

## CAN COMMERCIAL CORPORATIONS ENGAGE IN NON-COMMERCIAL SPEECH?

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In the thirty years since the Supreme Court controversially decided that commercial advertising is protected by the First Amendment,<sup>1</sup> but not *as* protected as, say, political speech, the scope of commercial speech has remained uncertain. A 1998 lawsuit<sup>2</sup> charging Nike with misrepresenting its overseas labor practices illustrates how much is at stake. Nike argued that its responses to accusations of sweatshop labor addressed debates about globalization that were matters of “public concern,” and therefore warranted the highest level of First Amendment protection.<sup>3</sup> The plaintiff argued that Nike’s statements were no different from ordinary commercial advertising, warranting only the lower degree of

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<sup>1</sup> The doctrine was officially announced in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

<sup>2</sup> Kasky v. Nike, Inc. (Super. Ct. Cal. 1998) (No. 994446).

<sup>3</sup> Specifically, it could be held liable for false statements only on a showing of “actual malice,” i.e., deliberate falsehood or reckless disregard for truth.

protection appropriate to commercial speech.<sup>4</sup> The United States Supreme Court accepted review, but instead of providing the “expected ... landmark ruling on the free speech rights of corporations,”<sup>5</sup> the Court dismissed *certiorari* as improvidently granted.<sup>6</sup> The lawsuit settled soon thereafter,<sup>7</sup> but its unanswered questions are bound to recur. How they are resolved is of enormous consequence, as made clear by the large number of *amicus* briefs filed in Nike by groups representing consumers, labor, environmental interests, civil libertarians, and business and advertising interests.

The importance of deciding what speech is commercial is illustrated by the fact that it was generally agreed that resolving whether the statements complained of in Nike were commercial speech would be dispositive in determining whether Nike could be found liable.<sup>8</sup> More generally, the ability of consumer campaigns to influence corporate behavior with respect to the environment, labor practices, and other areas of public impact depends on public access to accurate information about that behavior. Such access becomes more difficult as it becomes more difficult to hold corporations accountable for misinformation.<sup>9</sup> Indeed any oversight of corporate behavior requires the ability to compel corporations to provide information and to penalize them for misinformation.<sup>10</sup> As Nike demonstrates, such ability will depend in large part on whether the speech in question can be classified as commercial. Still more generally, anyone concerned about corporate dominance over public discourse should be concerned about the question of which corporate public speech is commercial and may therefore be subject to some regulation.<sup>11</sup>

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<sup>4</sup> Specifically, Nike could be held *strictly* liable for false statements under California’s unfair business practices statutes. Cal. Bus. & Prof. Code §§ 17200 *et seq.* (regulating unfair business competition) and §§ 17500 *et seq.* (regulating false advertising).

<sup>5</sup> Linda Greenhouse, Nike Free Speech Case Is Unexpectedly Returned to California, N.Y. Times, June 27, 2003, at A16.

<sup>6</sup> Nike, Inc. v. Kasky, 123 S.Ct. 2554 (2003).

<sup>7</sup> Adam Liptak, Nike Move Ends Case Over Firms’ Free Speech, N.Y. Times, Sept. 13, 2003, at A8.

<sup>8</sup> See Nike, Inc., 123 S.Ct. at 2555; Kasky v. Nike, Inc., 27 Cal. 4<sup>th</sup> 939, 946; *id.* at 949; *id.* at 979-80 (Brown, J., dissenting); Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857 (Cal. App., 1<sup>st</sup> Dist. 2000); Brief for Petitioners at 14, Nike, Inc., U.S. S.Ct. (2003).

<sup>9</sup> See Brief of Amici Curiae Sierra Club et al. at 1-2, Nike, Inc. v. Kasky, U.S. S.Ct.

<sup>10</sup> See Thompson v. Western States Med. Ctr., 535 U.S. 357, 389 (2002).

<sup>11</sup> See United States v. United Foods, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting); C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish’s *The Value of Free Speech*, 130 U. Pa. L. Rev. 646, 646 (1982).

In this paper I defend a thesis that offers a simple solution to the problem of classifying communications like those for which Nike was sued: all speech by publicly traded for-profit business corporations<sup>12</sup> is commercial.<sup>13</sup>

Even readers sympathetic in principle to this suggestion may fear that such an approach has been foreclosed by the Supreme Court's decisions of the last three decades. In its first decision focusing on corporate political speech in the context of campaign finance reform, the Court firmly declared, "We find no support ... for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."<sup>14</sup> While Bellotti continues to be cited in commercial speech decisions for the proposition that speech should not be treated differently because made by a corporation,<sup>15</sup> subsequent campaign finance decisions, upholding special limits on corporate speech, have largely been ignored in the commercial speech context.<sup>16</sup> Since Bellotti the Court has upheld restrictions on corporate spending and fund-raising in connection with federal elections,<sup>17</sup> on corporate contributions to nonprofit advocacy corporations,<sup>18</sup> and on corporate spending on issue advertising ("soft money" expenditures),<sup>19</sup> while finding analogous restrictions on personal spending<sup>20</sup> or spending by advocacy groups<sup>21</sup> to be unconstitutional.

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<sup>12</sup> Hereinafter, except where otherwise indicated, "corporate speech" will be used to refer to speech by such entities only.

<sup>13</sup> One need not accept this general claim to find that Nike's statements constituted commercial speech under established doctrine. The speech was made by a commercial speaker to prospective buyers, about verifiable facts within its own knowledge, for the purpose of fostering sales. See Kasky, 27 Cal. 4<sup>th</sup> at 963-4; Brief of Amicus Curiae Public Citizen, Nike, Inc. v. Kasky, U.S. S.Ct., 2003 WL 21012624, 15 and *passim*. Inducing customers to buy products through misrepresentation is precisely the sort of "commercial harm" that justifies lower protections for commercial speech. See *infra* sec. IA2; Erwin Chemerinsky & Catherine Fisk, What is Commercial Speech? The Issue Not Decided in Nike v. Kasky, 54 Case W. Res. L. Rev. 1143, 1147. See also Ass'n of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726, 731 (9<sup>th</sup> Cir. 1994) (merchants' misrepresentations about whether products were environmentally friendly constituted commercial harm)

<sup>14</sup> First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978).

<sup>15</sup> *E.g.* Kasky, 45 P.3d at 264 (Chin, J., dissenting).

<sup>16</sup> One of the only writings to take notice of the implications of post-Bellotti campaign finance decisions for commercial speech doctrine is C. Edwin Baker, Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike, 54 Case W. Res. L. Rev. 1161, 1165 (2004).

<sup>17</sup> F.E.C. v. Nat'l Right to Work Comm., 459 U.S. 197 (1982); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

<sup>18</sup> F.E.C. v. Beaumont, 123 S.Ct. 2200 (2003).

<sup>19</sup> McConnell v. F.E.C., 124 S.Ct. 619 (2003).

<sup>20</sup> Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>21</sup> F.E.C. v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

It is hard to imagine the Court upholding similar limitations on corporate spending on, say, product advertising. Thus, ironically, it appears that, with respect to limitations on advertising expenditures, corporations' speech on matters of public concern is *less* protected than is their commercial speech—just the opposite of commercial speech doctrine concerning regulation of advertising *content*. Although there may be ways of making sense of this apparent anomaly,<sup>22</sup> it highlights the extent to which commercial speech doctrine has been insulated from developments in campaign finance doctrine. I argue that the rationale for treating corporations differently in the campaign finance context applies equally to any corporate speech on matters of public concern.<sup>23</sup> That rationale, in brief, is that corporate speech is not the speech of any speakers.

The paper begins with a brief introduction to commercial speech doctrine, followed by a brief preliminary argument for the conclusion that corporate speech is commercial, based on the legal requirement that all corporate activity be directed toward profit. The principal argument comes in Part II, which surveys the First Amendment interests that might be implicated in corporate speech. Corporations cannot have free speech rights for their own sake; their speech is protected for the sake of actual human speakers and listeners. However, no speaker interests are at stake in corporate speech: it is not the speech of shareholders, officers or directors, or any other constituency. Meanwhile, case law and theoretical considerations suggest that listener interests alone merit only a reduced degree of protection

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<sup>22</sup> The most obvious explanation would be that even though commercial speech is entitled to a lower degree of First Amendment protection, state interests in restricting corporate expenditures on commercial advertising are much less weighty. The problem with that explanation is that most of the reasons advanced by the Court for limiting corporate expenditures would equally support limits on political expenditures by persons, limits which the Court has declared unconstitutional. *See infra* sec. IIB1. But if regulations on corporate speech may be justified by interests that are insufficient to justify comparable regulations on speech by persons, it appears that—despite its denials—the Court is not treating corporate speech as entitled to the same degree of protection as speech by persons.

<sup>23</sup> For the most part, scholars have examined commercial speech doctrine and corporate political speech doctrine separately. *But see* Baker, *supra* note 16, at 1180-81; C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1, 35 (1976). Related perspectives have been advanced in Randall P. Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 784-93 and 818 (1995); and Daniel J.H. Greenwood, Essential Speech: Why Corporate Speech is Not Free, 83 Iowa L. Rev. 995, 1002 (1998). *Cf.* Jill E. Fisch, Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures, 32 Wm. & Mary L. Rev. 587, 600 (1991) (noting that “[o]ne need not view corporate political speech as distinct from commercial speech,” but *defending* the political speech rights of corporations on that basis); Victor Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L.J. 235, 274 (1981) (suggesting that it may be constitutionally appropriate to regulate corporate political speech *more* than corporate commercial speech).

under the First Amendment. Moreover, even from the standpoint of listeners, corporate speech has particularly low interest, precisely because it is not the speech of any speaker. Finally, in Part III I address objections that reduced protections for corporate speech would tilt the “playing field” of public debate unfairly, and that it may be difficult in principle or in practice to draw lines between corporate speech and other speech—such as that of the press—that unquestionably merits full First Amendment protection.

## I. PRELIMINARIES

### A. Commercial Speech Doctrine

The idea that the First Amendment might protect commercial advertising is fairly new. In 1942 the Supreme Court found it “clear” that the Constitution does not restrain regulation of “purely commercial advertising.”<sup>24</sup> That assumption remained unchallenged until the 1970s, when the Court began to signal concern for commercial speech,<sup>25</sup> culminating in the declaration that purely commercial speech is not “wholly outside the protection of the First Amendment.”<sup>26</sup> At the same time, the Court noted that commercial speech may require “a different [lesser] degree of protection.”<sup>27</sup> Over the last twenty years the Court has moved (albeit inconsistently) toward finding increasing protections for commercial speech,<sup>28</sup> amidst much disagreement about the degree of protection to which commercial speech is entitled, and even some disagreement about whether truthful commercial speech should be treated differently from other speech at all.<sup>29</sup> Still, the doctrine

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<sup>24</sup> Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

<sup>25</sup> Pittsburgh Press Co. v. Human Rel. Comm’n, 413 U.S. 376 (1973); Bigelow v. Virginia, 421 U.S. 809 (1975).

<sup>26</sup> Va. Bd. of Pharmacy, 435 U.S. at 761, 770.

<sup>27</sup> Id. at 771, fn. 24.

<sup>28</sup> See David C. Vladeck, Lessons from a Story Untold: Nike v. Kasky Reconsidered, 54 Case W. Res. L. Rev. 1049, 1056-59 (2004). For example, when the Court in 1996 struck down a Rhode Island prohibition on advertising liquor prices, the plurality opinion explicitly disapproved a 1986 decision upholding a ban on advertising of casino gambling to Puerto Rican residents. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509 (1996) (disapproving Posadas De Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986)).

<sup>29</sup> Liquormart, 517 U.S. at 522-23 (Thomas, J., concurring in part and in judgment); id. at 501-04 (Stevens, J., plurality opinion, joined by Kennedy and Ginsberg, JJ.); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and in judgment); Id. at 571-72 (Kennedy, J., joined by Scalia, J., concurring in part and in judgment); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 431-38 (1993) (Blackmun, J., concurring); Posadas, 478 U.S. at 350-51 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.).

remains that commercial speech is protected by the First Amendment, but less so than speech considered more central to the purposes of the First Amendment,<sup>30</sup> notably political speech.<sup>31</sup>

Because of “its subordinate position in the scale of First Amendment values,” commercial speech is “subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”<sup>32</sup> Specific differences in the treatment of commercial speech include less tolerance of false or misleading speech,<sup>33</sup> more readily allowing speech to be compelled,<sup>34</sup> the inapplicability of overbreadth doctrine,<sup>35</sup> greater tolerance of prior restraints,<sup>36</sup> and, most controversially,<sup>37</sup> less rigorous standards for allowing truthful speech to be regulated to achieve other government ends.<sup>38</sup>

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<sup>30</sup> Commercial speech has been found to merit “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.” *Ohralik v. Ohio*, 436 U.S. 447, 456 (1978). This language has been repeated often. See also *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (“The Constitution ... affords a lesser protection to commercial speech”) (also repeated often).

<sup>31</sup> Political speech, or speech on matters of “public concern,” have often been described as at or close to the core of speech protected by the First Amendment. E.g. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Buckley*, 424 U.S. at 14; *Connick v. Myers*, 461 U.S. 138, 145 (1983).

<sup>32</sup> *Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik*).

<sup>33</sup> While robust public debate has been found to require tolerating even demonstrably false speech on matters of public concern, *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964), false or misleading commercial speech is considered unprotected by the First Amendment. E.g. *Thompson*, 535 U.S. at 367; *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). There is also greater latitude under commercial speech doctrine for regulating speech that *may* mislead. *Friedman v. Rogers*, 440 U.S. 1, 12-16 (1979).

<sup>34</sup> In most contexts, compelled speech is considered to violate freedom of speech under the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). With respect to commercial speech, however, the “constitutionally protected interest in *not* providing any particular factual information ... is minimal.” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis in original). See also *Va. Bd. of Pharmacy*, 435 U.S. at 771, fn. 24; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring in judgment). More recently however, regarding non-factual claims, it has been held that compelled commercial speech must pass First Amendment scrutiny. *United Foods*, 533 U.S. at 411.

<sup>35</sup> Overbreadth doctrine is an exception to the usual rule that statutes may be challenged only by actually injured parties. Regulations may be challenged on the ground that they substantially violate the First Amendment as written, even if they do not violate it as applied in the given case. E.g. *Lovell v. Griffin*, 303 U.S. 444, 452-53 (1938); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-34 (1980). However, “the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context.” *Bates v. State Bar*, 433 U.S. 350, 380 (1977) (“declin[ing] to apply [overbreadth analysis] to professional advertising,” *id.* at 381) (approved in *Schaumburg*, 444 U.S. at 634).

<sup>36</sup> “[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). But “the prohibition against prior restraints” is “inapplicable” to commercial speech. *Va. Bd. of Pharmacy*, 435 U.S. at 771, fn. 24. *Accord Friedman*, 440 U.S. at 10.

<sup>37</sup> See *supra* note 29.

<sup>38</sup> Content-based regulation of speech “must be narrowly tailored to promote a compelling Government interest.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Narrow tailoring requires that the regulation be “the least restrictive means” of achieving the goal.

1. What is commercial speech? The Court has hesitated to define commercial speech,<sup>39</sup> referring often to a “common sense distinction” between commercial and other speech.<sup>40</sup> The various characterizations offered have been more along the lines of paradigm cases or factors to consider. Roughly, “commercial speech” may be said to refer to traditional product advertisements and whatever seems sufficiently similar to be treated equivalently.

The best known characterization of commercial speech is speech that “does no more than propose a transaction.”<sup>41</sup> But that formula is better understood as a paradigm example than as a definition or necessary condition.<sup>42</sup> The Court has also characterized commercial speech more broadly as speech that “proposes a commercial transaction,” without the proviso that it do nothing more.<sup>43</sup> In applying the doctrine, the Court has treated as commercial various speech bearing only an indirect relation to proposing a transaction, including trade names,<sup>44</sup> professional identification on attorney’s letterhead and business cards,<sup>45</sup> real estate “Sold” signs (not just “For Sale” signs),<sup>46</sup> alcohol content printed on beer bottle labels,<sup>47</sup> and a condom distributor’s pamphlet “discussing at length the problem of venereal disease and the use and advantages of condoms in aiding [its] prevention.”<sup>48</sup>

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Ashcroft v. ACLU, 124 S.Ct. 2783, 2791 (2004). Regulation of commercial speech requires only that the regulation be “not more extensive than is necessary” to serve a “substantial” government interest. Central Hudson Gas & Elec. Corp. v. P.S.C., 447 U.S. 557, 566 (1980). Not only is “substantial” interest a lower threshold than “compelling” interest, but “not more extensive than is necessary” has been held *not* to require least restrictive means. Fox, 492 U.S. at 477. The Central Hudson standard has been labeled “intermediate” scrutiny, Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995), and described as “a far cry from strict scrutiny,” Discovery Network, 507 U.S. at 434 (Blackmun, J., concurring), the standard applying to other content-based regulation of truthful speech.

<sup>39</sup> See Discovery Network, 507 U.S. at 419; Zauderer, 471 U.S. at 637; In re Primus, 436 U.S. 412, 438 fn. 32 (1978); Metromedia, Inc. v. San Diego, 453 U.S. 490, 536 (1980) (Brennan, J., concurring in judgment).

<sup>40</sup> Ohralik, 436 U.S. at 455-56 (1978). The Court has often repeated this phrase.

<sup>41</sup> Pittsburgh Press, 413 U.S. at 385; Va. Bd. of Pharm., 425 U.S. at 762; Metromedia, 453 U.S. at 505; Posadas, 478 U.S. at 340; Edenfield, 507 U.S. at 767 United Foods, 533 U.S. at 409.

<sup>42</sup> The phrase has been said to capture the “core notion” of commercial speech. *E.g.* Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 66 (1983); *see also* United Reporting Publ’g Corp. v. Cal. Highway Patrol, 146 F.3d 1133, 1137 (9th Cir. 1998), *rev’d on other grounds sub nom. L.A.P.D. v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999): “This ‘core notion’ is the beginning of our inquiry, ... not the end.”

<sup>43</sup> *E.g.* Fox, 492 U.S. at 473-74; Central Hudson, 447 U.S. at 580 (Stevens, J., concurring in judgment); Zauderer, 471 U.S. at 637; Lorillard, 533 U.S. at 554; Discovery Network, 507 U.S. at 422; Ohralik, 436 U.S. at 456; Bates, 433 U.S. at 364.

<sup>44</sup> Friedman, 440 U.S. 1.

<sup>45</sup> Ibanez v. Florida Dept. of Bus. & Prof’l Regulation, 512 U.S. 136 (1994)

<sup>46</sup> Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977).

<sup>47</sup> Coors, 514 U.S. 476.

<sup>48</sup> Bolger, 463 U.S. at 62, fn. 4.

The other often cited characterization comes from Central Hudson: commercial speech is “expression related solely to the economic interests of the speaker and its audience.”<sup>49</sup> This characterization likewise does not provide necessary and sufficient conditions for commercial speech. Already in a concurrence to Central Hudson itself, it was criticized for failing to provide sufficient conditions: “Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.”<sup>50</sup> As for the interests of the audience, it has always been part of the Court’s rationale for protecting commercial speech that it does *not* relate solely to the audience’s economic interests, but also to political interest in how the economy should be managed.<sup>51</sup> Even focusing only on the interests of potential consumers, any product ads that make claims about the quality of a product, the satisfaction it offers, its esthetic value, its hipness, or its safety relate to listeners’ non-economic interests.<sup>52</sup> Thus it cannot be a necessary condition for commercial speech that it relate solely to the economic interests of its audience.

However, it does seem relevant—perhaps decisive—if the speech relates *solely* to the speaker’s economic interests. After all, it is implausible that Shakespeare’s motivation for writing was *solely* pecuniary,<sup>53</sup> and even more implausible that his pecuniary motivation determined the content of his plays. While no one thinks that courts should probe speakers’ motivations, certain sorts of speech, e.g., ordinary product advertising, may be thought of as inherently economically motivated, and therefore to be classified as commercial speech.

At best, then, the Court’s “definitions” of commercial speech are rough pointers. Commercial speech is speech closely related to effecting commercial transactions (perhaps,

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<sup>49</sup> Central Hudson, 447 U.S. at 561. See also In re R.M.J., 455 U.S. 191, 204, fn. 17 (1982).

<sup>50</sup> Central Hudson, 447 U.S. at 580 (Stevens, J., concurring in the judgment).

<sup>51</sup> Va. Bd. of Pharm., 425 U.S. at 764-65 (internal quotation marks and citations omitted).

<sup>52</sup> Interest in such factors could be considered “economic” only in the sense that a consumer might not have paid the same price for a given product, had she known that it was not of the quality she supposed, or not safe, etc. But in this sense, claims about whether a product was manufactured in an environmentally friendly way, or—as in Nike—under reasonable working conditions, relate equally to the economic interests of a consumer whose buying decisions are influenced by such factors.

<sup>53</sup> It is even less plausible with respect to Thomas Paine, whose pamphlets are sometimes cited to make the same point. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 709 (1992). Surely, he could have found easier (and safer) ways to make a living.

speech whose occurrence would make no sense apart from that connection), and/or speech whose occurrence and content are motivated largely by the speaker's economic interests.

Nor has the Court engaged in much analysis of how to decide whether a specific instance of speech is commercial; it has usually simply assumed that the speech before it is commercial or that it is not.<sup>54</sup> The Court's most extensive analysis came in Bolger,<sup>55</sup> where the Court found that the joint presence of advertising context, specific product references, and economic motivation supported the conclusion that the speech before it was commercial. But the Court expressly cautioned that the presence of all three characteristics is neither necessary nor sufficient for a given instance of speech to be commercial.<sup>56</sup> A Nike ad showing nothing but the Nike logo and the slogan "Just do it," perhaps accompanied by footage of beautiful people running, is commercial speech if anything is, though it does not refer to any specific products. What seems decisive is again the economic motivation of the speaker, as well as some intention to promote a commercial transaction.

2. Why protect commercial speech less than other speech? Three principal reasons have been advanced for why commercial speech should receive a reduced degree of protection: (1) particular commercial harms are associated with false or misleading commercial speech;<sup>57</sup> (2) a commercial speaker is usually in the best position to verify claims about his products or operations;<sup>58</sup> and (3) the profit motive makes commercial speech less easily "chilled" by regulation.<sup>59</sup> None of these rationales adequately explain why commercial speech should receive less protection than political speech.

(1) Granting that commercial harms may have severe consequences to its victims, it is not clear that those harms are more severe than the consequences of a political candidate misleading the public about the dangers of some environmental or economic policy, or about

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<sup>54</sup> On occasion the Court has briefly considered whether mixed commercial and non-commercial speech should be treated as commercial. See Schaumburg, 444 U.S. at 630-32; Fox, 492 U.S. at 473-75.

<sup>55</sup> 463 U.S. 60 (1983).

<sup>56</sup> Id. at 68, fn. 14.

<sup>57</sup> E.g. Discovery Network, 507 U.S. at 426; Liquormart, 517 U.S. at 499, 501, 503.

<sup>58</sup> Va. Bd. of Pharm., 425 U.S. at 771, fn. 24. Accord Coors, 514 U.S. at 493 (Stevens, J., concurring in judgment).

<sup>59</sup> Va. Bd. of Pharm., 425 U.S. at 771, fn. 24; Friedman, 440 U.S. at 10; Fox, 492 U.S. at 481; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 fn. 5 (1985); Liquormart, 517 U.S. at 499 (plurality opinion).

the evidence of the military threat posed by another country. In any event, even if commercial speech is often particularly harmful, that suggests only that it will more often be permissible to regulate commercial speech on some neutral standard of preventing harm, not that there should be a *different*—and lower—standard for when regulations of commercial speech are permissible, as prescribed by the Central Hudson framework.

(2) There is some merit to the idea that a business is in the best position to verify its claims about, e.g., the contents and qualities of its own products, how they were manufactured, etc. (as well as, for that matter, working conditions in its factories). However, the same rationale could apply to false statements by political candidates about their personal histories, professional record, etc.<sup>60</sup>

(3) Commentators have rightly criticized the effort to justify greater restrictions on commercial speech in virtue of its greater durability, pointing out both that the degree of chilling effect will depend in large part on the magnitude of the threatened penalties,<sup>61</sup> and that economic motivations for speech are not always more powerful than other motivations.<sup>62</sup> Such criticisms don't go far enough. In a way, the Court has it backward: because commercial speech is by definition motivated by profit, it will be completely deterred when the cost of the expected penalty becomes greater than the expected gain in revenue. Commercial speech necessarily has its price. Non-commercial speech need not: think of the speaker who sincerely utters "Give me liberty or give me death."

In criticizing the Supreme Court's justifications for affording lesser protection to commercial speech, I do not mean to support those who propose eroding or abandoning the distinction. The point is that the Court has failed to explain satisfactorily *why* commercial speech merits less protection. A more plausible explanation is that commercial speech simply fails to implicate certain concerns that justify First Amendment protections in many

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<sup>60</sup> See Daniel A. Farber, Commercial Speech and First Amendment Theory, 74 Nw. U.L. Rev. 372, 386 (1979); Lawrence Alexander, Speech in the Local Marketplace: Implications of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* for Local Regulatory Power, 14 San Diego L. Rev. 357, 375 (1977). The different levels of permissible regulation might be better explained by the special dangers of partisan enforcement if false political speech were actionable. See Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 634-35 (1982).

<sup>61</sup> Farber, *supra* note 60, at 386.

<sup>62</sup> *Id.*; Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 31-32 (2000); Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 637 (1990).

other contexts. I will argue in Part II that those concerns have to do with protecting the rights of *speakers*. I turn first to an initial defense of the thesis that all corporate speech should be treated as commercial speech.

### **B. The Fiduciary Responsibility Argument**

The officers and directors (hereinafter referred to collectively as managers) of a for-profit corporation have a fiduciary responsibility to the corporation's shareholders to pursue corporate profits.<sup>63</sup> Any corporate expenditures not directed toward this end constitute "waste" of corporate assets.<sup>64</sup> It follows that all legitimate corporate expenditures must be commercial in a sense, including expenditures to publish speech.<sup>65</sup>

The principle that corporate expenditures must be directed toward creating profits has been developed in the context of corporate philanthropy. Because they appear to violate this principle, charitable contributions by for-profit corporations were deemed at common law to violate the rights of shareholders.<sup>66</sup> In the twentieth century charitable contributions by corporations came to be upheld on the theory that they would ultimately redound to the financial benefit of the corporation by creating good will or community prosperity.<sup>67</sup> While the right of corporations to make charitable contributions is no longer seriously questioned, this rationale continues to be the principal basis for their permissibility.

The foregoing is no longer unqualifiedly true: modern decisions upholding corporate contributions have relied in substantial part on general policy considerations.<sup>68</sup> But such considerations are generally accompanied by findings that the donations are in the

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<sup>63</sup> The classic statement of this principle comes in Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). See also Am. Law Inst., Principles of Corporate Governance §2.01(a) (1994); Henry T.C. Hu, New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare, 69 Tex. L. Rev. 1273, 1278 (1991) (calling this "[t]he most basic principle of corporate law"); David Millon, Theories of the Corporation, 1990 Duke L.J. 201, 224 (1990) (calling it "the fundamental postulate of corporate law").

<sup>64</sup> See 3A Fletcher Cyclopedia of Private Corp. § 1102 (database updated 2003); Michaelson v. Duncan, 407 A.2d 211, 217 (Del. 1979).

<sup>65</sup> A similar point is made in passing in Carl E. Schneider, Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti, 59 S. Cal. L. Rev. 1227, 1259 (1986). Even Nike's own brief to the Supreme Court acknowledged: "virtually everything a company does is ultimately intended to improve its financial bottom line." Brief for Petitioners at 22, Nike, Inc., U.S. S.Ct.

<sup>66</sup> 6A Fletcher *supra* note 64, § 2938.

<sup>67</sup> A classic statement of this doctrine came in Union Pac. R.R. Co. v. Trustees, Inc., 329 Pac.2d 398, 401 (Utah 1958).

<sup>68</sup> See, e.g., A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

corporation's financial interests.<sup>69</sup> A weightier qualification is that corporate charitable contributions are now authorized by statute in every state.<sup>70</sup> In many cases those statutes expressly divorce this authority from any showing of specific benefit to the corporation.<sup>71</sup> Still the prevailing doctrine remains that it is the expected benefit to the corporation—good will or the prosperity of the community expected to patronize its business—that makes corporate donations permissible,<sup>72</sup> and donations are still typically justified by managers on the basis.<sup>73</sup> Moreover, to the extent that corporate charitable donations are authorized apart from any expected economic benefit to the corporation, this is an exception to the usual rules limiting corporate expenditures to ones expected to profit the corporation.<sup>74</sup> The exception is generally limited to contributions made “for the public welfare or for charitable, scientific or

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<sup>69</sup> See *id.* at 590 (finding that the donation was made “in furtherance of ... corporate ends” and “in the reasonable belief that it would aid the public welfare *and advance the interests of the plaintiff as a private corporation*”) (emphasis added).

<sup>70</sup> 6A Fletcher *supra* note 64, § 2939.

<sup>71</sup> E.g. Cal. Corp. Code § 207 (e) authorizes corporations to “[m]ake donations, regardless of specific corporate benefit, for the public welfare.” (West 2004.) However, this authority extends only to a corporation “in carrying out its business activities” and is “[s]ubject to ... compliance with ... any other applicable laws.” § 207. For an overview of state statutes governing corporate contributions, see R. Franklin Balotti & James. J. Hanks, Jr., Giving at the Office: A Reappraisal of Charitable Contributions by Corporations, 54 Bus. Law 965 (1999).

<sup>72</sup> Such statutes should be interpreted to allow directors to take other interests into account “only as and to the extent that the directors are acting in the best interests ... of the shareholders and the corporation.” Committee on Corporate Laws, Other Constituencies Statutes: Potential for Confusion, 45 Bus. Law 2253, 2269 (1990). “Even under such express statutory authority, ... charitable gifts are subject to challenge if clearly unconnected to the corporation's present or prospective welfare.” Cox & Hazen on Corporations, § 4.04(1). “Donations should ... bear some reasonable relation to the corporation's interest.” 6A Fletcher *supra* note 64, § 2939 (discussing contemporary statutory rules). Moreover, contributions should not be too large or to inappropriate recipients. *Id.*

<sup>73</sup> Balotti & Hanks, *supra* note 71, at 968; Nancy J. Knauer, The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity, 44 DePaul L. Rev. 1, 29-32 (1994). While courts will usually not scrutinize corporate contributions closely to see whether they appear likely actually to benefit the corporation economically, the lack of scrutiny is formally attributed to applying the lenient “business judgment rule,” according to which courts will not second-guess judgments about what is in the corporation's best interests, absent evidence of serious negligence or malfeasance. The business judgment rule has been expressly applied to donations, Kahn v. Sullivan, 594 A.2d 48, 59-61 (Del. 1991), and to corporate political expenditures in Marsili v. Pacific Gas & Elec. Co., 51 Cal. App. 3d 313 (1975). For discussion of the wide latitude accorded managers under the business judgment generally, and with respect to funding political speech in particular, see Thomas W. Joo, The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis Into First Amendment Jurisprudence, 79 Wash. U. L.Q. 1, 60 and 69-73 (2001); Elliott J. Weiss, Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse, 28 U.C.L.A. L. Rev. 343, 424 (1981).

<sup>74</sup> Balotti & Hanks, *supra* note 71, at 966. See also Am. Law Inst., *supra* note 63, at §2.01(b).

educational purposes.”<sup>75</sup> It is doubtful that much corporate political advertising (or Nike’s claims about working conditions in its overseas factories) fall into this category.<sup>76</sup>

In short, all corporate expenditures—including expenditures for corporate speech—are supposed to further the interests of the corporation, and the interests of the corporation are purely economic. Thus any speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.

So, any legitimate corporate speech is *in a sense* commercial. Granted, it need not follow that it would be commercial speech, as defined by the Supreme Court. When considering corporate speech, the Court has often denied that the identity of the speaker may determine the degree of protection to which speech is entitled,<sup>77</sup> and has often taken for granted that various instances of corporate speech are not commercial.<sup>78</sup>

Nevertheless, the Court’s official characterizations of commercial speech fail to undermine the conclusion that all corporate speech is commercial. First, if “commercial speech” is supposed to capture a “common sense” classification<sup>79</sup> that is natural to make, even if difficult to define precisely, then it is significant that the fiduciary responsibility argument implies that corporate speech must be commercial in a natural, non-doctrinal sense of ‘commercial.’ Second, as discussed in sec. IA1, about all that can be salvaged from the Court’s official characterizations of commercial speech is that commercial speech is motivated solely by the speaker’s economic interests, and is related to furthering commercial transactions. The legal constraints discussed in this section make it mandatory that any corporate expenditures—including expenditures to publish speech—meet these two characteristics.

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<sup>75</sup> Id.

<sup>76</sup> Matthew J. Geyer, Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality, 36 Hastings L.J. 433, 454 (1985), makes this point with respect to corporate expenditures for lobbying, noting that ALI comments narrowly define “public welfare” in this context in terms of declared government policies.

<sup>77</sup> Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 8 (1986); Bellotti, 435 U.S. at 777 (accord Consolidated Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 533 (1980)).

<sup>78</sup> E.g. id. at 534-35; P.G.&E., 475 U.S. at 8-9 and 17; Bolger, 463 U.S. at 68.

<sup>79</sup> See supra note 40.

A fuller defense of the suggestion that the First Amendment status of corporate speech in general should be assimilated to that of commercial speech will require a fuller inquiry into the First Amendment interests at stake in corporate speech. I turn now to such an inquiry.

## II. SPEAKERS, LISTENERS, AND CORPORATE SPEECH

The argument begins by defending the premise that if the First Amendment applies to corporate speech, it is not because there is a constitutional interest in vindicating the rights of corporations *per se*, but because restrictions on corporate speech might implicate the First Amendment rights of people.<sup>80</sup> Restrictions on corporate speech are sometimes thought to infringe on people's interest in broadcasting their views. I refer to this sort of interest as "speaker interests." More commonly, restrictions on corporate speech are thought to implicate the interests of prospective recipients of the speech. Those interests could be the interests of an actual audience in receiving certain information or exposure to certain viewpoints, or they could be general societal interests in the free exchange of information and ideas. I refer to both as "listener interests."<sup>81</sup> Associated with each sort of interest are rights arguably protected by the First Amendment: "speaker rights," i.e., rights to express and broadcast one's views, and "listener rights," i.e., rights to receive information and ideas, or the right to a free exchange of ideas in the society at large.<sup>82</sup>

The argument then is simply this. First, no persons' speaker rights are infringed by restrictions on corporate speech. Second, listener interests standing alone warrant only a lesser degree of First Amendment protection—like that accorded commercial speech.

I also argue, third, that speech that is not the speech of any person is less worthy than other speech of protection even on the basis of *listener* interests. This last claim, however, is not essential for my argument: the first two claims are sufficient to justify the conclusion that

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<sup>80</sup> The law often refers to "natural persons," in contrast to "artificial persons" such as corporations. I will throughout refer to the former simply as "persons" or "people," judging that terminology to be less misleading. Regardless of what legal rights are or should be assigned to corporations, a corporation is not a person of any kind. The phrase "artificial person" would correctly be used to describe something like a conscious, self-aware android or computer.

<sup>81</sup> I include under listener interests the possible interest of some third parties that others receive certain information.

<sup>82</sup> *Cf.* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 *Brook. L. Rev.* 5 (1989) (distinguishing between "speaker-centered" and "hearer-centered" First Amendment doctrine).

corporate speech is entitled to less than maximal First Amendment protection. (Alternatively, the first and third claims are also sufficient by themselves, even if the second is rejected.)

Before proceeding further, I defend the premise that there is no First Amendment interest in protecting corporate speech for the sake of the free speech interests of the corporation itself. If that premise seems too self-evident to require a defense, so much the better.

### **A. The First Amendment Rights of Corporations Themselves**

From the beginning, the Supreme Court's application of the First Amendment to corporate speech has been justified on the basis of the rights of people, not of corporations themselves. In the landmark decision first deciding that corporate political speech was protected by the First Amendment, the Court made this basis explicit:

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. ... The First Amendment ... serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights.... Instead, the question must be whether [the challenged statute] abridges expression that the First Amendment was meant to protect.<sup>83</sup>

Indeed it is hard to fathom on what basis corporations might be thought to have independent First Amendment rights of their own. As often observed,<sup>84</sup> none of the standard theoretical explanations of the importance of protecting speakers' rights make sense with respect to corporations.

The right to speak freely may be justified on the basis that self-expression is essential for human flourishing or for basic liberty.<sup>85</sup> Corporations are not normally thought to have needs for self-expression.<sup>86</sup> Similarly, it would be odd to worry about violations of corporations' autonomy,<sup>87</sup> or affronts to their dignity,<sup>88</sup> as one might worry about persons

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<sup>83</sup> *Belotti*, 435 U.S. at 775-76.

<sup>84</sup> *E.g.* Baker, *supra* note 16, at 1163; Schneider, *supra* note 65, at 1235 and 1261; Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 14-18 (1979); and references in notes 86-88 and 91 *infra*.

<sup>85</sup> This view is associated particularly with Thomas Emerson, *Toward a General Theory of the First Amendment* (1963). C. Edwin Baker is a leading current defender.

<sup>86</sup> *See P.G.&E.*, 475 U.S. at 33 (Rehnquist, J., dissenting); *Bellotti*, 435 U.S. at 804-805 and 807 (White, J., dissenting).

<sup>87</sup> *See* Brudney, *supra* note 23, at 261; David Shelledy, Autonomy, Debate, and Corporate Speech, 18 *Hastings Const. L.Q.* 541, 544 (1991).

<sup>88</sup> *See* Adam Winkler, Beyond Bellotti, 32 *Loy. L.A.L. Rev.* 133, 197 (1998).

whose right to express their beliefs was squelched.<sup>89</sup>

Alternatively, freedom of speech may be considered essential to participation in the political process, which in turn may be considered essential to democracy and to government legitimacy;<sup>90</sup> the right to elect political leaders is meaningless if citizens and office seekers are not allowed to criticize the government. Corporations are not citizens and are not entitled to vote, and the ideal of democracy does not require them to be. Thus corporate speech need not be protected on this ground.<sup>91</sup>

Of the standard explanations of the importance of free speech, the only one that applies plausibly to corporate speech is the general public value of the free exchange of ideas and information. The Supreme Court relied on a theory of this sort in finding that corporate speech on matters of public concern was constitutionally protected, basing its decision on the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas."<sup>92</sup> Such free exchange may be valued as conducive to knowledge, on the view that it increases the likelihood of truth coming to be recognized (and personal beliefs coming to be better justified).<sup>93</sup> Or it may be valued for its contribution to autonomous agency, as allowing informed choice among available alternatives.<sup>94</sup> Exposure to debate among different viewpoints and the ability to receive relevant information may be considered essential for democratic decision-making.<sup>95</sup> On any of its elaborations, this justification of freedom of speech is based on the interests of listeners. As applied to

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<sup>89</sup> Defamation of a corporation or its products could be described as affronts to a corporation's dignity. But it is legally actionable, not out of concern for dignity interests, but because it could result in financial losses, losses that will be borne by people who have a financial stake in the company.

<sup>90</sup> *E.g.* Cass Sunstein, *Democracy and the Problem of Free Speech* (1993); Steven Shiffrin, *Dissent, Injustice and the Meanings of America* (1999). The idea that free speech is justified by its connection to democratic decision-making comes in versions that emphasize the importance of participating in the political process as speakers and versions (like Meiklejohn's, *see infra* note 95, that emphasize the importance of listeners being able to hear varying points of view. The former idea does not support free speech for corporations; if the latter idea does, it is for the sake of listeners, not of corporations themselves.

<sup>91</sup> *See* Schneider, *supra* note 65, at 1235 and 1261; Greenwood, *supra* note 23, at 996, 1063, and 1065.

<sup>92</sup> *Belotti*, 435 U.S. at 783. *See also* *P.G.&E.*, 475 U.S. at 8 (a "critical consideration[...]" against restrictions on corporate speech was that they "limited the range of information and ideas to which the public is exposed" (internal quotation marks and citations omitted)).

<sup>93</sup> The classic statement is in John Stuart Mill, *On Liberty*, ch. 2.

<sup>94</sup> *E.g.* Thomas M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1972 *J. Phil & Pub. Aff.* 204 (1972); Redish, *supra* note 60.

<sup>95</sup> The foremost exponent of this view is Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

corporations, it is based not on any rights or interests of the corporation itself, but on the interests and rights of the people who might receive corporate communications (or who might have an interest in there being free discussion of the issues).

The barely intelligible idea that corporations could have independent rights of their own, apart from the interests of affected persons, might be suggested by judicial decisions establishing that corporations are persons for various legal purposes. But this manner of speaking does not mean that corporations have feelings, interests in self-expression, or other characteristics of human beings that make them persons. While a full discussion of the doctrine of corporate personhood would be beyond the scope of this paper,<sup>96</sup> two points will help to make clear that there is no conflict between that doctrine and the thesis that corporations have no constitutional rights for their own sake.

First, it has never been held that because corporations are considered legal persons for some purposes, it follows that they have all the rights of persons. To the contrary, when constitutional rights have been found to apply to corporations, it has always been on a right-by-right basis, based on discussion of the applicability of the particular right in question.<sup>97</sup>

Second, the applicability of various constitutional protections to corporations has generally been justified, as with First Amendment protections in Bellotti, as a means of protecting the constitutional rights of people. In the California railroad tax cases, the earliest decisions imputing constitutional rights to corporations, it was repeatedly stated explicitly that the reason for applying constitutional protections to corporations was to protect the

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<sup>96</sup> For interesting discussions of the history and meaning of the concept of corporate personhood and its implications for applying constitutional rights to corporations, see Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. Va. L. Rev. 173 (1985); Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings L.J. 577 (1990).

<sup>97</sup> It took separate decisions to decide that corporations were entitled to equal protection under the Fourteenth Amendment, Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886); due process under the Fourteenth Amendment, Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889); due process under the Fifth Amendment, Noble v. Union River Logging R.R. Co., 147 U.S. 165 (1893); protection against takings under the Fifth Amendment, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); the right to a jury trial under the Sixth Amendment, Armour Packing Co. v. United States, 209 U.S. 56 (1908); and freedom from double jeopardy under the Fifth Amendment. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Meanwhile, also in separate decisions, corporations were found *not* to be protected by the Privileges and Immunities Clause of either Article IV, Bank of Augusta v. Earle, 38 U.S. 519 (1839), or the Fourteenth Amendment, Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888), or the implied constitutional right to privacy. California Banker v. Schultz, 416 U.S. 21 (1974). Within the same decision, Fourth Amendment protection against unreasonable searches was found to apply to corporations, while the Fifth Amendment privilege against self-incrimination was found not to apply. Hale v. Henkel, 201 U.S. 43 (1906).

constitutional rights of people—specifically the corporation’s shareholders: “whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property, ... the benefits of the provision extend to corporations, and ... the courts will always look beyond the name of the artificial being to the individuals whom it represents.”<sup>98</sup> When the Court first stated (in dicta) that Fourth Amendment protections against unreasonable searches and seizures apply to corporations, its reasoning was similar: “A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.”<sup>99</sup>

In many contexts it is only sensible to allow a corporation to bring a legal challenge to an alleged deprivation of property, rather than requiring each shareholder to bring her own action to recover losses.<sup>100</sup> Some of the courts’ other imputations of constitutional rights to corporations may seem less sensible to some. But nothing in constitutional jurisprudence points to any ground for corporate rights other than the rights of people, nor does the metaphor of corporate personhood provide any basis for finding that corporations in themselves possess any of the characteristics of personhood that might be thought to imply the possession of intrinsic rights.

I have argued that the idea that corporations might have rights for their own sake,

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<sup>98</sup> Railroad Tax Cases. County of San Mateo v. S. Pac. R.R. Co., 18 F. 385, 744 (C.C. Cal. 1883). The court in that case explicitly contrasted constitutional property rights, which may be enforced by corporations, with other constitutional rights, which may not. Property rights apply to corporations “because the property of a corporation is in fact the property of the corporators [shareholders]. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. ... [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them.” *Id.* at 747-48. In contrast, “the prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because ... the lives and liberties of the individual corporators are not the life and liberty of the corporation.” *Id.* at 747. The brief subsequently filed before the Supreme Court for the corporation in that case based its central argument for corporate rights on the same reasoning: “A State act depriving a business corporation of its property without due process of law, does in fact *deprive the individual corporators of their property.*” Argument for Defendant, San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1882) (collected in Cases and Points at 12) (emphasis in original) (quoted in Horwitz, *supra* note 96, at 178).

The first Supreme Court decision explicitly to hold that corporations had some constitutional rights was Santa Clara Cty., 118 U.S. 394. The Court there gave no reason for its holding that the equal protection clause of the Fourteenth Amendment applies to corporations. But given the context of the various contemporaneous California tax cases, and the fact one of the members of the Supreme Court that unanimously decided Santa Clara was Justice Field, the author of the San Mateo decision quoted above, it may be inferred that Santa Clara was decided on the same reasoning. See Charles R. O’Kelley, Jr., The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti, 67 Geo. L. J. 1347, 1353-56 (1979).

<sup>99</sup> Hale, 201 U.S. at 76.

<sup>100</sup> See Brudney, *supra* note 23, at 240.

apart from people’s rights, is not readily intelligible, much less supported by any doctrine. However, the argument of this paper depends only on the narrower claim that corporations do not have *First Amendment* rights of free expression for their own sake, apart from people’s First Amendment rights, a claim that could hardly be contested.

## B. Speaker Rights And Corporate Speech

A corporation itself, I have argued, has no intrinsic right to speak. But does it follow that no rights of speakers are infringed by restrictions on corporate speech? On one hand, regulation of corporate speech does not prevent any shareholder, manager, or anyone else from speaking in her own voice on any issue.<sup>101</sup> But the Court has long recognized that freedom of speech includes the right to “amplif[y]” one’s voice by combining it with the voices of others of like mind.<sup>102</sup> Justice Scalia has argued on this basis that restrictions on corporate spending on political issue advertising are unconstitutional.<sup>103</sup>

But are there really any speakers whose right to amplify their voice in this way is infringed by regulation of corporate speech? In this section I defend a negative answer to this question, by surveying the various speakers whose rights might be infringed.

**1. Shareholders.** The most obvious candidates for speakers whose rights to free expression might be infringed by regulation of corporate speech would be the theoretical owners of the corporation, on whose behalf the corporation is traditionally taken to speak—the shareholders. But it is implausible that a corporation’s political speech speaks for its shareholders.<sup>104</sup> Many shareholders may disagree with the political positions taken by a

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<sup>101</sup> Justice Scalia has appeared to suggest otherwise. In *Austin* the Court upheld some regulation of corporate spending to influence elections, in part on the ground that the special privileges, such as limited liability, granted by the government to those who wish to incorporate a business, gave the government the right to regulate corporate behavior. 494 U.S. at 658-60. Scalia responded: “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.” *Id.* at 680. Set aside that this is not true—the State does just that when, for example, it requires confidentiality agreements in awarding contracts to do certain work. The key point here is that setting limits on the use of the corporate form is far different from asking people to give up their pre-existing speech rights in exchange for the right to incorporate. No existing or proposed regulations on corporate speech diminish any rights that any speaker had before incorporating.

<sup>102</sup> *Buckley*, 424 U.S. at 22. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

<sup>103</sup> *McConnell*, 124 S.Ct. at 724 (Scalia, J., dissenting).

<sup>104</sup> See *Bellotti*, 435 U.S. at 806 (White, J., dissenting); O’Kelley, *supra* note 98, at 1363; Brudney, *supra* note 23, at 257-58; Bezanson, *supra* note 23, at 786-87. Greenwood argues further that the fiduciary responsibility to maximize profits does not even *allow* managers to consider shareholders’ preferences. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021, *passim*; Greenwood, *supra* note 23, *passim*.

corporation in which they invest; other shareholders may be undecided or indifferent. Even those who do agree did not for the most part invest in order to express their political views. If Nike's speech about overseas working conditions were indeed contributions to debate about a matter of public concern, as its advocates maintain, rather than just sales pitches, there would be no more reason to think that its views are those of a given shareholder than that they are those of anyone else. That may be *slightly* over-stated, in that some potential investors with strong views about globalization might refrain from investing in Nike because of those views. Thus the average Nike investor might be slightly more likely than the average citizen to agree with the Nike perspective on globalization. But only very slightly, especially in view of the high proportion of securities owned by pension funds, mutual funds, or other institutional investors,<sup>105</sup> with little or no control by the beneficiary as to choice of investments. The further Nike's speech ventures beyond proposing a commercial transaction—"the core notion of commercial speech"<sup>106</sup>—the less reason there is to think that Nike is speaking for its investors. And when Nike's speech does fall within those narrow bounds, it speaks for investors only in the sense of acting as their business agent, not in the sense of representing their beliefs.

While the Court has not paid attention to this point in its commercial speech jurisprudence, it has acknowledged the point in the context of campaign finance reform. There the Court has upheld some degree of regulation of corporate speech largely on the ground of the possible divergence between the political positions taken by a corporation and the views of its shareholders, though it has conceived the relevance of this divergence in a somewhat different way. Essentially, the Court has reasoned that, although corporations have free speech rights, those rights may be over-ridden by the compelling state interest in protecting shareholders from having their money used to support ideas with which they disagree. That interest was considered compelling, because, on the accepted doctrine that

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<sup>105</sup> Already in 1990 53.3% of all outstanding equity was found to be held by institutional investors. Mark R. Wingerson & Christopher H. Dorn, Institutional Investors in the U.S. and the Repeal of Poison Pills: A Practitioner's Perspective, 1992 Colum. Bus. L. Rev. 223, 226 (1992). The relevance of this point to refuting the claim that corporate speech is shareholder speech has been recognized in Steven Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U.L. Rev. 1212, 1247 (1983).

<sup>106</sup> Bolger, 463 U.S. 60 (internal quotation marks and citations omitted).

funding speech is speech,<sup>107</sup> such use of shareholders' money would amount to compelled shareholder speech, in violation of shareholders' free speech rights.

This reasoning was first introduced in 1982, when the Court upheld a federal campaign finance reform statute that prohibited corporations and labor unions from spending general funds to influence federal elections.<sup>108</sup> The Court found that such restrictions did infringe on First Amendment associational rights, but that such rights were “overborne”<sup>109</sup> by two asserted government interests, the second of which was “to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.”<sup>110</sup> In 1990 the Court upheld a state statute prohibiting corporations from spending treasury funds to support or oppose political candidates,<sup>111</sup> because the statute could be justified as remedying “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>112</sup> The Court apparently reasoned that, because shareholders do not usually buy stock in order to support political ideas, corporate political expenditures—unlike most other political expenditures—do not reflect public support of any ideas—hence the “distorting effects” of corporate spending.<sup>113</sup> The concern for shareholder speaker interests was made more explicit in Justice Brennan’s concurrence: “A stockholder might oppose the use of corporate funds drawn from the general treasury—which represents, after all, *his* money—in support of a particular political candidate.”<sup>114</sup> The need to protect individuals from having their money used to support candidates that they may oppose was again cited in 2003 in upholding prohibitions on corporate election-related spending.<sup>115</sup> Allowing corporations to set up independent political action committees made possible corporate political participation “without the temptation to use corporate funds for

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<sup>107</sup> Buckley, 424 U.S. 1, (1976).

<sup>108</sup> Nat’l Right to Work Comm., 459 U.S. 197.

<sup>109</sup> Id. at 207.

<sup>110</sup> Id. at 208.

<sup>111</sup> Austin, 494 U.S. 652.

<sup>112</sup> Id. at 660.

<sup>113</sup> The Court has not been inclined to find similarly distorting the fact that supporters of different viewpoints often lack equal resources to support their respective views.

<sup>114</sup> Austin, 494 U.S. at 670 (Brennan, J., concurring) (emphasis in original).

<sup>115</sup> Beaumont, 123 S.Ct. at 2206.

political influence, quite possibly at odds with the sentiments of some shareholders or members.”<sup>116</sup>

The importance of protecting shareholders from funding political speech with which they do not agree was not the only rationale offered by the Court for upholding restrictions on corporate speech, but it was the only one that made clear why corporate speech should be treated differently from speech by people or other organizations. The principal other rationale advanced for restricting corporate political spending was that such spending poses special dangers of political corruption, because the special privileges associated with corporate form allow for the amassing of large sums of capital. Those sums “should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>117</sup> However, ever since Buckley, the Court has held that any limits on individual spending are unconstitutional, meaning that the amassing of large sums of capital is not in itself sufficient to justify regulation of expenditures. Nor does it seem sufficient if those large sums were amassed though the state-conferred benefits of the corporate form: the Court has never suggested that individual expenditures might be limited when the source of the individual wealth is investments in corporate stock. The decisive consideration distinguishing corporate expenditures from others must have been the possibility of using shareholders’ money for political purposes they do not support.<sup>118</sup>

It might be worried that the foregoing reasoning could undermine the principle that “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ... freedom of speech.”<sup>119</sup> After all, the NAACP too might broadcast statements with which some members disagree.<sup>120</sup> The difference is that people join and contribute to

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<sup>116</sup> Id. at 2211. See also McConnell, 124 S.Ct. at 695 (citing same).

<sup>117</sup> Nat’l Right to Work Comm., 459 U.S. at 207. Similarly, see also Mass. Citizens for Life, 479 U.S. at 257-59; Austin, 494 U.S. at 658-60. The exchange of monetary support for political favors is the only sort of political corruption that the Court has found a compelling interest in preventing through campaign finance regulation.

<sup>118</sup> A similar analysis has been offered by, e.g., Winkler, *supra* note 88, at 154-65; Meir Dan-Cohen, Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State, 79 Cal. L. Rev. 1229, 1241-44 (1991).

<sup>119</sup> 357 U.S. at 460.

<sup>120</sup> See Rodney A. Smolla, Free Speech In an Open Society, 238-39 (1992) (criticizing Austin on this basis).

organizations such as the NAACP precisely for the purpose of making their views heard.<sup>121</sup> Knowing that they will not agree with every position espoused by the organization, members and other contributors judge that on balance their views will find more expression if they support the organization than otherwise,<sup>122</sup> and support the organization for that reason.<sup>123</sup> As Dan-Cohen puts it, members “trade accuracy for volume” in broadcasting their views.<sup>124</sup> Therefore, restrictions on political speech by such advocacy organizations do infringe on the speaker interests of members. In contrast, regardless of whether they agree with, disagree with, or have no views at all concerning Nike’s corporate position on globalization, investors simply do not invest in Nike in order to “pool[...] financial resources for expressive purposes.”<sup>125</sup> Consequently, regulation of corporate speech does not infringe on their interests as speakers.

This contrast too has been acknowledged by the Court in the context of regulations on spending. Three years after upholding restrictions on corporate political spending, the Court found that, despite their corporate form, political action committees “designed expressly to participate in political debate, are quite different from the traditional corporations organized for economic gain,”<sup>126</sup> and therefore could not constitutionally be subjected to the same regulations. A year later the Court found it unconstitutional to apply limits on corporate political spending to an anti-abortion advocacy group.<sup>127</sup> In contrast to shareholders (and union members), who need to be protected from corporations’ (or unions’) using their money “for purposes that [they] may not support,”<sup>128</sup> “[i]ndividuals who contribute to [the advocacy

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<sup>121</sup> This contrast between corporations and advocacy organizations has been noted in the context of restrictions on corporate political spending. *E.g.* Dan-Cohen, *supra* note 118, at 1244-50; Brudney, *supra* note 23, at 261.

<sup>122</sup> If the organization’s speech departs too far from their expectations, they may withdraw their membership, as many ACLU members did when the ACLU defended the right of Nazis to march in Skokie.

<sup>123</sup> *Cf. Mass. Citizens for Life*, 479 U.S. at 261 (regarding individual contributions to political action committees, “It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put.... However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction”).

<sup>124</sup> *Id.* at 1249.

<sup>125</sup> *McConnell*, 124 S.Ct. at 724 (Scalia, J., dissenting) (quoted *supra*). Deliberately chosen “socially responsible investments,” in, say, “Fair Trade” coffee enterprises or non-polluting manufacturers, might constitute a partial exception.

<sup>126</sup> *F.E.C. v. Nat’l Conservative P.A.C.*, 470 U.S. 480, 500 (1985).

<sup>127</sup> *Mass. Citizens for Life*, 479 U.S. 238 (1986).

<sup>128</sup> *Id.* at 260.

group] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.”<sup>129</sup>

In a dissenting opinion in *Austin*, Justice Scalia sharply criticized the rationale that restrictions on corporate political spending can be justified on the basis of protecting shareholder speaker interests:<sup>130</sup>

A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, i.e., to make money. ... [I]n joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. ... His only protections ... are (1) his ability to persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock.<sup>131</sup>

Various commentators have pointed out the inadequacies of these shareholder protections.<sup>132</sup>

But for present purposes the cogency of such responses to Scalia does not matter. Scalia’s only disagreement with the *Austin* majority concerns the majority’s finding that limitations on corporate speech actually *protect* shareholder speaker interests.<sup>133</sup> On Scalia’s view, shareholders essentially have no speaker interests in the corporation’s speech—they invest for reasons unrelated to expressing their political or social views. Thus both Scalia and the majority reject the view that limits on corporate speech infringe shareholders’ speaker interests.<sup>134</sup>

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<sup>129</sup> *Id.* at 260-61.

<sup>130</sup> A majority in *Austin* had upheld restrictions on corporate spending as applied to the Michigan Chamber of Commerce on the basis of the contrasts developed in the cases discussed above. Although the Chamber was a non-profit corporation, the Court reasoned that it was relevantly more similar to a business corporation than to an advocacy organization. *Austin*, 494 U.S. at 661-65.

<sup>131</sup> *Id.* at 686-87 (Scalia, J., dissenting). The concession that all corporate action must be “designed to make a profit” supports the thesis that all corporate speech must be commercial in a significant sense.

<sup>132</sup> *E.g.* Winkler, *supra* note 88, at 165-68; Joo, *supra* note 73, at 40-59; Greenwood, *supra* note 104, at 1038-43.

<sup>133</sup> Scalia and the *Austin* majority shared the assumption that corporate speech falls under the protection of the First Amendment, independent of any shareholder speaker interests. The majority found, and Scalia denied, that the protection of shareholder speaker interests provides a compelling state interest that justifies some regulation of corporate speech nevertheless.

<sup>134</sup> On the majority view, limits on corporate political speech *protect* shareholder speaker interests, seeming to imply that those limits do not *infringe* shareholder speaker interests. However, restrictions on corporate speech could be viewed as protecting the speaker interests of some shareholders at the expense of others, as suggested by descriptions of a “stand-off between dueling First Amendment rights” of managers and majority shareholders, on the one hand, whose speaker interests are served by corporate speech, and dissenting shareholders, on the other, whose speaker interests are protected by not being made to subsidize speech with which they disagree. Martin H. Redish & Howard M. Wasserman, What’s Good for General Motors: Corporate Speech and the

If there is an interest in “protect[ing] the individuals who have paid money into a corporation ... for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed,”<sup>135</sup> there is a similar interest in protecting Nike investors from having their money used to support views about globalization to which they may be opposed. At any rate, the Court’s campaign finance jurisprudence—including Scalia’s dissent in Austin—supports at least the conclusion that corporate speech on matters of public concern is not an exercise of shareholder speaker interests. So, if any speaker rights are infringed by regulation of such speech, they are not those of shareholders.

**2. Managers.** If corporate speech on public affairs is not shareholder speech, perhaps it can be considered an exercise of the speaker rights of the managers who set the relevant corporate policies and commission the speech in question. While restrictions on corporate speech might not completely muzzle such a manager, who can still speak out in her own voice on any issue, they would substantially limit her ability to broadcast her message. Such restrictions might thus be thought analogous to limiting the political spending of an individual, or even to denying an individual access to certain media of communication.

But, as discussed in sec. IB, the proper criterion for deciding on corporate speech expenditures is whether the speech is expected to be profitable for the corporation. A manager has no more right to use corporate funds to broadcast his own views than he has to use them for his personal enrichment.<sup>136</sup> There is no First Amendment right to broadcast one’s views with “other people’s money.”<sup>137</sup>

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Theory of Free Expression, 66 Geo. Wash. L. Rev. 235, 277 (1998) (rejecting such a description). But there is no reason to suppose that even most shareholders agree with the speech. And even if many shareholders do agree, it is still not *their* speech, in that it is not advanced for the purpose of expressing their views, and in fact would likely occur regardless of whether they agreed.

<sup>135</sup> Nat’l Right to Work Comm., 459 U.S. at 208.

<sup>136</sup> See Corbin v. Corbin, 429 F. Supp. 276, 281 (M.D. Ga. 1977) (“corporate funds simply cannot be used to meet an officer’s personal desires”). Various authors have noted that this principle applies to corporate speech. *E.g.* Shelledy, *supra* note 87, at 583; Greenwood, *supra* note 23, at 1002.

<sup>137</sup> The phrase is borrowed from Winkler, *supra* note 88, at 155-56, who makes essentially this point. See also Joo, *supra* note 73, at 76 and 81. An opposing view is advanced by Larry E. Ribstein, who argues that First Amendment protection does not depend on the legitimacy of the speech’s funding. The Constitutional Conception of the Corporation, 4 Sup. Ct. Econ. Rev. 95, 133-34 (1995). But if that were right, any regulation of expenditures for speech by fiduciaries would be presumptively unconstitutional. The value of free expression has never been thought to make it legal to steal to finance publication of one’s views. See Brudney, *supra* note 23, at 247.

The Buckley doctrine that funding speech is the constitutional equivalent of speech implies that who pays for the speech determines who is the speaker. On this basis, it has been found unconstitutional to compel someone to fund speech with which she disagrees. Aboud v. Detroit Bd.

If, on the other hand, the responsible managers are not broadcasting their own views, but conscientiously fulfilling their fiduciary responsibilities by broadcasting those views they believe to be in the best economic interests of the corporation, then there is no longer reason to view the speech in question as *their* speech. Managers' speaker interests are not infringed if they are prevented from broadcasting messages that do not express their own beliefs.<sup>138</sup>

What if the manager's own views coincide with those she thinks in the corporation's interests? It would be wrong to say that such convergence is accidental. It may well be easier for managers to do their jobs if they identify with the corporate point of view; those with views sympathetic to the corporation may be more likely to be promoted to positions of authority. Such convergence may decrease the degree of "role-distance" subjectively experienced,<sup>139</sup> but it doesn't affect the analysis. To the extent that the manager is acting as faithful agent of corporate interests, it is those interests that determine the "output" of corporate speech.<sup>140</sup> The manager who shares the corporation's views may be compared to a printer working for the *New York Times*, who finds that he agrees with the editorials he is printing. The editorials are not *his* expression—they would read identically if he held different views. (This would be true even if he took the job because he tends to agree with *Times* editorials.) Insofar as the manager's own views do exert influence (perhaps

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of *Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar*, 496 U.S. 1 (1990); *United Foods*, 533 U.S. 405. Restrictions found unconstitutional on a utility's inclusion of leaflets in its billing envelopes were distinguished from earlier permissible restrictions on the basis of whose property was used to advance ideas. *Con Ed*, 447 U.S. 539-40. By the same reasoning, speech by a manager using funds to which she is not entitled is not the manager's speech.

<sup>138</sup> See *Baker*, *supra* note 23, at 7; *Bezanson*, *supra* note 23, at 755 ("speaking under the First Amendment requires that the words ... must reflect the utterer's own ideas, or intellectual free will"). For example, regulations of speech by lawyers representing clients are subject to less stringent review because they do not represent the lawyers' own self-expression. *Id.* at 794-95. See also *Greenwood*, *supra* note 23, at 1056 (when agents speak for principals, it is the principals whose free speech rights are protected by the First Amendment). Cf. *Belotti*, 435 U.S. at 807 (White, J., dissenting) ("Ideas which are not a product of individual choice are entitled to less First Amendment protection")

That the speech of those who speak for the corporation is not their own is illustrated by *Dan-Cohen*, who notes that the speech of a corporate spokesperson is usually—and appropriately—marked by a fairly high degree of "role-distance," i.e., a low degree of personal identification with the role. *Supra* note 118, at 1237-41. He illustrates the point with the example of the telephone operator who says, "Thank you for using AT&T." *Id.* at 1239-41. To modify his discussion slightly, it would be inappropriate to respond, "Do you really mean that? Are you really grateful?" An executive at Nike may feel more identified with the contents of press releases on globalization she authorizes, but a similar point applies. Insofar as she is conscientious with respect to her fiduciary responsibilities, the press releases she authorizes are not *her* speech.

<sup>139</sup> See preceding note.

<sup>140</sup> See *id.* at 1238; *Shelley*, *supra* note 87, at 583.

unconsciously) over what perspective she ends up regarding as in the corporation's best interest, she is again moving in the direction of illegitimately appropriating corporate resources to propound her own viewpoint.

In short, to the extent that the managers responsible for authorizing the contents of corporate political communications base their decisions on what is in the corporation's best economic interests, the speech is not theirs. To the extent that those decisions are based on their own views, managers have no right to use corporate funds to broadcast the speech. So, in neither case would regulation of the speech in question infringe managers' speaker rights.

One might wonder whether the foregoing argument relies too heavily on the assumption that shareholders are the real owners of corporate assets, an assumption which could reasonably be viewed as a legal fiction. That assumption has been challenged in particular by the "nexus of contracts" theory of the corporation<sup>141</sup> proposed by 'Law and Economics' scholars. On this view, corporations should be seen not as belonging to shareholders, but as embodying a series of contracts by which investors provide capital to entrepreneurs in hopes of a favorable rate of return. It has been suggested that such a contractarian view of the corporation makes it harder to justify treating corporate speech differently from speech by natural persons under the First Amendment.<sup>142</sup> And indeed Justice Scalia seems to appeal to a view of this sort of the corporation, when he attacks the rationale that limitations on corporate political spending protect shareholders' First Amendment interests: "in joining such an association, the shareholder knows that management may take any action..., so long as that action is designed to make a profit. That is the deal."<sup>143</sup>

But again the most that follows is that shareholders' speaker rights do not *require* government regulation of managers' use of corporate assets to finance political speech. It by no means follows that such regulation infringes managers' speaker rights. Perhaps the First

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<sup>141</sup> Important early presentations of the theory include Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organizations, 62 Am. Econ. L. Rev. 777 (1972); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ. 305 (1976). For an overview, see Millon, *supra* note 63, at 229-31 (1990).

<sup>142</sup> E.g. Charles D. Watts, Jr., Corporate Legal Theory Under the First Amendment: Bellotti and Austin, 46 U. Miami L. Rev. 317, 363 (1991); Ribstein, *supra* note 137, at 134-35.

<sup>143</sup> Austin, 494 U.S. at 686 (Scalia, J., dissenting) (quoted to make this point in Watts, Jr., *supra* note 129, at 360).

Amendment, in combination with the right of freedom of contract could be thought to imply a right for managers to as much financing of their speech as they could possibly achieve through free bargaining, notwithstanding any inequality in bargaining position.<sup>144</sup> But even if managers have a right to seek contracts calling for corporate funding of their speech, it does not follow that the state must require shareholders to accept such a contract as a condition of corporate investment. But that is what the state would be doing if restrictions on managers' use of corporate funds to finance speech in support of their own views were ruled unconstitutional. In any event, restrictions on corporate speech would not prevent the management of a given firm from seeking to contract for arrangements according to which, as part of managers' compensation, shareholders must contribute a contracted-for sum of money to finance the broadcasting of managers' political and social views. If it seems unlikely that shareholders would consent to such a bargain, that is all the more reason for thinking that this is not the bargain actually struck,<sup>145</sup> and that restricting corporate political speech would serve to enforce, rather than undermine, the actually intended bargain.

Other corporate constituencies represent even less plausible candidates for speakers whose First Amendment rights might be infringed by regulation of corporate speech.

**3. Spokespersons.** To the extent that the person who actually delivers the corporate speech is different from the one who determines its contents, it is even less plausible that speaker interests are at stake. The employee who merely delivers a statement drafted by others, or who writes up a statement whose content is determined by others, is even more like Dan-Cohen's AT&T operator.<sup>146</sup> The speech simply is not his. If anything, his speaker interests are constrained, rather than realized, if he is asked to say things he does not believe.<sup>147</sup> A spokesperson may feel disappointed if restrictions on corporate speech result in his losing opportunities to be seen or heard on TV by a large audience. But no First Amendment interests are at stake in the desire of some individuals to have their face widely

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<sup>144</sup> Even Justice Scalia does not fully subscribe to that view, as he accepts the limitation that management's actions—including its political speech—must be “designed to make a profit.” Austin, 494 U.S. at 686 (Scalia, J., dissenting) (quoted *supra*).

<sup>145</sup> See Joo, *supra* note 73, at 76.

<sup>146</sup> See, *supra* note 138.

<sup>147</sup> Legally, compelled speech is deemed to violate the speaker rights of the speaker. See *infra* note 154. Psychologically, Dan-Cohen points out, organizational spokespersons typically “experience the role's imperatives as external, and thus potentially as constraints.” *Supra* note 118, at 1238.

seen or their (literal) voice widely heard.

**4. Workers.** Other corporate employees lack input into the contents or delivery of corporate speech.<sup>148</sup> Therefore, the speaker interests of those employees cannot be infringed by regulation of corporate speech.

Some speech motivated by corporate interests may be perceived to be in the interests of workers as well, insofar as corporate prosperity may be thought to lead to increased job security or opportunities for advancement for workers. But that does not make it the worker's own expression. Moreover, a corporation is just as likely to advocate policies that lessen protections or benefits for workers. It is implausible that Nike's speech on globalization is a medium for self-expression of the production workers employed by the Asian manufacturers with whom it contracts, or of its own domestic employees whose jobs or wages may be threatened by Nike's reliance on those Asian workers.

To the contrary, it is common for corporate employers to restrict their employees' speech—even off the job—to minimize interference with the corporate message. While such restrictions, at least by private employers, are usually not considered constitutionally problematic, because they do not involve state action, they illustrate the implausibility of the claim that corporate speech *further*s employees' speaker interests. The point is illustrated by a 1983 debate on whether to rehear a Third Circuit decision that was unusually protective of speaker rights of a corporate employee against his employer.<sup>149</sup> One judge criticized the opinion for “fail[ing] to consider ... the first amendment interests of corporations.”<sup>150</sup> In other words, far from being exercised through corporate speech, the speaker interests of workers might need to be *sacrificed* to vindicate corporate speech rights.

**5. Advertisers.** Finally, restrictions on corporate speech could be thought to infringe the speaker interests of the writers and producers of corporate advertising (hereinafter, advertisers). Although advertisers are, like spokespersons, principally mouthpieces for someone else's message, the creativity they bring to the presentation of that message might be

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<sup>148</sup> Where they do have input into content, or a role in delivering the speech, the arguments above concerning managers or spokespersons apply respectively. It may be that almost all corporate employees sometimes serve as corporate spokespersons, but that wouldn't affect the argument.

<sup>149</sup> *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983). See *infra* note 190.

<sup>150</sup> *Id.* at 903 (Statement of J. Becker sur the Denial of the Petition for Rehearing).

considered self-expression protected by the First Amendment. If regulation of corporate speech is likely to result in an overall decrease in the quantity of corporate advertising, because of fears of liability, advertisers' speaker interests might be thought to be infringed by a decrease in opportunities for self-expression of this sort. But this concern is based on empirically questionable premises and a dubious conception of the First Amendment.

First, it is far from clear that regulations on corporate speech would in fact result in fewer opportunities for advertisers. Regulations compelling certain disclosures could lead to an increase in advertising opportunities. Regulations requiring greater accuracy in advertising could lead to more clarifications and increased give and take between rival points of view, potentially resulting in an overall increase in advertising. They could also lead to more careful production of advertisements, increasing the number of creative jobs in the advertising industry.

More importantly, it is implausible that the probability of such consequences has any bearing on the constitutionality of regulations of corporate speech. Let us suppose that writing or producing advertising provides more of an outlet for artistic creativity than most other high-paying jobs, and that such creativity may be thought of as a form of self-expression. True, the First Amendment protects manner of expression as well as content, and it has been held to protect non-propositional expression, such as music.<sup>151</sup> Nevertheless, it is doubtful that the First Amendment extends so far as to protect opportunities for creativity for the sake of creativity—as opposed to creativity as a means of expressing one's own viewpoint. A government regulation that incidentally resulted in a decrease in well-paid opportunities for musicians would not for that reason be unconstitutional. Or suppose instead that some government regulation of the garment industry had the effect that garment workers had fewer opportunities to be creative in their stitching. That would be an unfortunate consequence, but it is implausible that the regulation would therefore violate the First Amendment.

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<sup>151</sup> “Music, as a form of expression and communication, is protected under the First Amendment.” Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). But a composer, or even a performer of music composed by someone else, is expressing her own perspective in a way that an advertiser is not expected to. At any rate, performing music is not at the core of what the First Amendment protects. Ward concerned vocal music with words, performed for an explicit political purpose, leaving open to question to what extent the First Amendment protects music of which neither of those facts were true.

Of course, there are important differences between stitching and speech. But the most notable difference is that speech is more usually associated with expression of a point of view. (If some stitching expressed a point of view, it too would be considered speech for First Amendment purposes, like flag burning.<sup>152</sup>) The stitching example supports the conclusion that there is no First Amendment interest in protecting opportunities for creativity for their own sake, apart from expressing a point of view. If that is right, no First Amendment interests of advertisers are implicated in regulation of corporate speech.

In summary, restrictions on corporate political speech do not violate the speaker rights of any person, because corporate speech is not expression of any person. It is not the expression of shareholders, because it is made regardless of whether shareholders agree with it, and shareholders do not invest in order to support it. It is not the expression of managers, because, if the managers are acting responsibly, decisions about the content of corporate speech are not made on the basis of their own beliefs. In any event, managers do not have a constitutional right to use corporate resources to express their own views. It is even clearer that corporate speech is not the expression of corporate mouthpieces who have no input into its content, or of other workers. Nor is it the expression of advertisers, in that it does not express their viewpoint either, even if it does afford them some opportunities for creativity.

### **C. Free Speech And The Protection Of Listener Interests**

I have argued so far that corporations have no speech rights of their own, and that restrictions on corporate speech do not infringe any persons' speaker rights. If that is correct, extending First Amendment protections to corporate speech could be justified only on the basis of listener interests. I argue in this section that listener interests alone support a lesser degree of protection for speech than do speaker interests. A complete defense of this thesis would require a full-fledged theory of the purposes of protecting free speech. Instead I advance several considerations. I argue first that much First Amendment jurisprudence makes sense only on the premise that listeners' rights to receive speech are not as weighty as speakers' rights to express themselves. I then argue that this premise is plausible: it is hard to make theoretical sense of a strong right to receive speech. Finally, I argue that the

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<sup>152</sup> Texas v. Johnson, 491 U.S. 397 (1989).

differences between the rights of listeners and speakers provide the best explanation of the lesser protection accorded commercial speech.

**1. Listener interests in Supreme Court jurisprudence.** Much First Amendment jurisprudence is unintelligible apart from an implicit assumption that listener rights merit less absolute protection than do speaker rights.

Most strikingly, it has never been disputed that it is the speaker who ‘owns’ the speech interest, so to speak. It is the speaker who can choose to waive, or bargain away, his right to ‘inform’ the public. This principle applies even where First Amendment protections are justified on the basis of listener interests, as with commercial advertising. Cigarette or alcohol distributors, for example, may agree to refrain from certain kinds of advertising in exchange for release from certain types of liability. This would be difficult to understand, if the public’s right to receive the advertising were accorded as much weight as speakers’ rights.<sup>153</sup>

The assumption that a potential speaker may waive his right to speak follows from the widely accepted premise that the First Amendment protects against compelled speech. But that premise itself reflects the greater weight accorded to speaker interests in comparison to listener interests. Compelled speech is considered unconstitutional because it infringes on the speaker’s rights of free expression.<sup>154</sup> From the listener’s standpoint, on the other hand, it is hard to see why compelled speech is not often a good thing. Granted, not all compelled speech is informative: consider compelled recitation of the Pledge of Allegiance. But when a cigarette manufacturer is required to state on every package that cigarette smoking may be

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<sup>153</sup> Granted, when a speaker waives his right to broadcast some information, that need not prevent listeners from receiving it from another source. Thus one might argue that a certain symmetry obtains: just as a listener can refuse to listen but cannot waive a speaker’s right to communicate to other listeners, so a speaker cannot waive a listener’s right to receive the same information from other speakers. However, there will often be few, if any, alternative sources of the same information for listeners. Thus a speaker’s waiving his right to broadcast a certain message may result in that message being lost altogether. Moreover, even if *all* potential listeners agreed to waive their right to receive some message, it is doubtful that they could legally prevent the speaker from transmitting it.

<sup>154</sup> The classic statement of this principle came in Barnette, 319 U.S. 624 (1943), finding unconstitutional a state law requiring public school children to salute and pledge allegiance to the United States flag. The Court reasoned: “compelling the flag salute and pledge ... invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” Id. at 642. The Court has elaborated more recently: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” Wooley, 430 U.S. at 714 (quoting Barnette, 319 U.S. at 637) (finding it unconstitutional for state to punish person who covered over state motto on his car’s license plate).

harmful to one's health, useful information is conveyed.<sup>155</sup>

Another example of this primacy comes from the context of campaign finance regulation, where the Court has upheld limits on contributions to campaigns, while striking down limits on what an individual may spend in direct support of her own candidacy or on direct broadcasting of her own views.<sup>156</sup> While holding that the First Amendment applies to both, the Court has distinguished between the two largely on the ground that, unlike limits of the latter sort, limits of the former sort entail “only a marginal restriction upon the contributor’s ability to engage in free communication,”<sup>157</sup> because a contribution expresses only general support, not the particular beliefs or reasons of the contributor.<sup>158</sup> In other words, a restriction on contributions is a significantly lesser infringement of speaker interests in expression.<sup>159</sup> But it is not a lesser infringement of listener interests: if a would-be contributor is prevented from contributing \$1 million to the candidate of her choice, listeners are “deprived” of \$1 million worth of communications, as much as if the same person is prevented from spending \$1 million to broadcast her own views.<sup>160</sup> So, listener interests in contributions and expenditures for political communications are much the same, but expenditures receive greater protection because they are taken to implicate speaker interests to a significantly higher extent.

In this context the Court has often repeated: “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of

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<sup>155</sup> Compelled speech is allowed in this instance, presumably, because it is considered commercial speech. See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968).

<sup>156</sup> *Buckley*, 424 U.S. 1. The weight attaching to the distinction between ‘contributions’ and ‘expenditures’ has been repeatedly reaffirmed.

<sup>157</sup> *Id.* at 20.

<sup>158</sup> *Id.* at 21.

<sup>159</sup> Contributions merit less protection than expenditures for speech, because, “[w]hile contributions may result in political expression ..., the transformation of contributions into political debate involves speech by someone other than the contributor.” *Id.* This distinction is relevant to the contributor’s speaker interests, but of little consequence from the standpoint of listener interests.

<sup>160</sup> The Court denied that “contribution limitations ... would have any dramatic adverse effect on the funding of campaigns and political associations,” *id.* at 21, reasoning: “The overall effect ... is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression” *id.* at 21-22. This reasoning is unconvincing. Candidates presumably always try to raise as many funds as they can from every possible source; therefore, it is unlikely that they can make up from other sources for lost contributions. The claim that the funds would likely be spent on direct political expression instead may be true in the case of a would-be contributor of \$1 million. But a would-be contributor of \$100, would have a difficult time turning that money into direct political expression—mass public communication is expensive.

others is wholly foreign to the First Amendment.”<sup>161</sup> This formula too illustrates the priority given to speaker interests over listener interests. From the standpoint of listeners’ interests, if suppressing one source of information would allow the same information, and more besides, to be received from another source, then it is hard to see why the first source should not be suppressed.<sup>162</sup> But from the standpoint of speaker interests, the formula makes sense.<sup>163</sup> A speaker’s interest in expressing her views can reasonably be seen as a fundamental aspect of political liberty or personal autonomy that should not be violated—no matter how benign the intended effects. Thus the Buckley formula privileges the speaker standpoint over the listener standpoint.

Ironically, a similar priority can be seen in Kleindienst v. Mandel,<sup>164</sup> a case often invoked as a precedent for recognizing strong listener rights under the First Amendment. Mandel was a European Marxist academic, who had been invited to address various audiences in the United States, but was denied a visa to enter. While it was conceded that his rights as a speaker were not protected by the First Amendment, because he was neither a citizen nor a resident of the U.S., his exclusion was challenged as infringing on the First Amendment rights of U.S. citizens to hear his views. The Court agreed that First Amendment concerns were implicated by the interests of those who wanted to hear Mandel, but in the end upheld his exclusion under the plenary power of Congress over the admission of aliens. There is no doubt that Mandel’s right to deliver lectures would have been upheld had he been a U.S. citizen, though listeners’ interests would be the same in either case. Thus, despite dicta affirming listeners’ rights,<sup>165</sup> the outcome was analogous to that of the campaign finance cases just discussed: equal listener interests do not receive equal protection when the recognized speaker interests are not equal.

More recently, the Court has cited a number of precedents, including Mandel, for

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<sup>161</sup> Buckley, 424 U.S. at 48-49 (therefore rejecting limits on political spending).

<sup>162</sup> Granted, most real-life scenarios are unlikely to allow such clean balancing: suppressing certain sources of information or ideas, etc., might more likely allow *other* information, ideas, etc. to be heard. In that case, it might be hard to judge that certain restrictions would allow *more* total information, ideas, etc. to be heard without judging the relative value of the different ideas to which listeners might be exposed. Such judgments of the relative value of different ideas may be part of what the Court takes to be antithetical to the First Amendment.

<sup>163</sup> See Dan-Cohen, *supra* note 118, at 1245-46.

<sup>164</sup> 408 U.S. 753 (1972).

<sup>165</sup> Id. at 762-65.

recognizing the First Amendment importance of listener interests. In the remainder of this section I argue that, like Mandel, none of those cases in fact recognized listener rights as strong as speaker rights.<sup>166</sup> Listener rights have become prominent in Supreme Court jurisprudence only since the Court has become interested in finding some rationale for protecting commercial speech and corporate political spending.

One commonly cited precedent for the right to receive information is Stanley v. Georgia,<sup>167</sup> where the Court found prosecution for private possession of obscene materials to be unconstitutional. Despite language citing a “right to receive information and ideas, regardless of their social worth,”<sup>168</sup> the case was really about a right to privacy—the appellant’s “right to satisfy his intellectual and emotional needs in the privacy of his own home[,] ... the right to be free from state inquiry into the contents of his library.”<sup>169</sup> Stanley did not protect either listeners’ or speakers’ rights in the public sphere: prohibitions against distributing the same obscene materials were not struck down.

Red Lion Broadcasting Co. v. F.C.C.<sup>170</sup> upheld a fairness doctrine requiring radio stations to provide air time for response to persons attacked on air. This case was genuinely decided on the basis of listener rights: rejecting radio stations’ complaints that the requirement violated their First Amendment rights, the Court held: “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>171</sup> But that holding was tied to the specific context of radio broadcasting. Because only a finite number of broadcast frequencies are available, some applicants must be denied broadcast licenses. Therefore, “it is idle to posit an unbridgeable First Amendment right of broadcast comparable to the right of every individual to speak, write, or publish.”<sup>172</sup> So, the fairness doctrine could be upheld, not because listener rights trumped speaker rights, but because no

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<sup>166</sup> For a different analysis of why earlier cases do not provide robust justification for a right to receive information and ideas, see Schneider, *supra* note 65, at 1246-52.

<sup>167</sup> 394 U.S. 557 (1969).

<sup>168</sup> Id. at 564.

<sup>169</sup> Id. at 565. The Court continued: “[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” Id. A concurring opinion, signed by three Justices, found the prosecution illegal solely in virtue of the Fourth Amendment, without reference to the First Amendment. Id. at 569-72 (Stewart, J. concurring in result).

<sup>170</sup> 395 U.S. 367 (1969).

<sup>171</sup> Id. at 390.

<sup>172</sup> Id. at 388.

speaker rights were violated.<sup>173</sup> Moreover, the holding was not that a fairness doctrine was constitutionally required, but only that it was constitutionally permissible. Red Lion and similar cases provide no support for the idea that the First Amendment protects listener interests to the same degree that it protects speaker interests.

Perhaps the strongest intimation, outside the context of commercial or corporate speech, of a constitutional right to receive information comes from Lamont v. Postmaster General.<sup>174</sup> Lamont concerned a statute under which the Post Office would destroy unsealed mail from foreign countries that was determined to be ‘communist political propaganda,’ unless the addressee requested the mail in writing. This requirement was found “an unconstitutional abridgement of the addressee’s First Amendment rights.”<sup>175</sup> Presumably, if the statute had applied to domestic mail as well, there would have been no doubt that it was unconstitutional; so, even here, the rights of listeners may be viewed as less robust than those of speakers. In any event, the statute directly implicated the addressee’s rights of political association and dissent in a way that the loss of a single voice from public debate would not. It was also expressly aimed against a certain point of view in a way that restrictions on corporate speech are not. And it concerned communications actually sought by the recipient.<sup>176</sup>

In Procunier v. Martinez,<sup>177</sup> another case on the right to receive mail, the Court struck down interference with prisoners’ mail on the basis of their correspondents’ interests in receiving mail from inmates, as well as in having their communications to inmates received.<sup>178</sup> But the Court expressly denied that the decision was based on positing listener rights: “We do not deal here with difficult questions of the so-called ‘right to hear’ ... but with a particular means of communication in which the interests of both parties are inextricably meshed.”<sup>179</sup>

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<sup>173</sup> See id. at 389 (“[n]o one has a First Amendment right to a license” to broadcast).

<sup>174</sup> 381 U.S. 301.

<sup>175</sup> Id. at 307.

<sup>176</sup> Schneider, *supra* note 65, at 1238-40 and 1250, argues that early listeners’ rights cases all crucially concerned an individual’s right to receive information that he actually wanted, rather than a general imputed public interest.

<sup>177</sup> 416 U.S. 396 (1974).

<sup>178</sup> Id. at 408-09.

<sup>179</sup> Id. at 409.

Classic cases on the First Amendment rights of labor<sup>180</sup> are sometimes cited as precedents for a public right to receive information or ideas. But although those cases justify free speech protections in terms of a general public interest in full, free discussion, it is speakers, not listeners, who are held to be protected directly.<sup>181</sup> Early strong statements of a right to receive information explicitly derive that right from a right to transmit, implying the priority of the latter right.<sup>182</sup>

In short, precedents provide only limited support for a right to receive communications where no one has a right to transmit them, and still less support for vesting such a right in the general public, independent of any indication of interest in receiving the communications. On the other side, differential protection of campaign contributions and expenditures, or of communications originating from alien and domestic speakers, as well as the general presumption against the constitutionality of compelling speech, make sense only on the premise that listener interests in communications in which there is no protected speaker interest are less protected by the First Amendment than are communications that involve speaker interests. In the following subsection I argue that this premise makes good sense.

**2. Theoretical considerations.** It is widely supposed that many fundamental constitutional and statutory provisions protect innate human rights,<sup>183</sup> sometimes called “natural rights,”<sup>184</sup> that exist in some sense independent of—and provide the justification for—their legal recognition. For example, most of us believe that it is not our laws that make murder a violation of the rights of the victim; rather, we have laws against murder *because* we believe

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<sup>180</sup> The most important cases are Thornhill, 310 U.S. 88 (striking down statute prohibiting loitering and picketing at the scene of a labor dispute), and Thomas v. Collins, 323 U.S. 516 (1945) (striking down registration requirements for union organizers).

<sup>181</sup> See Thornhill, 310 U.S. at 101-02 (freedom of speech embraces liberty to discuss publicly); id. at 102 (Constitution guarantees right to disseminate information); id. at 104 (right to discuss is protected; challenged regulations rule out any avenue for those interested to convey their message); Thomas, 323 U.S. at 532 (right to discuss and inform is protected); id. at 537 (right to urge action is protected).

<sup>182</sup> See Martin v. Struthers, 319 U.S. 141, 143 (1943).

<sup>183</sup> E.g., Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (“the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points.... It is a rational continuum”).

<sup>184</sup> The phrase “natural rights” carries realist, if not theological, connotations that I wish to avoid. In speaking of innate rights, I make no claims that they are of divine origin, nor even that they exist independently of cultural norms. But if they derive from cultural norms, then those norms are fundamental ones: legal norms derive from them, rather than *vice versa*.

that murder violates the victim's rights. For two reasons, the right to receive information can less readily be understood as an innate human right than can a right to express one's views freely to whomever may listen.

First, the idea of a right to receive information (or ideas, etc.) is problematic, in that there seems to be no one with a corresponding obligation to provide information. In general, rights are necessarily correlated with obligations. If I have a negative right<sup>185</sup> not to be killed, then others must have a corresponding negative obligation not to kill me. I can have no positive right to the food I need to live, unless someone has a corresponding obligation to provide that food. It is not problematic in this respect to suppose that I have a right to express my views, because it is plausible enough that others have a corresponding obligation not to suppress my expression. In contrast, it *is* problematic to posit a positive right to receive information, because it does *not* seem plausible that anyone has a corresponding obligation to supply information. As noted in the preceding section, even when speech is protected on the basis of listener interests, no one doubts that the speaker has the right to refrain from that speech. No one has suggested that the First Amendment obligates the government—or anyone else—to take positive steps to make information or ideas available.<sup>186</sup> Moreover, the Bill of Rights in general tends to protect negative rights to be free from government interference.<sup>187</sup> Thus, to the extent that the First Amendment is interpreted to imply a positive right to receive information (as opposed merely to a negative right not to be silenced), it becomes somewhat anomalous.

A natural response might be that the First Amendment does not confer a positive right to receive information, but only a right not to have the state interfere with one's receipt of information, just as First Amendment protection of expression is usually thought to guarantee speakers neither the resources to broadcast their views nor even freedom from suppression by any party, but only the right not to have their expression suppressed by the state. But even if the legal protections of speakers and listeners are analogous in this way, this response fails to

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<sup>185</sup> A "negative right" is a right to be left alone or not to have something done to one, in contrast to a "positive right" that others take some action.

<sup>186</sup> This is not to deny that there may be an obligation to inform (or at least not to conceal information) in limited contexts, e.g., if one knew of an imminent threat to the safety of another.

<sup>187</sup> "[T]he Constitution is a charter of negative rather than positive liberties." Jackson v. Joliet, 715 F.2d 1200, 1203 (7<sup>th</sup> Cir. 1983) (Posner, J.).

address the difference in their justification. The legal right not to have one's expression suppressed by the government can be understood as protecting an innate right of free expression. But the legal right not to have the government interfere with one's receipt of information can less readily be understood as similarly protecting an innate right.

Nor is it so clear that First Amendment free speech protections apply only against government interference. "There is no sanctuary in the First Amendment for unlimited private censorship";<sup>188</sup> "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."<sup>189</sup> On occasion courts have recognized limits on private employers' authority to silence or compel employee speech.<sup>190</sup>

The second reason for believing that receiving information is a less plausible candidate for an innate right than is self-expression is simply the intuition that receiving information seems more a desirable good than a right that may not be violated.<sup>191</sup> There is a "strong sense" of 'right' that implies a degree of immunity from utilitarian balancing.<sup>192</sup> For example, suppose that three hospital patients are dying because organ transplants are unavailable, and that the lives of all three could be saved by killing a fourth, healthy person, and distributing his organs among the three patients. The collective welfare would presumably be maximized by doing so<sup>193</sup> (saving three lives at the cost of one). If it nevertheless seems wrong to do so, it is because we suppose that the fourth person has a right in a strong sense not to be killed, whereas the patients do not have a similar right to receive transplants of necessary organs.

Because it is inherent in political liberty or in personal autonomy, freedom to express one's views can plausibly be seen as a non-instrumental right of this sort, such that it is wrong to violate that right, even for the sake of some better outcome, just as one might judge

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<sup>188</sup> Red Lion, 395 U.S. at 392.

<sup>189</sup> Associated Press v. United States, 326 U.S. 1, 20 (1945).

<sup>190</sup> *E.g.*, Novosel, 721 F.2d 894 (finding that at-will employee's First Amendment rights were violated when he was terminated by private employer for refusing to participate in employer's lobbying efforts and for privately stating opposition to employer's political stand).

<sup>191</sup> This argument is derived from Dan-Cohen, *supra* note 118, at 1232-48. *See also* Neuborne, *supra* note 82, at 25.

<sup>192</sup> Dan-Cohen, *supra* note 118, at 1232. This "strong sense" of 'right,' explained further at *id.* at 1232-33 and 1245-48, is borrowed from Ronald Dworkin, *Taking Rights Seriously*, 188-92 (1977), and ultimately from the contrast between a Kantian deontological ethics and a consequentialist ethics.

<sup>193</sup> Assuming that all other things are held equal, *e.g.*, the life expectancies of all parties are comparable, all four would enjoy their lives equally and would be missed equally if they died.

it wrong to kill an innocent person, even to save three innocent lives.<sup>194</sup> As noted *supra*, the Court’s rejection of “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others”<sup>195</sup> reflects such a view. In contrast, receiving information may better be seen as simply a desirable good, in that it is generally reasonable to trade off the value of receiving certain information against the value of receiving other information, or even of realizing other values.

It would be overstated to say that speaker rights protect basic political liberty, whereas listener interests in receiving information and ideas concern only a desirable social good that does not implicate fundamental liberty interests. A state that prevents its citizens from receiving communications from outside its borders is an unfree state. Even so, a xenophobic state of this sort, if it allows free exchange of ideas among its citizens,<sup>196</sup> seems freer than one that stifles expression by its own citizens.

The example of the xenophobic state suggests that there might be general interest in—and perhaps right to—open debate in one’s society that is stronger than listeners’ interest in receiving communications themselves. But if there is such a general interest that is not reducible to a conjunction of speakers’ and listeners’ interests, the only further interest that might enter the mix would be an interest in third party communications. For example, while I may believe myself adequately informed about global warming, and have no interest in speaking publicly on the topic, it may be important to me that my fellow citizens receive information about the issue. But it is hard to see how a right that others receive certain information or ideas could be a more fundamental right than listeners’ own right to receive them. If the latter is not a right in a strong sense, then neither is the former.

If listener rights (including those of third parties) are indeed less fundamental than speaker rights, then it makes sense to accord lesser protection to speech—such as corporate speech—that is protected only for the sake of listener rights than to speech that is protected

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<sup>194</sup> To say that there is a right in this sense to self-expression is not to say that it would never be justified to violate that right to preserve some other value, e.g., to save lives; i.e., the right need not be absolute. But it is to say that there is at least a presumption that it is wrong to violate it in most circumstances, even if the benefits of doing so seem to outweigh the costs.

<sup>195</sup> *Buckley*, 424 U.S. at 48-49.

<sup>196</sup> A speaker’s interest in expression includes reaching her intended audience. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

for the sake of speaker rights. But even if there were thought to be a right in a strong sense to receive information or ideas, it is not clear that such a right would confer on others a right to impart the information, as seems assumed in much commercial and corporate speech doctrine. In general, to say that one has a right to something is to say that one may have it *if one wishes*.<sup>197</sup> For example, my rights are violated if someone takes my property against my wishes, but they are not violated if someone takes it with my permission. It would seem then that if I have no desire to receive certain information, my rights are similarly not violated if I am deprived of that information. If that is right, then it is hard to understand how listeners' rights could give advertisers a right to convey messages to listeners that do not want to receive them. And for many advertisements, it is far from clear that *anyone* wants to receive them.<sup>198</sup> If no one wants to receive advertising promoting a desire for tobacco products, then listeners' rights—even if they are rights in a strong sense—provide no basis for tobacco companies to claim a right to foist such advertising on the public. While there may be greater public interest in receiving certain other corporate communications, there is no reason to attribute to corporations a general right to purvey advertising on the basis of listeners' rights, apart from a showing that someone wants to receive the communications at issue.

Even if listeners do want to receive corporate communications, and even if it is not correct that listener rights are less fundamental than those of speakers, at any rate *different* protections make sense where the principal concern is with protecting listener interests. As already suggested, from the standpoint of protecting listeners, it may sometimes be reasonable to suppress some speech to allow other speech to flourish. From the listeners' standpoint, some compelled speech may be beneficial. A focus on listener interests also makes it more reasonable to penalize false statements. Even on the understanding that false statements are protected not for their own sake, but to avoid chilling the exchange of ideas,<sup>199</sup> the calculation of costs and benefits can be expected to differ where speakers' rights are not a

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<sup>197</sup> See Michael Tooley, *Abortion and Infanticide*, 2 *Philosophy and Public Affairs* 37 (1972).

<sup>198</sup> See Farber, *supra* note 60, at 397 (“A consumer might pay for product information, but no one would willingly pay in advance for the ‘service’ of being persuaded to buy a product not previously desired”).

<sup>199</sup> See *Sullivan*, 376 U.S. 254 (in libel context liability for false statements could deter criticism of public officials, because “erroneous statement is inevitable in free debate,” *id.* at 271, and because even true statement could be deterred by “doubt whether it can be proved in court or fear of the expense of having to do so,” *id.* at 279).

concern. Where the chief concern is with receiving information, it might sometimes be reasonable to risk some chilling effects in order to prevent people from being misled.

These differences call to mind ways in which commercial speech is treated differently from, say, political speech. I argue in the next subsection that this resemblance is not accidental. At least one prominent First Amendment scholar has made a strong case that the distinction between the (listener) interest in receiving information and the (speaker) interest in self-expression provides the best analysis of how and why to distinguish commercial speech from more protected speech.<sup>200</sup> I have argued that the only reason for protecting corporate speech is to protect listener interests. Therefore, if commercial speech doctrine is geared toward protecting listener interests, that fact supports the conclusion that any corporate speech should be classified as commercial, regardless of its content.

**3. Commercial Speech and Listener Interests.** From the beginnings of commercial speech doctrine, the principal rationale for protecting commercial speech at all has been listener interests. In the first Supreme Court decision to suggest that some commercial advertising might be protected by the First Amendment, the reason given for protecting the advertisement at issue was that it “conveyed information of potential interest and value to a diverse audience.”<sup>201</sup> The decision that “squarely” decided that the First Amendment applied to commercial speech justified that conclusion on the basis of the interests of consumers and of society in general in “the free flow of information.”<sup>202</sup> According to the case that established the still operative framework for scrutinizing regulations on commercial speech, “The First Amendment’s concern for commercial speech is based on the informational function of advertising.”<sup>203</sup> Similar ideas can be found throughout commercial speech jurisprudence.<sup>204</sup>

Granted, in more recent decisions the Court has sometimes said that it is not *only* listener interests that are implicated in regulation of commercial speech.<sup>205</sup> Nevertheless,

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<sup>200</sup> Post, *supra* note 62.

<sup>201</sup> Bigelow, 421 U.S. at 822.

<sup>202</sup> Va. Bd. of Pharmacy, 435 U.S. at 763 and 764.

<sup>203</sup> Central Hudson, 447 U.S. at 63.

<sup>204</sup> *E.g.* Liquormart, 517 U.S. at 496 (plurality opinion); Coors, 514 U.S. at 481; Edenfield, 507 U.S. at 766; P.G.&E., 475 U.S. at 8.

<sup>205</sup> *See* Lorillard, 533 U.S. at 564; Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 479 (1997) (1997) (Souter, J., dissenting).

listener interests continue to predominate in explanations of why commercial speech should be protected,<sup>206</sup> and the Court has stated explicitly that they are primary: “the extension of first Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>207</sup>

Moreover, any interests of speakers implicated in commercial speech are primarily—if not entirely—economic.<sup>208</sup> It is not clear that protection of those interests calls for stricter scrutiny than due process would require regarding non-speech regulations potentially infringing economic interests. Although the Court has insisted that the First Amendment protects speaker interests that are purely economic,<sup>209</sup> that is not to say that such interests merit the same degree of protection.<sup>210</sup> Received commercial speech doctrine implies that speech that implicates no non-economic speaker interests merits less protection. On both the Central Hudson and Bolger analyses,<sup>211</sup> if speech is motivated only by economic interests, that is relevant to classifying it as commercial speech. But the point of so classifying it is to determine that it is entitled to less protection.

That commercial speech does not significantly implicate non-economic speaker interests is a plausible explanation of “the subordinate position of commercial speech in the scale of First Amendment values.”<sup>212</sup> The correctness of this explanation is supported by the weakness of the Court’s usual explanations of the lesser First Amendment status of commercial speech.<sup>213</sup>

In any event, that fact makes sense of many of the differences in how commercial speech is treated. Where principally listener interests are at stake, it makes sense that there would be greater leeway to compel speech<sup>214</sup> and to regulate false or misleading statements.

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<sup>206</sup> *E.g.* Thompson, 535 U.S. at 366-67.

<sup>207</sup> Zauderer, 471 U.S. at 651. *See also* Bellotti, 435 U.S. at 783 (“A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the free flow of commercial information”); United Foods, 533 U.S. at 426-27 (Breyer, J., dissenting).

<sup>208</sup> *See* Lorillard, 533 U.S. at 564; Glickman, 521 U.S. at 479 (1997) (Souter, J., dissenting)

<sup>209</sup> Va. Bd. of Pharmacy, 435 U.S. at 762.

<sup>210</sup> For an argument that speech motivated solely by profit merits no First Amendment protection at all, *see* Baker, *supra* note 23, 23-25.

<sup>211</sup> *See supra* sec. IA1.

<sup>212</sup> Edge, 509 U.S. at 430 (1993).

<sup>213</sup> *See supra* sec. IA2.

<sup>214</sup> *See* Post, *supra* note 62, at 27-28; Neuborne, *supra* note 82, at 40.

The Court has explicitly endorsed such reasoning on occasion: “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”<sup>215</sup> Regarding compelled disclosures, “Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in not providing any particular factual information in his advertising is minimal.”<sup>216</sup> Others have argued that commercial speech doctrine’s focus on protecting listeners explains greater toleration of overbroad regulations and perhaps of prior restraints. Because information is fungible, from the listener’s perspective little harm is done if some speakers are deterred from speaking, as long as it is likely that some other speaker will deliver the same message, whereas “public discourse” serves other values that are undermined by suppression of the speech of any speaker.<sup>217</sup> The purpose of overbreadth doctrine is to protect unknown vulnerable speakers of conscience, who may be silenced by overbroad regulation, whereas there is no comparable reason to think that listener interests cannot adequately be safeguarded by those listeners or speakers actually affected.<sup>218</sup>

In short, the fact that commercial speech implicates speaker interests only minimally explains why it should be less protected. If that explanation is correct, all corporate speech must fall into the less protected category, for no speaker rights are implicated in corporate speech.

#### **D. Listeners’ Interest in Receiving Corporate Speech**

I argued earlier that corporations have no interest of their own in free speech, and that corporate speech is not the speech of any person. Therefore, if there are reasons to protect corporate speech, they have to do with listeners’ interests in receiving it. I then argued in the

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<sup>215</sup> *Liquormart*, 517 U.S. at 496-501 (plurality opinion). See also *Va. Bd. of Pharm.*, 425 U.S. at 781 (Stewart, J., concurring) (“the elimination of false and deceptive claims serves to promote the one facet of commercial . . . advertising that warrants First Amendment protection[:] its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking”).

<sup>216</sup> *Zauderer*, 471 U.S. at 651 (internal references omitted) (emphasis in original).

<sup>217</sup> Post, *supra* note 62, *passim*, in particular at 29-33.

<sup>218</sup> *Neuborne*, *supra* note 82, at 38-40.

preceding section that listener interests warrant less stringent (or in any event different) protection than do speakers' interests in expressing their views. In this section I argue further that, even from the standpoint of listener interests alone, the value of corporate speech is particularly low—precisely because it is not the speech of any person, i.e., it is not offered as an expression of any person's actual beliefs.

The generally accepted view that listeners have an interest in hearing purportedly informative speech or in hearing debate among different points of view presupposes that speakers in general at least *aim* at truth.<sup>219</sup> Corporate speech does not. To say that corporate speech is not the speech of any person is to say that, unlike most non-defective speech, it is propounded not because it expresses any person's beliefs, i.e., not because any person believes it to be true, but for entirely different reasons.<sup>220</sup>

Ironically, it is this very characteristic that underlies one of the most commonly advanced arguments for protecting corporate speech: that corporate communications convey a unique message, which might be lost to listeners if corporate speech were not protected.<sup>221</sup> Corporate messages are supposed to be unique in that they are often “the joint and undifferentiated product of complex decision-making processes,”<sup>222</sup> resulting in speech that is “irreducibly ‘organizational.’”<sup>223</sup> But to call it “irreducibly organizational” is to say that it may not represent the beliefs of anyone involved. To the extent that the resulting messages *are* believed, individuals will repeat them in their own voice, and so, those messages will not be lost even if the corporation is silenced. The real reason that some unique corporate messages could be lost is that corporate speech is “externally motivated, and being exempt from the requirement of sincerity, it is avowedly cut off from the speaker's own identity and psychological state. [Therefore, the speaker] may be neither inclined nor able to perform the same speech acts outside of her office hours....”<sup>224</sup> In other words, those corporate messages

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<sup>219</sup> Granted, speakers do not always aim at truth. But lies are not valued; they are protected only incidentally, because of the fear that suppressing them would chill other speech.

<sup>220</sup> Cf. Baker, *supra* note 23, at 16 (“neither the management, the owners, nor the workers ... need have any belief in the content of the commercial advertisement. ... The only necessary belief about the advocated activities is that their promotion will increase profits”).

<sup>221</sup> See Dan-Cohen, *supra* note 118, at 1234-48; Owen Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1411.

<sup>222</sup> Dan-Cohen, *supra* note 118, at 1237.

<sup>223</sup> *Id.* at 1241.

<sup>224</sup> *Id.*

that are unique and irreplaceable are so simply because no one believes them!

In the words of Meiklejohn, arguably the foremost proponent of a listener-oriented approach to the First Amendment, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>225</sup> If a given instance of corporate speech is actually believed by its authors, they can be expected to repeat it in their own voice “outside of ... office hours”; so, there is no reason to think it will be lost<sup>226</sup> if corporate speech is not protected.<sup>227</sup> Conversely, if its authors would not repeat it in their own voice, it is unlikely to be something “worth saying.”

Such a formulation may raise alarms. It is widely agreed that the First Amendment implies that it is not the role of government to judge what is worth saying,<sup>228</sup> government should be as neutral as possible in allowing the free exchange of ideas. But this principle need not extend to promoting ideas that aren’t anyone’s, that do not even aim at truth.<sup>229</sup>

On any account of why speech may have value for listeners, untrue speech has less value: it does not contribute to listeners’ knowledge, nor does it provide a basis for informed decision-making. Free speech protections extend to untrue speech as well, in part because

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<sup>225</sup> Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1960).

<sup>226</sup> It has been argued, though, that an important message *is* lost when a corporation’s message is communicated by other parties: “The message’s overall nature may change when the messenger changes.” Redish & Wasserman, *supra* note 134, at 257. “[T]he very fact that a major profitmaking corporation is of the opinion that ... a particular policy is important to the community’s prosperity may reasonably influence individual judgments on the matter.” *Id.* at 248-49. A first response is that corporations don’t *have* opinions; corporate statements that a given policy will benefit community prosperity should probably be understood as indicating corporate officers’ judgment that the policy would benefit that *corporation’s* prosperity.

Nevertheless, the fact that corporate officers make that judgment itself may be useful information, as J. Scalia points out, in a more realistic version of the same argument: “Why should the Michigan voters ... be deprived of the information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity?” Austin, 494 U.S. at 694 (Scalia, J., dissenting). But no one is proposing to deprive voters—or consumers—of such information. To the contrary, one of the speech regulations challenged by corporations is precisely the requirement that they identify themselves when they sponsor messages.

<sup>227</sup> It is true that if corporate speech is regulated, even those corporate utterances believed by those inside the corporation may end up less widely broadcast. Critics complain that the messages in question are thereby muffled; it would be more accurate to say that they fail to receive special amplification not available to other messages, which may have at least as much value for listeners.

<sup>228</sup> See Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 791 (1988) (quoting Thomas, 323 U.S. at 545).

<sup>229</sup> I have already argued that, from a speaker standpoint, treating corporate speech differently is not discriminatory, because corporate speech is not the speech of any speaker. I argue here that judging corporate speech to have less value *for listeners* likewise does not violate government neutrality.

penalizing false speech could chill debate—including true speech,<sup>230</sup> and in part because government regulators are not trusted reliably to distinguish true from false speech.<sup>231</sup> In addition, even false speech is taken to contribute to the social project of arriving at true, justified beliefs: the free exchange of ideas and arguments, including false ideas and unsound arguments, is supposed help us to sort out which ideas are true, and to strengthen the justification for our beliefs.<sup>232</sup> But attributing this sort of value to false speech presupposes that most speech at least *aims* at truth. Other perspectives are worth listening to and offer the possibility of learning from, insofar as they are the perspectives of other truth-seekers. While it is often difficult to distinguish willfully false speech with sufficient reliability to regulate it, such speech does not contribute to the social pursuit of knowledge, and, where distinguishable, is not protected.<sup>233</sup>

Corporate speech is a special case in that, as a class, it simply does not aim at truth.<sup>234</sup> It need not be willfully false, but it is advanced for reasons independent of its truth or falsity. As explained earlier, it is the fiduciary responsibility of the authors of corporate speech to decide its content, not on the basis of whether it is believed to be true, but on the basis of whether it is believed to serve the corporation's financial interests. For this reason, corporate speech does not contribute significantly to the social epistemic project.

For comparison, imagine a complex computer algorithm capable of constructing coherent sentences, randomly generated. Imagine further that it can put together sentences to construct arguments with some degree of facial plausibility—enough not to appear simply absurd, but otherwise without regard to the truth of any of the sentences. It would be implausible to hold that listeners have a strong interest in receiving such strings of sentences, or that listeners' rights would be violated if they were prevented them from receiving those strings. Corporate speech is of similarly low value to listeners. Although it may be more

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<sup>230</sup> *E.g.* Gertz v. Welch, 418 U.S. 323, 340 (1974); St. Amant v. Thompson, 390 U.S. 727, 732 (1968); Sullivan, 376 U.S. at 271-72.

<sup>231</sup> *E.g.* Riley, 487 U.S. at 791; Austin, 494 U.S. at 692-93 (Scalia, J., dissenting).

<sup>232</sup> This last consideration was advanced in the nineteenth century by British philosopher John Stuart Mill, *supra* note 93, at ch. 2, and endorsed by the Supreme Court in Sullivan, 376 U.S. at 279, fn. 19.

<sup>233</sup> For example, it is uncontroversial that neither fraud nor deliberate libel—even of public figures—is constitutionally protected. Traditionally, there is less protection for classes of speech that are of particularly “slight social value as a step to truth.” Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

<sup>234</sup> A similar point is made in Schneider, *supra* note 65, at 1259.

strategically oriented, it is similarly not truth-directed. Granting the premise that government should be as neutral as possible in allowing the free exchange of ideas, to discriminate against speech that is not anyone's is as principled and neutral as a TV station refusing to give equal time to broadcasting sentences randomly generated by computer.<sup>235</sup>

If anything, classifying all corporate speech as commercial would entail less government intrusion and less scope for government judgment about the merits of specific speech than is entailed by the case-specific inquiry called for under current doctrine into the content and context of specific instances of corporate speech that may or may not be commercial. It may be countered that if the goal is to minimize intrusive government judgments about the value of various speech, that goal would better be served by ceasing to classify some speech as commercial and thereby worthy of lesser protection.<sup>236</sup> But abandoning such classifications would not do away with the need to make comparable distinctions. For example, in defending their proposal to treat commercial speech like any other speech, Kozinski and Banner argue that doing so would not render unconstitutional statutes regulating consumer fraud and the like.<sup>237</sup> But such statutes require government inquiry at least as intrusive as those called for under commercial speech doctrine into the content, context, consequences, and intent of various statements by commercial speakers.

In summary, the claim that corporate speech embodies a unique message that would otherwise be lost is correct only when the message lacks credibility. This judgment of cred-

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<sup>235</sup> Several commentators have used other mechanistic images to illustrate the automatic nature of corporate speech, divorced from any person's actual beliefs. *E.g.* Bezanson, *supra* note 23, at 779 (comparing the speech of the Chamber of Commerce in Austin to "a machine programmed in a general direction"); Greenwood, *supra* note 104, at 1029 ("we have created an institution for a specific purpose and put it on a sort of automatic pilot"); Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* 46-49 (1986) (describing a thought-experiment in which a corporation becomes ownerless by buying all its own stock, workerless by fully automating production, and managerless by programming sophisticated computers to make all business decisions, and then continues much as before).

Given sufficiently sophisticated programming and technology, Dan-Cohen's personless corporation would continue to engage in product and political advertising. The ensuing corporate speech would contribute as little to the social quest for knowledge as would the computer-generated sentence strings imagined *supra*. If the managers of an ordinary corporation are doing their job responsibly, the corporate speech they produce should be the equivalent of that produced by the computer-run corporation, and of equally low value to knowledge-seeking listeners.

<sup>236</sup> As urged by, e.g., Kozinski & Banner, *supra* note 62; Kathleen Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1995 *Sup. Ct. Rev.* 123 (1997); Redish, *supra* note 60.

<sup>237</sup> *Supra* note 134, at 651-52.

ibility is not one made by a censoring government. Rather, a message's lack of credibility is demonstrated if no one chooses to advance it without being paid to do so. Failure to protect messages that are "unique" in this way does not significantly infringe listener interests.

In the remainder of this section I consider several further objections to the thesis that corporate speech has particularly low value for listeners.

The argument that corporate speech has low value for listeners rests on the assumption that the public pursuit of knowledge is advanced better when people argue for points of view they genuinely believe than when they seek reasons to support a point of view advantageous to certain interests. Against that assumption, it has been suggested that material incentives to promote a viewpoint serve to marshal the strongest arguments available for that viewpoint, allowing its strength to be tested against other viewpoints.<sup>238</sup> Thus, for example, our legal system calls for attorneys to be hired to make the best possible case for each side, regardless of their own personal beliefs, in the expectation that the truth is most likely to emerge when opposing points of view are each zealously advocated.

This counter-argument falls short. First, the idea that truth will emerge from 'zealous advocacy' presupposes a two-sided dispute, in which both sides are represented.<sup>239</sup> In the case of corporate speech, a few views are represented by paid advocates (often with large budgets for publicity), while countless other possible views are unrepresented. Second, even the legal model does not call for unrestrained advocacy by each side. To the contrary, the legal system aspires to an ideal of rational argumentation: rules of evidence are supposed to minimize the likelihood that jurors will be misled by prejudicial, confusing, or otherwise misleading arguments.<sup>240</sup> Few comparable checks operate on corporate advertising. For these reasons, it is implausible that zealous advocacy by corporate spokespersons serves as part of a process likely to enlighten listeners.

A different sort of objection can be derived from several Supreme Court dissents,

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<sup>238</sup> *E.g. id.* at 258, 262, and 269-71.

<sup>239</sup> The importance of the requirement that both sides get at least some representation is illustrated by the fact that representation is a constitutional right for criminal defendants facing serious consequences. *Gideon v. Wainwright*, 372 U.S. 335 (1963). One of the most widely recognized problems facing our legal system is that legal adversaries are often unequally represented, because of unequal resources, raising concerns that truth is less likely to prevail.

<sup>240</sup> *See* Farber, *supra* note 60, at 402.

according to which corporate political speech, contrary to the thesis of this section, has particularly *high* value: “Corporations, after all, are the engines of our modern economy. They facilitate complex operations on which the Nation’s prosperity depends. To say these entities cannot alert the public to pending political issues that may threaten the country’s economic interests is unprecedented.”<sup>241</sup> In contrast to views according to which corporate voices should be regulated to curb the excessive influence of corporations, on this view corporate voices are of particular interest to potential listeners precisely *because* of their influence.

While such arguments have some superficial plausibility, on reflection it is not clear what special “information” listeners are supposed to receive from corporations. It might be informative to hear the candid thoughts of an experienced corporate executive about the expected effects of various policies. But such speakers do not have difficulty finding fora in which to broadcast their views widely. There is no reason to suppose that the official position of some corporation on such issues would be similarly informative. That position is likely to consist principally of predictable communications serving the short-term interests of that corporation as judged by those who set its policies.

Intertwined with the foregoing sort of arguments, one sometimes finds the argument that it is particularly important to safeguard the voices of powerful non-government entities, because they are uniquely able to serve as checks on government power. As Redish and Wasserman put it, “To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from public debate is ... to augment the always dominant power of government.”<sup>242</sup>

This defense of corporate speech points to a fundamental theoretical disagreement underlying many legal debates, including those about campaign finance reform, media regulation, and government regulation of business in general. The viewpoint represented by Redish and Wasserman sees central government as the principal threat to individual liberty in today’s United States. Just as the constitutional scheme seeks to safeguard individual liberty

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<sup>241</sup> *McConnell*, 124 S.Ct at 772 (Kennedy, J., dissenting in part). *See also id.* at 725-26 (Scalia, J., dissenting in part); *Austin*, 494 U.S. at 694 (Scalia, J., dissenting).

<sup>242</sup> Redish & Wasserman, *supra* note 134, at 248 (emphasis in original).

by separating government power between several branches, and between federal and state levels, that can curb each others' excesses, so, on this view, individual liberty is similarly protected by the existence of private organizations powerful enough to serve as meaningful checks on government.<sup>243</sup> As in 18<sup>th</sup>-century Europe, limiting the rights of aristocrats and wealthy bourgeois would not have empowered the people, but would have solidified the autocratic power of the king, so limiting the voices of wealthy individuals or powerful businesses today would weaken the only elements of society powerful enough to check the natural tendency of government toward tyranny.

The opposing view sees government in the contemporary United States not so much as an independent center of power, like an 18<sup>th</sup>-century king, but as an apparatus for exercising power, control of which is contested among various parties, but which is captured largely—and always in danger of further capture—by large for-profit corporations. The task for protectors of liberty on this view is not so much limiting government power, as limiting the control of government by the most powerful elements of society—large for-profit corporations.

It is far beyond the scope of this essay to advance this long-standing debate. But to the extent that corporations are analogized to another branch of government (one neither elected nor required to serve the public interest), it is anomalous to claim free speech rights for them on this basis.<sup>244</sup> The First Amendment does not protect government speech; it protects *against* government power.

### III. OBJECTIONS

#### A. Does Treating Corporate Speech Differently Distort Debate Unfairly?

Probably the most prevalent argument<sup>245</sup> in favor of extending broad First Amendment rights to corporations is that it is *unfair* to apply less protective standards to corporate speech, particularly in a debate between corporations and other speakers, as when Nike re-

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<sup>243</sup> See *id.* at 263-64; McConnell, 124 S.Ct at 720 (Scalia, J., dissenting in part).

<sup>244</sup> *Cf.* Greenwood, *supra* note 23, at 999 (are corporations “similar to the government itself, a tool that constantly threatens to control us instead of being controlled by us, which we should have rights against and not vice versa?”).

<sup>245</sup> This argument was raised frequently regarding the Nike litigation. *E.g.* Nike, 123 S.Ct. at 2567 (Breyer, J., dissenting); Kasky, 45 P.3d at 263 (Chin, J., dissenting); *id.* at 273 (Brown, J., dissenting); Reply Brief for Petitioners at 16-17, Nike, U.S. S.Ct. (no. 02-575).

sponded to accusations that many of its products were made under sweatshop conditions. That argument goes something like this: critics of Nike are highly protected by the First Amendment. According to the doctrine of New York Times Co. v. Sullivan<sup>246</sup> and its progeny, purveyors of false criticisms of Nike could be liable for defamation only if it could be shown that they knew their criticisms were untrue or that they published them with reckless disregard for whether they were true,<sup>247</sup> a standard known as “actual malice,”<sup>248</sup> or subsequently as “*New York Times* malice.”<sup>249</sup> Meanwhile, Nike was sued under California unfair competition<sup>250</sup> and false advertising<sup>251</sup> laws, according to which it could be liable for *any* false statement, however inadvertent. Thus, if such statutes were found constitutional, one side of the debate is inhibited by facing a much lower threshold for liability than the other. This disparity is supposed to distort public debate by unfairly tilting the playing field against Nike.

This charge of unfairness could be understood in several ways: as unfairness to certain speakers, as unfairness to Nike itself, or as detriment to the public’s interest in open, fair debate on matters of public concern.

The first version of the charge can readily be dismissed. If I am right that a corporation cannot be presumed to speak for its shareholders or any other constituency, then there are no speakers treated unfairly by restrictions on Nike’s speech.

The suggestion that there might be some unfairness to Nike itself can be dismissed almost as quickly. Nike is a commercial corporation. The only interests it has are commercial. The only harms it can suffer are commercial. The only harm that Nike shareholders can suffer from harm to Nike is that their Nike investments lose value, not harms relating to their First Amendment rights.

The same asymmetry deplored with respect to debates about overseas sweatshop conditions applies to debates about matters that are uncontroversially commercial. It is

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<sup>246</sup> 376 U.S. 254 (1964).

<sup>247</sup> Sullivan held that such a high threshold was required for liability for defamation of “public officials” to prevent public debate about matters of public concern from being chilled by fear of liability for inadvertent falsehoods. Id. at 271, 279. The same standard was held to apply in actions for defamation against “public figures” generally in Gertz, 418 U.S. 323. Nike Corp. counts as a public figure.

<sup>248</sup> Sullivan, 376 U.S. at 280.

<sup>249</sup> E.g. Milkovich v. Lorain Journal Co., 497 U.S. 1, 15 (1990).

<sup>250</sup> Cal. Bus. & Prof. Code §§ 17200 *et seq.*

<sup>251</sup> §§ 17500 *et seq.*

settled doctrine that Nike may constitutionally be held liable, under any reasonable standard a legislature may impose—including strict liability, for false statements in its traditional commercial advertising, e.g., statements about price or product quality. But when a noncommercial speaker, such as Consumer Reports, falsely presents Nike’s products or prices in an unfavorable light, it too is entitled to the heightened protections of Sullivan.<sup>252</sup> As Nike Corp. has no non-commercial interest in the ideas it propounds, there is no reason to distinguish the two scenarios in terms of unfairness to Nike.

These asymmetries in the law of liability are reasonable. They may be justified in part on the ground that a business may be expected to be in a better position than other parties to verify claims about its own products and operations. The public interest in receiving reliable commercial information may be served best by a legal regime that allows more room for error to disinterested purveyors of such information, in order to avoid chilling their contribution.

In any event, there is nothing unfair to Nike or its shareholders in such asymmetries. Any disadvantage to Nike is shared by the businesses with which it competes for market share. Any burden to the industry as a whole fails to make such laws constitutionally more problematic than any other commercial regulation that may impose some costs on business for the benefit of the public. The fact that the legal regulations have to do with speech does not make them more unfair to Nike, as Nike itself has no speaker interests.

So, if the alleged difference in standards for liability between Nike and its critics has any First Amendment import, that import must be understood in terms of the public’s interest in open, fair debate of issues of public concern,<sup>253</sup> i.e., in terms of listener interests. In fact any supposed asymmetry is illusory. The debate supposedly stacked against Nike is commonly characterized as one between Nike and opponents of globalization. But that characterization is misleading. Opponents of globalization are for the most part disinterested parties. The plaintiff against Nike was simply a concerned citizen, bringing suit under the

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<sup>252</sup> Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

<sup>253</sup> See Kasky, 45 P.3d at 263 (Chin, J., dissenting) (“Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate”) (internal citations omitted); Nike, 123 S.Ct. at 2567 (Breyer, J., dissenting).

now-repealed ‘citizen attorney general’ provision of California’s fair business practices laws.<sup>254</sup> His First Amendment rights should be compared to the rights of disinterested defenders of Nike’s practices, not to Nike’s rights. Nike’s own speech protections are more properly compared to those of interested parties on the other side—in that case, the Chinese, Vietnamese, and Indonesian workers, most of them women under age 24,<sup>255</sup> who make Nike’s shoes. On either of these fairer characterizations of the debate, it is clear that the playing field is not tilted against Nike.

The idea that Nike’s voice needs to be protected to ensure that the public interest in fair debate is not impeded is ludicrous on its face. To listen to advocates of Nike’s right to speak, one would think that the U.S. airwaves were dominated by the voices of Nike’s overseas laborers, while Nike was unable to receive a hearing. The courts’ formalist approach to the First Amendment is supposed to prohibit consideration of such realities as the inability of Asian sweatshop workers to compete for the ear of the American public against Nike’s billion dollar budget for public relations.<sup>256</sup> I argue first that such formalism is misplaced when no speaker interests are threatened, and second that, even from a formalist perspective, it is incorrect that treating its speech as commercial would disadvantage Nike.

The Court’s refusal to take speakers’ actual resources into account makes sense only insofar as it is based on concern for speaker rights that might be impaired by restrictions on the ability of those with greater resources to dominate debate.<sup>257</sup> Such concerns do not apply to corporate speech, where no speaker rights are at stake. If one is to take seriously the official view that listeners’ principal interest in “robust debate on matters of public concern” is to allow them to reach an informed judgment about the disputed issues, then the ideal debate, from the standpoint of listeners, would be one in which all views get an equal chance to be heard. That ideal may not be achievable, nor even fully coherent—how many

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<sup>254</sup> California’s unfair business and false advertising statutes were amended by voter initiative (California Prop. 64) in 2004 to prohibit suits by plaintiffs who did not plead any injury to themselves. Notes and Comments, Cal. Bus. & Prof. Code §§ 17203, 17204, 17206, 17535, 17536 (West 2005).

<sup>255</sup> *Kasky*, 27 Cal. 4<sup>th</sup> at 947.

<sup>256</sup> In 1997 Nike reported annual expenditures for advertising and marketing of almost \$1 billion. *Kasky*, 45 P.3d at 247.

<sup>257</sup> See, e.g., *Buckley*, 424 U.S. 49, fn. 55 (rejecting “position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society”).

viewpoints are there, and what counts as a viewpoint that should be heard? Still, where concerns about violating speaker rights are absent, there is no reason for First Amendment jurisprudence not to consider inequality in actual ability to be heard.

Courts have been sensitive to such considerations in the context of traditional broadcast media, where the limited number of broadcast frequencies available has the consequence that more speech for one speaker literally means less speech for another.<sup>258</sup> But the following statement applies equally in other contexts:

[N]ot all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate ... in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal. ... [W]here ... one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, ... the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.<sup>259</sup>

Courts have occasionally recognized similar considerations in non-broadcast contexts. One of the reasons for requiring a more stringent standard for liability for defamation of public figures than of private figures was that the former “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements.”<sup>260</sup> Conversely, the Court declined to extend this higher level of protection to a credit report, on the ground that it did not require “special protection to ensure” robust debate on public issues.<sup>261</sup> The same could well be said of Nike’s speech. After all, the disparity in resources between Nike and its overseas workers is not a contingency of a particular case, but reflects a pattern to be expected in disputes between corporations and people—the very point of incorporation is to concentrate more capital than would otherwise be possible.

Even from a formalist perspective, treating Nike’s speech as commercial would not tilt the conditions of debate against Nike. Recall that the interested parties on the other side of this debate—the workers whose working conditions were at issue—were not U.S. citizens,

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<sup>258</sup> Notably in *Red Lion*, 395 U.S. 367, discussed *supra* sec. IIC1.

<sup>259</sup> *Banzhaf*, 405 F.2d at 1102-03 (Bazelon, J.) (upholding F.C.C. regulation requiring radio and television stations carrying cigarette advertising also to give air time to anti-smoking broadcasts).

<sup>260</sup> *Gertz*, 418 U.S. at 344.

<sup>261</sup> *Dun & Bradstreet*, 472 U.S. at 762.

and consequently were not protected by the First Amendment, except for the limited protection provided for the benefit of listener interests.<sup>262</sup> That level of protection applies to Nike's statements as well, even if they are classified as commercial speech. Moreover, corporations have the formal *advantage* of limited liability: a corporation such as Nike could use undercapitalized subsidiaries to put forward questionable claims, while insulating the parent corporation from liability.<sup>263</sup>

It is true that anti-Nike viewpoints could also be represented by many U.S. citizens, with full speaker rights under the First Amendment, including organizations whose principal purpose is to oppose globalization. That brings us to the second fair way to characterize the debate. The First Amendment rights of disinterested critics of Nike should be compared not to those of Nike, but to those of disinterested defenders of Nike's position. Disinterested parties wishing to defend globalization in general or Nike's overseas labor practices in particular can do so on the same terms as opponents of either. If anything distorts the debate it is the special amplification that corporate support makes possible for certain voices.<sup>264</sup>

The idea that subjecting Nike's corporate speech to easier standards for liability impairs one side of the debate appears plausible only because it is implicitly assumed that no one else would represent Nike's side of the debate, i.e., Nike's position is too bankrupt—intellectually or morally—to be defended by anyone not paid to do so. In short, the 'tilted playing field' objection is simply a variant of the 'unique corporate voices will be lost' objection, and the same response applies: holding corporate speech to a higher standard

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<sup>262</sup> See Mandel, 408 U.S. 753, discussed *supra* sec. IIC1. Granted, this point would not apply in a dispute between a domestic corporation and domestic workers. But the value for listeners of hearing opposing points of view does not depend on the nationality of the speaker. Nike's legal advantage vis-à-vis foreign the speech of foreign workers distorts debate at least as much any alleged disadvantage it might face against domestic workers.

<sup>263</sup> See Austin, 494 U.S. at 711-12 (Kennedy, J., dissenting).

<sup>264</sup> A similar point is sometimes couched in terms of the "special advantages extended by the State" to corporations. Bellotti, 435 U.S. at 809 (White, J., dissenting); see also William Patton & Randall Bartlett, Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology, 1981 Wis. L. Rev. 494, 498 (1981) ("To permit unrestricted corporate speech is to grant to certain individuals a special state-created mechanism for speaking"). But the claim of distortion does not depend on the claim that corporations' ability to concentrate wealth depends on any special concession from the state, but only on recognizing that "[r]ather than a group of citizens, a corporation must be understood as a pot of money." Greenwood, *supra* note 23, at 1054. If the norm for free debate is a situation in which everyone voices her views to the extent that she is able and cares to, then debate is distorted when this pot of money is thrown behind one voice without regard to anyone's belief that the viewpoint expressed has any merit beyond serving a corporation's financial interest.

neither infringes on the rights of any speaker nor interferes with the desired outcome that “everything worth saying shall be said.”<sup>265</sup>

### **B. Drawing Lines Between Corporate and More Protected Speech**

Even if it seems plausible that no speech by business corporations has any claim to greater protection than commercial speech, it may be questioned whether it is possible to draw a principled distinction between organizations that should be treated as commercial for First Amendment purposes and those that should not. If the foregoing analysis is correct, the crucial question on which to base such distinctions is whether the speech of the organization implicates non-economic speaker interests. We have already seen that corporate form is not enough on which to base a distinction: advocacy organizations with corporate form do implicate speaker interests. The distinction between for-profit and not-for-profit corporations may likewise be insufficient: Austin suggests that some not-for-profit corporations do not implicate speaker interests. Inversely, the New York Times Company is a for-profit corporation, but it is not plausible that all speech by the New York Times should be treated as commercial speech. Some non-press business corporations may have an ideological character that makes one hesitate to characterize all their speech as purely commercial either. And if the contrast between utilitarian organizations and those that represent expressive interests is crucial, how are labor unions to be classified? A different kind of line-drawing problem concerns which speech should be attributed to the organization. When is the public speech of a corporate manager her own, entitled to the highest level of First Amendment protection, and when is it corporate speech? In this section I attempt to show that principled answers are available to such questions. While there may be difficult borderline cases, the judgments called for will be similar to judgments that courts already need to make.

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<sup>265</sup> A related pragmatic objection has been raised against holding corporations liable for false statements: that the threat of liability might deter corporations from addressing such ‘social responsibility’ concerns as their overseas labor practices. *E.g. Nike*, 123 S.Ct. at 2568 (Breyer, J., dissenting). But it is not clear how much is lost by a decline in corporate communications on social issues, when those communications include substantial falsehoods. The argument that fear of liability for inadvertent misstatements will result in a reduction of truthful disclosures is dubious: it should not be difficult for Nike to verify straightforward claims about its own rates of pay and working conditions. At most, this consideration supports applying a negligence standard rather than a strict liability standard to Nike’s false statements; it does not justify requiring an “actual malice” standard. In any event, if consumer demand is not sufficient to elicit reports from corporations on their social practices, there are no constitutional obstacles to requiring Nike to make such information public.

1. Non-profit advocacy organizations. Little more needs to be said here. As argued earlier, because members join advocacy organizations to broadcast their beliefs, regulation of such an organization's speech infringes members' speaker interests. In contrast, corporate speech is not a broadcasting of anyone's beliefs, nor is it intended to be.

The point is *not* that corporate speech is necessarily the speech of an agent, that there is unlikely to be unanimity of viewpoint among members (shareholders), or that an agent may execute his fiduciary responsibilities imperfectly. All of this is true of advocacy organizations as well. The key contrast is that the fiduciary responsibility of a spokesperson for an advocacy organization is to express, as best as possible, the beliefs of its membership. A corporate spokesperson has no corresponding responsibility to express the beliefs of shareholders or any constituency. Her responsibility is to issue those communications she judges to be in the best economic interests of the organization.

Distinguishing between for-profit and non-profit corporations may often roughly track the distinction at issue, but it does so imperfectly. The crucial distinction is that between "expressive" and "utilitarian" organization, in Dan-Cohen's terminology,<sup>266</sup> where an expressive organization is one whose speech is intended to represent the views of its members. Some non-profit corporations may fall on the non-expressive side of the divide, as the Supreme Court found with respect to the Michigan Chamber of Commerce in Austin.<sup>267</sup> (It is relevant, though, that the Chamber of Commerce could be viewed as largely representing for-profit corporations.<sup>268</sup>)

Distinguishing between utilitarian and expressive organizations does not prevent any novel practical difficulties. Courts already need to draw such distinctions in the context of campaign finance regulation,<sup>269</sup> and in deciding whether an association is sufficiently expressive that it may legally discriminate against protected categories in its membership or employment practices.<sup>270</sup>

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<sup>266</sup> *Supra* note 118, at 1244-50.

<sup>267</sup> 494 U.S. at 661-63.

<sup>268</sup> The Austin Court considered this a significant factor in favor of treating the Chamber as akin to a business firm. 494 U.S. at 664.

<sup>269</sup> Discussed *supra* sec. IIB1.

<sup>270</sup> See Boy Scouts v. Dale, 530 U.S. 640 (2000).

2. Business organizations with a social agenda. Some businesses might be established specifically for the purpose of promoting some political or social agenda. For example, anti-globalization activists might establish a business for the purpose of demonstrating non-exploitative approaches to international trade. What then if such a business is set up as a for-profit corporation? It could even be marketed in such a way that its investors share the political/social goals of the organizers. In such a case, organizational speech might well implicate speaker interests, and therefore the rationale for treating corporate speech as commercial seems less applicable.

In practice, however, it could be difficult to distinguish such ‘advocacy businesses.’ Almost any corporation could recast its mission in terms of some social agenda. Nike could maintain that its use of Asian contractors was intended to demonstrate the benefits of globalization, while another corporation could maintain that it intended to demonstrate the social benefits of relying on domestic manufacturing. Higher protection for the speech of business corporations with a social agenda would require intrusive inquiry and potentially arbitrary judgments as to the motivations of entrepreneurs and investors. On the other hand, not distinguishing ‘advocacy businesses’ risks failing to accord higher protection to some speech that does implicate speaker interests.

One solution might be to treat speech by for-profit corporations as commercial in general, but allow an exception for corporations whose articles of incorporation expressly allowed profit-maximizing to be balanced against some other stated social or political corporate goal. Particular speech by such a corporation could be classified as commercial or not, according to the standards currently used to decide whether speech is commercial, without the presumption that *all* its speech is commercial (unless perhaps a court finds pretextual the stated alternative corporate objectives).

If the foregoing proposal proves unfeasible, it would be acceptable to treat all speech by for-profit corporations with social agendas as commercial. If the principal differences in treatment for commercial speech concern greater accountability for false statements about a business’ own practices or products, and greater leeway for compelling information about those, then why not hold corporations-with-social-agendas to the same standard? It may

seem odd to suggest that when anti-globalization activists criticize Nike, their speech should be highly protected, but that when they form an alternative business, the same speech should become less protected. But it must be remembered that those same activists lose no protection for criticisms of Nike in their own voice. Their rights are not infringed if their use of corporate funds to this end does not receive the same level of protection.

It would seem, however, that at least one class of publicly traded for profit corporations needs to be treated differently—the press.

3. The press. The New York Times Company, like many news companies, is a publicly traded for-profit corporation. If the thesis that all corporate speech is commercial entailed that anything published in the Times is commercial speech, that would count heavily against the thesis. But that inference can be resisted on several grounds.

A principled distinction can be drawn between speech of the New York Times *Company* and speech *in* the New York Times. The former is speech that is part of doing business, like the speech of any other business. When the company makes representations to potential subscribers about the reliability of its delivery services, or to distributors, suppliers, or workers about benefits, there is no reason those representations should receive higher protection than does analogous commercial speech by any other corporation.<sup>271</sup> The same should be true of company representations to the public about how well it treats its employees, suppliers, or the environment. In contrast, published articles or opinion pieces may more properly be viewed as speech of their respective authors than as speech of the New York Times Company.<sup>272</sup> Even unsigned editorials may be taken to be the speech of the editorial staff. At any rate, they are not ordinary business speech, but the product of the particular business. Crucially, the earlier arguments of this paper do not apply to them: unlike the speech of the New York Times Company, there is no fiduciary obligation that editorials maximize the profitability of the company (even if there may be pressures in that direction).

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<sup>271</sup> One of the reasons for accordng commercial speech lesser protection is that “the State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.” Edenfield, 507 U.S. at 767. Press companies can be regulated like any other business with respect to their business affairs. Pittsburgh Press, 413 U.S. at 397 (Douglas, J., dissenting, citing Associated Press, 326 U.S. 1. It follows that speech that is part of a press’s business affairs is commercial speech like any other.

<sup>272</sup> See Greenwood, *supra* note 23, at 1057-58.

An alternative approach could find in the free press clause of the First Amendment a principled reason for treating the press differently.<sup>273</sup> Given that it has always been accepted that the free speech clause protects written publications of all sorts, the press clause is in danger of appearing redundant, unless it is understood to provide some particular protection for the press.<sup>274</sup> Such an approach is in keeping with longstanding jurisprudence recognizing the unique role of the press as a check on government misconduct.<sup>275</sup> There is precedent for singling out the press for special protection: campaign finance laws often explicitly exempt media companies from restrictions on corporate spending and contributions.<sup>276</sup> The Court has usually found those exemptions unproblematic.<sup>277</sup>

What then if the Nike Corporation starts its own newspaper, disseminating misleading statements about its products or its overseas business practices, and then claims that it would violate freedom of the press to treat those statements as commercial speech? Or what if Nike simply buys the New York Times to the same end? If the parent company merely creates or allows a perception that favorable publicity for Nike will lead to reporters' and editors' professional advancement, the result may not differ much from the situation at many actual newspapers and broadcast companies. Unfortunate as it may be, the speech of reporters and editors may often be influenced by external pressures; such pressures are not enough to make the resulting speech that of the company, rather than of the individual speaker. On the other hand, if the parent company orders specific content about its own practices—analogue to Nike's 'press releases'—to be published in its newspaper, it might be reasonable to treat such content as the speech of the parent company. One can imagine a spectrum of intermediate cases, in which the parent company doesn't dictate specific content, but orders its business practices to be featured prominently and favorably. But the possibility of difficult borderline

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<sup>273</sup> See C. Edwin Baker, Press Rights and Government Power to Structure the Press, 34 U. Miami L. Rev. 819, 824; Bezanson, *supra* note 23, at 808-09.

<sup>274</sup> Although one former Justice argued that the press clause confers special protections on the press, Potter Stewart, Or of the Press, 26 Hastings L.J. 631 (1975), the Court has never officially endorsed or rejected this view. See Bellotti, 435 U.S. at 798 (Burger, C.J., concurring).

<sup>275</sup> E.g. Mills v. Alabama, 384 U.S. 214, 219 (1966); Martin, 319 U.S. at 143 fn. 3 (1943) (quoting Writings of Thomas Jefferson); Grosjean v. American Press Co., 297 U.S. 233 (1936).

<sup>276</sup> E.g. 2 U.S.C. § 434(f)(3)(B)(i); § 431(9)(B)(i).

<sup>277</sup> E.g. McConnell, 124 S.Ct. at 697-98; Austin, 494 U.S. at 668. Such exemptions have been questioned, however, in McConnell, 124 S.Ct. at 742-43 (Kennedy, J., dissenting in part); *id.* at 740-41 (Thomas, J., dissenting in part); Buckley, 424 U.S. at 51, fn. 56; and Belotti, 435 U.S. at 796 (Burger, C.J., concurring).

cases should not obscure the fact that the distinction between speech of the press and ordinary business speech of a parent corporation will be quite clear in most cases.

Where there are difficult cases near the borders, those difficulties should be no greater than in other contexts in which courts have had to distinguish between genuine press publications and commercial—or other—activity that may be more closely regulated. For example, the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act (BCRA) of 2002, exempts news reports and editorials in newspapers and broadcasts by independent media companies from various regulations, but excludes newspapers or broadcast companies controlled by candidates or political parties from the exemptions.<sup>278</sup> The Investment Advisors Act prohibits professionals who are not registered investment advisors from giving investment advice by people, but excludes from this prohibition “the publisher of any *bona fide* newspaper, news magazine or business or financial publication of general and regular circulation.”<sup>279</sup> Likewise, news stories are exempted from the requirement that broadcasters provide equal time to candidates for public office.<sup>280</sup> To enforce any of these statutes, courts must distinguish *bona fide*, independent press from campaign newsletters, investment newsletters, and the like, requiring judgments analogous to those that would be required to determine whether an article appearing in a Nike-owned newspaper is a *bona fide* news article or Nike’s corporate speech.<sup>281</sup> In fact such distinctions could be needed even in conventional commercial speech cases. If a newspaper editorialized in favor of a transaction in which it had an economic interest, that would presumably not be commercial speech, while the same content in a non-newspaper format would be.<sup>282</sup>

Judicial analyses in those other contexts could serve as starting points for distinguishing press speech from corporate speech in close cases. For example, in applying the press exemption to the Investment Advisers Act, the Supreme Court has reasoned that “a ‘bona

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<sup>278</sup> *E.g.* 2 U.S.C. § 431(9)(B)(i) (2004); 2 U.S.C. § 434(f)(3)(B)(i) (2004).

<sup>279</sup> 15 U.S.C. § 80b-2(a)(11)(D) (2004).

<sup>280</sup> *See McConnell*, 124 S.Ct. at 698.

<sup>281</sup> For example, in deciding whether certain publications qualify for the press exemption from campaign finance regulations, courts have asked “whether the press entity was acting as a press entity in making the distribution complained of.” *Reader’s Digest Ass’n, Inc. v. F.E.C.*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

<sup>282</sup> Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 Yale L. J. 1833, 1859 (1981).

fide' publication would be genuine in the sense that it would contain disinterested commentary and analysis as opposed to promotional material.”<sup>283</sup> The publications in question in that case were found to fall under the exclusion, in part because “they are published by those engaged solely in the publishing business and are not personal communications masquerading in the clothing of newspapers, news magazines, or financial publications. Moreover, there is no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest.”<sup>284</sup> Drawing on this precedent, the D.C. Circuit held in another case that “presentation of articles as objective reporting, if in fact the articles are paid for by the company featured, would be inherently misleading,” and so, would not fall under the bona fide press exemption.<sup>285</sup> Distinguishing a genuine newspaper from an outlet for corporate publicity could be guided by similar criteria, and should prove no more difficult.<sup>286</sup>

4. Labor unions. It is less clear where labor unions fit in a scheme that distinguishes expressive organizations from utilitarian ones. In recent decades, campaign finance law has tended to treat corporations and unions the same,<sup>287</sup> though it has sometimes been suggested that restrictions on corporations’ election-related expenditures and contributions are *more* problematic than identical restrictions on unions.<sup>288</sup>

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<sup>283</sup> Lowe v. SEC, 472 U.S. 181, 206 (1985).

<sup>284</sup> Id. at 209.

<sup>285</sup> SEC v. Wall St. Publ’g Inst., Inc., 851 F.2d 365, 371 (D.C. Cir. 1988).

<sup>286</sup> Greenwood, *supra* note 23, at 1060-61, proposes a simple test: when a corporation *pays* to have speech disseminated, it is presumptively corporate speech; when the corporation *receives* payment for speech, it is presumptively the speech of human authors.

<sup>287</sup> Both FECA, as amended in 1974, and RCRA treat corporations and unions alike with respect to campaign-related expenditures and contributions. For an overview of FECA rules concerning unions and corporations, see James Weinstein, Campaign Finance Reform and the First Amendment: An Introduction, 34 Ariz. St. L.J. 1057, 1063 (2002). For an overview of RCRA rules concerning unions and corporations, see id. at 1071-71; Erwin Chemerinsky, Five Justices Hold Firm on ‘Soft’ Campaign Money, 40-MAR Trial 78, 81 (2004).

The courts have likewise analyzed corporate and union political spending similarly. Using union funds, from mandatory dues, to support political candidates and fund unrelated political speech was held to amount to coerced speech, violating the First Amendment rights of dissident union members, Abood, 431 U.S. at 234-35; see also Int’l Ass’n of Machinists v. Street, 367 U.S. 740 (1961), just as restrictions on corporate political speech were later held to protect shareholders who might disagree with the speech. Nat’l Right to Work Comm., 459 U.S. at 208; Beaumont, 123 S.Ct. at 2211 (both treating corporate and union speech alike).

<sup>288</sup> E.g. Redish & Wasserman, *supra* note 134, at 275-76; Larry E. Ribstein, Corporate Political Speech, 49 Wash. & Lee L. Rev. 109, 139-40 (1992). First Amendment rights of dissenting union members are supposed to require greater protection than those of dissenting shareholders, because it is easier for a shareholder than for a union member to escape from financing political speech to which she objects: the shareholder can simply sell her shares, whereas the union member may have to give

In fact, however, while a principal purpose of unions may be to look out for the economic interests of their members, unions also serve as vehicles for political expression, in ways that ordinary for-profit corporations do not. Various contrasts between unions and corporations reflect this difference.<sup>289</sup> Union members are generally more involved in organizational decision-making than are shareholders of a publicly traded corporation. Many important decisions in large unions are made at the local level. Union leaders are elected, and many major questions are decided by vote, in a one person-one vote system. In contrast, while in theory shareholders elect directors and can present resolutions on corporate policy at annual meetings, they have unequal voting rights, many shares are controlled by institutional investors or holding companies, and they have little authority over directors.<sup>290</sup> Union members are also likely to identify with their roles as union members more than shareholders identify with theirs, as illustrated by the unlikelihood of finding groups of shareholders engaged in the cheering or chanting that can be found at union rallies or pickets.

Unions should probably be viewed as hybrids of utilitarian and expressive organizations. A union is most like an expressive organization in the early stages of union organizing, when it is similar to any other group seeking to vindicate rights or effect social or political change. It becomes more like a utilitarian organization as it becomes institutionalized, e.g., after it becomes recognized as an official bargaining representative, especially where union membership becomes a condition of employment.

Political speech by such an established union might be tantamount to coerced speech by members who disagree but are required to pay dues. Therefore, it may be inappropriate to treat all union speech simply as collective advocacy speech. At the same time, unlike corporate political speech, much union political speech does implicate speaker interests. Therefore, union speech cannot all be classified as commercial speech either. Just how union political speech should be treated under the First Amendment is a difficult question, but it does not point to any difficulties regarding how to treat corporate political speech.

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up his job. *See also* Austin, 494 U.S. at 709-10 (Kennedy, J., dissenting) (drawing similar contrast between members of non-profit corporations and union members).

<sup>289</sup> Some of these differences are alluded to in *Schneider*, *supra* note 65, at 1263; *Brudney*, *supra* note 23, at 292-93; *Baker*, *supra* note 11, at 656, fn. 35.

<sup>290</sup> Regarding how little power shareholder voting exercises, *see* *Greenwood*, *supra* note 104, at 1039-40; *Joo*, *supra* note 73, at 42-46.

5. Other forms of business organization. Does the argument that corporate speech does not implicate speaker interests extend to other forms of business organization? It does not apply to sole proprietorships, where there is no meaningful difference between speech of the proprietorship and speech of the proprietor. Whether a statement by a business proprietor is commercial speech would depend on the content and context of the statement in question. In partnerships or closely held corporations, there is some distinction between the speech of the organization and the speech of associated parties. But to the extent that investor-owners have more direct involvement in and control over what the business does, it is less clear that no speaker interests are implicated by the business' speech. Therefore, it may not be appropriate to treat all speech by a partnership or closely held corporation as commercial speech.

6. Individual speech by corporate officials. The line-drawing questions examined so far concern distinctions between corporations and other organizations whose speech might merit a higher level of protection. A different sort of line-drawing problem arises in distinguishing corporate speech from speech by corporate spokespersons in their own voice. In order to treat all corporate speech as commercial without infringing on the rights of corporate managers and other spokespersons to broadcast their own views, courts must be able to determine when the public comments of an executive about her company are the company's speech, and hence commercial, and when they are simply her own personal views.

Again, whatever difficulty may arise in deciding close cases, the legal questions here are no different from those that arise standardly in other contexts. For example, when liability attaches to speech by a corporate officer, courts need to decide whether the speech is that of the corporation to determine whether the corporation should be held liable. More generally, the question of whether a corporate officer is speaking for the corporation or herself is the familiar question of whether she is acting as a corporate agent, and a wide body of agency law is available to address it. Relevant factors include whether the speech is within the scope of the corporate officer's duties, perhaps whether it would reasonably be taken by listeners to represent the corporate view, and who pays for the speech. If the speech is specifically paid for by the corporation, that would be strong evidence that it is corporate speech. If it is not directly paid for, one might still ask whether it is supported by corporate

resources, as when a corporate jet is used to fly an officer to deliver a speech, or when corporate staff, as part of their work responsibilities, help to draft or research a speech.

The analysis required is no different from that required in applying commercial speech doctrine currently. For example, when a company officer publicly makes false claims about the company's products, such that those claims would uncontroversially be commercial speech if attributed to the company, they would not necessarily be commercial if they are expressions of his own views, unconnected to the company's marketing.

In summary, none of the putative difficulties in distinguishing commercial corporations from organizations whose speech should be more protected, or in distinguishing corporate speech from individual speech, constitute significant objections to the proposal that corporate speech be treated as commercial. There are principled grounds for distinguishing other sorts of organizations. Close cases will be decidable according to criteria that courts already rely on for other purposes. Reduced protections for the speech of commercial corporations need not imply reduced protections for speech by the press, advocacy organizations, or even unions, nor for the speech of corporate managers or employees in their own voice.

## CONCLUSION

I have argued that, because it is not an exercise of the speaker rights of any person, speech by a publicly traded commercial corporation is entitled to no more constitutional protection than (at most) that accorded commercial speech. I have not considered whether or to what extent constitutionally permissible regulation of corporate speech is desirable as a matter of policy. Nor have I examined the limits of what regulation is constitutionally permissible, i.e., what is the minimal level of protection constitutionally required for corporate speech—or commercial speech generally. It follows from my argument that corporations could constitutionally be held liable for false statements about any topic on a lesser showing than *New York Times* malice. The argument leaves open, however, whether strict liability, as per the California statutes under which Nike was sued, is constitutional, or whether some intermediate standard, such as negligence, is required by the First Amendment.

It also leaves open whether the First Amendment limits the severity of the penalties that may be imposed for false statements by corporations.

But if it is correct that no rights in a strong sense are implicated in corporate speech, it might be reasonable to conclude that there are no constitutional limits on penalties or liability standards, provided only that the regulatory and punitive regime may reasonably be judged to serve the public interest. The same may be true concerning the still more controversial question of when (or whether) true speech advocating legal activity may constitutionally be regulated or suppressed. Alternatively, penalties for false speech and regulation of truthful speech could be thought to be justified only if they can reasonably be judged to serve general First Amendment interests in free discussion more than they hinder them. (And some will argue that regulations of truthful speech advocating lawful activity never do so.) But at any rate, it follows that weighing corporations' speaker interests against the First Amendment interests of other parties is misconceived, as is the principle that it is illegitimate to silence corporate voices so that other voices may be heard. Because corporate speech vindicates no one's expressive interests, restrictions can in principle be justified by showing that listener interests will be benefited more than they will be harmed.

I have argued that commercial speech doctrine should take notice of developments in First Amendment law regarding campaign finance regulation. But the implications of making the connections run in both directions. In particular, the conclusion that all corporate speech is commercial implies that, contrary to Bellotti, Austin, and McConnell,<sup>291</sup> regulation of corporate election-related expenditures may be subjected to less than strict scrutiny.

The arguments of this paper are not just of theoretical interest, but are arguments that could prevail in court. They have proceeded from within the existing framework of First Amendment law, extrapolating from accepted doctrine concerning the justification of protections for commercial speech, the treatment of corporate speech under campaign finance law, the secondary weight traditionally accorded in practice to listener interests under the First Amendment, and the fiduciary responsibilities of corporate managers. While my

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<sup>291</sup> Although the Court upheld regulations of corporate speech in Austin and McConnell, it did so on the basis of finding compelling state interests that justified the regulations under strict scrutiny, not on the basis that strict scrutiny was not required.

conclusions may not be necessarily entailed by—or in some cases entirely consistent with—established legal doctrine, nor is it likely that today’s Supreme Court would accept them, they could be accepted without major breaks with established precedent or its underlying principles. That is, it is not difficult to “get there from here.”

In arguing from within received doctrine, I have accepted for purposes of argument the theoretical framework the courts have used as a basis for ascribing to listeners a strong epistemic interest in “open debate” (meaning debate free from direct government restraints, though not free from government-supported structures imposed by an economic system marked by great inequality). But the relation between listeners’ ability to receive messages unimpeded by government interference and a general societal interest in knowledge and justified belief—or autonomy—has been, at best, grossly oversimplified in First Amendment jurisprudence in several respects. First, power imbalances—and consequent imbalances in ability to be heard—among individuals and groups with different perspectives may obscure understanding more than would a simple lack of debate.<sup>292</sup> Second, natural science, the area of inquiry most widely regarded as achieving gains in knowledge, does not proceed on the basis that all voices or viewpoints merit equal hearing, nor that the hearing an idea receives should be proportional to the funds available to broadcast it; free inquiry is balanced by deference to expertise.

Finally, whatever pitfalls may attach to allowing government to judge the value of speech, one may question the Court’s insistence that more speech is always better, or that all speech contributes—however marginally—to autonomy or to the social pursuit of knowledge. The Justices have been quick to label any restrictions on advertising in order to prevent behavior from being influenced in undesirable ways as “manipulation” of citizens’ minds.<sup>293</sup> Such manipulation is central to what the First Amendment is supposed to protect against: “The essence of ... forbidden censorship is thought control.”<sup>294</sup> But what if much

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<sup>292</sup> The epistemic ideal may be more like Habermas’ counterfactual “ideal speech situation,” in which each voice has equal chance to be heard and to respond, *see* Jurgen Habermas, Towards a Theory of Communicative Competence, 13 *Inquiry* 360 (1970), or like Meiklejohn’s model of the town meeting, *see* Meiklejohn, *supra* note 225, at 24-27, than like the courts’ ideal of an unregulated market of ideas.

<sup>293</sup> *See* Central Hudson, 447 U.S. at 574-75 (Blackmun, J., concurring in judgment); Edge, 509 U.S. at 436 (Stevens, J., dissenting); Liquormart, 517 U.S. at 520 (Thomas, J., concurring).

<sup>294</sup> Police Dept. v. Mosely, 408 U.S. 92, 96 (1972).

commercial advertising is closer to thought control, or to manipulation on the order of subliminal advertising, hypnotism, or injection with drugs increasing suggestibility, than to advancing reasoned discourse? If so, regulation might actually *protect* listener autonomy. A similar complaint was raised against popular culture in general (and radio in particular) over sixty years ago by Meiklejohn: “It is misinterpretations such as this which ... are giving the name ‘freedoms’ to the most flagrant enslavements of our minds and wills.”<sup>295</sup>

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<sup>295</sup> Quoted in Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 255). Criticisms of commercial speech doctrine along related lines have been developed more recently in Ronald K.L. Collins & David M. Skover, Commerce & Communication, 71 Tex. L. Rev. 697 (1993); Tamara R. Piety, “Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech, 25 Seattle U.L. Rev. 377 (2001); and Daniel Hays Lowenstein, “Too Much Puff”: Persuasion, Paternalism, and Commercial Speech, 56 Cinc. L. Rev. 1205, 1220-23 (1988).