal protection constraints, constitutional text notwithstanding).

222. See *infra* text accompanying notes 384–89.

223. See Pollman, *supra* note 215, at 1670–75; Susanna Kim Ripken, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 UNIV. ST. THOMAS J.L. & PUB. POL’Y 285, 286–87 (2012).

224. See *Konigsberg v. State Bar*, 366 U.S. 36, 49 & n.10 (1961); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 2–3 (2012).

225. See THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3–15 (1966); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–86 (1982); see also Greenawalt, *supra* note 159, at 121; Louis H. Mayo, *The Free Forum: Development of a Democratic Forum in the Limited Media of Mass Communication*, 22 GEO. WASH. L. REV. 387, 393–94 (1954). Some have argued that too strong a reliance on First Amendment “values” risks under protecting speech. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring). But see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 279–80 (1981).

226. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970);

manifestation of individual freedom—“an integral part of the development of ideas, of mental exploration and of the affirmation of self.”²²⁷

Protecting a for-profit corporation’s speech does not advance that goal.²²⁸ A for-profit corporation’s speech is driven not by individual personality but by shareholder return; it is disconnected from individual self-realization or the development of character. It does not function to realize the speaker’s human potential. It is not part of the questioning mind’s “affirmation of self.”²²⁹

We protect speech in part because of its connection to political self-government. The process of talking about political issues is part of self-government.²³⁰ In democracy, citizens through their collective speech shape a common democratic will: they constitute and reconstitute the public opinion that is “the final source of government in a democratic state.”²³¹ Once again, though, a for-profit corporation’s speech is not part of that project of democratic determination because corporations (as distinguished from their owners and employees) are not citizens and thus are not part of the project of democratic self-governance.²³²

On the other hand, corporate speech can connect to First Amendment values in other ways. Speech promotes self-government whenever it informs the citizenry of information and arguments they need in order to govern themselves intelligently.²³³ Speech informing

EMERSON, *supra* note 225, at 4–7; *see also* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 33 (1941) (“The First Amendment protects . . . the need of many men to express their opinions on matters vital to them if life is to be worth living . . .”). And for that matter, *see* MILTON, *supra* note 158, at 324 (licensing of the press is “the greatest displeasure and indignity to a free and knowing spirit that can be put upon him”).

227. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 805 (White, J., dissenting) (quoting EMERSON, *supra* note 225, at 5).

228. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (“To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality. . . . It is recognized that corporate free speech rights do not arise because corporations . . . have any interest in self-expression.”); *see also* Jackson & Jeffries, *supra* note 24, at 14–15 (discussing commercial speech).

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

230. *See Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

231. Post, *supra* note 89, at 7 (quoting *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917)); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 639, 671 (1990).

232. *See* C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 (2004).

233. If the citizens who are to decide an issue “are denied acquaintance with

the public about the abuse of official power is “the most potent of all restraints upon misgovernment.”²³⁴ Indeed, not only when it comes to matters of self-government but also with respect to ideas and information generally, speech is said to facilitate the search for truth.²³⁵ All this is true without regard to the identity of the speaker.

In the 1978 case of *First National Bank v. Bellotti*,²³⁶ the Court struck down a Massachusetts statute making it illegal for a wide range of corporations to spend money in order to “influenc[e] or affect[] the vote on any question submitted to the voters [via referendum], other than one materially affecting any of the property, business or assets of the corporation.”²³⁷ Justice Powell’s majority opinion emphasized that for-profit corporations’ speech serves First Amendment values in the ways I have just described.²³⁸ Corporations as well as individuals can contribute political argument and information to the public store. Information relevant to a political issue can as well come from a corporate source as from an individual one: “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.”²³⁹ Rather than merely protecting individual self-expression, the *Bellotti* Court held, the First Amendment “prohibit[s] government from limiting the stock of information from which members of the public may draw.”²⁴⁰ No matter what its source, if speech is

information or opinion or doubt or disbelief or criticism which is relevant to that issue, . . . the result must be ill-considered, ill-balanced planning for the general good.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

234. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 616 (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971)); see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276–77 (1971); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); Letter from James Madison to W.T. Barry (Aug. 4, 1822), <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html> [<https://perma.cc/Y2Q4-X54F>].

235. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market[place of ideas] . . .”). See generally Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188–94 (1972).

236. 435 U.S. 765.

237. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977), quoted in *Bellotti*, 435 U.S. at 768 n.2.

238. *Bellotti*, 435 U.S. at 781–83.

239. *Id.* at 777.

240. *Id.* at 783.

silenced, then the community loses the contribution that speech would have made.²⁴¹

Moreover—the Court continued—whatever the source of speech, its regulation allows government to skew the public debate by substituting the fiat of government officials for the competition of ideas.²⁴² “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.”²⁴³ In sum, the *Bellotti* Court concluded, speech does not lose its First Amendment protection “simply because its source is a corporation.”²⁴⁴

Bellotti was decided two years after *Virginia Board*,²⁴⁵ and Justice Powell’s majority opinion—perhaps unsurprisingly—echoes the points Justice Blackmun had made in that earlier case.²⁴⁶ Powell cites *Virginia Board* three times,²⁴⁷ quoting it twice.²⁴⁸ Arguably, the First Amendment claim in *Bellotti* was the more vulnerable one. In *Virginia Board*, the challenged government rule applied to every pharmacist in the state, regardless of his or her employer;²⁴⁹ it was plain that pharmacists were First Amendment speakers, and the only question was whether their rights extended to commercial speech.²⁵⁰ In *Bellotti*, by contrast, Justice Rehnquist in dissent was convinced that a corporation had no right to engage in speech except that necessarily incidental to its business.²⁵¹ As a creature of the state, he urged, a corporation “possesse[d] only those properties which the charter of creation confer[ed] upon it.”²⁵² But Justice Rehnquist lost, in significant part

241. See JOHN STUART MILL, ON LIBERTY 76 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

242. See *Bellotti*, 435 U.S. at 776–77 & n.11, 784–85; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.”); see also SCHAUER, *supra* note 225, at 81–86; Lidsky, *supra* note 124, at 817–18.

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

244. *Id.* at 784; see also *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 533–35 (1980).

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

246. *Bellotti*, 435 U.S. at 775–95.

247. *Id.* at 783, 784 n.20, 791 n.31.

248. *Id.* at 783, 791 n.31.

249. 425 U.S. 748, 749–50 (1976) (quoting VA. CODE ANN. § 54.524.35 (1974)).

250. See *id.* at 760–61.

251. See *Bellotti*, 435 U.S. at 824–28 (Rehnquist, J., dissenting).

252. *Id.* at 823 (Rehnquist, J., dissenting) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

because the logic of *Virginia Board* swept his argument aside.²⁵³ If limits on corporate speech deprived consumers and voters of vital information, disserving their autonomy by denying them the enlightenment they needed to make political choices, then any focus on the status of the speaker was simply misplaced.²⁵⁴

C. *Austin and the Marketplace of Ideas*

And yet the Court has articulated an alternative vision to *Bellotti's*. The foundational authority there is *Austin v. Michigan Chamber of Commerce*.²⁵⁵ That 1990 case concerned a Michigan statute that barred corporations from using their treasury funds for speech “in assistance of, or in opposition to, the nomination or election of a [political] candidate.”²⁵⁶ Corporations, rather, could engage in such speech only

253. Both sides recognized that the rights of commercial and corporate speakers were parallel. Justice Rehnquist, arguing in a later case that the state could subject corporate speakers to compelled speech requirements, relied on commercial speech precedent; he explained that in both contexts courts deemed the First Amendment to apply only for the sake of informing the public. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting).

254. Justice Rehnquist's view of corporate speakers was consistent with his larger position that government is only lightly constrained in imposing speech restrictions as a condition of the receipt of government benefits. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 403 (1984) (Rehnquist, J., dissenting) (stating that an educational radio station, having accepted public money, cannot avoid the editorializing-ban condition that “Congress legitimately attached to receipt of that funding”); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588–90 (1998); *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991) (approving a ban by certain government grantees on “advocat[ing] abortion”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) (stating that because the government grants broadcasters “free and exclusive use of a limited and valuable part of the public domain,” they are subject to “public obligations” constraining their speech (quoting *CBS v. FCC*, 453 U.S. 367, 395 (1981))); *Sullivan, supra* note 92, at 149–50, 159–60.

Justice Rehnquist acted consistently with that belief when (without separate opinion) he joined the Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *See infra* Part IV.C. But no other Justice has followed that path. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 465 n.72 (2010) (Stevens, J., concurring in part and dissenting in part) (declining to draw First Amendment conclusions from a corporation's arguable status as “a grantee of a state concession”).

255. 494 U.S. 652 (1990).

256. *Id.* at 655 (quoting MICH. COMP. LAWS § 169.206(1) (1979)). The statute at issue in *Austin*, like the one in *Citizens United* (*see supra* note 189), on its face applied to both for-profit and nonprofit corporations. In litigation, the plaintiff—the Michigan Chamber of Commerce—emphasized its status as a nonprofit corporation. As the Court noted, though, the nonprofit chamber was populated and funded by for-profit corporations and acted as a service bureau for them; unless statutorily restrained, it could “circumvent the Act's restrictions” by acting as a conduit for its members' spending. *Austin*, 494 U.S. at 661–65.

using funds generated by voluntary contributions from the corporation's stockholders, officers, and employees.²⁵⁷

To better understand *Austin*, we need to look to the history of federal election restrictions. In 1907, Congress banned corporate contributions to candidates for federal elective office.²⁵⁸ In 1947, Congress enacted a rule forbidding corporate *expenditures* on speech relating to federal elections.²⁵⁹ It tweaked that rule in the 1971 Federal Election Campaign Act (FECA), which allowed corporations to establish PACs to engage in such speech; the PACs could not receive the corporation's treasury funds, but they could receive individual contributions by stockholders and certain employees.²⁶⁰

The Court in 1982 approved the federal corporate *contribution* ban, explaining that corporations could exploit “substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.”²⁶¹ It addressed the federal ban on corporate *expenditures* four years later, in 1986.²⁶²

257. See MICH. COMP. LAWS § 169.255(2)–(3).

258. Tillman Act, ch. 420, 34 Stat. 864 (1907); see also Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 871 (2004).

259. Labor-Management Relations Act, ch. 120, sec. 304, § 313, 61 Stat. 136, 159–60 (1947).

260. Pub. L. No. 92-225, § 302, 86 Stat. 3, 12–13 (1972).

261. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207–08 (1982). The case involved a challenge to a FECA provision forbidding a corporation to solicit contributions for its PAC from persons not adequately connected to it. *Id.* at 198–99. This PAC restriction was an adjunct to the larger ban on corporate contributions and expenditures, and made no sense without it. A unanimous Court held that any First Amendment interests of NRWC’s were “overborne” by the goals Congress had sought to achieve in the underlying statutory plan: “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts” and “to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.” *Id.* at 207–08. Because the NRWC sought to make *contributions* to political candidates rather than *expenditures* on their behalf, however, the Court had no occasion to address *Austin*’s distortion rationale.

262. The Court had already heard two cases involving the statute’s parallel restriction on union speech. In one of those cases, the Court ducked the union’s claim that the restriction was unconstitutional as applied to it; the majority, seeing unions and corporations as similarly situated, characterized Congress as seeking “to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.” *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957); see also *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 415–16 (1972) (Congress sought “to eliminate the effect of aggregated wealth on federal elections.”).

In *FEC v. Massachusetts Citizens for Life (MCFL)*, the question was whether the FECA expenditure limitation could constitutionally be applied to nonprofit corporations that were “formed for the express purpose of promoting political ideas,” had no shareholders with a claim on their assets or earnings, and received no contributions from for-profit corporations or unions.²⁶³ The Court held that it could not—but none of the nine Justices saw a problem with Congress’s larger move to restrict corporate speech in response to concerns about “the corrosive influence of concentrated corporate wealth.”²⁶⁴ The Court explained that “[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace”—an advantage that was unfair because “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas.”²⁶⁵ It continued, however, that the exempted category of nonprofits did not pose “the potential for unfair deployment of wealth for political purposes” that other corporations did.²⁶⁶

With that background, it was not surprising that the *Austin* Court in 1990 upheld Michigan’s statute, which largely paralleled the FECA.²⁶⁷ The majority began by noting *Bellotti*’s holding that “[t]he mere fact that [plaintiff] is a corporation does not remove its speech from the ambit of the First Amendment”;²⁶⁸ it held that the state regulation could be justified only with reference to a compelling state interest.²⁶⁹ But the Court had no difficulty finding such an interest.²⁷⁰ Corporations, it explained, had “legal advantages enhancing their ability to accumulate wealth.”²⁷¹ They could use those advantages to amass immense resources without regard to the extent of any public support for their political views.²⁷² And their deployment of that wealth could allow them to “unfairly influence elections”—giving them “an unfair advantage in

263. *MCFL*, 479 U.S. 238, 263–64 (1986).

264. *Id.* at 257.

265. *Id.* at 257–58.

266. *Id.* at 259. The dissenting Justices would have held that the statutory bar could constitutionally be applied to all nonprofit corporations. *Id.* at 266–67 (Rehnquist, C.J., dissenting).

267. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668–69 (1990).

268. *Id.* at 657.

269. *Id.* at 658.

270. *Id.* at 660.

271. *Id.* at 665 (quoting *MCFL*, 479 U.S. at 258 n.11).

272. *Id.* at 660.

the political marketplace,” with “corrosive and distorting effects” undermining “the integrity of the political process.”²⁷³

Justice Marshall’s opinion in *Austin* reflects the view—and the concern—that success of a message in the marketplace of ideas will turn to some extent on the economic resources available to the speaker.²⁷⁴ From the perspective of anyone other than a First Amendment lawyer, that view is unexceptional. It’s really hard to argue that the political and cultural views prevailing in a society are wholly independent of the money spent to advance particular ways of looking at the world.²⁷⁵

To be sure, First Amendment law is built on the view summarized by Jerome Barron as the “romantic view of the First Amendment”—that more speech is always better, that the “self-correcting force of ‘full and free discussion’” will always overcome biases in the marketplace of ideas so long as government can be kept from interfering.²⁷⁶ We encountered that view in considering the First Amendment context of false advertising law.²⁷⁷ But false advertising law recognizes that the “romantic view” is in important respect mythology.²⁷⁸ Commentators

273. *Id.* at 659–60, 668 (quoting *MCFL*, 479 U.S. at 257). The fact that the Michigan law left corporations free to participate in politics using segregated funds, the Court continued, demonstrated its narrow tailoring. *Id.* at 668–69.

Justice Brennan, concurring, took a somewhat different approach: he emphasized the value of Michigan’s law in protecting stockholders who did not agree with a corporate manager’s decision to use their property to electioneer. *Id.* at 673–75 (Brennan, J., concurring); see also Winkler, *supra* note 266, at 874.

274. See *Austin*, 494 U.S. at 658–59.

275. See Weinberg, *supra* note 119, at 1149–57. To be sure, that a message is well financed does not mean that, in the short-term, it will swing an election or cause the passage of legislation; over the history of American politics, many well-financed candidates and ballot propositions have failed. Some of that resistance relates to the strong status quo bias of American politics. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 572 (2014). Moreover, in candidate elections where both candidates have ample financial support from wealthy backers, other factors, such as partisanship and incumbency status, will come to the fore. See Kyle Kondik & Geoffrey Skelley, *14 From ‘14: Quick Takes on the Midterm*, U. VA. CTR. FOR POL.: SABATO’S CRYSTAL BALL (Nov. 30, 2014), <http://www.centerforpolitics.org/crystalball/articles/14-from-14-quick-takes-on-the-midterm/> [<https://perma.cc/B9UF-VM5C>]; see also Lee Drutman, *How Much Did Money Really Matter in 2012?*, SUNLIGHT FOUND. BLOG (Nov. 9, 2012, 7:29 AM), <http://sunlightfoundation.com/blog/2012/11/09/how-much-did-money-matter> [<https://perma.cc/XMF5-JT8R>] (concluding that the connection between political spending and electoral victory was weak in 2012 House of Representatives general election races).

276. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641, 1642–43 (1967).

277. See *supra* notes 153–85 and accompanying text.

278. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978); Barron, *supra* note 276, at 1647–50; Stanley Ingber, *The*

sometimes defend that mythology as necessary to avoid paternalistic or undesirable results,²⁷⁹ or treat the deficiencies of the romantic view as “an insight more fundamental than we can use.”²⁸⁰ But law and ideology are one thing; social reality is another.

Recent empirical social science research makes it clear, if more proof were needed, that the romantic view of the First Amendment incompletely describes the notional marketplace of ideas supporting U.S. government elections and decision making.²⁸¹ That research teaches us, for example, that the views of wealthy Americans and business-oriented interest groups play a major role in shaping government policy, while the views of ordinary Americans—to the extent they diverge from those of their wealthier neighbors—appear to play no role at all.²⁸² Business interest groups have substantial influence on government policy,²⁸³ notwithstanding that the correlation between

Marketplace of Ideas: A Legitimizing Myth, 1984 DUKE L.J. 1; Lidsky, *supra* note 124; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 4 (1985); Weinberg, *supra* note 119, at 1148–49; Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

279. See Lidsky, *supra* note 124; Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1120 (1993).

280. That was the way Harry Kalven described Ronald Coase’s challenge to broadcast licensing. Harry Kalven, Jr., *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 30–32 (1967) (initial capitalization of each word omitted).

281. See Gilens & Page, *supra* note 275, at 571–72.

282. See *id.* Because the preferences of ordinary Americans overlap substantially with those of their wealthier neighbors, the strong connection between wealthy Americans’ preferences and government policy choices means that the views of ordinary Americans end up being vindicated much of the time. But on many key issues, those preferences differ. The very wealthy tend to see budget deficits as the most pressing problem facing this country; almost no ordinary Americans agree. The very wealthy, on average, support cutting government spending on Social Security and health care; ordinary Americans support increasing such spending. See Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 56 (2013). Similarly, ordinary Americans tend to favor an expanded government role in making available jobs, health care, and quality education to all; the wealthiest Americans do not. See *id.* at 57–60.

283. Political scientists, to be sure, are not unanimous on this point. See Beth L. Leech, *Lobbying and Influence*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 534, 537 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (“[Q]uantitative studies of the influence of lobbying and PACs are . . . contradictory . . .”). That said, “[n]umerous case studies have detailed instances in which all but the most dedicated skeptic is likely to perceive interest group influence at work.” Gilens & Page, *supra* note 275, at 567; see also Leech, *supra*, at 551. Conditional interest group power based on “alliance making and provision of information” pervades American politics and is problematic given that “alliances are forged in part because of abilities to raise campaign funds and . . . some interests have a much greater capacity to create and compile information.” Leech, *supra*, at 551. On the substantial influence of campaign contributions on legislator voting behavior, see DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW

the preferences of ordinary Americans and the policy positions of business interest groups is negative—that is, policy changes supported by ordinary Americans tend to be opposed by business interest groups, and vice versa.²⁸⁴

Nor should that be at all surprising. After all, American political decision making is the product of investments in a variety of speech markets. One such market is lobbying. Corporate money spent on lobbying far exceeds that spent on elections. Total spending by all outside groups²⁸⁵ on federal campaigns in the 2012 election cycle barely topped a billion dollars.²⁸⁶ (This sum includes all corporate contributions and expenditures, but it also includes a rather larger amount of spending paid for by individuals.)²⁸⁷ By contrast, federal lobbying expenditures from 2008 through 2013 ranged from \$3.24 to \$3.52 billion dollars.²⁸⁸ It is fair to assume that the overwhelming majority of that lobbying was funded by for-profit corporations.

SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 71–98 (2014), <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf> [<https://perma.cc/8YSD-D3MD>].

284. See Gilens & Page, *supra* note 275, at 571–72. This work provides a corrective to the oft-expressed earlier view that interest groups, in the aggregate, reflect the views of ordinary voters. Compare ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 335 (1989), and DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 262–82 (2d ed. 1971) (interest-group competition yields broadly majoritarian results), with MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 132–67 (1965), and CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* 261–75 (1977) (noting systematic ways in which some interest groups, and particularly business groups, are more effective than others).

285. By “outside groups,” I mean entities other than the candidates’ own campaigns and the Democratic and Republican National Committees. This includes spending funded by either individuals or corporations.

286. See Russ Choma, *The 2012 Election: Our Price Tag (Finally) for the Whole Ball of Wax*, *OPENSECRETS.ORG: BLOG* (Mar. 13, 2013), <http://www.opensecrets.org/news/2013/03/the-2012-election-our-price-tag-fin/> [<https://perma.cc/RHJ8-2XL3>].

287. Most outside spending in the 2012 federal election came from Super PACs, and only 11% of Super PAC funding in that cycle came from for-profit businesses. BLAIR BOWIE & ADAM LIOZ, *DÉMOS, MILLION-DOLLAR MEGAPHONES: SUPER PACS AND UNLIMITED OUTSIDE SPENDING IN THE 2012 ELECTIONS* 9 (2012), <http://www.demos.org/sites/default/files/publications/MegaphonesMillionaires-DemosUSPIRG.pdf> [<https://perma.cc/YW5T-KQ2P>]. The law prohibits corporations from contributing to federal candidates or the national parties.

288. See Ctr. for Responsive Politics, *Lobbying Database*, *OPENSECRETS.ORG: BLOG*, <https://www.opensecrets.org/lobby/index.php> [<https://perma.cc/MYW9-BJKY>] (last updated Jan. 22, 2106).

Certainly all of the biggest spenders on lobbying are for-profit corporations or funded by them.²⁸⁹

And perhaps neither of these is the most important way corporate spending affects the public discourse. Stepping out of the realm of politics writ small, consider that still more money (much more) is spent on the subject of the first two parts of this Article: commercial advertising.²⁹⁰ According to one estimate, total U.S. advertising expenditures in 2011 were *\$144 billion*.²⁹¹ Proctor & Gamble was the biggest spender, accounting for about three billion dollars' worth of advertising all by itself.²⁹² And that spending matters. Americans "spend more time exposed to advertising than they spend eating, reading, cooking, praying, cleaning and making love combined."²⁹³ Advertising forms our culture, in the first instance because of the media support it provides: broadcast television draws almost all of its revenue from advertising, and consumer magazines more than half.²⁹⁴ Media executives' decisions about which audiences to go after, and which content to offer those audiences, ultimately rely on advertisers' decisions about which audiences they want to sell to.²⁹⁵

Advertising helps create, and reflects back to us, a common symbolic culture built around the operative values of our economy. It has been

289. See Ctr. for Responsive Politics, *Top Spenders*, OPENSECRETS.ORG: BLOG, <https://www.opensecrets.org/lobby/top.php?showYear=2013&indexType=s> [<https://perma.cc/P89Z-ZKBA>] (last visited Jan. 21, 2016). The biggest spender was the U.S. Chamber of Commerce, spending approximately \$74 million in 2013. The Chamber is formally non-profit but is funded entirely by for-profit corporations and engages in speech on its corporate members' behalf, much as the Michigan Chamber of Commerce did in *Austin*, see *supra* note 256.

290. The largest U.S. corporations spend, on average, about 2% of their budget on commercial ads. Patricia Laya, *Do You Pay Enough for Advertising? One Big Corporation Spent a Jaw-Dropping \$4.2 Billion Last Year*, BUS. INSIDER (June 6, 2011), <http://www.businessinsider.com/corporations-ad-spending-2011-6?op=1> [<https://perma.cc/TH7E-92BQ>].

291. *Kantar Media Reports U.S. Advertising Expenditures Increased 0.8 Percent in 2011*, BUSINESS WIRE (Mar. 12, 2012), <http://www.businesswire.com/news/home/20120312005272/en/Kantar-Media-Reports-U.S.-Advertising-Expenditures-Increased> [<https://perma.cc/CE86-D7LE>].

292. *Id.*

293. TERRY O'REILLY & MIKE TENNANT, *THE AGE OF PERSUASION: HOW MARKETING ATE OUR CULTURE*, at xiv (2009).

294. Joseph Turow & Matthew P. McAllister, *Introduction to THINKING CRITICALLY ABOUT ADVERTISING AND CONSUMER CULTURE, IN THE ADVERTISING AND CONSUMER CULTURE READER* 3-4 (Joseph Turow & Matthew P. McAllister eds., 2009).

295. See *id.*; see also C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 66 (1994).

characterized as “the official art of modern capitalist society”²⁹⁶ because, just as art presents a context for the larger world, a way of categorizing and experiencing the facts of our lives,²⁹⁷ commercial advertising provides powerful support for the institutional structures that shape our day-to-day existence.²⁹⁸

Advertising operates on a micro level, sinking billions of dollars yearly into promoting, for example, the desirability, sexiness, and value of the automobile as a mode of transport, in contexts where competing voices can draw on only a minuscule fraction of those economic resources. And it operates on a macro level, emphasizing private satisfactions over collective action. It suggests that each of us can know who we are and can achieve respect from others, can solve the problems of death and loneliness, simply by buying consumer goods: that exchanging money for physical objects will buy us beauty, success, and control over our personal circumstances.²⁹⁹

From this perspective, the Court’s concern in *MCFL* and *Austin* about “the corrosive influence of concentrated corporate wealth”³⁰⁰ on speech markets is unsurprising. Corporate speech expenditures support a business-friendly government structure, and a consumerist and market-friendly ideological framework, on a level almost too deep to evaluate. A statute limiting the ability of a corporation to use its treasury funds to influence the result of candidate elections does not seem an implausible response. There’s tremendous reason to be skeptical, after all, that the cause of truth would be much advanced by a corporation’s huge negative ad buy late in an election campaign.³⁰¹

296. RAYMOND WILLIAMS, *Advertising: The Magic System*, in *CULTURE AND MATERIALISM: SELECTED ESSAYS* 173, 184 (2005); see also MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 209–33 (1984).

297. See CLIFFORD GEERTZ, *Art as a Cultural System*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 94 (1983).

298. Michael Schudson, pointing to the way committed couples say “I love you” to invoke and reaffirm the deep underpinnings of their relationship, concludes: “Advertising is capitalism’s way of saying ‘I love you’ to itself.” SCHUDSON, *supra* note 296, at 232.

299. See *id.* at 221; WILLIAMS, *supra* note 296, at 189–90.

300. *MCFL*, 479 U.S. 238, 257 (1986).

301. For an anecdote, see Molly Redden, *This GOP Regulator Questioned Energy Companies—So They Spent Almost \$500,000 to Defeat Him*, MOTHER JONES (July 15, 2014), <http://m.motherjones.com/politics/2014/07/alabama-energy-election-chip-beeker-terry-dunn> [https://perma.cc/VQZ6-SF3Q]. Nearly three quarters of the money spent by non-party groups in the 2012 congressional elections went to fund attack ads. TOKAJI & STRAUSE, *supra* note 283, at 40; see also David A. Graham, *The Incredible Negative Spending of Super PACs—in I Chart*, ATLANTIC (Oct. 15, 2012), www.theatlantic.com/politics/archive/2012/10/the-incredible-negative-spending-of-super-pacs-

Even less does it promote democracy for Congress members' votes to be driven by fear of that ad buy—what Norman Ornstein has called “the \$20 million alien/predator attack on you and your campaign.”³⁰²

D. Bellotti and Austin

And yet the “distortion” rationale of *Austin* was badly in tension with orthodox First Amendment thinking, and in particular with *Bellotti*.³⁰³ The Court in *Bellotti* had rejected justifications that “‘corporations are wealthy and powerful and their views may drown out other points of view’ or ‘exert an undue influence’ on the electorate”;³⁰⁴ it had found no reason to believe that “corporate advocacy threatened imminently to undermine democratic processes.”³⁰⁵ The Court in *Bellotti* had pointed to *Virginia Board* in describing restrictions on corporate speech as paternalistic.³⁰⁶ “[T]he people in our democracy,” it had explained, “are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments advanced by [corporations], it is a danger contemplated by the Framers of the First Amendment.”³⁰⁷ That philosophy simply did not jibe with the *Austin* Court’s concern that well-funded corporate speech could be regulated as “unfair” or “distorting.”³⁰⁸

Moreover—as should be clear by now—it was the worldview of *Bellotti*, not *Austin*, that was more deeply founded in classic First Amendment thinking. Ordinary First Amendment doctrine has at its heart the idea that “the ultimate good desired is better reached by free

in-1-chart/263643 [https://perma.cc/K3NE-BS92].

302. *This American Life: Take the Money and Run for Office* (Public Radio International radio broadcast Mar. 30, 2012), <http://www.thisamericanlife.org/radio-archives/episode/461/transcript> [http://perma.cc/37JX-8DWT]; see also TOKAJI & STRAUSE, *supra* note 283, at 71, 76–89 (the fear of such attacks is “one of the most important ways outside spending affects the legislative process”).

303. The narrow holdings of *Bellotti* and *Austin* were not inconsistent. The *Bellotti* majority had explicitly noted the possibility of “a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections,” 435 U.S. 765, 788 n.26 (1978), and no Justice in that case had suggested that restrictions on corporate speech in connection with candidate elections would be problematic. Justice Stevens, concurring in *Austin*, stressed the “vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

304. *Austin*, 494 U.S. at 706 (Kennedy, J., dissenting) (quoting *Bellotti*, 435 U.S. at 789).

305. *Bellotti*, 435 U.S. at 789.

306. *Id.* at 791 n.31.

307. *Id.* at 791–92 (footnotes omitted).

308. *Austin*, 494 U.S. at 659–60.

trade in ideas—that the best [tool] of truth is the power of the thought to get itself accepted in the competition of the market”³⁰⁹ In that notional market, we take it for granted that government will enforce property rights in communication resources and otherwise support private ordering under the common law. We see that government role as both necessary and sufficient to assure a discussion in which members of the public have the opportunity to speak and to convince others to adopt their views, and listeners process that speech in a sufficiently rational manner.³¹⁰

I suggested a few pages back that that descriptive understanding of how speech works in American society is not especially accurate.³¹¹ But it is nonetheless central to our First Amendment thought.³¹² It is at the root, for example, of Justice Brandeis’s warning that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the [proper response to subversive advocacy] is more speech, not enforced silence.”³¹³ It is exemplified by *Bellotti*’s insistence that we must presume people’s ability to fairly and accurately evaluate the “information and arguments” corporations put before them.³¹⁴ And it seems inconsistent with *Austin*’s concern that immense aggregations of corporate wealth, unchecked, could dominate the political process.³¹⁵

V. CORPORATE AND COMMERCIAL SPEECH

How should we understand the *Austin* Court’s deviation from First Amendment orthodoxy? For that matter, how should we understand the apparent anomaly of false advertising law?

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

310. See Weinberg, *supra* note 119, at 1143.

311. See *supra* pp. 599–601.

312. This viewpoint is not essential to every set of First Amendment justifications. See Weinberg, *supra* note 119, at 1141–42. It nonetheless plays a dominant role in First Amendment philosophy taken as a whole. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7–12 (1989).

313. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

314. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790–92 (1978).

315. One might think that the use of a “market for ideas” metaphor might actually support government regulation of speech, given our extensive government regulation of the market for goods. See R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974); see also Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 3 (1964). But mainstream First Amendment philosophy has never gone down that path.

Duncan Kennedy and others, forty years ago, suggested that much of law reflects an opposition between two broad worldviews.³¹⁶ The first sees individuals in society as free and autonomous (in all but exceptional cases); it is rooted in individualism, value subjectivity, a sharp public-private distinction, and nonpaternalism.³¹⁷ In doctrinal form, it is often expressed through rules.³¹⁸

The other, by contrast, treats some degree of dependence and constraint as pervasively present in private ordering.³¹⁹ It is grounded in altruism and a belief in the communal nature of values; it minimizes the public-private distinction and makes room for paternalism.³²⁰ In doctrinal form, it is expressed in important part through situationally sensitive standards and balancing.³²¹

Imagine contract law as an example. Contract law might follow mainstream freedom of speech philosophy by treating private choices in the market place as completely autonomous and free. It would therefore seek to vindicate private choices by enforcing all contracts that are supported by formal consideration; it would treat duress, fraud, and unconscionability as arising only in exceptional cases, relevant only in sharply bounded, supplementary doctrinal areas.³²²

On the other hand, contract law might adopt the view that elements of fraud or economic constraint are pervasive, present in greater or lesser degree in the circumstances leading up to every contract. It might seek to address those concerns through doctrine-invalidating contracts whenever the parties seem to have had problematically unequal bargaining power, or where the contracts simply seem too unfair.³²³ To do so, it would have to rely on some form of fact-specific inquiry, asking “whether one’s trading partners can *actually* take care of themselves” instead of “presum[ing] that their formal legal capacity is the same as actual capacity.”³²⁴ That approach wouldn’t treat *private* contracts as something presumptively to be shielded from *public* intrusion; it would

316. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

317. See *id.* at 1767–71.

318. See *id.* at 1770.

319. See *id.* at 1771–74.

320. See *id.*

321. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 290–95 (1987); Weinberg, *supra* note 119, at 1167.

322. Weinberg, *supra* note 119, at 1168–73.

323. *Id.* at 1172–73.

324. KELMAN, *supra* note 321, at 60.

recognize that existing property entitlements are government conferred.³²⁵

Some scholars have suggested that the two approaches coexist in American law notwithstanding their fundamental contradiction and that the former tends to play the dominant role;³²⁶ for purposes of this Article, we might call the first approach the “default” framework. Certainly that seems to hold true for First Amendment law. The default framework nicely fits *Bellotti* and mainstream First Amendment thought. *Bellotti* adopts the default position’s assumption of a world of individual autonomy, in which individuals can participate as individuals in the marketplace of ideas, self-directedly able to speak and convince others of their views, unaffected by the skewing or coercive effects of inequalities of wealth and power in the private sphere. It follows the default position in its assumption that people react to speech in rational ways, choosing to adopt one belief rather than another as part of a willed, chosen reasoning process; it rejects the idea that people’s views are largely determined by socialization, social position, etc.³²⁷ It follows the default position in its understanding that the only meaningful source of constraint in the marketplace of ideas is government intervention.³²⁸

But the alternative position—rooted in the concern that inequality of private power and resources undermines citizens’ free interaction—holds sway to some extent in American law as well. As I once wrote elsewhere, “[w]e premise much of the modern administrative state on the recognition that the economic sphere *is* in important degree marked by domination and constraint, that government refusal to intervene is not necessarily empowering.”³²⁹ We give a variety of administrative agencies, such as the FTC, discretion to address that (although lawyers tend to see it as a problem that administrators exercise discretion rather than applying hard-edged rules).³³⁰

And the alternative position holds sway in some areas of First Amendment law: I have suggested elsewhere that U.S. broadcast

325. Those, after all, were among the realists’ key insights. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 277 (1947); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); see also Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 764 (1981) (book review).

326. See KELMAN, *supra* note 321, at 290–95; Weinberg, *supra* note 119, at 1181.

327. See *Bellotti*, 435 U.S. at 791–92.

328. See *id.* at 776–86.

329. Weinberg, *supra* note 119, at 1179.

330. See *id.* at 1178–79.

regulation law, in major part, reflects the alternative approach.³³¹ That's what underlay the Court's caution in *Red Lion Broadcasting Co. v. FCC* that absent administrative allocation, a few private licensees might "monopoliz[e]" broadcast discourse, making impossible an uninhibited marketplace of ideas.³³² It's what underlay the fear that absent a fairness doctrine, private holders of media power would be able to exercise "unlimited private censorship."³³³

Austin's concern that inequality of private power and resources may undermine citizens' free interaction straightforwardly embraces the alternative position peeking out from below the surface of our jurisprudence.³³⁴ The law of commercial speech reflects the same dichotomy.

In other words, commercial speech law, like our corporate speech precedent, is riven. Both bodies of law display the same themes of autonomy and constraint, the same split between default and alternative positions. Recall that the Court's rationales in *Bellotti* and *Virginia Board* were essentially the same: In thinking about both commercial advertising and corporate speech, the Court told us that the speech is protected not for the sake of the self-actualization or the freedom of conscience of those who utter it but because it provides valuable views and information to listeners.³³⁵ The Court in *Sorrell* relied on that thinking to rule that content discrimination in the regulation of commercial speech is sharply disfavored, as much so as in the political-speech context.³³⁶

But in commercial speech law as in the law of corporate speech, the vision of information made available by corporations to all is countered by competing concerns about exploitation and distortion. When it came to electoral speech by corporations, *Austin* provided the counterpoint; in the law of commercial speech, consumer protection and trademark law provide the analogous exceptions.

Mainstream First Amendment law's sharp rhetoric forbidding paternalism and content discrimination thus falls away once commercial speech is said to be "misleading"; the law of misleading advertising straightforwardly reflects the premises of the alternative position.

331. *See id.* at 1181–89.

332. 395 U.S. 367, 390 (1969).

333. *Id.* at 392.

334. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–60 (1990).

335. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

336. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664–67 (2011).

Rejecting the myth of the supremely competent auditor, it recognizes that consumers process speech in ways that may lend themselves to exploitation by advertisers hoping to mislead and that greater or lesser degrees of distortion and nonrational thinking are pervasive in the enterprise of advertising. It adopts a stance of paternalism, protecting consumers from their own errors. And in order to do so, it relies not on fact-specific, case-by-case determinations, not on the sort of hard-edged rules that maximize predictability for speakers. In other words, just as the philosophy of *Bellotti* is opposed by the concerns of *Austin*, the libertarian philosophy of *Sorrell* is opposed by our acceptance of an expansive and paternalistic government role when it comes to misleading advertising.

Recognizing this dichotomy helps us understand some key points. First, the fact that *Austin's* worldview is necessarily in tension with the one underlying *Bellotti* does not mean that either one is wrong. To the contrary, both are fundamental (if inconsistent) building blocks of U.S. law, reflecting deeply held intuitions, and both reflect aspects of reality.

Second, I will suggest, the occasional emergence of the alternative position in American law is what makes dominance of the default position tolerable. On the one hand, it's a good thing that the default position is dominant in First Amendment law. The default position is properly concerned about self-interested government control of individuals' speech. Curbing private power over speech resources means enhancing public authority, and that means giving government officials supervisory authority over a segment of public debate. Any vision of a more active governmental role in supervising the speech marketplace has to deal with the significant chance that government action will be incompetent, misguided, arbitrary, or political.³³⁷

But the example of consumer protection law suggests that we cannot, as a practical matter, stick *only* with the default position. A speech regulatory system based only on classic free-speech philosophy underestimates the degree to which concentrations of private power can skew the reasoning processes of the community. Common experience tells us that government regulation of misleading advertising is good for society. Trademark law, as broadly understood today, is good for society. If ordinary First Amendment thinking tells us otherwise, that's an indication that ordinary First Amendment thinking is incomplete. A complete, and workable, system of free expression will have niches in

337. See Weinberg, *supra* note 119, at 1195.

which it will acknowledge the alternative position, and will regulate accordingly.

VI. CORPORATE SPEECH REDUX

There is one obvious difference between the law of corporate speech and the law of commercial advertising. In the former—but not the latter—the Supreme Court recently has acted to eliminate the internal conflict between default and alternative positions. In *Citizens United* in 2011, the Court characterized *Bellotti* and *Austin* as “conflicting lines of precedent,”³³⁸ and embraced the first to overrule the second.³³⁹ It rejected the possibility that corporate expenditures could distort or corrupt at all.³⁴⁰ Quite the contrary, the majority said: it is vital to our society that corporate voices, which “best represent the most significant segments of the economy,” be able to “reach[] the public and advis[e] voters on which persons or entities are hostile to their interests.”³⁴¹ When government limits corporations’ ability to speak, out of fear that massive corporate treasuries will distort the marketplace of ideas, it is really “control[ling] thought” and eliminating “the freedom to think for ourselves.”³⁴²

The Court built on that foundation in 2014 in deciding *McCutcheon v. FEC*.³⁴³ That case involved individual rather than corporate contributions.³⁴⁴ Federal law limited the total amount an individual could donate in a given election cycle; it sought to address the danger that large contributors to a party and its candidates would gain undue influence over the party’s office holders, an influence the statute’s drafters had seen as “inherently, endemically, and hopelessly corrupting.”³⁴⁵ But just as the Court in *Citizens United* rejected the possibility that corporate speech could be distorting or corrupting, in *McCutcheon* it rejected the idea that—absent literal bribery—it was distorting or corrupting for large contributors to a party to have unusual

338. *Citizens United v. FEC*, 558 U.S. 310, 346–48 (2010).

339. *Id.* at 365.

340. *Id.* at 348–49.

341. *Id.* at 354 (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

342. *Id.* at 356.

343. 134 S. Ct. 1434 (2014).

344. *Id.* at 1443.

345. *McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (quoting Senator Rudman), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003), *quoted in McCutcheon*, 134 S. Ct. at 1484 (Appendix A).

influence over elected officials from that party.³⁴⁶ Quite the contrary—special influence for those with the means to make large financial contributions, Chief Justice Roberts explained, is a “central feature of democracy.”³⁴⁷

Now, that a Supreme Court majority would exalt disproportionate political access for the wealthy as a “central feature of democracy”³⁴⁸ was not an obvious result. Nor had it been a foregone conclusion that the Court in *Citizens United* would sweep away a six-decade-old, repeatedly reaffirmed, federal statutory regime.³⁴⁹ Both decisions were 5–4, after all,³⁵⁰ and by a margin of one vote could have gone the other way. But the *Citizens United* result teaches us that *Austin*’s position in the law of corporate speech was fragile in a way that commercial-speech consumer protection law is not.

A. Speech and Citizenship

Why was that? Let’s go back to *Austin*, and look more closely. Justices Scalia and Kennedy, in their separate *Austin* dissents, stressed what they saw as a fatal contradiction between *Austin*’s rule and the structure of ordinary First Amendment law.³⁵¹ They pointed out that in ordinary freedom of speech law, we don’t normally see inequalities in speech resources as problematic.³⁵² We assume that the marketplace of

346. *McCutcheon*, 134 S. Ct. at 1441, 1451 (plurality opinion).

347. The full quote, in case the reader figures that the language quoted in text must have been taken out of context, states:

[G]overnment regulation [of campaign contributions] may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access . . . are not corruption.” They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Id. at 1441 (omission in original) (citation omitted) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

As Usha Rodrigues has shown, the price for an official act inspired by a campaign contribution can be surprisingly low. See Usha R. Rodrigues, *The Price of Corruption* 4 (Univ. of Ga. Sch. of Law, Research Paper Series No. 2014-23 Aug. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486720 [<http://perma.cc/35R2-67NU>].

348. *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion).

349. The Court had reaffirmed *Austin*’s validity as recently as 2003. See *McConnell*, 540 U.S. 93; see also *FEC v. Beaumont*, 539 U.S. 146 (2003).

350. See *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon*, 134 S. Ct. 1434.

351. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679–80 (1990) (Scalia, J., dissenting); *id.* at 695–96 (Kennedy, J., dissenting).

352. *Id.* at 680–85, 692–95 (Scalia, J., dissenting); *id.* at 704–06 (Kennedy, J., dissenting).

ideas is not disabled by the fact that some individuals can devote vastly more resources to speech than others.³⁵³ Indeed, the fact that different individuals are able to spend completely arbitrary amounts of money on speech, depending on the resources available to them, is at the heart of the American system of freedom of speech.³⁵⁴

First Amendment law has never acknowledged anything wrong with that inequality. On the contrary, our cases say that government is largely disabled from addressing it.³⁵⁵ “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁵⁶ Any such step, we are told, would constitute prohibited discrimination against the speech of the wealthy.³⁵⁷ As the Court has put this argument, perhaps channeling Anatole France, the First Amendment right to speak cannot “be made to depend on a person’s financial ability.”³⁵⁸

Michigan campaign finance law, thus, imposed no limitations on the ability of wealthy individuals to spend their own money on speech relating to candidate elections:³⁵⁹ if a wealthy individual had wanted to drop \$50 or \$60 billion on public information campaigns relating to the Michigan gubernatorial election, Michigan law saw no reason to stop him. Moreover, all of the Justices would have agreed, the First Amendment stripped from Michigan any power to stop him.³⁶⁰

In light of all that, Justices Scalia and Kennedy can be seen to argue, the *Austin* majority’s embrace of the alternative position was simply incoherent: it created a contradiction in campaign finance law that was too powerful to ignore.³⁶¹ While a corporation accumulates funds without regard “to the public’s support for the corporation’s political

353. See *supra* Part IV.C.

354. See *supra* Part IV.C.

355. See *Davis v. FEC*, 554 U.S. 724, 744–45 (2008) (federal law cannot raise contribution limits for opponents of candidates spending more than \$350,000 of their own money); see also *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828–29 (2011) (stating that the state cannot administer matching funds system so as to award publicly financed candidates the same amount of money spent by or on behalf of their privately financed opponents).

356. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

357. *Id.* at 49 n.55.

358. *Id.* at 49; cf. ANATOLE FRANCE, *THE RED LILY* 75 (New York, The Modern Library 1917) (1894) (“[T]he majestic equality of the laws . . . forbid[s] rich and poor alike to sleep under the bridges . . .”).

359. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 665 (1990).

360. See *Buckley*, 424 U.S. at 45.

361. See *Austin*, 494 U.S. at 665; *id.* at 682–85 (Scalia, J., dissenting).

ideas,”³⁶² the same is true of wealthy individuals who choose to buy political advertising. Yet if the distortion is the same whether the money is coming from Koch Industries or the Koch brothers, what difference does it make? After all, as the *Citizens United* majority later urged, *all* speakers, whether corporate or individual, “use money amassed from the economic marketplace to fund their speech.”³⁶³

The *Austin* majority answered that corporations—unlike individuals—amass their funds by virtue of a “unique state-conferred corporate structure.”³⁶⁴ That answer, though, just isn’t satisfying. It leaves open the question why, exactly, the state-conferred structure should matter. Is a corporation’s speech, using funds accumulated with the aid of state corporations law, more distorting than the speech of a wealthy individual, using funds accumulated with the aid of state property, contracts, and estates law? After all, nonprofit corporations also utilize the state-conferred corporate structure, and Justice Marshall had joined Justice Brennan’s opinion in *MCFL* holding that concerns about “the corrosive influence of concentrated corporate wealth” don’t necessarily apply to nonprofits.³⁶⁵

362. *Id.* at 660 (majority opinion).

363. *Citizens United v. FEC*, 558 U.S. 310, 351 (2010).

364. *Austin*, 494 U.S. at 660.

365. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986); *see also supra* notes 274–75 and accompanying text.

One important consequence of the corporate structure is that for-profit corporate managers are using what has notably been described as “other people’s money”—they are engaging in speech using funds contributed by shareholders, who haven’t authorized the corporation to spend the money in this way. *See* Winkler, *supra* note 258, at 873–74. I think, though, that this argument has less independent force than initially appears. The argument offers no basis to challenge corporate managers’ decisions to spend money on advertising or other speech closely aligned with the core interests of the corporation; we take it for granted that a corporation can spend money to advance its business interests. That speech has a profound cultural impact that is on some level equally unintended by the folks whose salary contributions funded the pension funds that are buying corporate shares. And why, then, is a corporation’s political speech not equally unproblematic so long as the corporation is sufficiently clear-eyed about which political outcomes will maximize its profits? Corporate political speech is commonly intended to advance the firm’s business interests, as when the corporation seeks to defeat an officeholder whom it believes will be sympathetic to undesirable regulation. All of this poses, at the very least, a line-drawing challenge to the claim that certain corporate speech unfairly relies on the contributions of dissenting stockholders.

Moreover, if we assume that corporate political spending is a frolic undertaken by managers divergent from the interests of corporate shareholders, *see* *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 813 (1977) (White, J., dissenting) (characterizing the challenged corporate speech expenditures in that case as “promot[ing] . . . the purely personal views of the management”), can we reconcile that with the alternative argument, *see infra* notes 400–02 and accompanying text, that corporate speech is undeserving of First Amendment

Are there other ways to minimize or mitigate this contradiction? One possible answer might be that the state-conferred structure allows for-profit corporations to amass “immense aggregations of wealth” that can “dominat[e] the political process”³⁶⁶ in a way that a few wealthy individuals cannot. That corporations have more and bigger aggregations of wealth than individuals is undeniable; more than fifty U.S. corporations have market capitalization larger than the net worth of Bill Gates (the richest U.S. individual).³⁶⁷ It’s an empirical question, though, whether individuals or corporations, in the aggregate, are more motivated to spend their money on influencing candidate elections. So far the answer seems to be the former. In the 2012 federal election cycle, the total of the identifiable contributions made by *all* for-profit businesses to Super PACs was not quite as much as the contributions of one couple—Sheldon and Miriam Adelson—individually.³⁶⁸

Alternatively, one might argue that while wealthy individuals may individually have outsize influence, collectively their views tend to cancel each other out, lessening their systemic effect on the marketplace of ideas.³⁶⁹ By contrast, one might argue, for-profit corporations’ unfair influence tends to push in a single direction, structurally biased towards capitalism, consumerism, and anti-regulation (except where regulation generates rents), thus tending to skew and distort the conversation.³⁷⁰ Like the alternative position generally, this argument has the advantage of being rooted in reality. It will not avail us, though, if we’re looking for consistency with mainstream First Amendment law. This argument seems grotesquely un-First-Amendment-y to anyone who learned about viewpoint discrimination in the basic Constitutional Law course. And there is still the counterargument that allowing viewpoint-based government regulation of speech on this theory would be even more dangerous than letting capital have its say.

protection because it is entirely market determined? And would any of this be a problem but for our concern that this expenditure of other peoples’ money will skew the marketplace of ideas? In that sense, I think the “other people’s money” argument collapses into *Austin*’s distortion claim.

366. *Austin*, 494 U.S. at 659–60.

367. *Compare The Forbes 400*, FORBES (Sept. 29, 2015), <http://www.forbes.com/forbes-400/> [<http://perma.cc/KK4E-43GZ>] (as of September 29, 2015, Bill Gates was the wealthiest American with a net worth of \$76 billion), *with* Fin. Times, Financial Times Global 500 (Mar. 31, 2014), <http://im.ft-static.com/content/images/7097ad1a-fded-11e3-bd0e-00144feab7de.xls> [<https://perma.cc/6HLB-6T6U>].

368. *See* BOWIE & LIOZ, *supra* note 287, at 1.

369. *See id.* at 12–13 (urging that this argument is empirically unsupported).

370. *See supra* Part IV.C.

Finally, one might answer that for-profit corporations are unlike wealthy individuals in that they fall outside of our political community. By definition, one might argue, speech of wealthy individuals reflects “popular support”³⁷¹ because wealthy individuals are, after all, people. By contrast, corporations are not part of the polity; they are exterior to our circle of citizenship. Thus, the argument continues, law allowing corporations to amass great wealth and then to use that wealth to influence candidate elections is law allowing outside forces to influence our community, working corrosion and distortion of the community’s discourse.

This claim is worth further exploration because we have so little difficulty with it in a more straightforward context. Consider the controversy over foreign spending in U.S. candidate elections that arose in the wake of *Citizens United*. Politicians and others raised the possibility that *Citizens United* could open the door to foreigners’ seeking to influence U.S. elections—and while opinion may have been divided on the desirability of corporate spending, hardly anybody seemed to think foreign spending was a good idea.³⁷²

Let’s do a thought experiment: Imagine that the American people learn that a deep-pocketed foreign actor is planning on spending a huge amount of money in order to influence U.S. candidate elections. One can imagine people having two possible reactions. The first possibility: “This is wonderful news. The money will fund additional advertising and other forms of speech so that the marketplace of ideas will be richer and U.S. citizens will be better informed. There is no downside.” The

371. *Austin*, 494 U.S. at 659 (quoting *MCFL*, 479, U.S. 238, 258 (1986)).

372. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 424 (2010) (Stevens, J., concurring in part and dissenting in part) (majority’s approach “would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans”); President Barack Obama, State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> [https://perma.cc/D729-SNNF] (“[*Citizens United*] will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”); Dan Eggen & Ben Pershing, Campaign Finance Ruling Leaves Democrats with Few Options, WASH. POST (Jan. 23, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012204811.html> [https://perma.cc/3NET-NJMA] (quoting Democratic Rep. Chris Van Hollen as asking: “Do you really want the Chinese or any other country to be able to spend money on our elections?”); see also John Hudson, *Feds: Mexican Tycoon Exploited Super PACs to Influence U.S. Elections*, FP: CABLE (Feb. 11, 2014), <http://foreignpolicy.com/2014/02/11/feds-mexican-tycoon-exploited-super-pacs-to-influence-u-s-elections/> [https://perma.cc/NY47-8JQN]. But see Brief of *Amici Curiae* the Illinois Coalition for Immigrant and Refugee Rights and the National Immigrant Justice Center in Support of Appellants, *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (No. 11-275), http://www.fec.gov/law/litigation/bluman_sc_icirr_nijcamicus_brief.pdf [https://perma.cc/8QTL-DTZY].

second: “This is problematic, because the outcome of the election will be shifted in the direction desired by some entity not part of the U.S. political community, with interests perhaps adverse to that of the community as a whole.” The logic of *Citizens United* suggests the first reaction,³⁷³ but the intuitive reaction of most people would be the second. And indeed, it’s the second position that’s reflected in U.S. law.³⁷⁴

United States statutory law forbids any person who is not a U.S. citizen (or a lawful permanent resident while in the United States) to spend money to make “electioneering communications”³⁷⁵—that is, those messages advocating the election or defeat of a political candidate, disseminated via broadcast, cable, or satellite immediately before an election, that the *Citizens United* Court held were within the sphere of protected corporate speech.³⁷⁶ The courts have upheld the restriction; the U.S. government, we are told, has a compelling interest in “limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”³⁷⁷

That holding—by a three-judge district court in *Bluman v. FEC*³⁷⁸ summarily affirmed by the Supreme Court³⁷⁹—rests on two, perhaps three, foundations. The first is that well-targeted expenditures on speech can indeed affect public debate in ways inconsistent with the marketplace metaphor—otherwise, concern about foreign influence would make no sense.³⁸⁰ The second is a refusal to credit the view that “more speech is always better” when the additional speech originates from sources outside “the community’s process of political self-definition.”³⁸¹ The third, perhaps, is a premise that speech and expenditures closely tied to candidate elections can be more easily regulated than speech in general.³⁸²

373. See *Citizens United*, 558 U.S. 310.

374. 52 U.S.C. § 30121 (Supp. 2015) (previously classified as 2 U.S.C. § 441(e)).

375. *Id.*

376. See *supra* pp. 586–87.

377. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge panel), *aff’d mem.*, 132 S. Ct. 1087 (2012).

378. *Id.*

379. *Bluman*, 132 S. Ct. 1087.

380. See *Bluman*, 800 F. Supp. 2d at 288–90.

381. See *id.* at 287 (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982)).

382. See *id.* at 290–92.

Could this reasoning apply to corporations' political speech? The *Bluman* court, anticipating the question, said no.³⁸³ "American corporations," it explained, "are all members of the American political community."³⁸⁴ And that is the issue, if the *Austin* concern for corporate distortion is not to pose a recalcitrant contradiction with other elements of First Amendment law. Do we see for-profit corporations as *Austin* sees them, as artificial legal entities that sit atop immense aggregations of wealth, but whose political ideas are uncorrelated with those of "the public"?³⁸⁵ Or do we see them as *Citizens United* sees them, as "associations of citizens"³⁸⁶ that "represent the most significant segments of the economy"?³⁸⁷ Opposed to Justice Stevens' insistence that corporations "are not themselves members of 'We the People'"³⁸⁸ we have Justice Roberts's recognition of the commonplace that "[c]orporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine."³⁸⁹

Part of the challenge here is that the lines of the human discursive and political community do not neatly track the rules of corporate organization. Towards the beginning of Part IV, I suggested a distinction between closely held corporations (defined by the IRS to include those where a majority of the stock is held by five or fewer people)³⁹⁰ and publicly held corporations marked by a greater separation of ownership and control.³⁹¹ A small for-profit corporation (say, a law firm) might look a lot like a true ideological association.³⁹²

383. *Id.* at 290.

384. *Id.*

385. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

386. *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

387. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

388. *Id.* at 466 (Stevens, J., concurring in part and dissenting in part).

389. *Id.* at 355 (majority opinion). This brings back to mind the question I had earlier dismissed as not useful: whether we should think of corporations as "persons." *See supra* Part IV.A.

390. More accurately, the category of corporations described in text includes both "closely held" corporations and "personal service" corporations, for which the corporation's principal activity is providing personal services in specified fields, and where a substantial part of the services are provided by employee-owners. *See* IRS, DEP'T OF THE TREASURY, PUB. 542, CORPORATIONS 2–3 (2012), <https://www.irs.gov/pub/irs-pdf/p542.pdf> [<https://perma.cc/5HQG-42TA>].

391. *See supra* pp. 586–89.

392. This is all the more true for "benefit corporations," for-profit entities organized in part to serve public-interest goals. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 361–68 (2016).

Its speech might well be appropriately seen as analogous to the associational speech of nonprofit corporations formed and funded by individuals. But the distinction is imperfect. The category of closely held corporations includes some—like food, agriculture, financial, and industrial products and services provider Cargill, with more than \$120 billion in revenue and 153,000 employees³⁹³—which more nearly seem to present the problems *Austin* raised.³⁹⁴ Nor does the distinction between individuals, closely held corporations, and other corporations exhaust the possibilities for categorization—where, under this approach, would one slot LLCs, say, or limited partnerships?

Alternatively, even large for-profit corporations can sometimes look at least a little like human ideological communities. Google is a large for-profit corporation, but its public policy positions—such as its opposition to the SOPA bill³⁹⁵—plausibly reflect the views of many Google employees. And while some have suggested that corporations' speech lies outside our human discourse because it is instrumental and market determined,³⁹⁶ human individuals too (sometimes) speak instrumentally and in the cause of profit. So the lines are hard to draw. And that makes sense: as I indicated in Part V, once legal decision-makers begin treating limitations on individual autonomy as pervasive rather than exceptional, then hard-edged rules become problematic. One needs to turn to fuzzier, situationally sensitive standards.³⁹⁷

B. *The Limits of Austin*

There is a different reason, moreover, to view *Austin* as fragile. Recall that notwithstanding the challenges detailed in the previous section, the principles of *Austin* were the law for sixty-four years.³⁹⁸ And yet *Austin* never had any applicability outside the narrow context of

393. *America's Best Employer's #133 Cargill*, FORBES, <http://www.forbes.com/companies/cargill/> [<http://perma.cc/ZE7U-WVAV>] (last visited Apr. 1, 2016).

394. See Stephanie Armour & Rachel Feintzeig, *Ruling Raises Question: What Does 'Closely Held' Mean?*, WALL ST. J., July 1, 2014, at A6, <http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577> [<https://perma.cc/6FKM-RRKS>].

395. See David Drummond, *Don't Censor the Web*, GOOGLE: PUB. POL'Y BLOG (Jan. 18, 2012), <http://googlepublicpolicy.blogspot.com/2012/01/dont-censor-web.html> [<https://perma.cc/J7QQ-54M6>].

396. See Baker, *supra* note 232, at 1177.

397. See Weinberg, *supra* note 119, at 1175.

398. I am counting from the enactment of the Taft-Hartley Act in 1947 to *Citizens United*. See *supra* note 267 and accompanying text.

candidate elections.³⁹⁹ Why? The answer: *Austin* was workable only when confined to that narrow corner.

It is not that one cannot imagine extending *Austin* more broadly. The late Ed Baker, using reasoning parallel to that later found in *Bluman*, argued that commercial speech, and the speech of for-profit corporations, should enjoy no First Amendment protection at all.⁴⁰⁰ Corporate speech, he argued, does not stem from a human discursive community.⁴⁰¹ It is driven by market needs rather than by individuals' feelings or desires.⁴⁰² Our political community is limited to natural persons, he continued, and we as a people can choose to keep the conversation within our own community.⁴⁰³ But a little thought makes clear the deep problems inherent in seeking to extend the approach of *Austin* to the world of speech at large.

Recall *Bellotti's* starting point, that it is imperative to protect corporations' speech because that speech provides information that educates the public and informs the political process.⁴⁰⁴ That argument is uncontroversial when it comes to the mass media; even folks who are most concerned about corporate skew wouldn't want to strip First Amendment protections from the institutional press.⁴⁰⁵ But a lot of entities that perform mass media functions are owned by corporations.⁴⁰⁶ So can we, following *Austin*, adequately distinguish between (good) corporate media, protected because of their informing role, from other (bad) corporate entities, entitled to less protection because of the dangers of distortion?

The exercise I'm proposing here is a simple line-drawing exercise—but I want to emphasize how problematic that line drawing would be. The Supreme Court, over the years, has uncontroversially recognized free speech rights in a wide range of media corporations broadly construed—newspapers and broadcasters⁴⁰⁷ but also movie distributors,⁴⁰⁸ theatrical producers,⁴⁰⁹ book publishers,⁴¹⁰ even bars that

399. See Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 19 (Monica Youn ed., 2011).

400. See Baker, *supra* note 232, at 1187.

401. See *id.* at 1182–83.

402. See *id.* at 1177.

403. See *id.* at 1183.

404. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1977); see also *supra* Part IV.

405. See *id.* at 808 & n.8 (White, J., dissenting).

406. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964).

407. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

408. See, e.g., *Kingley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 690

feature live entertainment.⁴¹¹ Federal campaign finance law, pre-*Citizens United*, addressed this via a statutory exemption intended to protect “the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁴¹² But outside the realm of candidate elections, where would we draw the line to define those corporate entities whose speech advances First Amendment goals in a way outweighing any dangers of distortion?

Some have suggested that we can solve this problem simply by protecting the “press.”⁴¹³ But it would not do to protect only entities engaged in news gathering.⁴¹⁴ That would leave corporate-owned movie studios, theatrical producers, and entertainment venues without First Amendment protection, and few would think that a good result.

One might imagine, again drawing on intuitive understandings of the “press,” that corporate entities should gain First Amendment protection only when disseminating speech to the public as an end rather than a means. The idea would be to distinguish the public relations firm, seeking to manage the news, from a newspaper seeking to report it.⁴¹⁵ But that doesn’t give us a coherent or workable test; members of the press typically disseminate speech as a means to the end of selling ads

(1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952).

409. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561–62 (1975).

410. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

411. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–34 (1975).

412. H.R. REP. NO. 93-1239, at 4 (1974).

413. *See* E-mail from Roslyn Litman to the author (Jan. 28, 2012) (on file with author).

414. The federal Freedom of Information Act (FOIA), thus, defines the “news media” to include entities that gather information “about current events or that would be of current interest to the public,” “turn the raw materials into a distinct work, and distribute[] that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii) (2012); *see also* *Cause of Action v. FTC*, 961 F. Supp. 2d 142, 161–64 (D.D.C. 2013) (stating that an organization is not news media for FOIA purposes unless it can “disseminate the requested information to the public rather than merely make it available” and “its operational activities are especially organized around doing so”). State shield laws undertake the same sort of inquiry. *See, e.g., N.J. STAT. ANN. § 2A:84A-21a* (2011) (defining “news media” to include “newspapers, magazines, press associations, news agencies, [and] wire services,” with each of those terms separately defined, as well as radio, television, and “other similar printed, photographic, mechanical or electronic means of disseminating news to the general public”). That statute at one point circularly defines “news” to include any information disseminated by news media, *id.* § 2A:84A-21a(b), but the definitions elsewhere treat it as having independent meaning, *see, e.g., id.* § 2A:84A-21a(c) (defining “newspaper” as “a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter”).

415. *See In re Napp Tech. Litig.*, 768 A.2d 274, 280 (N.J. Super. Ct. Law Div. 2000) (denying state shield law protection to a public relations firm on essentially this ground).

and making money.⁴¹⁶ One might argue that an entity should enjoy protection as “press” if it controls its own means of distribution, as newspapers and magazines do, rather than merely soliciting or purchasing from others a route to the public’s eyeballs. But Internet-mediated communication makes a hash of that approach: any entity can put up a website directly accessible to the public.⁴¹⁷

One might say that a for-profit corporate entity is “the press” and entitled to protection if and only if it is engaged in the business of selling speech to the public for money. This would include the *New York Times*, and exclude political advertising, including the speech centrally at issue in the *Citizens United* case (a video called *Hillary: The Movie* that the maker sought to make available, via cable-system video-on-demand, at no charge to viewers).⁴¹⁸ The idea would be that media corporations distribute speech the public wants and is willing to pay for, while speech that a corporation distributes without market constraint should be seen as just an attempt to manipulate the discourse.

Unsurprisingly, that still doesn’t work. If *Hillary: The Movie* had been offered for a peppercorn, should its status then have been different? And what about NBC News, which is available for free to anyone with a broadcast antenna? The *Washington Times*, a nominally for-profit entity that has lost money every year it has been in existence?⁴¹⁹ The owners of the *Washington Times*, in a very real sense, have paid to distribute its speech to the public; but characterizing it on that basis as not “the press” would be odd. A little earlier, I mentioned the claim that corporations’ speech should be deemed to lie outside our human discourse because it is instrumental and market determined;⁴²⁰ this approach seems to say, contradictorily, that speech is market determined only if it is *not* sold in the marketplace.

416. Nor would it work to make frequency of publication the test. See, e.g., *In re Burnett*, 635 A.2d 1019, 1020–21, 1024 (N.J. Super Ct. Law Div. 1993) (holding that a once-a-year report rating the financial condition of insurance companies was “news media” within the meaning of New Jersey’s shield law).

417. *Cause of Action v. FTC*, 961 F. Supp. 2d at 163, suggested that whether an organization with a website was “news media” for FOIA purposes should depend on how popular the website is. While this might work for FOIA purposes, it seems deeply problematic from a First Amendment perspective.

418. The maker proposed to pay \$1.2 million for the use of those facilities. *Citizens United v. FEC*, 558 U.S. 310, 320 (2010).

419. Jennifer Harper, *Washington Times Reaches Profitability After 33 Years, \$1 Billion in Losses*, WASH. TIMES (Oct. 14, 2015), <http://www.washingtontimes.com/news/2015/oct/14/washington-times-reaches-profitability-after-33-ye/print/> [<https://perma.cc/UQ92-8M3X>].

420. See *supra* note 396 and accompanying text.

One might say that the corporate speech deserving fullest protection is speech that in some meaningful sense is really the speech of the human beings who created it—notwithstanding that those individuals were working within, or connected via contracts to, a corporate entity. That approach would give more First Amendment protection to a book written by J.K. Rowling and published by Little Brown than to an essay on corporate responsibility published with no individual by-line by GM; the idea would be that the former was more nearly an expression of individual authorship.

Yet there are individuals behind GM's speech as much as there are individuals behind a publisher's books. Some Don Draper writes those messages from GM—whether commercial or political—and he utilizes creativity and artistry in doing so. The argument would have to be that Don's human authorship on behalf of GM doesn't count because he is only acting within an economically determined role. But then how do we treat the corporation-owned bar that plays live music? The bar musician is also acting within an economically determined role.

Should our criterion then be whether the individual speaker (whose speech is being coordinated or distributed by the corporation) has meaningful autonomy about what messages she sends? It does not seem at all satisfying to say that when a corporation owns a restaurant, and hires a musician, then whether the First Amendment applies depends on how closely it restricts her set list. Nor can we say that it's not "media" if a corporation is coordinating or distributing speech only in service of its own economic interests because, well, all media companies do that.

All this may seem like an exercise in the obvious. My larger point, though, is that *Austin*-style campaign finance regulation—an approach that proved workable enough in practice for the sixty-odd years it was in place—only worked because it was limited to speech in a particular narrow context carrying a sharply constrained set of messages. Its distinction between distorting and informative corporate speech would have been incoherent in a broader setting.⁴²¹

421. Along similar lines, see Michael McConnell's argument that the FECA was unconstitutional—and *Citizens United* rightly decided—because the distinction between protected corporate media and unprotected non-media was unworkable even within the narrow elections context. See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 438 (2013) (stating that FECA could be upheld only if First Amendment press protections could be confined to "the journalism profession"—but "[t]here is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media").

Nor would it have made sense to transplant *Austin* to a broader setting in any event. Recall that corporations' spending on political speech directed to the public is dwarfed by their spending on non-public speech directed at government officials (i.e., lobbying).⁴²² The Court has given corporate spending on lobbying a warm constitutional embrace. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court referred to the legislative lobbying activities of two dozen railroads, their trade association, and their public relations firm as just an example of "the people . . . freely inform[ing] the government of their wishes," implicating the constitutional right of petition.⁴²³ There was no suggestion there that corporations were somehow outside the American political community—quite the contrary, from the perspective of Justice Black's opinion, railroad corporations *were* the people.⁴²⁴ Yet any serious attempt to address the concerns of *Austin* in the larger political sphere would be better addressed to lobbying than to political advertising.

Indeed, such an attempt would have to take into account corporate charity as well. Consider the fast-food restaurant chain Chick-fil-A. The company provides essentially all of the funding of the charitable WinShape Foundation, giving it more than \$22 million in 2011 alone.⁴²⁵ WinShape in turn engages in a variety of speech activities, and has funded other groups that engage in speech activities (in particular, in 2011, it passed along nearly \$3 million to the Marriage and Family Foundation, an entity created to support "public awareness campaigns" relating to marriage and sexual morality).⁴²⁶ Any attempt to purge the

422. See *supra* pp. 600–03.

423. 365 U.S. 127, 137 (1961).

424. The Court in *Noerr* rooted its ultimate holding—that legislative lobbying could not be the basis for antitrust liability—in statutory construction rather than in the Constitution. *Id.* at 135–45. However, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), in which plaintiffs sought antitrust liability for defendant trucking corporations' aggressive institution of administrative and judicial proceedings against them, the Court shifted to a constitutional basis. It held that "groups with common interests," such as the defendants, had First Amendment rights of association and petition, precluding liability so long as their litigation was not a "sham." *Id.* at 510–11.

425. I am aggregating a \$7.7 million dollar contribution from Chick-fil-A and a \$14.7 million dollar contribution from its sister corporation CFA Properties. See Winshape Foundation, Inc., Form 990-PF: Return of Private Foundation, at sched. B pt. I (2011), http://990s.foundationcenter.org/990pf_pdf_archive/581/581595471/581595471_201112_990PF.pdf [<https://perma.cc/7A5H-GBRQ>]. WinShape was formed in 1982 by Chick-fil-A's founder S. Truett Cathy.

426. See *id.* at pt. 6; Lucas Grindley, *A Big Loophole? Chick-fil-A Is Already Raising Questionable Money*, ADVOCATE (Sept. 20, 2012), <http://www.advocate.com/business/2012/09/20/chick-fil-raising-money-very-week-anti-marriage-equality-group> [<https://perma.cc/RC8T->

public debate of speech funded, directly or indirectly, by for-profit corporations would have to sweep very widely indeed.⁴²⁷ Such moves would neither be plausible nor consistent with our constitutional tradition.

VII.COMMERCIAL SPEECH REDUX

We saw in the previous part that—while tension between default and alternative viewpoints is inevitable—it’s especially hard for election law to incorporate both *Austin*’s understanding of corporate speech and the default position’s acceptance of the huge speech advantages given to wealthy individuals.⁴²⁸ Making that work rests on the proposition that corporations fall outside the American circle of citizenship, a circle containing only human persons. But that proposition requires difficult line drawing and contested assumptions.

Moreover, drawing the boundaries of *Austin* is made more challenging by the fact that so much of the valuable information and viewpoints in our society is made available to the public by corporations—and any attendant distortion is so ingrained in the fabric of our society that we cannot really address it. Finally, limitations on corporate political speech risk irrelevance given the other multiple avenues of corporate influence on society, whether through commercial speech, lobbying of legislators and administrators, or contributions to other entities engaged in political and speech activity.

When we turn our attention to commercial speech, on the other hand, the alternative position seems to have no such fragility. In part, the alternative position is more secure in this context because commercial speech as a class does not seem to have much First Amendment value; that’s why the Court did not imagine that it was protected at all until the 1970s.⁴²⁹

Commercial speech addresses such matters as which shampoo to buy, not whether to re-elect a political incumbent. It may well, as Justice Blackmun stated, promote the efficient working of economic markets—markets work best when consumers have more information

9YAP]. The Marriage and Family Foundation, like Winshape, was founded by a member of the Cathy family, which owns Chick-fil-A.

427. Charitable contributions by for-profit corporations, in addition, can help buy political support from nonprofits for the company’s positions. See, e.g., Eliza Krigman, *AT&T Gave Cash to Merger Backers*, POLITICO (June 10, 2011), <http://www.politico.com/news/stories/0611/56660.html> [<https://perma.cc/F4SY-4K3X>].

428. See *supra* Part VI.

429. See *supra* Part II.

and advertising can convey that information.⁴³⁰ But how to structure markets is a matter for democratic determination; the potential value of commercial advertising in helping those markets doesn't support using the First Amendment to override those democratic judgments.⁴³¹ The key First Amendment principle behind a rule disapproving government restriction of commercial advertising is our suspicion of selective government censorship. But it's a contestable empirical question whether, in the realm of advertising,⁴³² government power or private power poses the greater threat.⁴³³

Line-drawing problems, moreover, are less problematic in the commercial speech context than they are in the larger context of all corporate speech. While it may be problematic to say whether a particular instance of speech should be classed as "commercial,"⁴³⁴ those problems are insignificant compared to the challenge of classifying disfavored speech that we encountered in the previous section.

In the context of corporate speech, finally, we saw a limitation to regulatory effectiveness in that a corporation debarred from engaging in political speech outside of the elections context could always make its points in other ways, including shifting its resources to nonprofit organizations.⁴³⁵ In the commercial speech context, by contrast, a shampoo company is likely to have little success in shifting resources to an appreciative nonprofit so that the latter can engage in speech urging the public to buy its benefactor's shampoo.

430. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65 (1976).

431. *See supra* note 24 and accompanying text.

432. It is relevant here that the informational value of much advertising (especially television advertising) is low. *See* Avery M. Abernethy & George R. Franke, *The Information Content of Advertising: A Meta-Analysis*, 25 J. ADVERT. 1, 11 (1996). The foundational analysis is Alan Resnik & Bruce L. Stern, *An Analysis of Information Content in Television Advertising*, 41 J. MARKETING 50 (1977).

433. The dangers of government power in the misleading-advertising and trademark contexts, to be sure, are not nonexistent. *See, e.g., supra* notes 20–23 and accompanying text; *see also* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). And there have been politically fraught instances where firms have sought to use commercial speech regulation to gain an advantage in the marketplace. *See, e.g., supra* notes 105–07 and accompanying text. But the alternative position is consistent with the conclusion that nonetheless the greater evils are those averted by regulation.

434. *See, e.g., Kasky v. Nike, Inc.*, 45 P.3d 243, 254 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003).

435. *See supra* p. 623. In the pre-*Citizens United* electioneering context, nonprofit corporations that had received funds from for-profit corporations were themselves subject to FECA electioneering limitations. *See supra* note 198. But such restrictions would not be plausible in the extended version of *Austin* imagined in the previous part of this Article.

In short, the alternative position seems pretty robust in the context of commercial speech. But this discussion raises the question whether alternative concerns should be dominant—as they are under current law—*only* when commercial speech is said to be “misleading.” I urged earlier that the alternative position is a legitimate countertradition within American law and, indeed, a necessary one.⁴³⁶ So we must choose where it has sway and where it does not; and when it comes to commercial speech, it’s worth examining whether the line the Supreme Court has drawn is the right one.

To think about that, let’s look at the case of *Capital Broadcasting Co. v. Mitchell*.⁴³⁷ That pre-*Virginia Board* case addressed the constitutionality of federal law banning cigarette advertising from radio and television.⁴³⁸ The three-judge district court had little difficulty upholding the statute, citing the subordinate First Amendment status of product advertising,⁴³⁹ and the Supreme Court affirmed.⁴⁴⁰

It is impossible to justify that result under current doctrine. In *Virginia Board*, the Court distinguished *Capital Broadcasting* in a footnote, waving its hands at “the special problems of the electronic broadcast media.”⁴⁴¹ That was all very well for 1972, when we treated broadcasters as subject to entirely separate First Amendment rules, but it does not hold up today.

In 1972, one could argue that a broadcaster’s carriage of cigarette advertising was sanctionable because it disserved the Communications Act’s “public interest” standard.⁴⁴² Indeed, one could plausibly argue then that the Communications Act gave the government wide leeway to ban all sorts of content-defined categories of speech from the airways.⁴⁴³

436. See *supra* Part V.

437. 333 F. Supp. 582 (D.D.C. 1971), *aff’d mem. sub nom.*, *Capital Broad. Co. v. Acting Attorney Gen.*, 405 U.S. 1000 (1972); see also *supra* note 13 and accompanying text.

438. *Capital Broad.*, 333 F. Supp. at 584.

439. *Id.* at 583.

440. *Capital Broad.*, 405 U.S. 1000.

441. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

442. 47 U.S.C. § 307(a), (c) (2012).

443. See Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221, 250–57 (1996); cf. *Monroe Commc’ns Corp. v. FCC*, 900 F.2d 351, 358 (D.C. Cir. 1990) (stating that “obscene broadcasts . . . bear on the public interest” and, therefore, FCC license renewal proceeding must take up allegations that the licensee had aired obscene movies as scrambled subscription programming); *Yale Broad. Co. v. FCC*, 478 F.2d 594, 603–05 (D.C. Cir. 1973) (stating that a broadcaster’s playing songs said to promote illegal drug use may be inconsistent with its public interest obligations), *cert. denied*, 414 U.S. 914 (1973). *But see*, e.g., LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 177–

But the Supreme Court never endorsed such an approach, and would not do so today. To be sure, the Court has applied an intermediate-scrutiny standard to some content-based restrictions of broadcast speech, upholding them if they are adequately well tailored to promoting “the public’s ‘paramount right’ to be fully and broadly informed on matters of public importance” in the broadcast context.⁴⁴⁴ But it has done so only in limited contexts pertaining to structural considerations such as the fairness doctrine or broadcast diversity—not as a means of suppressing disfavored views.⁴⁴⁵ When the Court post-*Virginia Board* considered cases presenting restrictions on commercial speech in the broadcast medium, it did not suggest that the standard of scrutiny in these cases was any lower than in the nonbroadcast context.⁴⁴⁶

And without a special rule for broadcasting, the *Capital Broadcasting* result is badly out of sync with modern law. In *Lorillard Tobacco Co. v. Reilly*, the Court considered a Massachusetts law banning any smokeless tobacco or cigar advertising within 1,000 feet of a playground.⁴⁴⁷ It recognized that the restriction would legitimately and directly further the state’s goal of discouraging use of those products by minors but nonetheless found it too sweeping, especially given that “tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.”⁴⁴⁸ Given that result, it is hard to imagine how the federal broadcast ban—which contains no exceptions, say, for late-night hours when children are likely to be in bed—could survive a challenge.⁴⁴⁹

82 (1987) (excoriating the *Yale Broadcasting* decision).

444. *FCC v. League of Women Voters*, 468 U.S. 364, 398–99 (1984).

445. *See Metro Broad. v. FCC*, 497 U.S. 547, 566 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). The Ninth Circuit recently applied this intermediate standard in upholding the statutory plan setting aside broadcast frequencies for “noncommercial educational” licensees who promise to run educational programming and are forbidden to accept paid advertisements. *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1194–95 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2874 (2014).

446. *See Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

447. 533 U.S. 525, 535 (2001). The Massachusetts law also restricted advertising of cigarettes; the Court found those provisions to be preempted by federal law. *Id.* at 570–71.

448. *Id.* at 564.

449. *Cf. Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (striking down a 24-hour-a-day ban on broadcast indecency on the ground that it was not well tailored to the goal of protecting children), *cert. denied*, 503 U.S. 914 (1992).

Certainly the Court in *Lorillard* appeared to see no legitimate state interest in restricting cigarette advertising to *adults*.⁴⁵⁰

But should we therefore conclude that *Capital Broadcasting* was wrongly decided? I find myself unable to see much good in a body of First Amendment law that would foreclose the right of the people, through their democratic representatives, to decide that they do not want broadcast advertising of cigarettes.⁴⁵¹ The evidence of a link between advertising and tobacco use is strong,⁴⁵² and the cost in dollars and lives is tremendous. From the standpoint of Justice Blackmun's concern for efficient working of the economic marketplace,⁴⁵³ the informational value of cigarette advertising on television is trivial. Try as I might, I find it hard to imagine disqualifying First Amendment damage being done there. (Indeed, from the perspective of the alternative position, we might note the historic success of the tobacco industry in suppressing editorial discussion of the health risks of smoking in magazines dependent on cigarette advertising and ask about the First Amendment damage thus done by *allowing* cigarette advertising.⁴⁵⁴)

Or consider the Supreme Court's decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.⁴⁵⁵ This was a pre-*Virginia Board* case upholding a rule forbidding a newspaper from including columns labeled "Jobs-Male Interest" and "Jobs-Female Interest" in its help wanted ads.⁴⁵⁶ The Court later characterized *Pittsburgh Press* as unproblematic from a First Amendment standpoint because "the

450. See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 319 (D. Mass. 2012) (finding that *Sorrell* forecloses such a justification).

451. The story behind this particular statutory provision is complicated. Prior to the statute's enactment, the FCC had interpreted the fairness doctrine to require broadcasters carrying cigarette advertising to provide a significant amount of broadcast time to anti-smoking public service announcements. See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). "[T]he individual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers." *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 588 (D.D.C. 1971) (Skelly Wright, J., dissenting), *aff'd mem.*, 405 U.S. 1000 (1972). The tobacco industry supported the statutory advertising ban to address that dilemma. *Id.* at 588–89. Today, of course, with the fairness doctrine long since repealed and generally understood to be unconstitutional, that dilemma would not exist.

452. See *Lorillard*, 533 U.S. at 557–61.

453. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–63 (1976).

454. See generally Lowenstein, *supra* note 86.

455. 413 U.S. 376 (1973).

456. *Id.* at 379.

transactions proposed in the forbidden advertisements [were] themselves illegal.”⁴⁵⁷ It relied on the fact that a city ordinance forbade gender discrimination in hiring.⁴⁵⁸

But it’s trickier than that. The newspaper pages stated that employers would consider both men and women for any job except as explicitly noted in a specific advertisement and warned that gender discrimination in employment was illegal.⁴⁵⁹ The newspaper took the apparently sincere position that it was listing the jobs separately for the convenience of its readers, so that male readers would not have to waste their time wading through ads for girly jobs that would only interest women and female readers would not waste their own time looking at ads for butch boyish jobs that could not possibly interest them.⁴⁶⁰ To that end, even if an employer did not specify in which column its ad should be run, the newspaper would go back and ask, so as to know where to file it.⁴⁶¹

It seems plain, especially from the perspective of forty years later, that the newspaper’s attitude was retrograde, pernicious, and actively harmful. It is hard to argue that in this commercial-speech context a government rule that want ad columns should not be gender identified surpassed First Amendment bounds. But the justification that the columns amounted to advertisement of illegal transactions—as if the columns were labeled “Narcotics for Sale”—does not quite do it. The two cases are not parallel. It would be illegal for the company that placed such an ad to sell narcotics, but it was not illegal for an employer to hire a person responding to one of its employment ads.

Rather, it’s hard to avoid the conclusion that—as in *Capital Broadcasting*—the Court was applying a standard of scrutiny for state regulation of truthful, nonmisleading commercial speech that was more forgiving than ordinary First Amendment doctrine calls for. Further, I would argue, its decision to do so was appropriate. The Justices validated that approach a few years later in *Central Hudson*, explaining that content-based regulation of even truthful, nonmisleading advertising was fine so long as it directly and parsimoniously advanced some “substantial” government interest.⁴⁶²

457. *Va. State Bd. of Pharmacy*, 425 U.S. at 772.

458. *See Pittsburgh Press*, 413 U.S. at 388–89.

459. *Id.* at 381 n.7.

460. *Id.*

461. *Id.* at 380 n.5.

462. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 568–69 (1980).

In the *Sorrell* case, the Court discarded the *Central Hudson* rule, denying the existence of any more forgiving standard for the regulation of truthful, nonmisleading commercial speech.⁴⁶³ But *Sorrell*'s context provides no compelling support for that change. And absent such support, it's unclear why we would want the First Amendment to be a guarantor of pharmaceutical companies' ability to tailor sales pitches and gift inducements individually for each doctor in a state so that the companies can more successfully use targeted techniques in aid of prodding the doctors to overprescribe proprietary drugs at the expense of generics.

Once we recognize the interplay between classic First Amendment thinking and the alternative perspective in the law of commercial speech, rather, we should recognize that we have a choice between them. I would argue that the more regulation-friendly rule of *Central Hudson* found a better balance than the Court found in *Sorrell*. In recent years, the Court has moved away from the alternative position in both corporate speech and commercial speech law. That has achieved some ideological consistency. But it may not have made us better off.

VIII. CONCLUSION

The Supreme Court's divided commercial speech jurisprudence combines comfort with regulation of misleading commercial speech, with a growing hostility to content regulation of commercial advertising on any ground *other than* that it is false and misleading, in a way that seems hard to justify. We can understand that divide better when we look at the law made by the Court regarding speech by corporations generally. Those cases are driven by a parallel set of considerations and display a parallel internal contradiction. In the corporate speech context, the Supreme Court has recently moved decisively to uphold traditional free speech philosophy at the expense of the alternative, more pro-regulatory, worldview. In the commercial speech context, there is nonetheless a good argument for resting the law on an alternative set of foundations—recognizing the ubiquity of distortion and nonrational thinking, leaving room for paternalism, and relying on fact-specific determinations—notwithstanding that those thoughts are disfavored in ordinary First Amendment philosophy.

463. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671–72 (2011).