FACING THE FEAR: A FREE MARKET APPROACH FOR ECONOMIC EXPRESSION

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Commentators differ on whether a diminished constitutional status for profit-driven speech is consistent with free speech theory. Most recently, the Supreme Court of the United States in Citizens United v. Federal Election Commission *largely embraced an unfettered marketplace approach for political speech financed by corporate treasuries. Given the harm a free market approach is said to have produced in the economic realm, is this approach useful for structuring the constitutional protection economic expression receives? This article discusses the placement of economic expression within First Amendment theory and contends that restrictions on economic speech should be aimed at combating deceptive economic activities while overall regulatory goals should focus on requirements that enrich the supply of accurate and timely information.*

For economists, profit motives, greedy intentions and the private accumulation of wealth do not in and of themselves establish social harm.[1] Instead, such outcomes of self-interest are widely recognized in economic circles as the motivation that stimulates productivity and advances society's interests.[2] But for many non-economists, overall faith in and appreciation for the merits of a self-regulated market approach produces a distasteful even offensive system that calls out for self-restraint and government regulation to minimize the social harms it produces.[3]

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[1] *See* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 182 (2007); Walter Williams, *The Virtue of Greed*, CAPITALISM MAG., Jan. 5, 2001, *available at* http://www.capmag.com/article.asp?ID=69.

[2] *See* Jonathan B. Wight, *Adam Smith and Greed*, 21 J. PRIVATE ENTERPRISE 46, 49-50 (2005). The idea that profit seeking, in a sense, is good can be traced to Adam Smith in *The Wealth of Nations* (1776). Smith wrote, "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interests." *Id.* at 49.

[3] *See* CAPLAN, *supra* note 1, at 182.

The debate surrounding free markets, profit seekers and wealth accumulation is not confined to issues of economics. For decades, First Amendment commentators have debated the marketplace value of speech motivated by profit maximization and the appropriate placement such expression should occupy within existing free speech theory. Like many non-economists, a number of commentators have called for regulation of economically driven speech in order to mitigate the corrosive and damaging effects economic power can have on expression.[4] Regulation of economic expression, they argue, is consistent with First Amendment principles given that speech motivated by profit maximization is unrelated to the core values of individual liberty and self-realization[5] and effective self-government.[6] These speaker-based values, they contend, provide the framework for the constitutional protection speech activities receive, but are not implicated in the realm of commercial speech,[7] where the rights of the receiver are paramount[8] and speech is valued for the utility it provides to society at large.[9] In this speech-based arena, regulation is warranted to protect receivers from false information and deceptive commercially based speech practices.[10]

Other commentators, however, view the lower levels of First Amendment protection for speech provoked by monetary rewards and commercial gain as inconsistent with the core principles of free speech theory. Those principles,

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[4] *See, e.g.*, MARTIN H. REDISH, MONEY TALKS 1 (2001).

[5] *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976-77).

[6] *See, e.g.*, Thomas H. Jackson & John Calvin Jeffries Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5-6 (1979).

[7] *See id.* at 6, 14.

[8] *See, e.g.*, Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 454 (1980).

[9] *See, e.g.*, Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 763-64 (1995).

[10] *See* Neuborne, *supra* note 8, at 459.

commentators argue, promote the inclusion of ideas and opinions within the marketplace and preclude government from discriminating among speech based on the perceived economic power of the speaker. A diminished constitutional status for profit-driven speech, it is argued, reduces the amount of information in the marketplace in order to achieve an economic redistribution among speakers. This marketplace redistribution works to favor certain speakers and subtly promote the ideological objective of economic redistribution.[11]

Most recently, the Supreme Court of the United States waded into these waters with its decision in *Citizens United v. Federal Election Commission*.[12] Reaction to the Court's decision ran the gamut from praise to contempt. President Barack Obama called it a "major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."[13] Senate Minority Leader Mitch McConnell, on the other hand, commended the "important step" the Court took in "restoring the First Amendment rights" of corporate interests and profit-motivated speakers.[14] "Our democracy," he said, "depends upon free speech, not just for some but for all."[15]

The division *Citizens United* fostered among elected officials and public interest groups mirrors the long-standing debate among commentators concerning the marketplace value of corporate and commercial expression and

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[11] *See. e.g.*, REDISH, *supra* note 4, at 9-10, 149-52.

[12] 130 S. Ct. 876 (2010).

[13] *Reactions to the Supreme Court Reversing Limits on Corporate Spending in Political Campaigns*, WASH. POST, Jan. 21, 2010, *available at* http://voices.washingtonpost.com/44/2010/01/reactions-to-the-supreme-court.html.

[14] *Id.*

[15] *Id.*

its subsequent place within the theoretical structure of First Amendment law.[16] This debate largely reflects the dominance of the marketplace model in First Amendment law[17] and the inherent tensions that underlie the reconciliation of a model largely rooted in laissez-faire economic theory[18] with the multiplicity of values and interests at play in a speech market. In *Citizens United,* the tension between a self-regulating, free market approach and a paternalistic regulatory practice designed to mitigate the corrosive effects of economic expression came to a head. The Court noted the deviation between First Amendment theory and regulatory practice in this area of free speech law and made a course correction that largely embraced an unfettered marketplace and placed greater reliance on the rationality of the voting public and its ability to discern truth from falsehood in the short term.[19]

By discounting the alleged harms that flow from political speech financed by corporate treasuries and interests,[20] the Court is fostering a free market system for economic expression. In the economic realm, this system has come under repeated criticism for the harms it generates. Most recently, the federal government enacted a sweeping expansion of federal financial regulation that broadened consumer protection in light of the near-collapse of the world

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[16] For those who align constitutional protection for speech solely with the individual liberty rights of the speaker, profit-driven speech by institutional speakers lies largely outside of the realm of any First Amendment safeguards. *See, e.g.,* Baker, *supra* note 5, at 3.

[17] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3 (1989); W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 40 (1996).

[18] *See* R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1974).

[19] *See infra* text accompanying notes 240-70.

[20] *See infra* text accompanying notes 251-65.

financial system[21] that critics contend was largely caused by a free market ideology.[22] Given the harms this ideology is said to have produced in the economic realm, is a market-based model useful for structuring the constitutional protection economic expression receives? To answer this question, this article examines the relationship between economic theory and a market-based free speech approach for economic expression and concludes that economic expression should be fully encompassed within the marketplace structure of the First Amendment law and that free speech principles that harness and expedite the self-correcting power of the marketplace should drive regulatory regimes involving profit-driven speech.

The analysis upon which this conclusion was reached begins with an examination of the rise of the marketplace model as an organizing principle in First Amendment jurisprudence and its relationship to the free speech values of self-determination and effective self-government. The article first explores the present place economic expression occupies within the theoretical structure of the First Amendment and the justifications for government restrictions on corporate and commercial speech. Second, the marketplace model is used to explore the association between unfettered speech and economic markets. Specifically the section examines the roles individualism, rationality, power and harm play in these markets in general and in economic speech markets in particular. The article concludes with a discussion on the degree to which government regulation of economic expression is warranted and contends that

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[21] *See, e.g.*, *Financial Regulatory Reform*, N.Y. TIMES, Updated: Sept. 20, 2011, *available at* http://topics.nytimes.com/topics/reference/timestopic/subjects/c/credit_crisis_/financial_regulatory_reform/index.html.

[22] *See, e.g.*, Edmund L. Andres, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008, *available at* http://www.nytimes.com/2008/10/24/business/economy/24panel.html?.

speech restrictions should be reserved as means to combat deceptive and fraudulent economic activities and that overall regulatory goals for economic expression should focus on requirements that enrich the supply of accurate, reliable and timely information that is available to consumers.

THE RISE OF MARKETPLACE MODEL

Commentators and courts have been justifying the constitutional status of speech for more than a century. The discussion focuses largely on the values the preservation of speech activities foster and the perceived dangers government restriction of such activities generate. Although multiple explanations have been proffered for the prominent placement expression receives within constitutional law, individual fulfillment and realization, effective self-government and the marketplace of ideas have emerged as the most frequently cited.[23] Each of these justifications casts the underlying purpose of the First Amendment in somewhat different terms and frames the adjudication of free speech issues in distinct and explicit ways. The justification that dominates First Amendment jurisprudence organizes the judiciary's understanding of freedom of speech[24] and works to shape the constitutional, political and economic landscape in which expression exists. It provides the foundation upon which speech-based decisions are built and becomes the "background against which every judge writes."[25]

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[23] *See* Matthew Bunker, *First Amendment Theory and Conceptions of the Self*, 1 COMM. L. & POL'Y 241, 242 (1996).

[24] Because the First Amendment is written in vague, sweeping language, the adjudication of free speech issues requires the judiciary to craft an understanding of freedom of speech, that is, what it means, what lies at its core and at its periphery, what is completely outside its protection and what is unknown, and where future speech challenges exist, for example. This understanding is largely influenced by the theoretical justification(s) the judiciary brings to bear on a particular case.

[25] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986).

Although the First Amendment was added to the Constitution in 1791, the modern understanding of free speech law largely emerged in the latter decades of the twentieth century and took its shape from an evolving body of case law that began in 1919[26] with *Schenck v. United States*[27] and the question of whether the free speech clause provided any protection against criminal sanctions for the distribution of anti-draft leaflets. In a unanimous decision written by Justice Oliver Wendell Holmes, the Supreme Court upheld the criminal conviction in *Schenck*.[28] Eight months later, a similar case produced a dissent by Justice Holmes. While the conviction was upheld in *Abrams v. United States*,[29] in his dissent Justice Holmes introduced the concept of the marketplace of ideas into First Amendment law and used it to affirm free speech protection of wartime dissent.[30] Since then the concept has become embedded in American jurisprudence[31] and "rests on the premise that the proper evolution of intellectual, political, scientific and philosophical thought can only be achieved if the exercise of speech is uninhibited by governmental interference."[32]

The marketplace concept provides extensive protection for free speech activities, and when employed by justices as rationale in majority or plurality

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[26] Most commentators agree that by the 1970s there was uniform acceptance of the principle of free speech. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 4-6 (1995); Frederick Schauer, *Must Speech Be Special*, 78 NW. U. L. REV. 1284, 1285-86 (1983). By the early 1970s, case law – including *Cohen v. California,* 403 U.S. 15 (1971) *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and *New York Times v. Sullivan,* 376 U.S. 254 (1964) – laid the groundwork for a "profound commitment to virtually unlimited discussion of political, moral, and social questions of all types." Schauer, *supra,* at 1287.

[27] 249 U.S. 47 (1919). According to Steven H. Shiffrin, "[M]ost American law students begin their study of the first amendment" with this case. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 72 (1990).

[28] 249 U.S. at 52.

[29] 250 U.S. 616 (1919).

[30] *Id.* at 630-31 (Holmes, J., dissenting).

[31] *See, e.g.*, BAKER, *supra* note 17, at 7; LEE C. BOLLINGER, THE TOLERANT SOCIETY 18 (1986); Hopkins, *supra* note 17, at 40.

[32] Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL'Y 321, 326 (2008).

opinions, the model has consistently produced favorable results for free speech interests.[33] Rooted in laissez-faire economic theory, the marketplace model maintains that truth will emerge in the long run as long as the marketplace remains free from government intervention and all ideas — even those the vast majority believes are harmful, false and "fraught with evil"[34] — have the opportunity to compete. Because the marketplace is self-correcting, harmful ideas are not to be feared. Full and open discussion will eventually expose them for what they are, and a public, comprised of rational individuals, will eventually gravitate toward sound reasoning and sensible ways of thinking.

While a dearth of definitions or explanations regarding the marketplace model exists in Supreme Court decisions,[35] justices have spoken eloquently regarding a profound belief in the "power of reason as applied through public discussion,"[36] and a national commitment to uninhibited public debate.[37] They have declared that it is a political duty to participate in this debate[38] and linked participation as a means of freeing oneself from the "bondage of irrational fears."[39] In First Amendment jurisprudence, public discussion and debate have become a deep-rooted and fundamental value that is uniquely tied to an unfettered marketplace. To properly function, public discussion must exist in an open, self-regulating marketplace. A marketplace in which coerced or forced silence is allowed to exist will not reap the benefits sound reasoning and

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[33] *See* Hopkins, *supra* note 17, at 41-42.
[34] Whitney v. California 274 U.S. 357, 375 (1927) (Brandies, J., concurring).
[35] Hopkins, *supra* note 17, at 42.
[36] *Whitney*, 274 U.S. at 375.
[37] New York Times v. Sullivan 376 U.S. 254, 270 (1964).
[38] *Whitney*, 274 U.S. at 375.
[39] *Id.* at 376.

thoughtful deliberation are said to produce.[40] On the contrary, a heavily regulated marketplace will eventually lead to repression, hate and instability.[41]

Given the role individual expression plays in public debate, the right of individuals to think and speak freely and develop their faculties has also been noted by members of the Court as a key but not dominant First Amendment value.[42] Individual self-actualization has, however, received a more exalted position within the realm of First Amendment values among certain commentators. In its prominent position, self-realization has been viewed as the "only one true value" of freedom of speech.[43] Under this analysis, other values, such as effective self-government and the evolution of thought and provisional truth, are seen merely as sub-values that derive from it[44] or are subordinate to it.[45] The acceptance of the ascendancy of individual fulfillment by the judiciary would substantially alter the construction of First Amendment law as the adjudication of free speech issues would be filtered through a lens that questions the relative potential of expression to foster self-realization or manifest individual choice instead of its value to the marketplace. It has been argued that this approach would most likely result in either the denial of constitutional protection to speech activities like commercial speech that are not rooted in individual freedom,[46] or the rejection of the low value distinction speech such as

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[40] *See id.* at 375.

[41] *See id.*

[42] *See, e.g.*, Cohen v. California 403 U.S. 15, 24 (1971); *Whitney*, 274 U.S. at 375. *See also*, BAKER, *supra* note 17, at 3.

[43] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). *See also*, Baker, *supra* note 5, at 3.

[44] *See* Redish, *supra* note 43, at 594, 611.

[45] *See* BAKER, *supra* note 17, at 24; Baker, *supra* note 5, at 3.

[46] *See* Baker, *supra* note 5, at 5.

obscenity and commercial speech currently receive.[47] In the latter analysis, the Court's current two-tiered approach to free speech adjudication[48] would be replaced with a review that focuses on the ability of the expression at issue to foster self-realization.[49]

While the Court has not justified the constitutional status of freedom of speech solely in terms of self-realization, the idea of an autonomous, individual speaker is an important concept in First Amendment law. In this traditional understanding of freedom of speech, the First Amendment is seen as shielding the street corner speaker from government restriction of unpopular expression and, thereby, preserving democracy and collective self-determination.[50] The protection of individual self-fulfillment is, therefore, most valued for the utility it provides in fostering public debate,[51] and the most cherished outcome of that debate is the "discovery and spread of political truth."[52] In American democracy, the right of every citizen to engage in political expression and association provides the foundation upon which government is formed[53] and majority will is shaped and disseminated.[54] Without the expression of popular political sentiment, representative democracy would be meaningless.[55] Accordingly, commentators have argued that the "First Amendment should protect only

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[47] *See* Redish, *supra* note 43, at 625-40. While Baker and Redish recognize the self-realization value of free speech, Redish argues that Baker has so narrowly defined the concept that he has "effectively excluded significant amounts of expression that could substantially foster the self-realization value." *Id.* at 620. Based on this more narrow definition, Baker would deny constitutional protection to commercial speech while Redish would not. *Id.*

[48] For a discussion on the levels of First Amendment analysis, *see* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298-301 (1995); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190-200 (1983).

[49] *See* Redish, *supra* note 43, at 625-27.

[50] *See* Fiss, *supra* note 25, at 1408-10.

[51] *See id.* at 1410.

[52] *Whitney*, 274 U.S. 357, 375 (1927).

[53] *See* Sweezy v. New Hampshire 354 U.S. 234, 250 (1957) (plurality opinion).

[54] *See* Jackson & Jeffries, *supra* note 6, at 9-10.

[55] *See id.* at 10.

political speech or speech that is a part of democratic self-government."[56] In its purest form, political speech theory contends that the First Amendment absolutely prohibits the abridgement of speech relevant to the self-governing process.[57] Commentators, however, have differed over the definition of politically relevant speech. In its most narrow form, this body of speech includes only explicitly political speech. Scientific or literary expression would then lie outside the protection of the First Amendment.[58] Broader definitions of political speech have also been proposed that would encompass all the arts, sciences and humanities as well as other expression that aids an individual's ability to self-govern.[59] Under a particularly broad-based approach, speech intended to be political and received as political would qualify for heightened protection.[60]

Political speech theory has been "subjected to persuasive criticisms" and, at least in its purest form has "never been widely accepted."[61] The main contention centers on the complexity of accurately and effectively categorizing speech as either political or nonpolitical.[62] Critics have noted that political speech can be defined so broadly that no line can effectively be drawn between the First Amendment's highly protected core and its less protected fringe.[63] At this stage, political speech theory begins to closely resemble the marketplace of ideas theory with the highly protected category of politically relevant speech virtually unlimited in its scope.[64]

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[56] BAKER, *supra* note 17, at 25.
[57] *See id.* at 26.
[58] *See id.*
[59] *See id.*
[60] *See* SUNSTEIN, *supra* note 26, at 131.
[61] BAKER, *supra* note 17, at 25.
[62] *See* SHIFFRIN, *supra* note 27, at 47-53.
[63] *See id.* at 53.
[64] *See* BAKER, *supra* note 17, at 25-26.

While the dominance of the marketplace of ideas model as a rationale for freedom of speech has been noted by justices and commentators alike,[65] critics of the theory find its logic unpersuasive[66] and question whether a system of free expression built largely on a philosophy of unregulated private markets is healthy.[67] Most pointedly, they criticize the theory's false confidence in the ability of citizens to make rational and reasonable determinations based on their critical consumption of information and ideas.[68] Without this foundational tenet, they argue, the advancement of knowledge and the search for truth are seriously hampered as the ability to discern truth and falsehood diminishes and the quality of conclusions from robust debate wanes.[69] Consequently, the very concept of truth has been questioned with the idea of objective truth largely discounted.[70] In the end, truth has come to be viewed as a provisional and wide-ranging collection of responses to a particular set of circumstances and phenomena. The conditional and often transient nature of truth results from the fact that individuals most often base their perceptions upon their varying interests and experiences.[71] As long as individuals have differing experiences, little opportunity exists for a homogeneous truth to emerge.[72] Consequently, diversity and conflict continue to persist[73] as truth becomes relative to the observer[74] and "effective rewards lead people to adopt particular perspectives

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[65] *See, e.g., id.* at 7.
[66] *See, e.g., id*. at 12-22.
[67] *See, e.g.,* SUNSTEIN, *supra* note 26, at 17-23.
[68] *See, e.g.,* BAKER, *supra* note 17, at 14-15; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7-8
[69] *See* BAKER, *supra* note 17, at 15; Ingber, *supra* note 68, at 7-8.
[70] *See* Ingber, *supra* note 68, at 25; Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 673 (1986).
[71] *See* Ingber, *supra* note 68, at 25-26.
[72] *See id.* at 26.
[73] *See id.*
[74] *See* Wonnell, *supra* note 70, at 673.

irrespective of their relation to truth, wisdom or the progressive interests of humanity."[75]

Even with the recognition that individuals often lack the capacity for rational reasoning, the marketplace model continues to dominate judicial thinking given the pragmatic belief that a free market — while unable to produce objective truth — will lead to results that are wiser, more useful and more desirable than the outcomes generated by an environment in which speech is restricted.[76] Furthermore, given the fallibility of human judgment, it is feared that the suppression of speech activities will distort the marketplace, deepen irrationality and increase the probability that harmful conclusions will gain widespread acceptance.[77] Criticisms of this modern pragmatic view of the marketplace theory point to the societal benefits of carefully formulated limitations on speech.[78] They contend that while freedom of speech may help expose error, it may also result in new errors or block efforts to identify and avoid existing errors, such as racism, sexism, capitalism, consumerism and incivility.[79] And while the argument of fallibility justifies caution, errors in judgment can occur with either suppression or inclusion and either choice could aid the entrenchment of error.[80]

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[75] BAKER, *supra* note 17, at 15

[76] *See id.* at 19. The marketplace model predicts that a society that permits free speech will find itself nearer to the truth and exhibit more progress toward the truth than a similar society that proscribes free speech. *See* Wonnell, *supra* note 70, at 675-76.

[77] *See* BAKER, *supra* note 17, at 18. Steven H. Shiffrin contends that it is an "'unbeatable proposition' that truth will never emerge in the marketplace if it does not get in." SHIFFRIN, *supra* note 27, at 20.

[78] *See* BAKER, *supra* note 17, at 21.

[79] *See id.* at 21-22.

[80] *See id.* at 22.

While the assumptions on which the classic marketplace model rest are almost universally rejected by the academic community,[81] the notion of the modern marketplace has largely gained favor with the courts and scholars who perceived it as useful in the search for truth and knowledge and essential to effective popular participation in government.[82] This perception has become entrenched in judicial thought given the belief that the quality of public discussion advanced by the marketplace is uniquely linked to the quality of democratic government.[83] Given the importance of self-government in the United States, freedom of speech has become more valued by the judiciary for its collective benefits to society than its protection of individual self-fulfillment.[84] Under a collective perspective, the marketplace model looms large. It becomes the instrument that allows society to achieve effective self-government and in the process provides the justification for the extensive protection of expressive activities required for self-fulfillment. In the end, its utmost utility is drawn from the constant supply of ideas it generates and from the continual state of upheaval it asserts on this supply in order that even a small percentage of ideas will adapt and ultimately survive.

THE PLACEMENT OF ECONOMIC EXPRESSION

While the marketplace model is the dominant organizing principle upon which free speech law is shaped, its principal value derives from its ability to

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[81] *See id.* at 12.
[82] *See* Ingber, *supra* note 68, at 3-4.
[83] *See id.* at 4.
[84] *See id. See also*, Fiss, *supra* note 25, at 1409-10.

achieve greater goals for society.[85] But like its economic cousin, the marketplace of ideas model can also foster harms and elicit the need for government regulation. For many scholars and jurists, this is particularly true when economic power is used for expressive purposes. Speech motivated by profit maximization, accordingly, causes "significant harm to the systems of free expression and democracy" and, therefore, "regulation of corporate and commercial speech is consistent with the First Amendment[]."[86] Throughout the development of free speech law, the Court has never fully embraced and never fully rejected this line of reasoning. As a result, commentators have long complained about the lack of clarity and consistency surrounding commercial

[85] *See* Ingber, *supra* note 68, at 4.
[86] REDISH, *supra* note 4, at 2.

speech doctrine[87] and the incompatibility between that doctrine and Court's approach to corporate political speech.[88]

Commercial Speech

Before *Valentine v. Chrestensen*[89] was decided in 1942, the Court treated commercial speech as an economic activity subjected to protection under the due process clause of the Fourteenth Amendment.[90] Commercial speech interests relied on the Court's interpretation of the due process clause, which "limit[ed] the ability of the states to restrict economic freedom," to overcome restrictions on business advertising.[91] It wasn't until the New Deal ushered in a "hostility to unfettered capitalism" that the Court began expanding state power over

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[87] *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser*," 55 VAND. L. REV. 693, 701 (2002) (concluding that the Court's commercial speech doctrine is "confused and unstable"); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1317 (1988) (explaining that "virtually every commentator writing about the first amendment believes that the [Supreme] Court's treatment of commercial speech is wrong"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (writing that the "commercial/noncommercial distinction makes no sense"); Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 206 (1976) (explaining that the Supreme Court's rulings in commercial speech cases "may be difficult for lower courts to apply consistently"); Robert M. O'Neil, *Nike v. Kasky—What Might Have Been…*," 54 CASE W. RES. L. REV. 1259, 1259-60 (2004) (contending that *Nike v. Kasky* gave the Court an opportunity to clarify the "increasingly confusing" commercial speech doctrine); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV 1, 2 (2000) (describing the commercial speech doctrine as "a notoriously unstable and contentious domain of First Amendment jurisprudence"); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 92 (1999) (writing that "a lack of clarity continues to mark" commercial speech jurisprudence); Sean P. Costello, Comment, *Strange Brew: the State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 682 (1997) (explaining that commercial speech is "in a state of constitutional limbo"); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 360-61 (1990) (criticizing the Supreme Court's treatment of commercial speech as inconsistent and incoherent); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1634 (1997) (criticizing the "lack of clarity" surrounding commercial speech law).

[88] *See* Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247, 250 (2008). *See also,* Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL'Y 63, 74-77 (2005).

[89] 316 U.S. 52 (1942).

[90] *See* Merrill, *supra* note 87, at 207-08; Troy, *supra* note 87, at 118-20.

[91] Troy, *supra* note 87, at 118.

commerce.[92] In this environment, Chrestensen put forth a First Amendment argument, claiming that a New York City ordinance prohibiting the distribution of commercial advertising on city streets was an unconstitutional infringement of freedom of speech.[93]

Responding to that claim in an opinion that cites no authority for its judgment, the Court concluded that the First Amendment imposes no prohibition to government restraints on "pure[] commercial advertising."[94] Legislative judgment, the Court explained, will determine whether to permit this type of business pursuit to take place on city streets.[95] Furthermore, the fact that the double-faced handbill included a protest against government action did not implicate the First Amendment or change the outcome of the Court's analysis. Instead, the Court determined that because the primary intention of the handbill was to generate income, the communication at issue must be classified as pure commercial advertising deserving of no First Amendment protection.

While this case represented a departure from past claims based on the due process clause, the *Chrestensen* Court continued to view commercial speech as an economic activity designed to "promote or pursue a gainful occupation."[96] Its significance to free speech doctrine resided in the fact that the opinion made explicit that a communication whose primary purpose was to generate business profits received no First Amendment protection and, thus, "can be regulated as a form of economic activity."[97] The determining factor, then, was the speaker's intent. If the speaker intended to use the communication to generate private

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[92] *Id.* at 121.
[93] 316 U.S. at 53-54.
[94] *Id.* at 54.
[95] *Id*. at 54-55.
[96] *Id.* at 54.
[97] Merrill, *supra* note 87, at 208.

income, the speech would be classified as commercial, and no First Amendment protection would apply.

The *Chrestensen* doctrine held until *New York Times v. Sullivan*.[98] In *Sullivan*, the Court acknowledged that in certain circumstances commercially motivated speech — speech bought and paid for by an organization with the primary purpose to persuade an audience to financially support the organization and its mission — should be classified as political speech and receive all the protection the legal system gives its most cherished category of speech.[99] The Court recognized that commercial speech is sometimes used to further debate on important public issues, and when it does, it deserves robust First Amendment protection, including protection for false speech.[100]

Commentators have viewed *Sullivan* as a departure from the primary purpose of unprotected commercial speech set forth in *Chrestensen*.[101] The opinion, they say, shifted the legal analysis from the purpose of the speaker to the content of the speech.[102] In *Sullivan,* the Court recognized that the commercial format of speech does not by itself eliminate First Amendment protection.[103] Instead the Court examined the content of speech, determining the value of that content in the marketplace of ideas.[104] This shift created a new branch of commercial speech, a fully protected branch that opened the way for the

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[98] 376 U.S. 254 (1964).
[99] *Id*. at 265-66.
[100] *Id.* at 266, 271.
[101] *See* Merrill, *supra* note 87, at 209; McGowan, *supra* note 87, at 363.
[102] *See* Merrill, *supra* note 87, at 209-10; McGowan, *supra* note 87, at 363.
[103] 376 U.S. at 266.
[104] *Id.* at 266, 269-70.

development of a commercial speech doctrine in which even speech proposing a commercial transaction was deserving of some First Amendment protection.[105]

In *Sullivan,* the Court relied primarily on principles rather than general rules and holdings to justify its departure from the *Chrestensen* doctrine. In large measure, these principles were drawn from a variety of cases with disparate fact situations and holdings,[106] and constituted the background justifications upon which the Court believed that the advertisement at issue in *Sullivan* could be distinguished from the *Chrestensen* doctrine.[107] Drawing on these and other legal authorities, the *Sullivan* Court set forth the purpose that the First Amendment is supposed to serve and against which the correctness of the judgment could be evaluated.[108] The Court, then, disposed of the *Chrestensen* doctrine by amplifying

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[105] *See infra* text accompanying notes 117-37.

[106] The cases cited by the Court to distinguish the advertisement at issue in *Sullivan* from the *Chrestensen* doctrine were *Smith v. California*, 361 U.S. 147, 153-54 (1959) (holding that a city ordinance, which affixed criminal liability to a bookstore proprietor for the mere possession of an obscene book even though the proprietor had no knowledge as to the contents of the book, violates the freedom of the press); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (finding that the First Amendment does not afford the press any constitutional immunity against anti-trust laws); *Schneider v. New Jersey*, 308 U.S. 147, 162, 165 (1939) (finding that laws which prohibit leafleting on streets violated the First Amendment); and *Lovell v. City of Griffin*, 303 U.S. 444, 447, 451 (1938) (holding that a city ordinance, which punished leafleting without prior written permission from the city manager, is unconstitutional on its face).

[107] *See Sullivan*, 376 U.S. at 266.

[108] *See Smith,* 361 U.S. at 150 (explaining that First Amendment protections apply to printed materials regardless of whether those materials were disseminated for commercial purposes); *Associated Press,* 326 U.S. at 20 (explaining that the First "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"); S*chneider,* 308 U.S. at 164 (contending that freedom of the press includes a speaker's liberty to communicate with individuals in their homes and that laws which impose censorship on the free and unhampered distribution of information "strike[] at the very heart of the constitutional guarantees"); *Lovell,* 303 U.S. at 452 (explaining that free press guarantees cover "every sort of publication which affords a vehicle of information and opinion"). The *Sullivan* opinion also included a section expounding specifically on the purposes that the First Amendment was designed to serve. 376 U.S. at 269-70. Cases cited in this section were *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963) (explaining that the First Amendment protects "vigorous advocacy" as well as "abstract discussion"); *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (explaining that the First Amendment protects and is best served by speech that "is provocative and challenging," … "strikes at prejudices and preconceptions"…"invite[s] dispute," …"induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"); *Bridges v. California*, 314 U.S. 252, 270

the importance of particular facts *vis-à-vis* the relevant purpose of the First Amendment.

Although the speech at issue in *Sullivan* was both economically motivated[109] and an issue of public importance, the Court put the emphasis on the latter, recognizing the public benefit in the exchange of such ideas and invoking the traditional speaker interests underlying First Amendment theory.[110] To view the facts otherwise, the Court said would cut off an important vehicle for the free flow of information.[111] Moreover, the Court characterized the commercial communication at issue in the case as political speech and its content as serving the First Amendment's public interest function in enhancing public knowledge and furthering public debate.[112] The case also viewed the advertiser, a nonprofit fundraising organization,[113] as an individual speaker whose participation in the marketplace was helping "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"[114] The Court's treatment of the marketplace under this theoretical structure of the First Amendment presupposes that the receivers of these ideas are sophisticated enough to judge the accuracy of information disseminated and, in turn, are

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(1941) (explaining that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (explaining that a fundamental principle of the Constitution is maintaining an opportunity for free political discussion in order to hold government responsive to the will of the people and insure that changes in law are obtained by peaceful means); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandies, J., concurring) (spelling out the rationale for freedom of speech); and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (explaining that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

[109] The advertisement included an appeal for funds. 376 U.S. at 257.

[110] *Id.* at 266,

[111] *Id.* at 266, 269-70.

[112] *Id.* at 266.

[113] The ad was placed by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Id.* at 257.

[114] *Id.* at 266, (quoting *Associated Press*, 326 U.S. at 20).

prepared to engage in the public debate.[115] In the end, the *Sullivan* Court found no incongruity between the commercial advertisement and noncommercial speech.[116]

Sullivan created a split based on content between purely commercial speech and public issue speech of a commercial nature. In the latter, the content is richer and more useful to the marketplace of ideas than purely commercial speech. Once the Court relied upon content and its value in the marketplace as the primary determining factor for First Amendment protection, it followed that the Court would find some value in purely commercial expression and, therefore, some First Amendment protection. With the marketplace as a central theoretical structure of the First Amendment, the *Sullivan* Court also laid the groundwork to expand the justification of freedom of speech beyond the confines of the street corner speaker and pure political speech. The concept of the marketplace as an imperceptible mechanism for the exchange of information and ideas necessary for the proper functioning of society significantly broadened the interests that could now be linked to free speech rights. In *Bigelow v. Virginia*[117] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[118] the Court embraced this broader focus and, as a result, struck down the state regulations on commercial advertising at issue in these cases. In doing so, the Court recognized the right of citizens to receive information and the value

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[115] The idea that "right conclusions" are more likely to reached in a free and open marketplace presupposes that receivers of information are sophisticated enough to not only understand and absorb the content but also to participate in the discussion. This idea runs contrary to commercial speech doctrine which, at times, views receivers of commercial information as naive and in need of government protection. *See infra* text accompanying notes 187-93.

[116] 376 U.S. at 266.

[117] 421 U.S. 809 (1975).

[118] 425 U.S. 748 (1976).

commercial speech afforded individual decision-making as legitimate First Amendment interests.[119] Given these enhanced interests, the Court found "no justification for excluding commercial speech from First Amendment protection"[120] and fully rejected the notion that speech related to the economic marketplace has no value to the marketplace of ideas.[121]

At first blush, *Bigelow* and *Virginia Board of Pharmacy* appeared to diminish the distinction between economic expression and public interest discussion[122] and extinguish any vestiges of the two-level theory of free speech protection[123] outlined in *Chaplinsky v. New Hampshire*.[124] In *Virginia Board of Pharmacy,* the Court concluded that even speech that does no more than propose a commercial transaction contributes to the exposition of ideas, [125] and provides the public with indispensible information upon which intelligent opinions are based as to the "proper allocation of resources in a free enterprise system" and "how that system ought to be regulated or altered."[126] Commercial speech, the Court noted, provides as significant a benefit to society as political discussion and may likely

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[119] *See Bigelow*, 421 U.S. at 822 (explaining that the advertisement in question "conveyed information of potential interest and value to a diverse audience"); *Virginia Board of Pharmacy*, 425 U.S. at 763-64 (noting that the consumer's interest in commercial information may be greater than "his interest in the day's most urgent political debate").

[120] Baker, *supra* note 5, at 2.

[121] *Bigelow*, 421 U.S. at 826.

[122] *See* Kerr, *supra* note 88, at 75.

[123] *See* Merrill, *supra* note 87, at 217.

[124] 315 U.S. 568 (1942). In *Chaplinsky*, the Court concluded that "[t]here are certain well-defined and narrow classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571-72. Fighting words, obscenity and commercial speech were thought to be among these classes of non-protected speech. *See supra* text accompanying notes 93-97.

[125] 425 U.S. 748, 762 (1976). While the speech at issue in *Virginia Board of Pharmacy* was purely commercial, the speech in *Bigelow* contained "factual material of clear 'public interest'" in addition to proposing a commercial transaction. 421 U.S. 809, 822 (1975). As a result, "[L]ower courts divided after *Bigelow* as to whether the Court's emphasis on the public interest element of the advertisement signified that a narrow category of commercial speech remained per se unprotected." Merrill, *supra* note 87, at 218 n.87. The Court's opinion in *Virginia Board of Pharmacy* resolved this ambiguity by clearly stating that speech does not lose its constitutional protection simply because it is commercial. *Id. See also Virginia Board of Pharmacy*, 425 U.S. at 762.

[126] 425 U.S. at 765.

be more useful to the public than the most urgent political debate.[127] Relying on the theoretical structures of the marketplace, the Court eschewed public ignorance precipitated by a government ban on the dissemination of prescription drug prices. The best interests of the public, the Court said, are achieved through open channels of communication that work to inform and educate all consumers[128] even those who are poor, sick and aged.[129] An open marketplace allows these consumers to learn where their scarce dollars are best spent[130] and to determine which economic choice is in their own best interest.[131] Commercial speech bans, the Court said, work to frustrate this choice in an effort to manipulate consumer behavior by suppressing valuable information.[132] The result is a highly paternalistic public policy approach that violates the First Amendment, diminishes self-determination and depletes the marketplace of information.

Justice Harry Blackmun's appeal in *Virginia Board of Pharmacy* to self-governance focuses on the rights of citizens to receive commercial information and the subsequent impact of that information on the formation of opinions and decisions.[133] In this manner, the development of the commercial speech doctrine tracks closely with Alexander Meiklejohn's analysis[134] and the view that what is

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[127] *Id.* at 763.
[128] *Id.* at 770.
[129] *Id.* at 763.
[130] *Id.*
[131] *Id.* at 770.
[132] *Id.*
[133] *See id.* at 763-65. *See also* Post, *supra* note 87, at 13.
[134] *See* Post, *supra* note 87, at 14. Post argues that Justice Blackmun's theoretical analysis in *Virginia Board of Pharmacy* has more in common with Alexander Meiklejohn's First Amendment approach, which focused on the flow of information to voters rather than the participatory model of self-governance. *Id.* at 13-14. Meiklejohn noted that there are "many forms of thought and expression" from which a voter derives the knowledge and intelligence to make wise voting decisions. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961). For Meiklejohn, the final aim of the First Amendment is "not words of the speaker but the

essential in public discourse is that citizens are "'aware of all the options and in possession of all the relevant information.'"[135] In the end, the fact that the impact of commercial information on the formation of public opinion and consumer choice is largely a by-product of the speaker's economic intent[136] is viewed as inconsequential to the fact that such information can "enlighten public decision-making in a democracy."[137]

While the idea that a purely economic intent by the speaker disqualifies speech from protection under the First Amendment was largely discounted in *Virginia Board of Pharmacy*,[138] both *Bigelow* and *Virginia Board of Pharmacy* recognized that in certain contexts commercial speech is ripe for regulation and exclusion from constitutional protection.[139] In doing so, however, both cases fell short of identifying the elements that define commercial speech[140] and set up an incoherence that continues to haunt the commercial speech doctrine to this day. In *Virginia Board of Pharmacy*, the Court noted that commercial speech is not "wholly undifferentiable from other forms" of speech and "commonsense differences" between commercial speech and other varieties of speech do exist.[141] But the Court did not provide a distinct definition of commercial speech that went beyond an earlier description of speech that does "no more than propose a commercial transaction."[142] And yet the Court said that these commonsense

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minds of the hearer" and making voters as wise as possible. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

[135] *Id.* at 13 (quoting OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996)).

[136] *Id.*

[137] *Virginia Board of Pharmacy*, 425 U.S. at 765.

[138] *Id.* at 762.

[139] *See Bigelow*, 421 U.S. 809, 828 (1975); *Virginia Board of Pharmacy*, 425 U.S. at 771-73.

[140] *See* Merrill, *supra* note 87, at 222.

[141] 425 U.S. at 773 n. 24.

[142] Pittsburgh Press Co. v. Human Relations Comm'n., 413 U.S. 376, 385 (1973).

differences justify disparate treatment of some forms of commercial speech so that the "flow of truthful and legitimate commercial information is unimpaired."[143] To this day, the determination of whether the speech at issue is commercial speech and, therefore, constitutionally restricted in certain contexts lies at the center of many commercial speech disputes.[144]

While no dominant test for determining commercial speech exists,[145] the Court in *Bolger v. Youngs Drug Products Corp*.[146] considered a combination of three characteristics — advertising format, reference to product and economic motivation — as strong support for a determination of commercial expression.[147] However, the Court noted that the presence of any one of the three will not by itself render the speech at issue commercial.[148] The California Supreme Court relied on *Bolger* in *Kasky v. Nike*[149] to render a public relations campaign that included editorials, press releases and letters to critics and athletic directors at colleges and universities commercial speech.[150] While Nike's communications did not involve product references or appear in an advertising format, the California Supreme Court determined that communications "directed by a commercial speaker to a commercial audience" that contained "representations of fact about the speaker's own business operations for the purpose of promoting sales of its products" constituted commercial speech.[151]

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[143] *Virginia Board of Pharmacy*, 425 U.S. at 773 n.24.

[144] *See, e.g.*, Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 473 (1989); Bolger v. Youngs Drug, 463 U.S. 60, 65 (1983); Kasky v. Nike, 45 P.3d 243, 247 (2002).

[145] *See* Amber McGovern, *Kasky v. Nike, Inc.: A Reconsideration of the Commercial Speech Doctrine*, 12 DEPAUL-LCA J. ART & ENT. L. 333, 334 (2002).

[146] 463 U.S. 60 (1983).

[147] *Id.* at 66-67.

[148] *Id.*

[149] 45 P.3d 243 (Cal. 2002).

[150] McGovern, *supra* note 145, at 341.

[151] 45 P.3d at 247.

Regardless of its inability to universally define commercial speech, *Virginia Board of Pharmacy* is viewed as a high point in the constitutional protection of commercial speech.[152] From a theoretical standpoint, the opinion forged a rationale for economic expression based on the interlinking values of truth, self-realization and self-government.[153] But while these values were used to secure First Amendment protection for commercial speech, the Court also relied upon the profit motive involved to justify a strict standard of accuracy — a standard that solicitations for contributions to nonprofit organizations did not receive.[154] The Court based this distinction upon two characteristics of profit-driven commercial speech. The Court said that such speech was "more easily verifiable by its disseminator" and had a greater ability to withstand sanctions than other forms of expression.[155] Bolstered by an economic motive, commercial speakers are viewed as more determined to thwart regulatory restrictions than other speakers. Based on this analysis, the Court concluded that the threat of sanctions for false or misleading statements would not chill commercial speech to the same degree it would political commentary or news reporting.[156] Moreover, the Court strongly suggested that it was not extending constitutional protection to false or misleading commercial speech.[157] The reliance upon the profit motive of advertisers to justify restrictions on false or misleading

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[152] *See* Costello, *supra* note 87, at 683-84, 691; McGowan, *supra* note 87, at 365-66; Waters, *supra* note 87, at 1633-34.

[153] *See* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm,* 42 CASE W. RES. L. REV. 411, 453 (1992). In *Virginia Board of Pharmacy*, the Court also addressed the relationship between economic expression and the argument that the principal purpose of the First Amendment is to foster democracy. "Even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy," the Court held, the free flow of commercial information would serve that goal. 425 U.S. at 765.

[154] *Compare Virginia Board of Pharmacy*, 425 U.S. 748, 773 n.24 (1976), *with* New York Times v. Sullivan, 376 U.S. 254, 266, 271-72 (1964).

[155] *Virginia Board of Pharmacy*, 425 U.S. at 772 n.24

[156] *Id.* at 771-72.

[157] *Id.*

commercial speech, however, altered the Court's prior statements asserting that economic intent was irrelevant in commercial speech analysis[158] and ultimately resulted in a tiered system of free speech protection in which inaccurate commercial statements received no constitutional protection.[159]

To ensure that the *Sullivan* principle that false speech must be tolerated in the marketplace to avoid a chilling effect on public discussion did not apply to commercial speech, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[160] devised a four-part test that unequivocally afforded no constitutional protection to false or misleading commercial speech. The opinion, which "drastically restructured the commercial speech doctrine,"[161] described commercial speech in expansive profit-making terms as "expression related solely to the economic interests of the speaker and its audience" and "speech proposing a commercial transaction."[162] In a concurrence, Justice John Paul Stevens responded to the ambiguity of the Court's description and the potential damage that arises to First Amendment freedoms when commercial speech is defined too broadly. He questioned whether the definition "uses the subject matter of the speech or the motivation of the speaker as the limiting factor."[163] Either way, Justice Stevens said the definition "is unquestionably too broad"[164] and "encompasses speech that is entitled to the maximum protection afforded by

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[158] *See* McGowan, *supra* note 87, at 368 n. 58. *See also Virginia Board of Pharmacy*, 425 U.S. at 762; *Bigelow*, 421 U.S. 809, 818 (1973).

[159] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563, 566 (1980).

[160] *Id*.

[161] McGowan, *supra* note 87, at 371.

[162] 447 U.S. at 561-62.

[163] *Id.* at 579 (Stevens, J., concurring).

[164] *Id.* at 580 (Stevens, J., concurring).

the First Amendment."[165] The idea that speech, which was thought to be fully protected, could now be labeled commercial speech was especially troublesome given that *Central Hudson* strayed from the promise that the state may not restrict truthful, nonmisleading commercial speech of a lawful activity to manipulate the effect the expression may have upon its audience.[166] In *Central Hudson*, the regulation at issue banned promotional advertising by an electric utility to dampen unnecessary growth in energy consumption.[167] Justices concurring in the judgment found the state's justification for the regulation as "nothing more than the expressed fear that the audience may find the utility's message persuasive."[168] Conveying a similar point, the Court conceded that government sought to pursue a "nonspeech-related policy" through its ban on promotional advertising and that prior case law had never upheld a blanket ban on commercial speech unless the expression itself was deceptive or related to unlawful activity.[169] Consequently, the Court said special care was required in this case.[170]

For the Court, special care came in the formulation of a four-part analysis that first determined whether the speech in question concerned a lawful activity and was not misleading or false. If so, the commercial speech at issue would fall within the protection of the First Amendment, and government's attempt to

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[165] *Id.* at 579 (Stevens, J., concurring). According to Justice Stevens, examples of fully protected speech that would fall within the Court's definition of commercial speech included a dissertation on the money supply (economic subject matter) and Shakespeare's works (speech motivated by financial gain). *See id.* at 579-80.

[166] In *Virginia Board of Pharmacy*, the Court concluded that the state may not completely suppress the "dissemination of concededly truthful information about [an] entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." 425 U.S. 748, 773 (1976).

[167] 447 U.S. at 559-60.

[168] *Id.* at 581 (Stevens, J., concurring). *See also id.* at 574 (Blackmun, J., concurring). Justice Brennan joined both concurrences.

[169] *Id.* at 566 n.9.

[170] *Id.*

regulate it would need to be justified. Basically a type of intermediate scrutiny then would be applied in which government would need to show that the regulation is furthering a substantial state interest, directly advances the interest asserted, and is no more extensive than is necessary to serve the interest.[171] At the time of the decision, Justice Blackmun expressed doubt that the test was the "proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly."[172] Citing *Linmark Associates, Inc. v. Willingboro*,[173] a case which overturned a ban on "For Sale" signs on residential property to promote stable, racially integrated housing, Justice Blackmun asserted that a "strict standard of review applies to suppression of commercial information, where the purpose of the restraint is to influence behavior by depriving citizens of information."[174] Intermediate scrutiny, Justice Blackmun wrote, was appropriate for a restraint on commercial speech designed to protect consumers from deception or coercion.[175] True consumer protection interests such as these speak to the "commonsense differences" between commercial speech and other categories of speech. It would, therefore, be highly unlikely that a speaker who is willing to engage in deceptive or coercive expression to convince a consumer to complete a commercial transaction would be chilled by the existence of regulations on such speech.[176] While the lack of a chilling effect on deceptive or coercive commercial expression justifies an intermediate review standard, no such justification exists when truthful commercial speech for a

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[171] *Id.* at 564.
[172] *Id.* at 573 (Blackmun, J., concurring).
[173] 431 U.S. 85 (1977).
[174] 447 U.S. at 577 (Blackmun, J., concurring).
[175] *Id.* at 573 (Blackmun, J., concurring).
[176] *Id.* at 578 (Blackmun, J., concurring).

lawful activity is suppressed to influence public conduct through the manipulation of available information.[177]

Since its inception, the *Central Hudson* test, as it has come to be called, has been roundly criticized for its subjective nature.[178] Commentators have complained that the test is applied "with varying degrees of scrutiny,"[179] resulting in "problematic styles of reasoning,"[180] "inconsistent … commercial speech jurisprudence and … confusion in the lower courts."[181] The lack of uniform implementation of the rule is most likely a symptom of the indeterminate nature of immediate scrutiny standards[182] and the ambiguity inherent in the effort to enlarge the scope of permissible expression within the marketplace. By granting at least partial protection to commercial speech, *Virginia Board of Pharmacy* attempted to create a better-informed community of consumers. While subsequent opinions have recognized that purpose,[183] areas of contention remain. Most importantly is the lack of a coherent theoretical

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[177] *Id.* (Blackmun, J., concurring).

[178] *See* Post, *supra* note 87, at 2 (calling the Central Hudson test "vague and abstract"); Troy, *supra* note 87, at 129-30 (explaining that the test is a subjective "malleable standard capable of being manipulated by lower court judges"); Costello, *supra* note 87, at 684 (contending that application of the 4-prong test has "produced spectacularly divergent results"); Howard K. Jeruchimowitz, Note, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV. 432, 434 (1997) (noting the courts' inconsistent application of the Central Hudson test); Kerri L. Keller, Note, *Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 143 (2002) (noting the flexible nature of the test); Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements,* 85 COLUM. L. REV. 632, 635 (1985) (noting that lower courts applying the Central Hudson standard reached "differing constitutional conclusions" when adjudicating cases with similar fact patterns).

[179] Jeruchimowitz, *supra* note 178, at 447.

[180] Miller, *supra* note 178, at 635.

[181] Troy, *supra* note 87, at 123.

[182] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-54 (1987); Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule,"* 8 COMM. L. & POL'Y 25, 68-73 (2003).

[183] *See* Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237, 269 (2004); O'Neil, *supra* note 87, at 1260.

structure that can be reconciled with *Sullivan* and the Court's treatment of ideological speech. While verifiability and durability remain the central theoretical justifications provided by the Court for the disparate treatment of commercial speech, justices and commentators have questioned the logic of this rationale and called for greater protection of commercial information.[184] Especially troubling for some is the Court's treatment of paternalistic regulations intended to further policy goals through blanket bans on truthful consumer information. As Justice Blackmun argued in his concurrence in *Central Hudson*, the value commercial speech asserts on the marketplace cannot be reconciled with regulations intended to keep consumers ignorant and manipulated in order to foster public policy aims. For if commercial speech receives its constitutional status from the "indispensible information" it provides, how can the Court justify applying a malleable intermediate standard[185] to blanket bans on that information? To allow government to pick and choose what it considers indispensible and what it considers dispensable to the marketplace, provides government with the power to manipulate consumer choice and thwarts the aims of a free market in information and ideas. For this reason, Justice Blackmun's call for a stricter review standard for paternalistic restrictions on

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[184] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); 44 Liquormart v. Rhode Island, 517 U.S. 484, 501-04 (1996) (Stevens, J., plurality); *44 Liquormart*, 517 U.S. 484, at 523 n.4, 526 (Thomas, J., concurring). *See also* Kozinski & Banner, *supra* note 87, at 634-38.

[185] *See, e.g,* Troy, *supra* note 87, at 129-30 (explaining that the Court has sometimes used a relatively weak, deferential version of the test to uphold restrictions on advertising); Miller, *supra* note 178, at 635-41 (noting that the third and fourth prongs of the test can be applied with varying degrees of rigor to produce differing constitutional conclusions among cases with similar factual patterns); Waters, *supra* note 87, at 1636-41 (detailing differing applications of the test).

commercial speech has resurfaced in cases from time to time although it has never garnered a majority following.[186]

The idea that no real distinction exists between commercial and noncommercial speech in cases involving the suppression of truthful information about legal products speaks to the rationality of the audience and the collective nature of the market. Theoretically, intelligence and rational decision-making are an outgrowth of a market in which information is transmitted among groups of individuals and where ideas are dependent upon their human carriers and the environment for their survival and development.[187] For this reason, various members of the Court and at times the Court itself have stressed the importance of

> free dissemination of information about commercial choices in a market economy; the anti-paternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decision making; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.[188]

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[186] *See Lorillard*, 533 U.S. at 575-77 (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 501-04 (Steven, J., plurality); *44 Liquormart*, 517 U.S. at 526 (Thomas, J., concurring); Rubin v. Coors, 514 U.S. 476, 496-97 (1995) (Stevens, J., concurring); United States v. Edge Broadcasting, 509 U.S. 418, 439 (1993) (Stevens, J., dissenting).

[187] *See* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA xi (2001).

[188] *44 Liquormart*, 517 U.S. at 520 (Thomas, J., concurring).

But the Court has also upheld paternalistic regulations fearing that unsophisticated consumers would be unable to discern misleading information from factual statements.[189]

In upholding paternalistic regulations, the Court has noted a correlation between consumption and advertising. Advertising, justices contend, increases the demand for products such as alcohol, gambling or cigarettes.[190] Although lawful, government heavily regulates the use of these products through taxation and age restrictions in order to diminish the harmful effects over indulgence can cause. When such restrictions do not provide enough of a deterrent, government has turned to directly regulating the promotion of these products through prohibitions on advertising.[191] In 1986, the Court upheld a ban on casino advertising in *Posadas v. Tourism Company of Puerto Rico*[192] through a weak application of the *Central Hudson* test that granted increased deference to governmental claims that the regulation at issue curbed harmful secondary effects attributed to casino gambling.[193] Controversy surrounding this case led to a plurality opinion in *44 Liquormart v. Rhode Island*[194] that maintained that the Court "erroneously performed the First Amendment analysis"[195] in *Posadas* by

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[189] *See* Hindman, *supra* note 183, at 269-70.

[190] *See Lorillard*, 533 U.S. at 557; *Rubin*, 514 U.S. at 487; *Edge Broadcasting*, 509 U.S. at 434; Posadas v. Tourism Company of Puerto Rico, 478 U.S. 328, 342 (1986). *See also Central Hudson,* 447 U.S. 557, 569 (1980).

[191] *See Lorillard*, 533 U.S. at 534-36; Greater New Orleans Broadcasting v. United States, 527 U.S. 173, 177-80 (1999); *Rubin*, 514 U.S. at 480-81; *44 Liquormart*, 517 U.S. at 489-90; *Posadas*, 478 U.S. at 332-33.

[192] 478 U.S. 328 (1986).

[193] *See id.* at 341-44. In addition, the opinion employed a greater/lesser analysis, which granted government the lesser power to ban advertising of casino gambling because it maintained the greater power to completely ban casino gambling. *See id.* at 345-46. The greater/lesser analysis has been thoroughly criticized by legal scholars as a violation of free speech principles. *See, e.g.,* Berman, *supra* note 87, at 697.

[194] 517 U.S. 484 (1996).

[195] *44 Liquormart*, 517 U.S. at 509 (Stevens, J., plurality).

utilizing a "highly deferential approach"[196] in its application of the *Central Hudson* test. Since *Posadas*, the Court has "declined to accept at face value the proffered justification" for the restriction on commercial speech and instead has engaged in a more rigorous examination of the relationship between the aims asserted by government and the means used to achieve those aims.[197] While concern still arises among members of the Court over the *Central Hudson* test and whether it gives sufficient protection to truthful, nonmisleading commercial speech,[198] commentators have found that the Court no longer grants deference to governmental interests or upholds reasonable restrictions on commercial speech as it once did, but instead applies *Central Hudson* in an increasingly rigorous manner that emphasizes the test's last two prongs.[199]

Corporate Speech

The precarious position commercial speech occupies within the body of free speech adjudication has produced a spillover effect with regards to corporate speech. In *Kasky v. Nike*,[200] the speech at issue, much of which concerned a political and social issue, would have most likely received

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[196] *Id.* at 510 (Stevens, J., plurality).

[197] *44 Liquormart*, 517 U.S. at 531 (O'Connor, J., concurring). From 1986 to 1993, the Court's commercial speech decisions reflected "inconsistency and doctrinal discord" even as the Court asserted that commercial speech received an intermediate level of First Amendment protection. Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons From Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 609 (2000). Whether this level of protection amounted to any meaningful check on government action came nearly a decade after *Posadas* when the Court, in series of cases, "finally disavowed" its greater/lesser analysis and the deferential approach to applications of the *Central Hudson* test. *Id.* at 604. In *Greater New Orleans*, the Court concluded that a rigorous application of the *Central Hudson* test provides sufficient constitutional protection for commercial speech. *See* 527 U.S. at 184.

[198] *See Lorillard*, 533 U.S. at 571-72 (Kennedy, J., concurring); *Lorillard*, 533 U.S. at 572 (Thomas, J., concurring).

[199] *See, e.g.*, Langvardt, *supra* note 197, at 640-41; Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 185 (2007); David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. 1049, 1059 (2004).

[200] 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003).

maximum First Amendment protection prior to 1976 regardless of the economic status of the speaker.[201] Decades later, the commercial nature of Nike's factual assertions landed those statements in the lower rungs of the constitutional ladder[202] and, as a result, precluded Nike from engaging in false or misleading speech in an effort to thwart criticism of the company's labor practices.[203] The speech at issue included descriptions of Nike's labor policies and practices as well as the working conditions in the factories where Nike products are made.[204] In doing so, Nike addressed personnel and employment matters that were readily verifiable and "within its own knowledge," including employee wages, hours worked, treatment, environmental conditions, and health and safety laws.[205]

At issue upon appeal to the Supreme Court was the question of "whether a corporation participating in a public debate may 'be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions.'"[206] The Court dismissed the case as improvidently granted without resolving the question at issue.[207]

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[201] *See* O'Neil, *supra* note 87, at 1260-61; Rodney A. Smolla, *Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1281-82 (2004).

[202] The California Supreme Court held that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience and because they made representation of fact about the speaker's own business operations for the purpose of promoting sales of its products, … [the] messages are commercial speech." *Kasky v. Nike*, 45 P.3d at 247.

[203] *Id.*

[204] *Id.* at 248

[205] *Id.* at 258.

[206] Nike v. Kasky, 539 U.S. 654, 657 (2003) (Stevens, J., concurring).

[207] *Id.* at 655.

Kasky stands in stark contrast to *First National Bank of Boston v. Bellotti*,[208] a 1978 corporate speech case that discounted the economic strength of the speaker and focused, instead, on the inherent worth of the speech to the marketplace.[209] The speech at issue in *Bellotti* involved a proposed ballot question that would permit the Massachusetts legislature to impose a graduated tax on the income of individuals.[210] The First National Bank of Boston wanted to publicize its views on the ballot measure, but a state statute prohibiting corporations from making expenditures for the purpose of influencing a vote stood in the way.[211] In striking down the statute, the Court noted that it is the inherent worth of speech that matters, not the identity of the speaker. Given the importance of the speech to democratic decision making, a prohibition on such expression would be clearly unconstitutional if it applied to an individual speaker.[212] The same expression, the Court said, does not lose its marketplace value or its constitutional protection simply because the speaker is a corporation.[213]

In *Bellotti*, the Court used recent commercial speech cases to rebut the argument that corporate speech rights should apply only to expression that materially affects the business interests of a corporation. The Court said that *Virginia Board of Pharmacy* and *Linmark Associates* illustrate that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw."[214] As a result, the economic effect of the information on the speaker's interests is not the central constitutional

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[208] 435 U.S. 765 (1978).
[209] *Id.* at 777.
[210] *Id.* at 769.
[211] *Id.* at 768-69.
[212] *Id.* at 777.
[213] *Id.*
[214] *Id.* at 783.

question. Instead, economic expression garners its free speech protection from the fact that it "furthers the societal interest in the 'free flow of commercial information.'"[215] Consequently, the constitutionality of regulations that prohibit the "exposition of ideas" by economic speakers will turn on whether those restrictions can survive the same exacting scrutiny as the Court applies to government restrictions on an individual's right to engage in public debate.[216]

Unlike the *Central Hudson* test, strict scrutiny requires the government to show that the regulation serves a compelling state interest[217] and the means to accomplish that interest are the least destructive of free speech rights.[218] The most favorable standard to free speech interests, strict scrutiny is employed when restrictions limit expression on the basis of viewpoint or content.[219] Relying on *Bellotti* and its focus on the inherent worth of speech in the marketplace,[220] the Court applied strict scrutiny to strike down two statutes targeting the content contained in a private utility's billing envelope.[221] In both cases, the Court dismissed the identity of the corporate speaker as not decisive[222] and determined that state action had limited protected speech. In *Consolidated Edison Company of New York v. Public Service Commission of New York*,[223] a state statute prohibited the inclusion of inserts discussing controversial issues of public policy,[224] and in

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[215] *Id.*
[216] *Id.* at 786.
[217] *See* NAACP v. Button, 371 U.S. 415, 438 (1963).
[218] *See id.* at 433.
[219] The exact definition of what constitutes a content-base restriction can vary. For a discussion on the various interpretations of the term, *see* Whitmore, *supra* note 182, at 90-91.
[220] *See* Pacific Gas & Electric Co. v. Pub. Utilities Comm'n of California, 475 U.S. 1, 8 (1986); Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 533 (1980).
[221] *Pacific Gas & Electric*, 475 U.S. at 19; *Consolidated Edison,* 447 U.S. at 540
[222] *Pacific Gas & Electric*, 475 U.S. at 8; *Consolidated Edison,* 447 U.S. at 533-34.
[223] 447 U.S. 530 (1980).
[224] *Id.* at 532.

Pacific Gas & Electric Co. v. Public Utilities Commission of California,[225] a California statute mandated the inclusion of content from a consumer-based interest group.[226] Both statutes, the Court said, were impermissible content-based regulations that were not narrowly drawn to further a compelling interest.[227] As a result, they directly infringed the First Amendment rights of corporate speakers.

Corporate speech statutes that restrict the use of general treasury funds for independent expenditures in connection with candidate elections also trigger the application of strict scrutiny. Such statutes restrict political speech based on the speaker's perceived economic strength and ensuing capability to corrupt the political process. Government contends that for-profit corporations with their ability to accumulate immense wealth through a state-conferred corporate structure threaten to distort the marketplace of ideas and improperly influence election outcomes. The prevention of corruption or the appearance of corruption, thus, becomes the justification for restrictions on ideological corporate speech.

In *Bellotti*, the Court rejected the argument that corporate participation in the referendum process would "drown out other points of view" and "destroy the confidence of the people in the democratic process and the integrity of government."[228] Furthermore, the *Bellotti* Court found no evidence in the record to support the contention that corporate advocacy threatened to undermine the democratic process. This line of thought continued in *Federal Election Commission*

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[225] 475 U.S. 1 (1986).
[226] *Id.* at 5-6.
[227] *Pacific Gas & Electric*, 475 U.S. at 20-21; *Consolidated Edison*, 447 U.S. at 544.
[228] 435 U.S. 765, 789 (1978).

v. Massachusetts Citizens for Life,[229] in which the Court dismissed the government's concerns regarding the threat to the political process from participation by a nonprofit corporate interest that was formed to disseminate ideas rather than to amass capital. The "potential for unfair deployment of wealth for political purposes," the Court concluded, is not implicated when the resources aggregated are "not a function of an entity's success in the economic marketplace but its popularity in the political marketplace."[230] While corporate speech interests were upheld in *Bellotti* and *MCFL*, the Court also signaled in *MCFL* that the use of resources in the treasury of a business corporation could present an unfair advantage in the political marketplace. The Court noted that the expenditure of treasury funds for political purposes "may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."[231] The idea that a corporation's economic power could justify state restrictions on corporate political speech was soon tested and ultimately reinforced in *Austin v. Michigan State Chamber of Commerce*.[232]

In *Austin*, the Court upheld a state regulation that prohibited business corporations from using general treasury funds for independent expenditures in connection with a candidate election for public office. Relying on *MCFL* and *FEC v. National Conservative Political Action Committee*,[233] the Court recognized the compelling interest in the prevention of corruption or the appearance of

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[229] 479 U.S. 238 (1986).
[230] *Id.* at 259.
[231] *Id.* at 258.
[232] 494 U.S. 652 (1990).
[233] 470 U.S. 480 (1985).

corruption in the political process through the influence of economic power.[234] The Court explained:

> State law grants corporations special advantages — such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets — that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."[235]

In *Austin*, the Court linked the perceived economic strength of an idea, measured in terms of the state-conferred corporate form of the speaker, to the idea's potential for producing harmful effects in the ideas market. With this linkage, the Court effectively moved away from *Bellotti* and a market-based approach in which the inherent worth of the speech in terms of its capacity to inform public discussion and decision-making ultimately held constitutional sway.[236] In *Austin*, the Court accepted the government's contention that the "unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption."[237] The corruption at issue in *Austin* involved the "corrosive and

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[234] 494 U.S. at 658-59.
[235] *Id.* (quoting *MCFL*, 479 U.S. at 257).
[236] *See Bellotti*, 435 U.S. 765, 776-77 (1978).
[237] 494 U.S. at 658.

distorting effects of immense aggregations of wealth" accumulated under the corporate form and used to disseminate political ideas which have little or no support from the public.[238] With an anti-distortion rationale as a recognized compelling interest, the Court upheld the Michigan Campaign Finance Act as sufficiently narrowly tailored to achieve this goal given that corporations remained free to express their political views through independent expenditures from separate segregated funds that are amassed from voluntary contributions from individuals associated with the corporation.[239]

The course set in *Austin* and followed in *McConnell v. FEC*[240] would eventually experience a directional turnaround in *Citizens United v. Federal Election Commission.*[241] In *Citizens United*, the Court addressed whether a corporate speech ban on electioneering communication made within thirty days of a primary or sixty days of a general election was constitutional. An element of the Bipartisan Campaign Reform Act of 2002, the restriction prohibited corporations and unions from using general treasury funds for "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within a prohibited timeframe.[242] Although this provision of the BCRA was upheld in *McConnell*,[243] the *Citizens United* Court used an action in which the provision was applied to an advocacy organization to consider whether *Austin* should be overruled.[244] The organization, Citizens United, accepted corporate funding and wanted to use its financial resources to

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[238] *Id.* at 660.
[239] *Id.* at 660-61.
[240] 540 U.S. 93 (2003).
[241] 130 S. Ct. 876 (2010).
[242] 2 U.S.C. § 434(f)(3)(A) (2006).
[243] 540 U.S. at 206-09.
[244] 130 S. Ct. at 888.

promote and disseminate a ninety-minute documentary about then Senator Hillary Clinton, who was, at the time, a Democratic candidate in the 2008 presidential primary elections. Citizens United planned to make the film available free of charge to digital cable subscribers *via* video-on-demand within the restricted time frame. Based on the case-specific facts, the Court noted that the action could not be resolved on narrower grounds. The film, the Court held, clearly qualified as electioneering communication as defined by BCRA, was the functional equivalent of express advocacy and was funded in part from for-profit corporations.[245] Furthermore, the medium of distribution was specified in the act, and the Court was not at liberty to carve out an exception to the act based on the perceived effectiveness of video-on-demand to influence viewers.[246]

In its adjudication of the case, the Court returned to a market-based approach. The restriction on corporate expenditures, the Court said, "[S]ilence[s] entities whose voices the Government deems to be suspect."[247] As a result, the statute "'reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'"[248] The First Amendment, the Court explained, stands against such attempts to disfavor and distinguish among certain subjects, viewpoints and speakers. To allow speech by some speakers but not by others is "all too often simply a means to control the content" of the marketplace and "deprive the public of the right and privilege to determine for itself what speech and speakers

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[245] *Id.* at 888-92.
[246] *Id.* at 890-91.
[247] *Id.* at 898.
[248] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam)).

are worthy of consideration."[249] In its opinion, the Court noted the essential role speech plays in a democracy. It is the means, the Court held, by which the public holds officials accountable, obtains information from diverse sources and makes determinations regarding who will be elected to serve.[250] Given the storied position political speech holds in the nation's development, the doctrinal adherence to free and full public discussion, and the explicit pre-*Austin* holdings that prohibited restrictions on political speech based on a speakers' corporate identity, the Court reasoned that *Austin* was an outlier that changed the natural course of First Amendment law.

In *Citizens United*, the Court relied heavily on the principle that "political speech does not lose its First Amendment protection 'simply because its source is a corporation.'"[251] This principle — a key holding in *Bellotti* — should have invalidated government bans on independent expenditures by a corporation to support candidates in subsequent cases, the Court noted.[252] Instead, *Austin* upheld such a restriction by finding a compelling interest in an anti-distortion rationale.[253] The *Citizen United* Court found this rationale flawed on First Amendment grounds. The First Amendment, the Court held, prohibits the suppression of political speech based on a speaker's wealth and regards as irrelevant the correlation between the amount of public support for an idea and the amount of money used to disseminate it.[254] According to the Court, "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment," the Court

[249] *Id.* at 899.
[250] *Id.* at 898-99.
[251] *Id.* at 900 (quoting *Bellotti*, 435 U.S. at 784).
[252] *Id.* at 903.
[253] *Id.*
[254] *Id.* at 905.

held, "protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas."[255]

The Court also took issue with the assumption that restrictions on corporate expenditures are aimed at the "'distorting effects of immense aggregations of wealth.'"[256] Noting that 96% of businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees,[257] the Court concluded that the restrictions at issue amounted to censorship and thought control.[258] The government, the Court said, "seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear."[259] The Court called such action unlawful and a violation not only of the right to think for oneself[260] but also of the marketplace principle, which favors the inclusion of voices and viewpoints, entrusting to the people the ultimate responsibility of separating truth from falsehood.[261] In the end, the Court overruled *Austin* and returned to the principle established in *Buckley v. Valeo*[262] and *Bellotti* that government "may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest," the Court held, "justifies limits on the political speech of nonprofit or for-profit corporations."[263] Preventing corruption or the appearance of corruption is, therefore, limited to the type of *quid pro quo* corruption at issue

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[255] *Id.*
[256] *Id.* at 907 (quoting *Austin*, 494 U.S. at 660).
[257] *Id.*
[258] *Id.* at 908.
[259] *Id.*
[260] *Id.*
[261] *Id.* at 906-07.
[262] 424 U.S. 1 (1976) (per curiam).
[263] 130 S. Ct. at 913.

in *Buckley*.[264] In *Buckley*, the Court upheld limits on direct contributions to candidates to ensure against the reality or appearance of *quid pro quo* corruption. This type of corruption, the *Citizens United* Court concluded, was not extended to independent expenditures and is distinguished from favoritism and influence, which are unavoidable in a representative democracy and, as justifications for restrictions on speech, are at odds with the First Amendment due to their unbounded and limitless nature.[265]

In keeping with the marketplace principle that more speech, not less, is the governing rule,[266] the *Citizens United* Court upheld the statute's disclaimer and disclosure requirement. While disclaimers and disclosures burden speech,[267] the Court said the public's interest in knowing who is speaking about a candidate shortly before an election justifies the regulation on speech.[268] At the very least, the Court said, disclaimers avoid confusion by making it clear that a candidate or political party is not funding the message.[269] Furthermore, the transparency they provide enables the electorate to make an informed decision and properly assess the importance of different speakers and messages.[270]

In both commercial and corporate speech law, a contention has developed regarding the degree of harm required to circumvent free speech protection. In commercial speech, a minority of justices has called for stricter review standards for paternalistic restrictions on truthful nonmisleading commercial information, arguing that a relaxed constitutional review is appropriate only when evaluating

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[264] *Id.* at 909-11.
[265] *Id.* at 908, 910
[266] *Id.* at 911.
[267] *Id.* at 914.
[268] *Id.* at 915.
[269] *Id.*
[270] *Id.* at 916.

challenges to regulations aimed at protecting consumers from deceptive or coercive commercial expression. In corporate speech law, the Court changed course from prior case law and held that only *quid pro quo* corruption or the appearance thereof constituted grounds for regulation of corporate political speech. Both arguments embrace a free market approach to economic expression, and place the ultimate responsibility for an idea's adaptation and ultimate survival in the hands of the consuming public.

Economic Markets and Speech Markets

In economic parlance, the market is an ideological construct that is laden with assumptions about the role of consumers, suppliers and the expected outcomes of their interactions.[271] The idea that the ultimate outcome of these interactions in a free market system is increased productivity, a gradual rise in wages and, in the long run, greatly improve living standards has remained essentially unchanged since Adam Smith introduced the concept in 1776.[272] Smith based his free market philosophy on the belief that the ultimate goal of any economic system was the maximization of a country's wealth.[273] The attainment of this goal was possible, according to Smith, if the economy was free of artificial restraints that stifled openness and competition.[274] Smith's market-driven, consumer-based economic system was a reaction against mercantilism — an economic and political system in place at the time that benefited producers and entrenched interests at the expense of the consumer who was routinely confronted with

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[271] *See* Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1110 (2000).
[272] *See* JOHN CASSIDY, HOW MARKETS FAIL 26-27 (2009).
[273] *Id*. at 31.
[274] *Id.*

inflated prices for domestically produced goods.[275] Smith strongly emphasized that commercial regulations were the result of political pressure from dealers who wanted to widen the market and narrow the competition.[276] In turn, the economic system that Smith envisioned relied on the competitive market forces of supply and demand[277] to produce a self-regulating mechanism or invisible hand that would satisfy human wants while stimulating technological innovations and minimizing waste.[278]

In a fully competitive market, the invisible hand regulates supply and demand through the fluctuation of prices. This self-regulation mechanism ensures that finite human and physical resources are directed to where they are most agreeable to the desires of society.[279] In the end, an efficient market system is formed in which prices account for the trillions of voluntary transactions between buyers and sellers and signal the marginal value and cost of goods to the players involved.[280] This system ultimately brings order to the marketplace as an unintended consequence of the interactions of a multitude of economic actors who are each seeking to further their own self-interest.[281]

Under a free market approach, human selfishness is good for the economy as individual wants and desires work to create wealth and elevate the standard of

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[275] *See* G. R. Bassiry & Marc Jones, *Adam Smith and the Ethics of Contemporary Capitalism*, 12 J. BUS. ETHICS 621, 622 (1993); Robert Kerr, *Impartial Spectator in the Marketplace of Ideas: The Principles of Adam Smith as an Ethical Basis for Regulation of Corporate Speech*, 79 JOURNALISM & MASS COMM. Q. 394, 401-02 (2002).

[276] *See* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 6 (1977).

[277] *See* Bassiry & Jones, *supra* note 275, at 622.

[278] *See* CASSIDY, *supra* note 272, at 32. While Smith is largely associated with the invisible hand metaphor, actual references to the idea are "scarce and brief in his works." Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 LOY. L. REV. 33, 35 (2010). However, within judicial opinions, Smith is "overwhelmingly present ... as an authoritative reference for the invisible hand of self-interest, unfettered competition, and minimal government regulation." *Id.* at 43.

[279] *See* CASSIDY, *supra* note 272, at 30.

[280] *See id.* at 32, 68.

[281] *See id.* at 32-33.

living for an entire economy.[282] As a result, self-reliance and freedom of choice are valued, and the use of state power to manage the economy and manipulate market behavior is feared.[283] Critics of this approach contend that regulation is necessary to stabilize and fine tune the economy,[284] and point to the mass unemployment and plunging levels of productivity in the 1930s, which helped to ushered in a loss of faith in the free market,[285] as support for their position. In this era, competition was still desirable but only up to a point.[286] Given the widespread unemployment and economic devastation that occurred during this time, regulatory redress was extended to individuals who needed protection against the types of hardship that had previously been accepted as a fact of life.[287] Once protection against economic hardship became a legitimate basis for regulatory intervention, the logical basis for limiting it diminished and protection of industries, firms and individuals that were likely to be losers in the competitive struggles combined with restraints on those that were likely to be winners in the economic scene.[288] This protectionist philosophy expanded the boundary of existing regulations and led to a loss of resistance to a managed economy.[289] As a result, the regulatory period expanded in the 1960s and 1970s. During these decades, "[M]ore new regulatory agencies and activities were

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[282] *See id.* at 32.

[283] *See id.* at 34.

[284] *See id.* at 37. Even Adam Smith acknowledged that regulation was warranted to maintain the market's mechanism for allocating resources against powerful competitors and institutions that seek to widen their market and narrow the competition. *See* Robert Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People's Money*, 9 FIRST AMEND. L. REV. 211, 221-22 (2011).

[285] *See* Peter O. Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1289, 1297 (1983).

[286] *Id.* at 1297.

[287] *See id.* at 1298-99.

[288] *Id.* at 1299.

[289] *See id.*

started than during any comparable period" of U.S. history.[290] The dominant target of these activities was the social costs or spillover effects on third parties from the exchange process.[291]

The classic example of these spillover effects or what economists call adverse externalities is air or water pollution — a ubiquitous byproduct of consumer demand that imposes costs on elements of society that are unaffiliated with the production and exchange process that produced the pollution in the first place.[292] In this regard, the full costs incurred by the exchange process are not borne by the actors involved in it. Instead spillover costs, that is, pollution, are incurred by third parties, leaving the producers of pollution with little to no incentive to engage in expensive activities to abate the adverse externalities they have produced.[293] In such a situation, government intervention, mandating the installation of a pollution abatement system, for example, may be warranted to correct the market defect.[294] Because adverse externalities are a pervasive and formidable byproduct of a free market system, regulatory efforts to mitigate or control these social costs are potentially limitless and often ineffective at eliminating or preventing the problem.[295] Moreover the very vastness of the problem leads to charges of market failure as anticipated benefits from the free market process are achieved at higher than anticipated costs or not realized at all.[296] Supporters of a free market system, while acknowledging these spillover effects, warn that optimal regulation is exceedingly difficult to attain and even

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[290] *Id.* at 1290.
[291] *Id.*
[292] *Id.*
[293] *See id.*
[294] *See* Whitmore, *supra* note 32, at 334.
[295] *See* Steiner, *supra* note 285, at 1302.
[296] *See id.* at 1303.

seemingly sensible rules that solve some problems will often lead to the creation of new inefficiencies that greatly offset any benefits produced.[297]

Like its economic cousin, the marketplace of ideas model contends that optimal benefits will occur from a hands-off government approach to regulation of speech activities.[298] Free idea markets are much more likely than state-managed markets to produce the provisional truth and knowledge essential for effective self-government and individual realization. Management of idea markets, like the management of economic markets, skews outcomes and leads to results that are problematic and undesirable. Free markets, on the other hand, that rely on the desire of individuals to pursue a rational end — be it the maximization of pleasure or the acceptance of ideas that are wise and useful — produce results that are beneficial to society. Nonetheless, as in the economic arena, the utilitarian focus of a free speech market has, throughout history, been overshadowed by the harmful outcomes that can be tied to the absence of regulation. When adverse outcomes occur, the free market approach is said to have failed and calls for regulatory redress to correct social costs are common.

Given the tendency of economic markets to produce a vast array of adverse externalities, it is understandable that a regulatory approach for economic expression emerged over time. Like the regulatory regime in the 1930s, restrictions on economic speech are often aimed at preventing hardships that result from poor purchasing decisions and lifestyle choices. This paternalistic approach seeks to manipulate individual behavior through blanket bans on economic expression in order to prevent economic power from distorting and

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[297] *Id.* at 1288.

[298] *See* Coase, *supra* note 276, at 14 (contending that the arguments used to support freedom of expression in the market of ideas are "equally applicable in the market for goods").

corrupting the speech market in its quest to reap financial gains. With various members of the Court signaling a willingness to embrace a free market approach for economic expression, how likely is it that constitutional protection for profit-driven speech will produce the harmful effects that regulation of that market was intended to prevent? Detractors of a free market approach fear that economic power will distort the true outputs of the speech market by drowning out the expression of those with fewer economic resources.[299] Supporters of the approach counter that expression often requires significant financial resources.[300] They say that restrictions, which reduce the sum total of expression, foster public ignorance and create a viewpoint bias that runs counter to the central values of the First Amendment.[301] A speech market prone to government-induced viewpoint bias can no longer function effectively and efficiently in its effort to produce provisional truth and knowledge. Instead, it resembles an economic market in which government-induced price controls have frustrated the market's ability to effectively reflect the demand preferences of consumers.

The dispute over the costs and benefits of a hands-off regulatory approach centers on the role individualism, rationality, power and harm play in a free market system. As envisioned by Smith, the concept of a free market rests on an individualistic view of society, and the belief that people, who are free to engage in voluntary exchange motivated by individual self-interest, will produce collective advancements in social welfare.[302] The idea that individual freedoms

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[299] *See* REDISH, *supra* note 4, at 4-5.
[300] *See id.* at 2.
[301] *See id.* at 5.
[302] *See* Richard Bell, *Individualism, Collectivism, and Economic Development*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 59 (2001). Adam Smith's economic actor in *The Wealth of Nations* is a "radical individualist who knows what he wants" and makes trades to further his desires. Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1444 (1997).

can produce collective goods is not unique to economic theory. Freedom of expression, which rests on the right of an individual to think and speak freely, has been lauded as an essential element in advancing knowledge and discovering truth, establishing a means for participation in collective decision making and achieving a more adaptable and stable society.[303] While these individualist philosophies value individual abilities,[304] in reality, an autonomous individual acting independently and solely in her own best interest is rare. Instead, individuals tend to form groups with regards to both expression and business in an effort to have a greater return on investment and a greater effect on the market. Because efficiencies are created in speech and economic markets when individuals come together for a shared/collective purpose, herd behaviors are common in both markets. These behaviors have been noted by economists who point out that in certain circumstances it is more advantageous for an individual to mimic the actions of others rather than to trust one's own judgment.[305] For example, a fund manager who follows the crowd with regards to investment decisions will share the blame with others if things turn out badly, whereas the manager who follows his own divergent strategy will bear the sole responsibility for the mistake.[306] Because an individual who follows the herd will maintain a reputation if the collective judgment is misguided and enhance a reputation if the judgment reaps benefits, the decision to follow the herd is viewed as rational.

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[303] *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).
[304] *See* Blanks Hindman, *supra* note 183, at 241.
[305] *See* CASSIDY, *supra* note 272, at 177-78.
[306] *Id.* at 177.

The concept of rationality lies at the heart of speech and economic market philosophy and has been adopted by a wide range of disciplines, including law and economics, as their "central account of human decision making."[307] While debate surrounds the exact definition of the concept,[308] within law and economics it is used as a predictive model built on the assumption that in the aggregate people respond to incentives[309] and will choose the best means available to achieve their goal.[310] Although the concept implies an explicit cost-benefit analysis, a rational choice does not necessarily involve a conscious decision or "entail either complete information or error-free reasoning from available information."[311] Because information is costly in time to obtain and process, individuals also engage in rational decision making when they act on incomplete information or use mental and emotional shortcuts to reach conclusions.[312] Emotion and ideology, therefore, can be powerful tools in swaying individual judgment.[313]

This is particularly evident when it comes to choices involving the political process. Because one vote has so small a probability of affecting an electoral outcome and the time needed to acquire and analyze political information is significant, voters who choose to cast their votes according to emotional and ideological shortcuts are also acting rationally. Likewise, as the personal cost of tossing information gathering and analysis aside increases, individuals will rely

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[307] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1060 (2000).

[308] *See id.*

[309] *See* Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMPLE L. REV. 1, 11 (2003).

[310] *See* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 252 (2001).

[311] *Id.* at 253.

[312] *See id.*

[313] *See* CAPLAN, *supra* note 1, at 2.

less on such "rationally irrational" shortcuts.[314] In the end, the concept of rationality may well prompt an individual to engage in a cognitive reasoning process that is fully detached from any emotional or ideological attachment, or it may foster a thought process that allows for the acceptance of a political position that is inconsistent with one's material self-interest.

The concept of rational irrationality can be tied to a whole host of behaviors that belie reasoned decision making. For example, the psychological benefits of being associated with a particular idea coupled with the low probability of decisiveness and the high cost of deliberative analysis can produce support for counterproductive policies and worldviews.[315] Irrationality, then, makes the individual better off as long as the psychological benefits minus the material costs are positive. Because, in the realm of democracy, the probability of casting the decisive vote is near zero, an individual is better off getting a sense of meaning and identity from his counterproductive worldview than from engaging in the high cost of research and analysis in order to cast a largely non-decisive vote rationally.[316]

While irrationality is the rational choice for individuals in these circumstances, the potential social costs of this behavior to the democratic process can be alarming especially when powerful economic interests are involved. The belief that powerful economic interests have to a large extent hijacked the democratic process has long been the cause of much concern. With the Supreme Court's decision in *Citizens United*, this concern has only intensified.

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[314] *Id.* at 123. Caplan refers to this phenomenon as "rational irrationality." He argues that "[b]eliefs that are irrational from the standpoint of truth-seeking are rational from the standpoint of individual utility maximization." *Id.* at 141.

[315] *See id.* at 138.

[316] *See id.* at 145-46.

The decision, which negated the assumption that unlimited corporate spending in elections has a corrupting impact on the political process, is being blamed for the large influx of money spent on the 2010 midterm election by groups that are largely anonymous.[317] Although the decision upheld disclosure and disclaimer requirements, IRS regulations provide donor confidentiality to 501(c)(4) social welfare organizations, 501(c)(5) labor organizations and 501(c)(6) trade associations and chambers of commerce. These organizations are now able to engage in political activities without disclosing the names of their donors as long as these activities do not represent the primary purpose of the organizations.[318]

The Sunlight Foundation calculated the effect of *Citizens United* on the 2010 midterm election. The Foundation reported that the decision was responsible for adding $126 million in undisclosed spending by outside groups and $60 million in disclosed spending by outside groups to the midterm election.[319] The $186 million made possible by *Citizens United* represented 40% of the total election spending by outside groups.[320] The ability to increase spending some 40% in less than ten months from unknown sources with unknown interests certainly raises eyebrows and the apprehension that the very corruption and distortion the Court said was not implicated by campaign finance regulation does indeed exist. This apprehension is exacerbated by the high and largely

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[317] *See, e.g.*, T.W. Farnam & Dan Eggen, *Interest-group spending for midterm up fivefold from 2006; many sources secret*, WASH. POST, Oct. 4, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664_pf.html.

[318] *See Hidden Money in the 2010 Elections: A Preelection Primer on Recent and Recently Exploited Avenues for Secretly Funding Elections*, SUNLIGHT FOUNDATION, Oct. 19, 2010, *available at* http://www.scribd.com/doc/39686572/Hidden-Money-in-the-2010-Elections-Final.

[319] *The Citizens United Effect: 40 Percent Outside Money Made Possible by Supreme Court Ruling*, SUNLIGHT FOUNDATION, Nov. 4, 2010, *available at* http://blog.sunlightfoundation.com/2010/11/04/the-citizens-united-ef…-40-percent-of-outside-money-made-possible-by-supreme-court-ruling/.

[320] *Id.*

insurmountable cost of rational analysis and research. Even investigative reporters and organizations whose primary purpose is to track the sources of election spending have been largely unable to uncover the names of individuals behind these generic and nebulous outside groups.[321]

While the Court may have miscalculated the effect of its decision, it, more importantly, upheld the disclosure and disclaimer requirements. Embracing the open market concept, the Court reasoned that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[322] Because full transparency reduces the time it takes to find information, it works to lower the cost of the deliberative process and delineate the exact cost or benefit of being associated with a particular ideological group. In the current marketplace, however, certain organizations are exempt from disclosure and disclaimer requirements. The key, then, is to override this exemption and create a reliable source of information that can be quickly uncovered and processed at the time the expression is disseminated.

Markets fail when information is hidden and unprocessed. The result is prices and behavior that do not account for the lost information. In this climate, externalities are likely to occur especially when choices are driven by short-term desire and emotion and economic interests that have the power to overwhelm the speech market are organized and determined to manipulate behavior. In order to minimize the spillover effect, the market needs to capture as much of the true cost of associating oneself with an idea as possible. Producers and supporters of an idea need to be clearly identified and consumers fully informed.

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[321] *See* Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010, *available at* http://www.nytimes.com/2010/10/03/weekinreview/03mcintire.html?

[322] Citizens United v. Federal Election Commission, 130 S. Ct. 876, 916 (2010).

A marketplace rich in reliable information decreases the power of economic interests to manipulate and deceive and increases the ability of consumers to uncover the "tricks and traps" economic motivation fosters. Instead of drowning out expression from economically weak sources, government requirements that increase the amount of reliable information available to consumers work to inform and educate the public. By requiring full disclosure of the speakers' and producers' identities and creating a reliable information source that is prominently tied to the economically-driven expression, lost information is found and processed, public ignorance decreases and the need for paternalistic approaches to curb perceived market harms diminishes. In the end, self-correcting long-term market outcomes are expedited, and regulatory regimes are structured around open market principles not speech bans.

CONCLUSION

The Court has struggled over the last half century to find a place for economic expression among the theoretical landscape of the marketplace of ideas. This speech, which is provoked by monetary gains, is so closely tied to the undesirable outcomes of a self-regulated economic market that it has been difficult for the Court to bring it into the fold of fully protected speech. Instead, its attempts to fine tune the protection economic expression receives from the First Amendment have resulted in a patchwork of starts and stops that have produced a variety of disparate decisions. From upholding blanket bans that deprive the public of truthful nonmisleading commercial information to overturning precedent that restricted the rights of corporations to engage in political speech during an election, the Court's attempts to build an optimal

regulatory regime for economic expression have proven exceedingly difficult to attain and have garnered criticisms from commentators on nearly every side of the issues involved.

Behind many of the Court's decisions in this area is a fear of economic power's ability to corrupt and deceive – a fear no doubt fostered by the regulatory apparatus that has developed in the economic marketplace. Depression, recession, unemployment, inflation, stagnation and adverse externalities — the economic marketplace is ripe with examples of market failure, and yet the constitutional protection of one of the nation's most valued liberties is based on the very concept that is often at the center of these failures. The idea that wiser, more useful and more desirable outcomes are generated by an unrestricted marketplace than one restricted by regulation forms the core of free speech and economic theory. Although both embrace a self-regulated marketplace, large segments of the economic marketplace remain heavily regulated, while the vast majority of the speech market is free from government intrusion. A regulatory dilemma develops, however, when the two intersect and economically based market fears stifle free speech values. In this environment, a link between economic expression and deceptive and corrupt economic practices is forged. Once the link is formed, even truthful nonmisleading economic expression is suspect and tied to wide-spread social harms. Everything from the word "casino" to prices for alcoholic beverages is ripe for restriction by way of a secondary effects justification, and the idea that a free expressive market will produce a better informed community of consumers is stifled.

In *Citizens United*, the Court retreated from this approach and severed the tie between corrupt economic practices and profit-driven speech. It fully

embraced the free market concept where the public retains the right and the responsibility to "determine for itself what speech and speakers are worthy of consideration."[323] It embraced a market where speech is valued for the role it plays in the quest for effective self-government, and where the inclusion of voices and viewpoints are favored and suppression based on a speaker's wealth, the amount of public support for an idea or the money used to disseminate it is prohibited.[324] In the end, the Court narrowed the type of interest that could justify restriction of economic expression to *quid pro quo* corruption. In doing so, it fractured the association between corruption and favoritism and influence, and brought the periphery of First Amendment protection in line with the core principles of free speech theory.[325]

Given the Court's reasoning in *Citizens United*, there still may be hope for the commercial speech doctrine[326] which suffers from the same often muddy association between real market harms, such as deceptive and fraudulent commercial advertising, and speculative harms, such as a fear of the persuasive power of truthful advertising for vice products. While the former warrants restrictions on expression, the latter does not. Like favoritism and influence, the potential adverse externalities associated with vice products are largely unlimited and unbounded and thus at odds with free speech values. A regulatory regime built on a boundless supply of speculative justifications to restrict expression in order to manipulate behavior not only infringes speech but

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[323] *Id.* at 899.

[324] *See supra* text accompanying notes 247-55.

[325] *See supra* text accompanying notes 256-65.

[326] *See* Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 133 (2010) (arguing that *Citizens United* will likely lead to a rejection of the commercial speech doctrine as formulated in *Central Hudson*).

also creates a culture in which consumers become dependent on government to filter the information they can acquire in an effort to save them from themselves and their own rational irrationality. In such a regime, government assumes the responsibility for determining not only which behaviors are harmful or potentially harmful to society but also which information is likely to induce those behaviors and, therefore, is best kept from the minds of the public. The result is an uninformed and unaware public that is truly susceptible to deceptive economic expression and fraudulent sales practices.

Because both economic and speech markets rely on perfect information for optimal performance, interests, be they government or corporate, that are able to control the information the marketplace distributes have a distinct advantage over consumers who do not possess the knowledge to make fully informed decisions or have the time necessary to investigate commercial claims. However, more information is not necessarily better information. More speech can add to the confusion, increase search costs and may, in the end, drive unwise purchasing or selection decisions and promote lifestyle choices that are harmful. Commentators have noted, for example, that disclosure of product attributes or potential product risks will not necessarily help consumers make wiser, more rational selection decisions.[327] The time it takes to process the information can make the decision to ignore a disclosure a rational decision,[328] especially if the information is technical in nature and difficult to absorb[329] or the product market is crowded and the number of choices are overwhelming.[330] Because no

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[327] *See, e.g.,* Horowitz, *supra* note 309, at 57.
[328] *See* POSNER, *supra* note 310, at 253
[329] *See* Horowitz, *supra* note 309, at 57
[330] *See* BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS 73-74 (2004).

individual possesses the "time or cognitive resources to be completely thorough and accurate with every decision,"[331] acting on incomplete information or mental or emotional shortcuts is not necessarily irrational even if it can yield less than desirable results.[332] While time and cognitive capabilities are important variables in the way people process and act upon information, responses to data are inseparable from a host of additional factors, including individual interests, desires, resources, strength of will and social circumstances and perspectives.[333]

Given all the factors involved, "people may ignore information or misunderstand it or misuse it."[334] As a result, their decisions may be judged as wise or unwise and their choices determined to be the best means or the worst means available to achieve their goal. In the end and in the aggregate, they will respond to incentives. Disclosed information that is more valuable than expensive to use will be processed.[335] And all information — disclosed or concealed — will have an effect on the overall market. The question then comes down to whether an open market structure works for economic expression. From a theoretical level, free speech theory — like economic theory — is largely concerned with the collective values an open marketplace will foster rather than the individual harms and unwise decisions that may occur as a result. Depriving citizens of information in order to influence consumer decisions and behavior runs counter to those values. Instead it is the inherent worth of speech in the marketplace that matters.

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[331] *Id.* at 74.

[332] *See* POSNER, *supra* note 310, at 253.

[333] *See* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 53 (2008).

[334] *Id.*

[335] *See id.* at 55-59.

Because the true worth of speech is not always known or knowable, marketplace theory would have government error on the side of allowing more speech into the market — rather than less — noting that in the long run the inherent worth of speech will be realized. But consumers live in the short-run, where self-interests and adverse externalities may not be exposed in a timeframe necessary to prevent or curb widespread harm resulting from misinformation or misleading marketing tactics. As a result, many of the calls for restrictions on economic speech have focused on a fear of widespread corruption and deception. However removing information from the economic speech market not only frustrates the values an open marketplace promotes but also fosters public ignorance and diminishes self-reliance and the skills necessary for deliberation. Regulatory decisions that ban speech are more harmful to the traditional value of self-realization than an unfettered marketplace for economic expression. Therefore, restrictions that ban speech should be reserved as a means to combat deceptive and fraudulent speech activities. Instead, the link must be severed between deceptive practices and economic expressive power and its ability to overwhelm the speech market with incomplete information that has the potential to mislead consumers. The overall regulatory goal for the latter should focus on requirements that clearly disclose the identity of the speaker(s) and, thereby, alert the marketplace of the self-interests at play. Because optimal regulation is difficult, if not impossible, to obtain, regulatory goals aimed at reducing hidden risks and performance flaws that create serious problems for the public at large should be focused on the disclosure of missing information.[336] Disclosure requirements use a relatively light-handed government action to capture lost

[336] *See id.* at 6.

information that can significantly improve practices or products and reduce serious widespread risks or performance flaws.[337] The key is utility. Consumers are most "likely to act on new information only if it has value to them, is compatible with the way they make choices, and is easily comprehensible."[338] New information must be easy to find, use and understand and must focus on the needs and interests of consumers when they are making routine purchasing and selection decisions. In this way, disclosed information becomes an embedded part of a consumer's decision-making process[339] and a more accurate demand signal is sent to the economic interests involved.

Regulations that enrich the supply of accurate, reliable and timely information that is available to consumers by exposing self-interests and widespread adverse externalities and hidden risks harness the self-correcting power of the marketplace to diminish the informational control economic interests exert over the marketplace, enhance self-reliance and participatory democracy, and lessen the need for paternalistic, content-restrictive regulations and deferential applications of First Amendment standards. In the end, the ability to achieve long-run outcomes in a short-run timeframe provides the framework needed to align economic expression with free speech theory and justifies a place at the constitutional table for profit-driven speech.

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[337] *See id*. at 5-6.

[338] *Id.* at 16. According to the authors, examples of highly effective disclosure requirements include corporate financial disclosure, mortgage lending disclosure and publicly posted hygiene scores of restaurants. *See id.* at 82-84.

[339] *See id.* at 55.