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CORPORATE SPEECH & THE FIRST AMENDMENT: HISTORY, DATA, AND IMPLICATIONS

*John C. Coates IV**

This Article draws on empirical analysis of court decisions, history, and economic theory (a) to show that corporations have begun to displace individuals as the direct beneficiaries of the First Amendment, a shift from individual to business First Amendment cases is recent but accelerating, and (b) to outline an argument that such cases typically reflect a form of socially wasteful rent seeking—not only bad law and bad politics, but also increasingly bad for business and society. Basic facts about corporations in history are reviewed, regulation of commercial speech in U.S. history is summarized, and the emergence of the First Amendment in case law is retold, with an emphasis on the role of constitutional entrepreneur Justice Lewis Powell prompting the Supreme Court to invent corporate speech rights. The chronology shows that First Amendment doctrine long *post*-dated pervasive regulation of commercial speech, which long *pre*-dated the rise of the U.S. as the world’s leading economic power—a chronology with implications for originalists, and for policy analysis of the value of commercial speech rights. The Article then analyzes Supreme Court and Courts of Appeals decisions to quantify what others¹ have noted qualitatively: corporations have

* John F. Cogan Professor of Law and Economics, Harvard Law School. Thanks for helpful discussions—but no blame for the contents of this paper—should go to John Bonifaz, Ben Clements, Jeff Clements, Clarke Cooper, Ron Fein, Jill Hasday, Vicki Jackson, Geoff Stone, Ava Scheibler, Leo Strine, Mark Tushnet, and to participants at the legal symposium on “Advancing a New Jurisprudence for American Self-Government and Democracy, co-sponsored by Harvard Law School and Free Speech For People on Nov. 7, 2014, and at a “Last Lecture” at Harvard Law School on February 11, 2015. Any errors are mine. For disclosure of financial interests potentially relevant to this Article, see *Faculty Disclosures re: Related Outside Interests and Activities*, HARV. L. SCH. [<http://perma.cc/TTH6-LNFE>].

1. See, e.g., Thomas Jackson & John Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Frederick Schauer, *First Amendment Opportunism*, in LEE C. BOLLINGER & GEOFFREY R. STONE, EDs., *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174–97 (2002); TAMARA

increasingly displaced individuals as direct beneficiaries of First Amendment rights, they have done so recently, but with growing speed since *Virginia Pharmacy* (1976),² *Bellotti* (1978),³ and *Central Hudson* (1980).⁴ Nearly half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals. Such cases represent examples of a particular kind of corruption, defined here as a form of rent seeking: the use of legal tools by business managers in specific cases to entrench reregulation in their personal interests at the expense of shareholders, consumers, and employees, and in aggregate to degrade the rule of law by rendering law less predictable, general and clear. This corruption not only risks the loss of a republican form of government emphasized by most critics of *Citizens United*, but also risks economic harms – a package of risks one could call (with some but only some exaggeration) “the risk of Russia.”

I. SOME HISTORY

In this Part, I review basic historical facts at the intersection of constitutional, business, and corporate law. Nothing in this section is news – except that business and corporate scholars may not be aware of the details of the constitutional history, and constitutional scholars may not be aware of the details of the business and corporate legal history. This Part of the Article thus represents an effort at improving dialogue across the sub-disciplinary divide between corporate, business and constitutional scholars. Knowledge about each sub-discipline is increasingly necessary to understand the background for, and context and

PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2013); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, THE NATION (June 3, 2013), available at <http://tinyurl.com/mpggrf7>.

2. 425 U.S. 748.

3. 435 U.S. 765.

4. 447 U.S. 557.

implications of, recent, controversial decisions such as *Citizens United*⁵ and *Hobby Lobby*.⁶

The key points of the three sections are (a) from the inception of the U.S., corporations were crucial to economic growth and were not merely constituted but heavily regulated by law, prominently through structural laws constraining their activities, (b) commercial speech has been regulated throughout U.S. legal history, both at common law and over time through statutes and regulations that largely reflect the purposes of the common law, and (c) the First Amendment has only recently been used by courts to strike down laws, and even more recently to strike down laws constraining commercial speech. In combination, these points should (1) lead committed originalists to reject First Amendment rights for corporate speech, (2) make courts (whatever their interpretive approach) reluctant to find such rights unless tightly linked to rights of specific individuals that cannot otherwise be protected and whose expressive (not financial) interests are represented by a legal entity, and (3) reduce the policy appeal of such rights, because they were not necessary to create the massive economic growth that turned a marginal set of colonies into the world's leading economic power by 1900.

A. A CAPSULE HISTORY OF THE ROLE OF CORPORATIONS IN BUSINESS HISTORY

I begin by reviewing the role of corporations in U.S. business history. This review is broad in scope and summary in form, meant to put in context more focused (but useful) historical accounts by others, such as (for example) research on the question of how the “Founding Fathers” might have thought about whether business corporations should have First Amendment rights distinct from those held by the individuals acting through or on behalf of the

5. 558 U.S. 466 (2010). For an empirical analysis of the consequences of *Citizens United*, see John C. Coates, *Corporate Politics, Governance and Value Before and After Citizens United*, 9 J. EMP. LEGAL STUD. 657 (2012). For a trenchant legal critique co-authored by the Chief Justice of the Delaware Supreme Court, see Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course? The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 101 (2015). For additional commentary, see ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 497 (“[A]ny Justice attempting seriously to employ an originalist analysis in *Citizens United* would also have had to uphold the legislation.”).

6. ___ U.S. ___, 134 S. Ct. 2751 (2014).

corporations, or how the authors of the Fourteenth Amendment might have thought about the problem given the historical events of the second half of the nineteenth century.⁷ The main take-away is that businesses have long and pervasively been creatures of law and regulation, both in the United Kingdom leading up to the founding era, and in the U.S. corporations—in their creation, governance and activities—have from the outset of modern history been structured and regulated by law. This enmeshment of businesses in law was so intrusive and intense that—had it carried over to individuals—it would have been viewed as intolerable. Yet it was not merely tolerated, but taken for granted, even celebrated, for more than two centuries of Anglo-American history.

As recounted in detail by Mary Bilder, among others, corporations from their inception in English (and hence, American) history were extensions of government—a “particular type of delegated jurisdiction within the ‘King’s exclusive prerogative.’”⁸ Typically, the sovereign granted what would then have been understood as royal franchises, powers or property to a subset of citizens, and the “corporation” of those citizens held authority from the sovereign over the domain specified in the corporate charter or equivalent documents. In English law, the term “corporate” used in a modern sense to refer to a legal entity can be traced to 1410,⁹ and commentary on corporations’ legal powers dates to the late-sixteenth and early-seventeenth centuries, a time when incorporations were increasing.¹⁰

7. See, e.g., Leo F. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. (forthcoming 2015); see also John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806 (1989); Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment* (2014), <http://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/corporations-14th.pdf>.

8. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 502–10 (2006) (quoting Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 364 (2004)).

9. *Id.* at 516 n.58 (citing Y.B. 11 Hen. IV, fol. 47a, Hil., pl. 21 (1410) (Seipp No. 1410.021) (“*un University fuit corporate*”)), reprinted in J.H. BAKER & S.F.C. MILSOM, *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750*, at 613 (1986).

10. *Id.* (citing ROBERT BROOKE, *LA GRAUNDE ABRIDGEMENT* 188–92 (1573); *id.* at 517 n.61 (citing *A Discourse of Corporations* (c. 1587-1589), in 3 TUDOR ECONOMIC DOCUMENTS 273 (R.H. Tawney & Eileen Power eds., 1924); *id.* at 513, n.39 (citing 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* 250 (Garland 1979) (1628); WILLIAM SHEPHEARD, *OF CORPORATIONS, FRATERNITIES, AND GUILDS* 1–2 (London, H. Twyford, T. Dring & J. Plate 1659). On the numbers and nature of corporations through English history, see RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* (2000).

Among these early corporations¹¹ were the overseas trading companies, such as the East India Company.¹² These trading companies functioned as recognizably (early) modern for-profit business enterprises—with dispersed private ownership, internal and external struggles for corporate and market control, and even hostile takeovers and mergers.¹³ However, they also functioned as extensions of the military and political power of the English government, comprising part of the emerging English naval power and extending English control to India, the East Indies and North America. England's trading companies “did not pursue ‘peaceful trading’ because they believed that neither Portuguese [the rivals of the English] nor Asian rulers would allow them to do so without arms,” such that the “use of force remained an integral part of the commercial presence in Asia” of business corporations throughout the early modern period.¹⁴

The East India Company also played an important role in public finance, lending money to the Stuarts (with James II becoming a shareholder), before managing to survive the Glorious Revolution to compete with the newly formed Bank of England and the ill-fated South Sea Company in providing fiscal support to the new Orange monarchy, recruited from the Netherlands to provide England's new line of (if you will) chief executive officers.¹⁵ Nascent political parties formed on the shareholder bases of rival trading firms, and law, politics and business were intertwined in numerous detailed ways.¹⁶ Over time, the Bank of England came to play the dominant role in British public finance, and was structurally barred from engaging in non-financial activities, such as trade, or, as the industrial revolution progressed, manufacturing.

11. For an overview of types of early corporations, see, for example, 1 HENRY ALWORTH MEREWETHER & ARCHIBALD JOHN STEPHENS, *THE HISTORY OF THE BOROUGH AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM* xxviii–xxix, xxxi (1835).

12. The best overall treatment of these earlier companies remains WILLIAM ROBERT SCOTT, *THE GENERAL DEVELOPMENT OF THE JOINT-STOCK SYSTEM TO 1720* (Thoemmes 1993) (1910).

13. JOHN KEAY, *THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY* (1991); K.N. CHAUDHURI, *TRADE AND CIVILIZATION IN THE INDIAN OCEAN: AN ECONOMIC HISTORY FROM THE RISE OF ISLAM TO 1750* (1985); Dan Bogart, *There Can Be No Partnership with the King: Regulatory Commitment and the Tortured Rise of England's East Indian Merchant Empire* (Nat'l Bur. Econ. Research, Working Paper, 2015), available at http://eml.berkeley.edu/~webfac/seminars/bogart_211seminar.pdf.

14. Chaudhuri, *supra* note 13.

15. Keay, *supra* note 13.

16. BRUCE G. CARRUTHERS, *CITY OF CAPITAL: POLITICS AND MARKETS IN THE ENGLISH FINANCIAL REVOLUTION* (1996).

Throughout this period, charters were granted for temporary durations, insuring the ability of the sovereign to renegotiate their terms and impose new conditions (and extract money) as the terms approached. The Bubble Act of 1720 statutorily monopolized the creation of liquid business companies, by forbidding the sale of stock without a charter. Joint stock companies played a significant role in manufacturing as early as the mid-eighteenth century, as public stock markets began to build on the basis of what were effectively sovereign bond markets used by the English to facilitate the finance of their wars with France, undergirded by what John Brewer famously called its “sinews of power”—the successful British switch from privately managed tax farming (essentially a form of highly inefficient privatized tax collection) to much more effective and efficient publicly administered consumption taxes (equivalent to modern state and local sales taxes).¹⁷ That the American Revolution was fueled by resentment over taxes levied on and through “corporate” colonies,¹⁸ that the Declaration of Independence includes as one of King George’s acts of tyranny the fact of mercantilist trade regulation, much of it designed to protect the English trading companies,¹⁹ and that the Boston Tea Party was aimed at and prompted by laws designed to improve the financing of the East India Company,²⁰ all reinforce the point that law was viewed as a crucial tool for constraining corporations in the period leading up to the adoption of the U.S. Constitution.

Upon the formation of the U.S., one of the first major political battles was over another mixed public/private business corporation—the First Bank of the United States.²¹ Designed by Alexander Hamilton to enhance the power of the U.S. Treasury, the occasion of the first (wildly oversubscribed) initial public offering in U.S. history, the First Bank became the focus of attacks by Democrats as beyond the power of the Federal government to

17. JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783* (1988).

18. On the use of the corporate form to constitute the American colonies, and their connections to the key players in trading companies, see, for example, Mary Sarah Bilder, *English Settlement and Local Governance*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (Christopher L. Tomlins & Michael Grossberg eds., 2007); ROBERT ASHTON, *THE CITY AND THE COURT, 1603-1643* (1979); and ROBERT BRENNER, *MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON’S OVERSEAS TRADERS, 1550-1653*, at 92–112 (1993).

19. The Declaration lists “the cutting off our trade with all parts of the world.”

20. BENJAMIN W. LABAREE, *THE BOSTON TEA PARTY* (1964).

21. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1957).

create, before having its charter lapse in 1811.²² The many state banks and insurance companies that were set up in part as rivals to the First Bank were limited by the terms of their charters from leveraging their central roles in finance into dominant roles in other sectors. Justice Scalia's statement in *Citizens United* that there were "hundreds" of corporations in existence at the founding is correct but a red herring: corporations in that era were not rare, but they were heavily intertwined with government, and as a result, just as mistrusted as government itself was mistrusted.

The closeness of corporations and government in the eyes of the "Founding Fathers," and the distance between their rights and those of the individuals acting through or on behalf of corporations, was well captured by Justice Marshall, in the first (1819) and still among the most famous statements of the legal theory of the corporation in U.S. legal history:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.²³

The fact that corporations could only act in ways and to pursue ends authorized in their charters means that—until late in the nineteenth century, when "general purpose" clauses became common in corporate charters—none of the corporations in existence at the time the First Amendment was adopted was legally authorized to engage in speech as a business activity, particularly political speech. Newspapers—which if organized as corporations would have been so authorized—by virtue of their very purpose, were not organized as corporations.²⁴ In short,

22. *Id.*

23. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (Marshall, C.J.). As noted in Strine and Walter, "[This] holding is consistent both with contemporary practice and the descriptions of the corporation by [corporate treatise writers] Coke, Blackstone, and Kyd, [and] ... was reaffirmed scores of times before the Civil War." *Supra* note 7 and text accompanying note 180 (discussing the phrase "existing only in contemplation of law"). Strikingly, the case is nowhere cited in the majority opinion in *Citizens United*, or in Justice Scalia's concurrence. The "artificial entity" theory has been generally contrasted with two rival theories, the "aggregate" theory, which attempts to treat a corporation as "merely" the aggregate of the individuals who create it (typically, for such theorists, shareholders) and the "natural entity" theory, which treats corporations as if they were individuals for legal purposes. *See Coates, supra* note 7, at 809–25 (reviewing theories of the corporation in law).

24. This was acknowledged in the majority opinion in *Citizens United*. "The great debates between the Federalists and the Anti-Federalists over our founding document

corporations generally had no First Amendment rights because they had no authorization to engage in the activities protected by the First Amendment—that is, such activities were “*ultra vires*.”²⁵ The one exception—an important one that helps prove this general point—is that many religious organizations were chartered corporations, with explicit authority to engage in religious activities, and they would obviously be able to engage in religious activities protected by the Free Exercise clause of the First Amendment.²⁶

The year that the First Bank’s charter lapsed (1811) was the same year that New York became the first state to adopt a “general” incorporation statute for business corporations, by which any citizen could create a business corporation.²⁷ Prior to that date, business corporations had continued to be specially created by one-off laws and hence close interactions between corporate founders and elected politicians.²⁸ Even after that date, most new corporations continued to be specially chartered, creating a political/business system rife with opportunities for corruption that continued to characterize and challenge the

were published and expressed in the most important means of mass communication of that era—newspapers *owned by individuals*.” 558 U.S. at 353 (emphasis added).

25. In the context of corporate political expenditures—i.e., “speech” under *Buckley v. Valeo*, 424 U.S. 1 (1974), see *Mobile Gas Co. v. Patterson*, 293 Fed. 208, 226 (M.D. Ala. 1923) (finding that campaign contributions are personal expenditures of officers for rate-making purposes); *McConnell v. Combination Min. & Mill. Co.*, 31 Mont. 563, 79 Pac. 248 (1905) (holding that expenses incurred in lobbying for passage of a bill charged to directors as beyond corporate purposes); *People ex rel. Perkins v. Moss*, 187 N.Y. 410, 439, 80 N.E. 383, 386-89 (1907) (larceny prosecution for contributing corporate funds to political party). See also Opinion Letter to the Savings and Loan Commissioner, California Attorney General, October 14, 1960, p. 2 (finding that a statute broadening the power of corporations to permit charitable gifts does not extend to political causes) (cited in *Corporate Political Affairs Programs*, 70 *YALE L.J.* 821, 854 n. 206 (1961)).

26. 2 J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 24 (1917) at 16-17.

27. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 109-39 (1977); Paddy Ireland, *Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 *J. LEG. HIST.* 41-73 (1996); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 124-38, 511-31 (2d ed. 1985).

28. This fact was noted by the dissent in *Citizens United*, but ignored by the majority. “Those few corporations that existed at the founding were authorized by grant of a special legislative charter.” 130 S. Ct. at 949 (Scalia, J., concurring). Justice Scalia’s concurrence tries to confuse the issue by noting (correctly) that “[a]t the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.” *Id.* at 926. However, he does not acknowledge that at that time—that is, at the time of the writing and adoption of the First Amendment—*business* corporations were not so covered by general incorporation statutes. See 2 J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 24 (1917) at 16-17.

sensibilities of 19th century voters, lawyers, and courts.²⁹ The battle over the Second Bank of the United States underlines the point: backers and foes alike occupied multiple roles as politicians, shareholders, borrowers, and backers of rival state banks. The structure and nature of the Second Bank was both for-profit and private, but also structured by its relations and terms of its engagement with the U.S. government.³⁰ Alongside the fights over banks were struggles over canals and railroads,³¹ with the same mix of public/private characteristics persisting, with each transportation company needing special government action to create the rights of way and local monopolies, and to facilitate financing, even as the companies promised and in some cases generated significant public goods in the form of economic growth and rapidly increased public mobility.

As Justice Scalia acknowledges in *Citizens United*, the “Founders” bore “resentment towards corporations.”³² He tries to blunt the force of this concession by arguing that this resentment existed only because they commonly held “state-granted monopoly privileges,” which (he asserts) “modern corporations” do not have.³³ But his argument falls short for several reasons, historical and modern. First, Berle and Means were the first to popularize the phrase “separation of ownership and control” but did not invent the concept, nor were they the first to identify it as a threat to social welfare. Founding-era observers such as Adam Smith critiqued large corporations not on the ground of monopoly power—which he famously identified as a risk of all business activity,³⁴ and not solely of businesses organized as corporations—but also on the ground that dispersed ownership creates what would modernly be called agency problems towards which corporate and securities law have largely

29. CHARLES FRANCIS ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ERIE* (Waveland Press 2002) (1871) (vividly recounting corrupt and violent stories of railroad corporation activity in the middle of the nineteenth century).

30. Hammond, *supra* note 21.

31. Harris, *supra* note 10. For the best treatment of English railway corporations, including vivid details on how corrupt and interconnected with state power they were, see generally R.W. KOSTAL, *LAW AND ENGLISH RAILWAY CAPITALISM, 1825-1875* (1994).

32. 130 S. Ct. at 926.

33. *Id.*

34. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 144 (Edwin Cannan ed., 1976) (1776) (“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

been aimed at addressing.³⁵ Second, the very fact that Founding-era corporations commonly held monopolies makes it impossible to sort out which feature create their resentment—Scalia’s claim that it was their monopoly powers that created the resentment is not implausible, but it is inescapably speculative. Founding-era observers must have thought that grants of monopoly power generated social benefits, and were willing to grant special corporate legal status only because of those benefits, in which case the resentment would be more properly generated by special legal status, and not monopoly powers.

From a modern perspective, the shortcomings of Scalia’s argument begin with the fact that many modern corporations—including public utilities involved in cases such as *Central Hudson*—do in fact have privileges (special powers, barriers to entry, government contracts) similar to privileges of Founding-era corporations; so too with telecommunications companies, airlines, banks, railroads, defense contractors, and the rest of government-dependent or -protected sectors that comprise roughly a third of the value of all privately owned business.³⁶ In addition, *all* modern corporations enjoy legal benefits not enjoyed by individuals or unincorporated associations: limited liability, which transfers value from all potential tort victims into a subsidy for risky activities; asset partitioning, which greatly economizes on transaction costs and which some scholars have argued is the most important economic benefit of the corporate form;³⁷ indefinite life, which in combination with separate tax identity for public corporations provides significant economic advantages; and the ability to sue and be sued as a fictional legal person.

What can we take away from this capsule history of business corporations in England and the U.S.? First, the conception of business corporations as fully *private*, equivalent to individuals in operation, is a late development—emerging well after the adoption of the U.S. Constitution, the Bill of Rights, and even the Civil War Amendments. To the contrary corporations—even

35. *Id.* at 264–65 (“[D]irectors of [joint stock companies], being the managers rather of other people’s money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own”).

36. For data on heavily regulated (and hence government-protected) and government-dependent sectors, see Coates, *supra* note 5, at Table 1.

37. See, e.g., Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387, 393 (2000) (discussing significance of “asset partitioning”).

closely held ones—were viewed primarily as *public*,³⁸ and as such subject to constitutionally imposed limitations, and often powers, but not affirmative rights against regulation.³⁹ Second, the tools of “regulation” (not a word then in use, but a fair description) were varied, and included explicit limits in corporate charters, as well as explicit requirements (the Second Bank of the US, for example, was required to redeem notes in its charter⁴⁰), short terms for charters (to require negotiated renewal), explicit bargains for charter grants, implicit bargains (sometimes corrupt or hidden), structural regulation (limiting, for example, the physical locations of corporate activities, including for example the routes of railroads or canals), grants of monopoly, of takings powers, and so on. Third, only in the *Lochner*⁴¹ era did corporations begin to function in a fully private fashion, and even then, even when business interests successfully used the Due Process and Equal Protection clauses to achieve deregulatory (or, more accurately, re-regulatory) goals,⁴² the First Amendment was not a significant component of those efforts, as discussed more below. In sum, as discussed more below, the First Amendment played no significant role in facilitating the massive economic growth that accompanied the transportation revolution of the 19th century, nor did it significantly disrupt or slow down the backlash against the rapidly growing railroad companies and business trusts, as reflected in increasing federal regulation (e.g., the Interstate Commerce

38. For classic expositions of the heavily integrated public and private sectors in the early part of American history, see, for example, HARRY N. SCHEIBER, *OHIO CANAL ERA* (1968); OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (2d ed. 1969); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956). See also Karen Orren, *The Laws of Industrial Organizations, 1870–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 531 (Michael Grossberg & Christopher Tomlins eds., 2008).

39. See Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 945 (1952) (“Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States...the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument.”).

40. Hammond, *supra* note 21.

41. *Lochner v. New York*, 198 U.S. 45 (1905).

42. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (explaining that corporations have liberty of contract, and due process clause of Fourteenth Amendment prevents state from barring corporate “citizen” from mailing a notice describing goods it seeks to insure under a policy issued by a foreign insurance company); *Reagan v. Farmers’ Loan and Trust Co.*, 154 U.S. 362 (1894) (holding that railroad corporations could not be required to charge less than tariff proposed by state railroad commission under due process clause if it would leave railroad unable to pay its debts); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (collecting cases).

Commission, established 1887⁴³) and the sometimes heavy hand of antitrust enforcement (e.g., the Standard Oil breakup in 1910⁴⁴).

B. A BRIEF TOUR OF LAWS REGULATING CORPORATE SPEECH IN LEGAL HISTORY

Perhaps the above recounting of the history of the intertwining of corporations and law may seem off-point in an article on the First Amendment. Perhaps the “regulation” reflected in business history just reviewed can be separated from laws “abridging” the freedom of speech, including commercial speech generally, or corporate speech specifically. But a brief review of traditional laws relevant to the conduct of business—both court-created and statutory—undermines this idea, too. The key point of this section is that commercial and corporate speech—in the most important activities of every business, including contract formation, retention and regulation of agents, and engaging in risk-taking activities—was pervasively regulated and structured by law long before the modern, expansive version of the First Amendment, which the next section will show was invented only recently.

To quickly sketch how pervasively law regulated commercial speech throughout U.S. history, let us put aside the problems of any literal, textualist reading of the First Amendment, which would appear to curtail only Congress, and not the President or executive agencies. Let us also skip the usual problems for sweeping understandings of the First Amendment—e.g., laws against libel, threats, conspiracy, and obscenity that were long enforced before and after the First Amendment, with little sense of contradiction by anyone involved. Instead, let us focus on the pervasive sets of laws that constrained and burdened business speech. Specifically, consider how law “abridged” speech by those in business in their routine activities of forming contracts, hiring agents, and engaging in risk-taking.

Regulation of Speech in Contract Formation. To form contracts, businesses must speak—indeed, as Robert Post has noted, “The process of contract formation . . . consists entirely of

43. For a historical comment on the Act by one of the founders of the oldest continuously operating US corporate law firm, Cadwalader Wickersham & Taft LLP, see George W. Wickersham, *Federal Control of Interstate Commerce*, 23 HARV. L. REV. 241 (1910).

44. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911).

communication.”⁴⁵ His laconic, passing observation is worth elaborating, to emphasize the economic significance of the speech so regulated. The combination of an intricate and sometimes counterintuitive body of law, on the one hand, with the way businesses and their representatives speak, on the other hand, determines whether a contract is formed, and if so, what its content is. At this intersection, the law routinely imposes economic penalties on businesses for speech or silence.

Courts penalize certain types of speech by refusing to enforce contracts that are insufficiently definite,⁴⁶ or which fail to specifically accept offers as made,⁴⁷ or which include deceptive misrepresentations,⁴⁸ or by finding enforceable contracts based on past conduct or course of dealing,⁴⁹ or on words that are ambiguous as to their intent, all despite attempts to deny their existence, based on precisely how parties did or did not speak.⁵⁰ Contract law also “implies” what it calls “representations” or “warranties” from context, unless contracting parties make specific statements to deny liability⁵¹—effectively compelling speech. Quasi-contract doctrines like promissory estoppel are founded on speech acts.⁵²

A form of contract historically important to economic growth was the promissory or negotiable bill or note—a form of writing that was intended to allow value to pass among strangers to

45. Robert Post, *The Constitutional Status of Commercial Speech* 9 (Yale Law School Faculty Scholarship Series, Working Paper No. 190, 2000).

46. See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003) (finding that “the indefiniteness doctrine lives on in the common law of contracts”).

47. See, e.g., *Glenway Industries, Inc. v. Wheelabrator-Frye, Inc.*, 686 F.2d 415 (6th Cir. 1982) (noting that under Pennsylvania law, offeror is “master of the offer” and unless offeree accepts in accordance with terms of offer, offeree cannot sue on contract or in reliance).

48. See, e.g., *Sabo v. Delman*, 3 N.Y.2d 155 (N.Y. 1957) (finding that the contract could be rescinded based on promises to finance business not intended to be kept when made).

49. See Restatement of Contracts § 69 (silence may constitute acceptance based on intent and facts).

50. Compare RESTATEMENT (SECOND) OF CONTRACTS § 59, and RESTATEMENT (SECOND) OF CONTRACTS § 60, with U.C.C. § 2-207, each of which treats ambiguous communications responding to a contract offer differently in determining contract formation.

51. See, e.g., *In re Mercer*, 246 F.3d 391 (5th Cir. 2001) (“[E]ach use of pre-approved credit card by Chapter 7 debtor was in nature of implied representation by debtor of her intent to repay any credit extended[.]”).

52. See Eric M. Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996).

facilitate trade and finance.⁵³ Attempts to restrict the assignability of notes—a particular form of written speech—could turn on minor differences in language.⁵⁴ More modernly, notes have to take a particular form to be negotiable,⁵⁵ and significant differences in legal outcomes could (and still can) turn on minor differences in language. In particular, defenses to enforcement could depend on small variations in word choice and form of writing. Similarly important categories of business transaction are those involving real estate and security interests, each of which require special speech-acts—including the recording of transfers or security interests—to accomplish the goals of those market transactions. Indeed, Homer Kripke long ago suggested that in the context of security interests the word “perfection” be replaced with “giving (or excusing) public notice”—i.e., the making of a particular form of legally required speech act.⁵⁶

Regulation of Speech in Hiring Agents. Beyond contract law, courts use the common law of agency effectively to force those owning or running businesses to speak to third parties about who has authority to bind the business (whether organized as corporation, partnership, or sole proprietorship),⁵⁷ and to impose contract liabilities for loose speech that implies that someone is agent, even if the corporation’s internal communications make it clear that they are not. Agency law also regulates speech by decreeing that words equivalent to direction of the physical conduct of their activities render an agent an “employee” (or, in older usage, a “servant”) capable of producing tort liability on the speaking principal.⁵⁸ Agents, in turn, are subject to duties of

53. J. M. HOLDEN, *THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW* (1955); JAMES S. ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW* (1995).

54. See e.g., Z. SWIFT, *A DIGEST OF THE LAW OF EVIDENCE . . . AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES* 298 (1810) (“All bills payable to a certain person, or order, or to the order of a certain person; or to a certain person, or bearer; or to the bearer generally: or where equivalent words are used: are transferable by indorsement, or delivering from hand to hand, *ad infinitum*: so as to vest the assignee with a right of action, on the instrument against the parties to it, in his own name. This is what constitutes the negotiable quality of the instrument[.]”) (cited in James S. Rogers, *The Myth of Negotiability*, 31 B.C. L. REV. 265 n.20 (1990)).

55. For the modern legal test, see U.C.C. § 3-104 (defining “negotiable instrument” by excluding writings that include undertakings beyond the promise to pay money, with certain exceptions).

56. See Peter F. Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1032 n.75 (1978).

57. RESTATEMENT (THIRD) OF AGENCY § 2.03 (defining apparent authority).

58. RESTATEMENT (THIRD) OF AGENCY § 2.04 (defining respondeat superior); § 7.07 (defining “employee”).

loyalty, which includes subsidiary duties not to speak about confidences learned from or about their principals, even when the speech touches on the public interest, First Amendment notwithstanding.⁵⁹

Regulation of Speech in Risk-Taking. When businesses engage in risky activities, that may impose harms on third parties, the way they speak (to warn, for example) can influence their liability.⁶⁰ Tort and fraudulent conveyance law punishes not only fraud by forbidding misleading speech, but also forms of silence, effectively compelling speech in specified settings.⁶¹ Corporate law requires those seeking to use the corporate form to “speak” by creating and filing public charters, disclosing their purposes and governance.⁶² Antitrust law forbids agreements in restraint of trade, including companies from agreeing (a form of speech) to fix prices, which may be inferred from sharing information (i.e., speaking to each other) about prices.⁶³ More general doctrines—waiver, estoppel—impose liability as a result of speech in a wide variety of settings without running afoul of the First Amendment.⁶⁴

Regulation of Speech in the Modern Regulatory State. All of these doctrines pre-date the modern regulatory state, and have evolved significantly since then, and continue to do so, sometimes shaped by statutory interventions. Beginning in the early twentieth century, accelerating in the New Deal, and then surging again in the 1960s, the modern regulatory state brought into widespread acceptance a wide array of additional laws that curtail or burden speech: securities laws, consumer protection laws, truth-in-lending laws, common carrier laws, professional licensing

59. *Food Lion v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923 (M.D.N.C. 1997).

60. *See, e.g., Oberson v. U.S. Dept. of Agriculture, Forest Service et al.*, 514 F.3d 989 (2010) (finding that failure to post a warning sign on a dangerous trail created tort liability for negligence on the part of Forest Service).

61. RESTATEMENT (SECOND) OF TORTS § 551 (liability for nondisclosure under various circumstances).

62. *See, e.g., Delaware General Corporation Law* § 102 (setting required provisions in publicly filed corporate charter, including “purposes” and any deviations from default corporate statutory provisions for governance).

63. *See, e.g., Ohio Valley Electric Corp. et al. v. General Electric Company, et al.*, 244 F. Supp. 914 (S.D.N.Y. 1965) (communication of price sheets and related topics among competitors provided evidence of price-fixing conspiracy violating Sherman Act).

64. *See, e.g., Cohen v. Cowles Media Co.*, 570 U.S. 663 (1991) (“Minnesota doctrine of promissory estoppel is a law of general applicability ... [and] enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations...”).

laws, etc.⁶⁵ This is not to mention the specific laws barring the “active promotion of prescription drugs, liquor, cigarettes, and other products” noted by Justice Rehnquist in his dissent in *Virginia Pharmacy*.⁶⁶ And, of course, as noted by the majority in *Citizens United*:

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates.⁶⁷

These statutes, regulations, and related court interpretations are varied in content and effect, but worth emphasizing is that many in practice track elements of the common law doctrines reviewed above,⁶⁸ or alter them while preserving other elements.⁶⁹ As a result, it is hard to see any reason not to extend to much of these modern statutes and regulations any general presumption that common law doctrines of ancient vintage or general applicability are exempted from strict or intermediate scrutiny, or otherwise treated lightly, under from the First Amendment. Many of these laws have also been challenged under the First Amendment in recent years, as discussed below.

But before turning to a review of the First Amendment challenges, a simple point should here be recognized: these laws all *predate* any understanding of First Amendment doctrine that includes a distinct commercial speech component, first announced in *Virginia Pharmacy*, and none were seriously viewed as contrary to the First Amendment at the time they were adopted.

65. See, e.g., Securities Act of 1933, 15 U.S.C. § 77a et seq.; Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301 et seq.; Fair Packaging and Labeling Act of 1966, 15 U.S.C. §§ 1451–61; Uniform Deceptive Trade Practices Act (implemented in, for example, 6 Del. Ch. 25; Truth in Lending Act, 15 U.S.C. § 1601; Telecommunications Act of 1996, Pub. L. No. 104-104; N.Y. DR 3-101 (unauthorized practice of law)).

66. 425 U.S. at 781.

67. 130 S. Ct. at 900 (citing B. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 23 (2001)).

68. Many consumer protection laws, for example, contain anti-fraud provisions that are substantially similar to the common law of fraud. See, e.g., 6 DEL. CODE ANN. § 2532(a)(4) (“A person engages in a deceptive trade practice when ... that person ... uses deceptive representations or designations of geographic origin in connection with goods or services”). For an overview of consumer protection laws, see MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW (2013).

69. The federal securities laws, for example, largely track the common law of fraud, but eliminate, modify, or reverse certain common law elements, such as scienter, privity, or damages. See JOEL SELIGMAN, TRANSFORMATION OF WALL STREET (3d ed. 2003).

C. THE NON-ROLE OF THE FIRST AMENDMENT IN ECONOMIC HISTORY

The last section described how pervasively corporate and commercial speech was regulated throughout legal history. In this section, I briefly review First Amendment history to show that this pervasive regulation long pre-dated modern First Amendment doctrines, to show how radical modern First Amendment doctrine is, as applied to corporate and commercial speech, and to show that the doctrine is a poor fit with the inevitable need for political compromise in the American method of lawmaking. The chronology—pervasive speech regulation of commerce *before* development of First Amendment doctrine—and the fact that modern business use of the First Amendment represents a radical break with the history and traditions of U.S. law should quite important to anyone who purports to be a strong originalist in interpreting the Constitution. It should also be of relevance to anyone with even a partially originalist understanding of the U.S. Constitution. Finally, it has also an important implication for policy judgments about how important or valuable modern First Amendment doctrine is in advancing economic growth and social welfare. The incompatibility of the doctrine with American political realities only reinforces the problematic nature of the corporate takeover of the First Amendment.

The facts of the chronology that follows will be familiar to constitutional scholars but perhaps less so to corporate scholars. Most basically, it may be surprising to non-specialists that the First Amendment as we know it today is a recent judicial invention. For the first half of U.S. history, it played only a modest role in law, as reflected in legal decisions and the opinions of famous jurists. As late as 1907, Justice Oliver Wendell Holmes, Jr. stated that the First Amendment did not apply to the states and, even as applied to Congress, its “main purpose” was to “to prevent . . . previous restraints upon publications as had been practiced by other governments,” “not [to] prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare.”⁷⁰ Already by that point, well before the Supreme Court used the First Amendment to strike

70. *Patterson v. Colorado ex rel. the Attorney General of the State of Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.); *cf.* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1202 (1986) (“The Supreme Court . . . did not decide a case involving prior restraint until 1931 . . . and did not consider a case involving judicial prior restraint . . . until 1968.”).

down a law, the U.S. economy had become the richest in the world,⁷¹ as depicted in Figure 1.

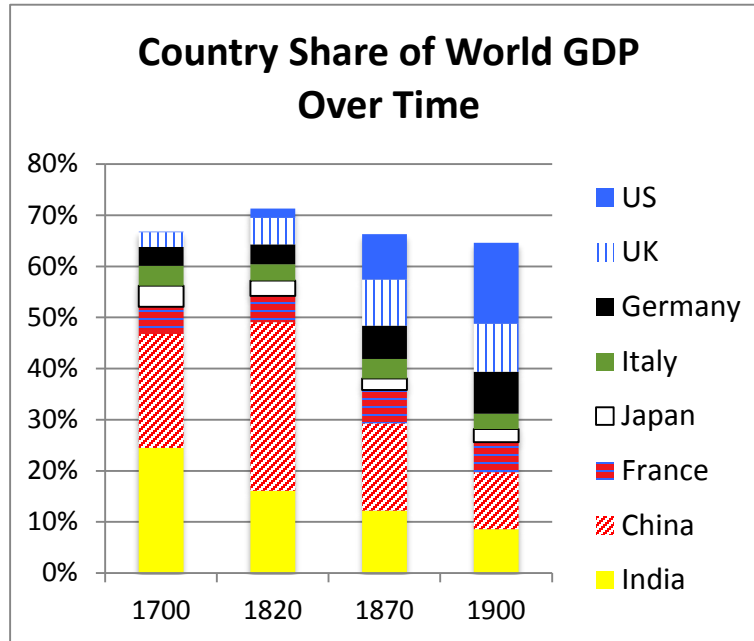


Figure 1. Source: <http://www.ggd.net/maddison/oriindex.htm>

The Supreme Court did not rely on the First Amendment to strike down a law of any kind until 1931—that is, 140 years after the First Amendment was adopted—and no federal law until 1965.⁷² Even accounting for prior cases refusing to enforce laws as

71. See MADDISON-PROJECT, <http://www.ggd.net/maddison/maddison-project/home.htm> (last visited Mar. 21, 2015) (discussing per capita GDP by country over time) and <http://www.ggd.net/maddison/oriindex.htm> (last visited Mar. 21, 2015) (discussing aggregate GDP by country over time).

72. *Stromberg v. California*, 283 U.S. 359 (1931) (first case voiding a state law under the First Amendment); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (first case voiding a federal law under the First Amendment). One earlier case, *Fiske v. Kansas*, 274 U.S. 380 (1927), struck down a state law under the due process clause of the Fourteenth Amendment, as representing an “arbitrary and unreasonable exercise of the police power, unwarrantably infringing the liberty of the defendant,” in context where the conduct in question consisted of speech and references were made in the state court opinion to the challenges based on the “constitutional guarantees of freedom of speech,” which that court had rejected. Still earlier cases in and following World War I, famously including opinions enunciating the “clear and present danger test,” in which Justices Holmes and Brandeis began to articulate a broader conception of First Amendment protections, nevertheless upheld lower court convictions based on speech. See Martin H. Redish, *Advocacy of*

applied, the First Amendment was not a significant part of the legal arsenal for the protection of business or economic activity prior to the second half of the twentieth century. The landmark cases that have given the First Amendment its prominence since the middle of the twentieth century were primarily concerned with individuals acting outside of that context: dissidents,⁷³ public employees,⁷⁴ students,⁷⁵ and civil rights activists.⁷⁶

As shown in the empirical analysis in Part II, cases in which businesses were the direct beneficiaries of judicial review of laws for violations of the right to free speech are even more recent. The first such case (*Joseph Burstyn, Inc.*⁷⁷) did not occur until 1952,⁷⁸ and the doctrine of “commercial speech,” in which businesses speak not for expressive purposes but for primarily business purposes, was not accepted in the Supreme Court until *Virginia Pharmacy*,⁷⁹ in 1976. Nor was the First Amendment extended to corporate political activity until 1978, in *Bellotti*, nor was it articulated in its modern form—complete with the requirement that a law be well-tailored to fit its purpose to survive First Amendment scrutiny—until *Central Hudson*,⁸⁰ in 1980.

Each of these three cases is worth discussing briefly for three reasons. First, each is an important part of the foundation for contemporary controversial cases such as *Citizens United* and *Hobby Lobby*. Second, each was controversial at the time, generated strong dissents by the generally pro-business Justice

Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 CALIF. L. REV. 1159, 1171 (1982).

73. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (children whose parents object to flag salute could not be compelled to do so); *Yates et al. v. United States*, 354 U.S. 298 (1957) (overturning convictions of officials of the Communist Party USA, Court narrowly interpreted federal statute making it unlawful to advocate overthrow of government, articulating “clear and present danger” test).

74. See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 391 U.S. 563 (1968) (holding that teacher may not be dismissed for letter to newspaper critical of school budget).

75. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students “do not shed their constitutional rights at the schoolhouse gate”).

76. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963) (finding that state government officials violated the First Amendment by ordering an end to an orderly and otherwise lawful civil rights march in front of the state house).

77. 343 U.S. 495.

78. *Burstyn* is the oldest case cited in the string cite in *Citizens United*, 130 S. Ct. at 900, laying out the “historical” case for its premise that corporations have First Amendment rights. An older case, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), resulted in a finding that a tax aimed specifically at newspaper businesses violated the Fourteenth Amendment’s due process clause by abridging the freedom of the press.

79. 425 U.S. 748.

80. 447 U.S. 557.

Rehnquist, and as will be suggested in the discussion, each remains vulnerable to legal critique. Third, each is a reflection of what has been fairly characterized as a “movement” among businesses and conservatives that began in the early 1970s,⁸¹ which itself is an important part of context for understanding these cases and their potential effects. This movement was stimulated in part by the 1971 “Powell memo,” in which Lewis Powell—before he went on the Supreme Court—advocated that the Chamber of Commerce undertake a broad, multi-channel effort at mobilizing corporations and their resources to defend capitalism and the “free enterprise system.”⁸²

This movement was needed, Powell asserted, to defend against a growing and dangerous movement of academics, media, intellectuals, clergy, and politicians to attack business and capitalism, by pushing such ideas as consumerism and environmental protection. “Under our constitutional system,” he wrote, “especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.” In other words, Powell’s memo advocated using the courts not simply to enforce or interpret the law—the standard publicly stated understanding of political conservatives such as Chief Justice Roberts⁸³—but to change the law.

In *Virginia Pharmacy*, the Court held that the First Amendment overrides laws abridging commercial speech, arguing that the distinction between commercial and other speech was “simplistic” and difficult to draw. Since no pharmacy sought

81. ROBERT L. KERR, *THE CORPORATE FREE SPEECH MOVEMENT* (2008). As Kerr notes at 7, the Business Roundtable was formed in 1972, which helped push previously politically moderate trade groups such as the Chamber of Commerce and the National Association of Manufacturers to the right. Kerr’s account is similar to that told by *The Economist* editors John Micklethwait and Adrian Woolridge. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE FOURTH REVOLUTION: THE GLOBAL RACE TO REINVENT THE STATE* (2014).

82. See Memorandum from Eugene B. Sydnor, Jr. to Lewis F. Powell, Jr., Education Committee Chairman, U.S. Chamber of Commerce (Aug. 23, 1971), available at law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf [hereinafter Powell Memorandum]. The Powell Memorandum was less than two months old before Powell was nominated to serve as an Associate Justice of the Supreme Court of the United States, but not publicly released until after he had been confirmed on the Court. See Mark Schmitt, *The Legend of the Powell Memo*, AMERICAN PROSPECT (Apr. 27, 2005), available at <http://prospect.org/article/legend-powell-memo>.

83. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of John Roberts) (testifying that judges should be “umpires” who “don’t make the rules; they apply them”).

to “speak” (i.e., advertise the drug prices as had been banned in the law under review), the Court focused instead on the interest of the audience – the consumer – to “hear” the forbidden speech (i.e., drug price advertising), an interest the Court thought “keener . . . than . . . the day’s most urgent political debate.” In so holding, the Court explicitly overruled several of its precedents, which had established the proposition that commercial speech was in fact entitled to less, or no, First Amendment protection, including cases from 1942⁸⁴ and 1951,⁸⁵ and repudiated dicta from *New York Times Co. v. Sullivan* (1964), which had stressed that the speech in that case was “not ‘purely commercial.’”⁸⁶ Citing several of its precedents in which bans on speech by individuals or *expressive businesses* (film companies, newspapers, etc.⁸⁷) were found unconstitutional, the Court extended First Amendment protection to *any* (non-deceptive) *expression by any business*—a dramatic if subtle expansion of the reach of the Courts in overseeing economic regulation. Nowhere did the Court note or discuss the significance of the broad and traditional range of laws and regulations that had long regulated commercial speech without comment or First Amendment challenge, such as those reviewed above.

Two years after *Virginia Pharmacy*, in *First National Bank of Boston v. Bellotti*,⁸⁸ the Court extended it into a domain just opened up by the equation of money with speech in *Buckley v. Valeo*⁸⁹ in 1976. Revealing political ambitions that Justice Powell had long secretly harbored but were unknown to the public when he was appointed to the Court,⁹⁰ Powell’s opinion in *Bellotti* affirmed in the strongest terms a corporate “right” to free expression, founded in the simple logic that corporations were (legally) people, and people have rights under the First

84. *Valentine v. Chrestensen*, 316 U.S. 52 (upholding a statute banning handbills on streets).

85. *Breard v. Alexandria*, 341 U.S. 622 (upholding an ordinance banning door-to-door magazine subscriptions).

86. 376 U.S. 254.

87. *See, e.g., id.*; *Joseph Burstyn, Inc.*, 343 U.S. 495 (1952); *Smith v. California*, 361 U.S. 147 (1959).

88. 435 U.S. 765 (1978).

89. 424 U.S. 1, 19 (1976) (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”).

90. *See Schmitt, supra* note 82.

Amendment, and through the Due Process Clause of the Fourteenth Amendment rights against the states.⁹¹

This syllogism held (said the Court) even though the law in question permitted corporations to speak about political issues affecting corporate property, and only banned the use of corporate funds to speak on other political issues, and so could have been readily understood as a restraint on how corporate managers spend corporate (i.e., shareholder) money for non-corporate purposes, rather than as a ban on corporate speech generally. This syllogism held even though the Court had previously upheld complete bans on union and corporate donations to political candidates.⁹² This syllogism held despite Powell's earlier dissent in *Pipefitters*, in which he expressed dismay at the majority opinion in that case, because it "open[ed] the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations."⁹³ To be sure, in *Bellotti*, the Court held back from a full-bore equation of corporations with individuals, noting that since this case concerned "a corporation's right to speak on issues of general public interest," the holding implied "no comparable right in the quite different context of participation in a political campaign for election to public office," and "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."⁹⁴

In *Central Hudson*, the Court went farther. Claiming to base its formulation on prior cases (*Virginia Pharmacy*,⁹⁵ *Bates*,⁹⁶ *Primus*,⁹⁷ *Bellotti*,⁹⁸ and *Carey*⁹⁹), the Court articulated the still-

91. 435 U.S. at 780–81 and nn.14–15.

92. See e.g., *United States v. UAW-CIO*, 352 U.S. 568 (1957) (enforcing Federal Corrupt Practices Act of 1935 over dissent that emphasized that the law "as construed and applied, is a broadside assault on the freedom of political expression guaranteed by the First Amendment").

93. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 443 (1972).

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

95. *Virginia Pharm. Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding unconstitutional a law forbidding pharmacies from advertising drug prices).

96. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding unconstitutional a law banning advertising of legal services).

97. *In re Primus*, 436 U.S. 412 (1978) (holding that a law barring solicitation of prospective litigation clients was unconstitutional).

98. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding unconstitutional a law forbidding a corporation from spending money on ballot initiatives not affecting property, business or assets of corporation).

99. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (finding unconstitutional a law banning advertising of contraceptives).

dominant multi-step test for commercial speech cases. First, in a step often not articulated formally, the Court determines if the case involves “commercial speech” – if not, it applies some other doctrinal analysis. Second, if it does involve commercial speech, the Court asks if the speech concerns lawful activity and is not misleading – if not, then the speech is not protected at all.¹⁰⁰ If so, then the laws must pass three tests to be constitutional: (a) they must serve “substantial” government interests, (b) they must do so “directly” and (c) they may restrict no more speech than “necessary,” referred to as the “fit” requirement.

The Court’s purported precedents in *Central Hudson* in fact provided only weak support for the test it articulated. *Primus* involved a non-profit public interest law firm, not a business, and the speech was held by the Court to be a “form of political expression,” entitled to the highest form of First Amendment protection, not the nominally lower protection afforded commercial speech even after *Central Hudson*. *Bellotti* likewise involved political activity, albeit in the form of corporate expenditures. *Carey*, cited in *Central Hudson* to support its fit requirement, expressly noted that the law was not aimed at commercial speech, but “at the ideas conveyed and form of expression.”¹⁰¹ While *Bates* did suggest that laws short of a flat ban might have survived scrutiny, consistent with the fit requirement in *Central Hudson*, it nowhere suggested that to survive a law could only go so far as “necessary” to achieve a substantial public interest, but instead simply acknowledged that “many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved,” and even suggested that laws might constitutionally restrict advertisements of the “quality of services” where the quality could not be measured or

100. In this respect, the test is weaker than in political or other individual, non-commercial speech contexts, where falsity is generally not a reason to eliminate First Amendment protection altogether. Compare *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (because “erroneous statement is inevitable in free debate, “ even false statements of fact must be protected to some extent, “if the freedom of expression [is] to have ‘breathing space’ that they ‘need . . . to survive’”), with *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (holding unconstitutional a law criminalizing false statements about having a military medal), with *Chaplinsky v. New Hampshire*, 315 U.S. 468 (1942) (“prevention and punishment” of “libelous” speech is “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality”), and *Garrison v. Louisiana*, 379 U.S. 64 (1964) (finding that criminal prosecution of defamation is constitutional).

101. 431 U.S. at 702 n.28.

verified.¹⁰² *Central Hudson* was a bold and aggressive example of judicial activism, and paved the way for a corporate takeover of the First Amendment—right in line with Powell’s 1971 memo calling for a new corporate political movement to work its will through the courts.¹⁰³ In practice, as documented in Part II, *Central Hudson* has provided an open invitation to courts to strike down laws “abridging” speech by businesses, even if the laws serve concededly “substantial” and legitimate purposes, even if the interests are served in a straightforward and intuitive fashion, and even if the speech in question has no political or ideological content.

A recent case—*POM Wonderful, LLC*¹⁰⁴—illustrates the way the “fit” requirement has transformed the nominally “intermediate” form of judicial review under *Central Hudson* into a blank check for activist judges to de- or re-regulate on behalf of businesses. In *POM Wonderful, LLC*, a panel of the D.C. Circuit considered a Federal Trade Commission order requiring that “health claims” used in marketing food products be substantiated by “competent and reliable scientific evidence that is sufficient in quality and quantity,” and that unless the evidence included at least two randomly controlled trial (RCT) studies, the marketing had to include qualifying language indicating the research was “preliminary” or “initial.” While conceding the intuitively obvious justification for the order as serving “substantial” governmental interests in protecting consumers from misleading claims, and that the order directly served those interests, the Court found that the order did not “fit” the purpose served, because—in the Court’s opinion, nowhere supported by meta-studies about the reliability of RCTs or the relevance of statistical significance in a single RCT—one RCT might be just as good as two at substantiating the claims. Even a casual review of the literature on science would have provided ample ground for a neutral observer to want to see more than one study before letting a corporate marketing machine take a run at an unsuspecting public with unqualified claims based on “science.”¹⁰⁵ While the

102. 433 U.S. 383–84.

103. See generally Powell Memorandum, *supra* note 82.

104. *POM Wonderful, LLC v. FTC*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015).

105. See, e.g., RETRACTION WATCH, <http://retractionwatch.com> (website devoted to retractions of peer-reviewed published articles in a range of sciences) (last visited March 21, 2015); Daniele Fanelli, *How Many Scientists Fabricate and Falsify Research? A Systematic Review and Meta-Analysis of Survey Data*, PLOS ONE 1 (May 29, 2009) (“In surveys asking about the behavior of colleagues, admission rates were 14.12% for falsification,” “misconduct was reported more frequently by medical/pharmacological

Court attempted to argue that if the FTC had found, in the specific case, reason to doubt the one study, it could have justified requiring a second study, the Court nowhere explained why a prophylactic rule requiring two studies was not a reasonable fit to an order limiting *unqualified* marketing claims.

The bottom line lesson of *POM Wonderful LLC* is clear: regulatory agencies under *Central Hudson* face a strong risk that a court will be able to exploit any mismatch between the court's (often uneducated or even ignorant) view of what is "necessary" to accomplish the agency's goals to strike down a regulation. Lurking in the background of the "fit" requirement, as also illustrated by *POM Wonderful LLC*, is a politically naïve (or disingenuous) notion often trotted out in cases under *Central Hudson* that agencies or legislatures can simply rewrite their regulations or statutes with minimal effort and delay, to bring them into line with the court's view of what is "necessary" to achieve the valid purposes of the regulation or statute. Such naivete is hard to understand in an era of political logjams, "do-nothing" Congresses, and increasingly bitter and polarized politics, which make it more likely that the result of a court striking down a law is that it will stay struck. It also flies in the face of long-standing theory underwriting at least some jurists' resistance to the use of legislative history—i.e., that a multi-member regulatory or legislative body is not an "it" but a "they," and unlike the text of the rule or the statute, legislative history reflects only a subset of the members' views, rather than the compromise reflected in the final text. This perspective should be remembered when evaluating the "fit" requirement of *Central Hudson* in practice, because it is a reminder that imperfectly fitting rules and statutes are part of the price of political compromise, which is the essence of the American method of lawmaking.

Putting this short history of the First Amendment and its application to commercial speech together with the business and legal history above, the bottom line is that the First Amendment had no operative legal role in creating or sustaining the great era of US economic growth that began in the 19th century and continued through the 1950s and 1960s. Instead, during most of American history, at most, the First Amendment served

researchers than others . . . [and] it appears likely that this is a conservative estimate of the true prevalence of scientific misconduct"), available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0005738>.

principally as a symbol and hortatory summation of the value of free expression by individuals, and even after the Supreme Court began striking down laws in the 1930s and 1940s, it did not commonly do so for business (as will be shown more systematically in Part II).¹⁰⁶ These roles for the First Amendment might have played a role in the political restraint of regulation of expression generally, and perhaps even by businesses in limited contexts (such as expressive businesses, such as newspapers), but the First Amendment played little to no role in restraining the regulation of commercial speech as such, until the recent era inaugurated in *Virginia Pharmacy*. Too many statutes and regulations, and too many courts using too many common law doctrines, routinely and pervasively regulated speech by businesses prior to the 1970s, with little general public complaint or widespread efforts to resist on the ground that those laws violated the First Amendment, for any fair understanding of U. S. economic history to assert otherwise. While the ramp-up in business regulation in the late 1960s and early 1970s might have justified *political* concerns by business groups, as illustrated by the Powell memo, nothing in U.S. business history or its legal or constitutional traditions did so. The corporate takeover of the First Amendment is a modern doctrinal invention.

II. EMPIRICAL EVIDENCE ON THE CORPORATE TAKEOVER OF THE FIRST AMENDMENT

Let us test the historical summary set out in Part I.C against some case data. This Part analyzes data from Supreme Court and Circuit Court decisions to illustrate how recently the corporate takeover of the First Amendment has occurred, and how pervasively and systematically corporations have been using the First Amendment to achieve de- or re-regulatory goals. To my knowledge, this quantitative exercise has not been previously undertaken. The findings are that (a) prior to *Virginia Pharmacy* only expressive businesses challenging laws that directly impeded their core business were able to convince the Court to strike down laws on their behalf, and not other businesses seeking to achieve de- or re-regulatory goals generally; (b) First Amendment cases in which businesses are the primary beneficiary have increasingly displaced cases in which individuals are the primary beneficiary,

106. Geoffrey R. Stone's fascinating book, *PERILOUS TIMES: FREE SPEECH IN WAR TIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004), for example, does not mention commercial speech, businesses, corporations, or any related topic.

with the docket now roughly split between business and individual cases; (c) the *Central Hudson* doctrine has encouraged an increasing number of commercial speech cases to be brought over time; and (d) cases currently in the Courts of Appeal under *Central Hudson* predominantly do not involve expressive businesses, but are attacks on laws and regulations that inhibit “speech” by other kinds of businesses in areas of activity incidental or instrumental to their core profit-making activity.

A. THE ROLE OF BUSINESS IN THE SUPREME COURT’S FIRST AMENDMENT DECISIONS

i. Data and Coding

This subsection starts with all U.S. Supreme Court cases in the Supreme Court Database (“SCD”),¹⁰⁷ which ranges from 1946 to the present (n=12908 as of the date that the data were downloaded, in December 2014). After dropping 68 records that on inspection were duplicates or cases closely related to other records, the resulting data set includes 423 unique Supreme Court decisions involving speech, press or assembly under the First Amendment.¹⁰⁸ The cases were then coded for whether they involved a business, an individual or some other kind of party (usually a government entity), in what combination, and which type of party won. Victories were distinguished between those in which a party defeated an attempt to persuade the Court to strike down a law or regulation under the First Amendment and those in which a party succeeded in so persuading a Court to strike down a law or regulation.¹⁰⁹

107. THE SUPREME COURT DATABASE, <http://scdb.wustl.edu> (last visited March 21, 2015).

108. SCD codes cases in several ways, including a field called “Legal Provision Supplement” (“Legal Supp” in the database itself). One case type within “Legal Supp” is assigned the number 200 by SCD, and consists of cases involving “First Amendment (speech, press and assembly)” (n=491).

109. For purposes of distinguishing businesses, individuals and other kinds of parties, the following steps were taken. First, the SCD numerical codes for “petitioner” and “respondent” were mapped into “business,” “individual” and “other,” in generally straightforward ways. For example, any governmental entity or official was coded as “other,” as were parties coded by SCD as universities, churches, public utility commissions, eleemosynary institutions, public interest organizations, judges and unions. Parties coded by SCD as corporations or businesses were coded as “business,” as were power companies, telephone companies or utilities, banks, radio or television stations or networks, trade organizations, shopping centers and restaurants. Parties coded by SCD as individuals were coded as “individuals,” as were employees, aliens, authors, draftees, juveniles, political candidates, private persons, protestors, racial minorities, journalists, and students. The remaining categories were ambiguous. A significant subset consisted of expressive

ii. Summary Statistics

Over the full period of the dataset, based on the above classification, 63% of the cases involved at least one individual party, and a slightly overlapping subset of 30% involving at least one business party, with the remaining cases consisting of disputes between other kinds of parties (e.g., university vs. government, government official vs. government, etc.). The ratio of business to individual First Amendment cases overall was 0.48.

Consistent with standard doctrinal histories and the review in Part I.C, *Virginia Pharmacy* (1976) marks a clear shift in the data. Prior to *Virginia Pharmacy*, businesses were involved in 26% of the 176 cases, or 1.5 per year, while afterwards they were involved in 34% of the 246 cases, or 2.2 per year. These increases for business are statistically significant at a 95% level. These increases are not due to an overall increase in First Amendment cases over time – the overall linear time trend in the number of such cases is almost zero. The increase in business cases remains significant with linear time (annual) controls. The annual number of First Amendment cases involving individuals actually decreased from 4.3 per year prior to *Virginia Pharmacy* to 3.6 per year after that case. Both absolutely, and relative to individuals, business has been involved in significantly more First Amendment cases to the Supreme Court in the thirty-eight years since *Virginia Pharmacy* than in the prior thirty-eight years.

The increase in First Amendment cases involving businesses is depicted in Figure 2, which plots a five-year moving average of the percentage of such cases as a share of the Supreme Court's First Amendment docket as a whole. Visual inspection reveals four periods: the period prior to the 1950s, when business cases were missing altogether; the period from the 1950s through the early 1970s, when cases represented roughly 20% of the Court's First Amendment docket; the period from the mid-1970s through the late 1980s, when such cases rose steeply and steadily before leveling off at around 40% of the Court's First Amendment docket; and then the period since the late 1980s, during which they have varied but represented a roughly stable share between 35% and 40%. What constitutional law scholars will already have

businesses that could be operated by an individual or an incorporated entity: bookstores, movie theatres, art exhibitors, newspapers, and publishers. These, as well as other ambiguous party identities (for example, farmers, which included individuals and agribusinesses) were classified based on a review of the specific captioned parties – if the caption included “Incorporated,” “Corporation” or similar indicators of corporate status, they were classified as “business,” and otherwise as “individual.”

2015]

CORPORATE SPEECH

251

noted is that period 3—the period of rising First Amendment cases involving businesses—coincides with the presence on the Court of Justice Powell, who served from 1972 to 1987.

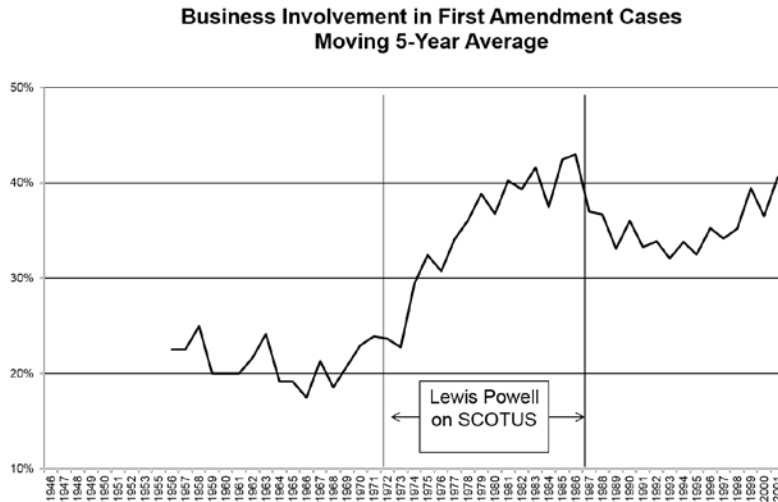
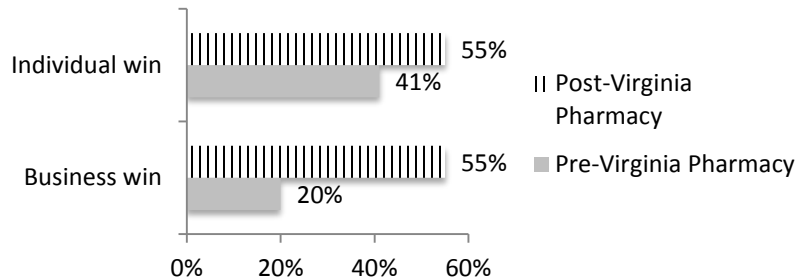


Figure 2. Source: Author calculations, <http://scdb.wustl.edu>

Business “win” rates also rose dramatically after *Virginia Pharmacy*. Prior to that case, business won 20% of its First Amendment cases, compared to a 41% win rate for individuals. After *Virginia Pharmacy*, business and individual win rates were roughly equivalent at 55% each. Again, the differences are robust to overall time trends—while both kinds of parties won more frequently, businesses won more frequently after *Virginia Pharmacy* than can be accounted for by the overall increase alone, while individuals’ victories are in line with the time trend.

**Business v. Individual "Win" Rates
First Amendment Cases
Pre- and Post-*Virginia Pharmacy***



These changes over time in the role of business in First Amendment cases is larger once the cases are analyzed to see if business is seeking to use the First Amendment affirmatively, to strike down a law or regulation, rather than defensively, to uphold a law or regulation. In the 1940s, and a few times since then, unions sought to have the Supreme Court strike down open shop or anti-picketing laws as violating union members' First Amendment rights—generally to no avail.¹¹⁰ Business involvement in those cases was defensive—they were not seeking to use the First Amendment to overturn legislation, but were defending the outcome of the popular legislative process against potential court intervention. Excluding defensive cases and focusing solely on offensive uses of the First Amendment, business cases and win rates fall by roughly a third in the pre-*Virginia Pharmacy* era, but not after.

A final point to make about the “offensive” First Amendment cases prior to *Virginia Pharmacy* involving business is that they almost always involved attacks on laws barring or

110. See, e.g., *Lincoln Federal Labor Union et al. v. Nw. Iron & Metal Co. et al.*, 335 U.S. 525 (1949) (holding that open shop laws did not violate union members' First Amendment rights); *Am. Fed'n Of Labor et al. v. American Sash & Door Co. et al.*, 335 U.S. 538 (1949) (same); *Giboney et al. v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (upholding anti-picketing law used against union under First Amendment); *Int'l Bhd. of Teamsters, Etc. Union, Local 309, et al. v. Hanke et al., d/b/a Atlas Auto Rebuild*, 339 U.S. 470 (1950) (same); *Bldg. Serv. Emps. International Union, Local 262, et al. v. Gazzam*, 339 U.S. 532 (1950) (same); *International Brotherhood of Teamsters, Local 695, A.F.L., et al. v. Vogt, Inc.*, 354 U.S. 284 (1957) (same).

restricting *expressive businesses*—i.e., the business of the business party itself—whereas after *Virginia Pharmacy* they began increasingly to involve attacks on laws regulating speech, such as advertising, that was incidental or instrumental in the business of the business party, brought by non-expressive businesses. The first businesses to win First Amendment victories in the Supreme Court illustrate typical expressive business cases. In *Grosjean v. American Press Co.*,¹¹¹ the Court found the right to a free press incorporated into the Fourteenth Amendment’s Due Process Clause conflicted with a two percent gross receipts tax imposed by Louisiana solely on individuals or corporations engaged in the business of ad-based large-circulation newspapers, magazines or similar publications, at the behest of Governor Huey Long, who was generally understood to be retaliating against the newspapers for being critical of his administration.¹¹² In *Joseph Burstyn, Inc. v. Wilson*,¹¹³ the Court found that a New York statute authorizing the appointment by the Board of Regents of a head of the motion picture division of New York State’s Board of Regents (which has authority over education policy in the state) to examine motion picture films and to issue licenses based on whether films were “sacrilegious” was invalid as an unconstitutional abridgment of free speech and of free press. The law challenged in this case directly regulated the revenue-producing expression (in the form of movies) of the business plaintiff, a for-profit film company.

Contrast these cases with the *POM Wonderful* case discussed above, or another recent business victory—that of *Western States Medical Center et al.* against provisions of the federal Food and Drug Administration Modernization Act in 2002.¹¹⁴ In *Western States*, the statute and regulations challenged did not regulate the sale of the underlying drugs being sold by the business party, but instead regulated the advertising and promotion of drugs. The companies involved were not set up to engage in speech or other forms of expression, but were using expression as an instrument, to further the primary goals for which they were established, to produce, distribute and sell drugs.

111. 297 U.S. 233 (1936).

112. The Court in *Grosjean* adverts to this background when it notes that the “form in which the tax is imposed is in itself suspicious,” being based not on advertising or revenues but “the extent of the circulation of the publication, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.” 297 U.S. at 251.

113. 343 U.S. 495 (1952).

114. *Thompson v. Western States Medical Center et al.*, 535 U.S. 357 (2002).

The distinction between laws regulating expressive businesses and laws regulating expression by non-expressive businesses is an important one in understanding the patterns in and social effects of post-World War II First Amendment doctrine. Expressive business cases—those involving film companies,¹¹⁵ newspapers,¹¹⁶ magazines,¹¹⁷ book publishers,¹¹⁸ radio stations,¹¹⁹ theatre companies,¹²⁰ and similar businesses—often have fact patterns that are nearly identical to those involving individuals, with the only difference being the nature of the party. Individuals, by contrast, much less commonly bring cases involving expression of commercial speech, even though there are more sole proprietorships doing business in the U.S. than corporate businesses, and the sole proprietorships are equally subject to most business regulation.¹²¹ More importantly, expressive businesses brought *all* of the business victories under the First Amendment prior to *Virginia Pharmacy*. No non-expressive business – which is to say, no business not engaged in expression for its primary revenue-producing activity—was able to achieve an offensive First Amendment case prior to 1976. Put differently, the era in which businesses have used the First Amendment to achieve de- or re-regulatory goals beyond their core revenue-producing activities falls entirely in, with increasing frequency during, the last thirty years since the First Amendment’s adoption in 1791.

115. *Burstyn*, 343 U.S. 495 (1952).

116. *New York Times Co. v. Sullivan et al.*, 376 U.S. 254 (1964). This case also included as petitioners the individuals who had taken out the ad claimed to be libelous, but it is coded for present purposes as a “business” case because of the role of the newspaper itself. *Grosjean*, 297 U.S. 233 (1936), an earlier First Amendment case involving newspaper companies, predates the sample.

117. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

118. *Bantam Books, Inc. et al. v. Sullivan et al.*, 372 U.S. 58 (1963).

119. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

120. *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968).

121. Commercial speech cases brought by individuals commonly involve professionals, such as lawyers and accountants, all generally banned from using the corporate form. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (mandatory disclosures in attorney advertising); *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978) (attorney advertising restrictions); *King v. New Jersey*, 767 F.3d 216 (3rd Cir.) (2014) (professional counselors barred from seeking to change sexual orientation); *Edenfield v. Fane*, 507 U.S. 761 (1993) (ban on in-person solicitation by certified public accountants); *Friedman v. Rogers*, 440 U.S. 1 (1979) (ban on use of trade names by optometrists).

iii. Limits and Implications of Supreme Court Evidence

The analysis so far has limits. Because the dataset is composed solely of Supreme Court cases, it runs up against censoring or selection problems for both case type and outcome data. These include the fact that the Supreme Court's docket is largely discretionary and small relative to the universe of disputes, creating a challenge for interpreting data on both case type incidence and case outcomes. For data on case type incidence, the Court's docket over time may not reflect the importance of legal doctrines over time, if a doctrine had reasonably predictable implications for disputes if litigated. For data on case outcomes, the empirical challenge was flagged long ago context by Priest and Klein¹²²—one should expect to see “win” rates for a given class of cases near 50%, if litigants were rational and equally informed and incentivized, because they would tend to settle as the odds of victory moved away from 50%.¹²³ Indeed, this is what we see for the period after *Virginia Pharmacy*, where win rates for both businesses and individuals are 55%, close enough to 50% given the variance in the data to be consistent with the Priest-Klein hypothesis.

What is empirically interesting is that there were enough cases prior to *Virginia Pharmacy* in which businesses sought to use the First Amendment, the Supreme Court took the case, but where the Court declined to intervene, such that the win rate for business was quite low, over a sustained period.¹²⁴ One such case was *Citizen Publishing Co.*,¹²⁵ where two businesses attempted to

122. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

123. Cf. Jeff Yates, Damon M. Cann, & Brent D. Boyea, *Judicial Ideology and the Selection of Disputes for U.S. Supreme Court Adjudication*, 10 J. EMP. LEGAL STUD. 847 (2013) (finding that about 56% of First Amendment cases favor the liberal party, and that partisan ideology of Supreme Court Justices in First Amendment cases is strongest in cases where deviation of case outcomes from 50% exceeds 5%).

124. These imply that the Priest-Klein hypothesis—which assumes equal incentives for parties to pursue cases to a litigated decision (and here, through the difficult appeal up to the Supreme Court)—may not always hold in the business context, where the profit motive and large corporate resources may dramatically shift the willingness and ability of businesses to pursue litigation beyond that a party-blind analysis would suggest would be rational in a narrowly framed analysis of a single case. (Individuals may be strongly motivated by both profit and ideology, but typically have fewer resources than business corporations.) Indeed, one can rightly conceive of *Virginia Pharmacy* and *Central Hudson*—and all of their progeny—as reflecting that same set of unusual incentives, in which businesses have far more to gain from a sustained and programmatic effort to shift First Amendment doctrine in their favor than a narrow cost-benefit analysis of any one case would be true for an individual or less well-resourced and motivated litigant.

125. *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1970).

argue that the Sherman and Clayton Acts were in conflict with the First Amendment because they prohibited the use of joint operating agreements between a city's only two newspapers. Quoting and affirming the 1945 case of *Associated Press*,¹²⁶ the Court held that:

It would strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.

This wisdom seems to have fallen out of the current Court's jurisprudence, in the same way that the guaranty of a Republican form of government contained in Article IV of the U.S. Constitution¹²⁷ has faded from the public memory. Another failed business effort to use the First Amendment against laws and regulations from the pre-1976 era was *California v. LaRue*, in which the Court upheld regulations of liquor licenses and dancers at licensed bars, on the ground that it was not "irrational or unreasonable" for a state to pass laws providing that the "sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously."¹²⁸ Ongoing efforts by society to confront the causes and consequences of violence against women make what might have for a time seemed old-fashioned prudery seem more reasonable than once was the case.¹²⁹ Another example of a failed business effort to use the First Amendment to strike down regulation was *Pittsburgh Press*, in which the Court

126. *Associated Press v. United States*, 326 U.S. 1 (1945).

127. That clause reads "The United States shall guarantee to every State in this Union a Republican Form of Government." *Luther v. Borden*, 48 U.S. 1 (1849), is generally thought to have—under the political question doctrine—essentially eliminated Article IV, Section 4, Clause 1 from operative U.S. law. A neutral observer might wonder at the U.S. Supreme Court essentially inventing ever-widening First Amendment grounds for intervening in political questions, while refusing to consider a part of the U.S. Constitution on the basis of a pre-Civil War case that was essentially repudiated by the addition of the Fourteenth Amendment's Equal Protection Clause, even when the neglected part of the Constitution directly bears on modern decisions, including campaign finance cases such as *Am. Tradition P'ship, Inc. et al. v. Bullock*, 132 S. Ct. at 2490 (2012) (overturning a Montana ban on direct corporate political expenditures out of general treasury funds).

128. 409 U.S. 109 (1973).

129. Interestingly, the Court has "disavowed" the reasoning in *LaRue*, but not the holding, focusing instead on the *LaRue* opinion's mistaken reliance on the Twenty-First Amendment as giving states more power to regulate alcohol consumption in derogation of other Constitutional rights, *44 Liquormart, Inc. et al. v. Rhode Island*, 517 U.S. 484 (1996), even as the Court in the same case built on *Virginia Pharmacy* to extend it to bans on advertising alcohol prices.

upheld a municipal ordinance banning newspapers from carrying sex-based job advertisements.¹³⁰

B. THE ROLE OVER TIME OF *CENTRAL HUDSON* IN THE FEDERAL COURTS OF APPEAL

To address one limit of the foregoing analysis, this section analyzes a different set of cases—those in the federal Courts of Appeal. Unlike the Supreme Court, those courts do not have substantial discretion over their docket, eliminating one source of potential selection bias over the cases reported. (The other source—litigant anticipation of case outcomes—remains, but should not strongly affect incidence of mandatory appeals, which is what is here analyzed.) The data for this section consists of all cases decided in the Courts of Appeals found in Westlaw citing *Central Hudson*, the leading case establishing the “commercial speech” doctrine. After eliminating duplicates, the dataset consists of 414 decisions, with some found in each of the Circuits: from 21 in the Eighth Circuit and 25 in the D.C. Circuit to 77 in the Ninth Circuit and 80 in the First Circuit.

The time trend revealed in the data is fairly straightforward: it is up. A simple regression of cases on year of decision shows that *Central Hudson* is being cited 0.21 more times every year, on average, since 1980, and the time trend alone explains 31% of the variation in case cites. The peak in the sample was 2012, when 20 decisions cited *Central Hudson*. The most recent year, 2014, saw 15 such decisions. The time trend is not perfectly linear—as shown in Table 1, there are some fluctuations, with a decline in the early ‘90s, and another in the early ‘00s. But the overall trend is clearly up, and not driven by any particular spike towards the end of the period. In each of the fifteen years in the second half of the sample, the number of cases citing *Central Hudson* exceeded the average (nine) for the first half, and the average for the second half was 44% higher (fourteen) than for the first half.

Consistent with the Supreme Court data presented below, the growing role of *Central Hudson* in the Courts of Appeal supports the view that businesses are growing steadily more aggressive in their use of the First Amendment to pursue de- or re-regulatory goals.

130. 413 U.S. 376 (1973).

Years	Court of Appeals Cases Citing <i>Central Hudson</i>
1980-84	50
1985-89	48
1990-94	44
1995-99	67
2000-04	55
2005-09	71
2010-14	79
Total	414

One concern about interpreting the above data as showing a trend towards more use of the First Amendment by businesses is that one could imagine that *Central Hudson*—simply by articulating a new test—stimulated more cases in which plaintiffs and lower courts cited it, but without having much impact on the application of the First Amendment to business regulation. The above analysis partly rejects this idea—given that no case prior to *Virginia Pharmacy* had struck down laws under the First Amendment on behalf of non-expressive businesses. But one might ask how the patterns of post-*Central Hudson* Courts of Appeals citations compare to other novel, landmark cases under the Bill of Rights. To consider this, a similar time-series was constructed of Courts of Appeals cases citing (1) *Mapp v. Ohio*,¹³¹ which first articulated the exclusionary rule permitting evidence in violation of Fourth Amendment rights to be barred from criminal trials, and (2) *Roe v. Wade*,¹³² which first articulated a right to abortion. Each of those cases articulated a new ground for bringing federal cases. The results of that analysis are presented in Figure 3.

131. 367 U.S. 643 (1961).

132. 410 U.S. 113 (1973).

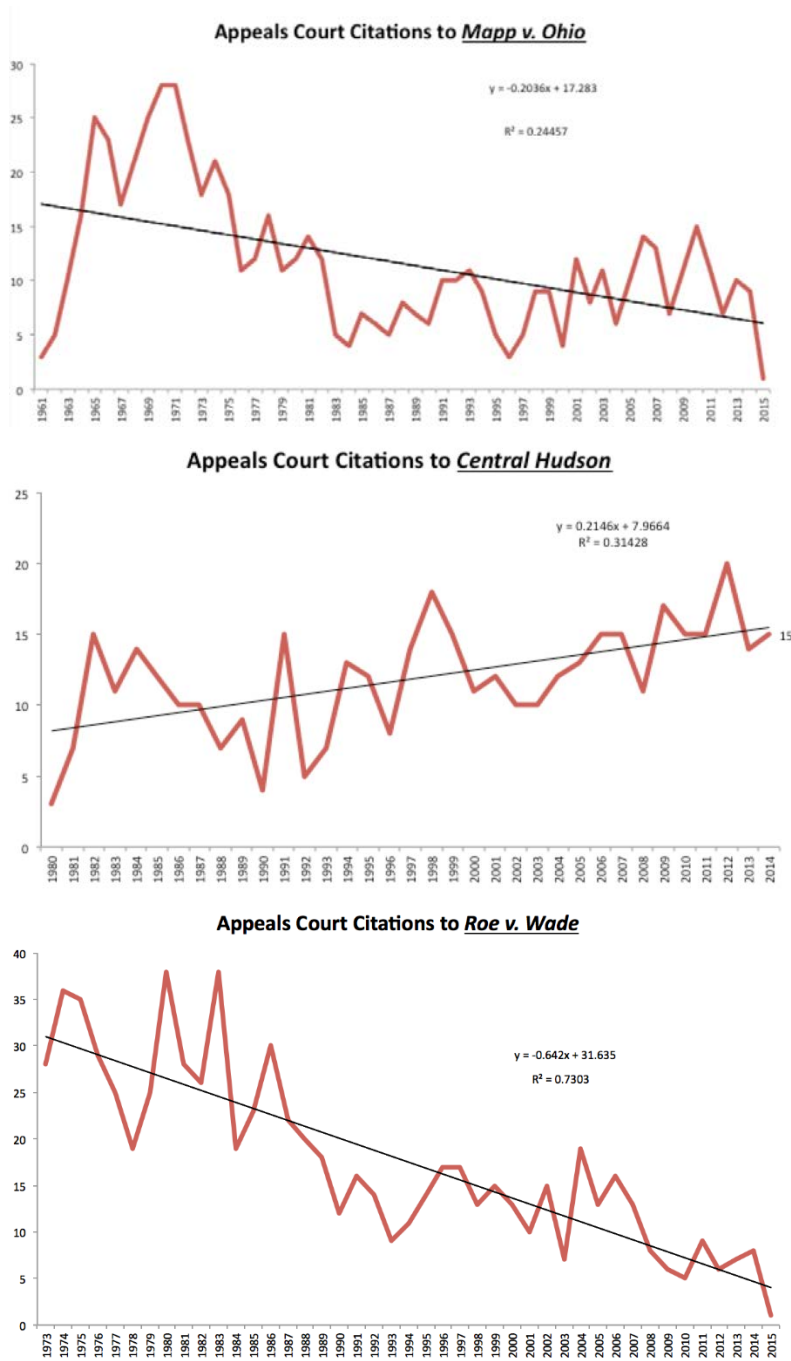


Figure 3. Sources: Author calculations, Westlaw

As can be seen, the pattern of Courts of Appeals cases citing *Mapp* spike in the half-dozen years afterwards, and then fall off significantly, before leveling off at a relatively low level, with an overall trend line sloping down over the period since the decision. Cases following *Roe* are similar, with an even steeper decline over the entire time since the decision, and no durable resurgence in the 1990s and 2000s. The case pattern for *Central Hudson* is distinct. Instead of falling off, the numbers of Courts of Appeal cases have increased since 1980, with some annual ups and downs, but a clear overall trend upwards. Compared to *Mapp* and *Roe*, *Central Hudson* created a sufficiently malleable tool for litigants that they have continued to generate ever more contested cases at the appellate court level over time. Of course, these numbers do not tell us anything about the nature of the cases, so it possible that the increase in cases under *Central Hudson* is not substantively meaningful, and does not reflect successful challenges to regulations by businesses. To assess the decision's substantive impact, we need to examine the specifics of a sample of current business cases under the First Amendment.

C. THE CURRENT ROLE OF THE FIRST AMENDMENT IN THE COURTS OF APPEAL

To better understand the cross-section of current commercial speech cases, each of the decisions citing *Central Hudson* decided in 2014 was reviewed to identify the nature of the litigants, theory of the case, and case outcome. Table 2 summarizes.

Case	Citation	Plaintiff Type	Defendant Type	Outcome
Safelite Group, Inc. v. Jepsen	764 F.3d 258 (2nd Cir.)	Business	Government	Business win
King v. New Jersey	767 F.3d 216 (3rd Cir.)	Individual	Government	Individual loss
Heffner v. Murphy	745 F.3d 56 (3rd Cir.)	Business	Government	Business win
1-800-411-Pain Referral Serv., LLC v. Otto	744 F.3d 1045 (8th Cir.)	Business	Government	Business loss
Dwyer v. Cappell	762 F.3d 275 (3rd Cir.)	Business	Government	Business win
Liberty Coins, LLC v. Goodan	748 F.3d 682 (6th Cir.)	Business	Government	Business loss

2015]

CORPORATE SPEECH

261

Hucul Adver., LLC v. Charter Twp. of Gaines	748 F.3d 273 (6th Cir.)	Business	Government	Business loss
Nat'l Ass'n of Mfrs. v. Sec. and Exch. Comm'n	748 F.3d 359 (D.C. Cir.), vac. in rehearing en banc 2014 WL 2619836	Business	Government	Business win
Am. Meat Inst. v. U.S. Dept. of Agric.	746 F.3d 1065 (D.C. Cir.), vac. in rehearing en banc 2014 WL 2619836	Business	Government	Business loss
Van Wagner Boston, LLC v. Davey	770 F.3d 33 (1st Cir.)	Business	Government	Business win
Evergreen Ass'n, Inc. v. City of New York	740 F.3d 233 (2nd Cir.)	Individual	Government	Individual win
Tyler v. Hillsdale Co. Sheriff's Dept.	775 F.3d 308 (6th Cir.)	Individual	Government	Individual win
Jordan v. Jewel Food Stores, Inc.	743 F.3d 509 (7th Cir.)	Individual	Business	Business loss
Wollschlaeger v. Florida	760 F.3d 1195 (11th Cir.)	Individual	Government	Mixed outcome

Business achieved a 50% win-rate (five of ten) in these cases.¹³³ Consistent with the analysis above, most of these cases are not brought by expressive businesses—not newspaper companies or book publishers or the like—but by a range of ordinary corporations, in a range of ordinary businesses, challenging a range of ordinary regulations not targeted at speech generally, but either requiring disclosures or regulating specific speech acts (such as the content of sales pitches, trade names, and radio ads) that were incidental to the businesses in question. In *Safelite Group*, the plaintiff was a insurance claim manager, unhappy about an anti-tying not allowing the business to contractually require insureds to use, or steer them towards, an

133. The fact that business is over-represented in these cases relative to the Supreme Court cases above is not surprising, since these cases are all citing *Central Hudson*, which articulated the commercial speech doctrine. In *King*, that doctrine was extended to individual professionals seeking to speak in their professional capacities, but the individual plaintiff involved lost despite the application of the doctrine. In *Tyler* and *Wollschlaeger*, the case was cited by analogy, and not applied to the facts of the case. In *Jordan*, the business asserted the doctrine as a defense to a series of claims brought by Michael Jordan. In *Evergreen Ass'n*, the government defendant attempted to argue that the case was a commercial speech case, and lost that argument.

affiliated service company;¹³⁴ in *Heffner*, plaintiffs included funeral services companies, who wanted to be able to operate under trade names that did not include the name of a current or former funeral director;¹³⁵ in *Otto*, it was a medical services referral provider seeking to use actors in TV ads purporting to depict former customers and to claim in radio spots that injured victims “may be entitled to up to forty thousand dollars.”¹³⁶ In *American Meat* and *National Association of Manufacturers*, the plaintiffs were industrial company trade groups hoping to avoid “country-of-origin” labeling requirements¹³⁷ and disclosure requirements concerning their purchase of “conflict minerals,”¹³⁸ respectively. The only expressive business-plaintiff in these cases was Van Wagner Boston, LLC, an outdoor advertising company.

D. SUMMARY OF FINDINGS AND IMPLICATIONS:
CORPORATIONS, INDIVIDUALS, AND OWNERSHIP

The foregoing historical empirical analyses found that (a) the Supreme Court’s First Amendment docket did not include business plaintiffs at all until roughly 150 years after the First Amendment was adopted, and long after business had produced the giant gains in wealth and welfare that have made capitalism the dominant form of economic activity in the world; (b) until the mid-1970s, only expressive businesses challenging laws that directly impeded their core business were able to convince the Court to strike down laws on their behalf, and not other businesses seeking to achieve de- or re-regulatory goals generally; (c) after the burst of judicial activism under the influence of Justice Powell in the mid-1970s, First Amendment cases in which businesses are the primary beneficiary have increasingly displaced cases in which individuals are the primary beneficiary; (d) the *Central Hudson* doctrine has encouraged an increasing number of commercial speech cases to be brought over time, and, in line with the Priest-Klein hypothesis, the private litigants are generally making accurate predictions in their case selection, leading to business wins in about 50% of the cases appealed to the Courts of Appeal; and (e) cases currently being decided in the Courts of Appeal under *Central Hudson* mostly do not involve expressive businesses, but are attacks on laws and regulations that inhibit

134. 764 F.3d 258, at 259–61.

135. 745 F.3d at 88–89.

136. 744 F.3d at 1051–53.

137. 746 F.3d at 1065–66.

138. 748 F.3d at 363–65.

“speech” by other kinds of businesses in areas of activity incidental or instrumental to their core profit-making activity.

These findings present a challenge to the view, articulated by the majority and concurrences in *Citizens United* and *Hobby Lobby*, that corporations and other business entities should be understood “simply” as aggregations or associations of individuals, and so should not be distinguished from them for purposes of First Amendment analysis. It is true that corporations are given life and meaning only because of individuals, but the identities, roles and powers of individuals associated with corporations vary enormously. As a result, the influence of different individuals associated with corporations on the legal decisions of those corporations, and the effects of those decisions on individuals associated with corporations, also varies enormously, across types of corporations.

At one extreme, a single-owner corporation with no employees is nothing more than a form of property for that one individual. The individual does not typically need the corporation to pursue the individual’s interests in free expression—they can do so directly. Even if the corporation so owned has property needed to defend constitutional rights, that property can be removed easily from the corporation and used by the individual. For the millions of sole proprietorships organized for legal purposes in this way, there is simply no legitimate need (albeit little harm) in granting First Amendment rights to such entities.

At the other extreme, a multiple-owner corporation with thousands of employees may be viewed as the association of the owners, of the employees, or both. In typical, large, publicly held U.S. companies, the ones with the most money and resources, it is neither owners nor employees that are legally empowered to act on behalf of the company, or to choose its business strategies or litigation tactics. The individuals with that power comprise the board of directors, typically fewer than fifteen in number, nominally elected by the shareholders, but in fact largely self-perpetuating. In fact, even the board rarely chooses business strategy and almost never chooses litigation tactics in practice, but delegates those tasks to a small number of senior managers, subject only to loose oversight, consisting of six to twelve board meetings per year, at which the information the board has is largely produced by the managers they oversee.

However one evaluates these facts, they are facts, with implications for how to think about the corporate takeover of the

First Amendment. While any corporate challenge to a law or regulation under the First Amendment necessarily involves some human individual, that individual is not necessarily one with legitimate authority or social interests in the strategy or tactics involved in the challenge. For example, at the time that IMS Health Inc. initiated the lawsuit that led to the *Sorrell*¹³⁹ decision in 2011, it was a publicly traded company, with thousands of shareholders, and thousands of employees.¹⁴⁰ No individual owned more than 3% of its shares – indeed, all of its directors and officers combined owned less than 3% of its shares.¹⁴¹ It had four institutional shareholders with more than 5% of its shares, each, but each of those institutions held on behalf of thousands of individual beneficiaries.¹⁴²

As a result, the decision to sue the Vermont Attorney General to strike down the privacy laws attacked in that case was not made by (or with the consent or even knowledge) of any of those employees or owners, other than (possibly) the senior management and (likely) a relatively small number of employees in the business unit interested in exploiting customer data and in the legal department. The bulk of the owners, and in all likelihood most of the employees, were not asked or informed about whether they or IMS Healthcare, Inc. had a meaningful First Amendment interest in “speaking” about the prescribing practices of individual doctors based on private patient data that the company had obtained. In fact, the majority of owners or employees living in Vermont had an interest in the *prevention* of “speech” of that kind, assuming ordinary assumptions about representative democracy reflecting the “median voter” were valid. Nor in fact did any individual have such an interest—the individuals in the relevant business unit and the individuals

139. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

140. IMS Health Incorporated, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 at 10, 22, *available at* <http://www.sec.gov/Archives/edgar/data/1058083/000104746910000961/a2196431z10-k.htm> (disclosing over 7,000 employees and over 3,000 record holders). Record holders include brokers and banks that typically hold on behalf of more numerous beneficial owners, which in turn may be institutions (for example, mutual funds) that hold on behalf of still more numerous individuals. John C. Coates IV, *The Powerful and Pervasive Effect of Ownership on M&A* (Harvard Law and Economics Discussion Paper No. 669, June 2010), *available at* <http://ssrn.com/abstract=1544500>.

141. IMS Health Inc. 2010 Proxy Statement at 5-7, *available at* <http://tinyurl.com/osegjb6>.

142. *Id.* (listing Barclays, Arian Capital, FMR, and Wellington as block holders). Each of those institutions is a well-known money management firm investing money on behalf of their own investor-clients.

2015]

CORPORATE SPEECH

265

managing the corporation only had an interest in earning a profit in the least regulated way possible, and the company's interests in "expression" (of private prescribing practice data!) were instrumental and linked to their individual interests only through their profit motive.

In sum, the effect of the Supreme Court's decision in *Sorrell*—as in most of the First Amendment business cases since *Virginia Pharmacy*—was not to vindicate the expressive interests of any individual associated with IMS Health Inc., but simply to make it easier for that company, as a business organization, to make money, at the expense of the privacy of Vermont residents. The result was, in essence, to transfer power to set regulatory policy from the Vermont government to the Court. The transfer was achieved at the behest of a small group of individuals, managers and employees of a single company. These managers and employees were never asked or expected by the organizers or owners of the company to use that power in such a fashion. Put differently, the corporate takeover of the First Amendment represents a pure redistribution of power over law with no efficiency gain – "rent seeking" in economic jargon. That power is taken from ordinary individuals with identities and interests as voters, owners and employees, and transferred to corporate bureaucrats pursuing narrowly framed goals with other people's money. This is as radical a break from Anglo-American business and legal traditions as one could find in U.S. history.

III. THE RELATIONSHIP BETWEEN THE TAKEOVER TO THE NEW CORRUPTION

In this final Part III, I cash out the historical and empirical analysis in Parts I and II by sketching the consequences of the corporate takeover of the First Amendment. I first try to define what is at stake—a specific form of legal corruption that is distinct but has analogues to forms of corruption that can be found in history. I then argue that the corruption represented by the ongoing corporate takeover of the First Amendment, if it persists, not only risks the loss of a republican form of government emphasized by most critics of *Citizens United*, but the risk of an extended era of economic malaise—a package of risks that one might call (with only some exaggeration) "the risk of Russia."

A. WHAT IS CORRUPTION?

Definitions of “corruption” vary. Corruption is a “derivative concept,” one that needs to be linked to both a specific noun (institution, person, object) and a normative theory of how that noun ought to be, against which corruption can be measured.¹⁴³ Corruption is the negative of health. For complex systems such as democracy and capitalism, ill health can arise from a wide number of causes. It follows that—for an institution or a system—efforts to improve health—to combat corruption—can take a wide number of forms.

In ordinary conversation, multiplicity of meanings may lead to confusion but also to discussion and clarification. But legal concepts in operation need to be more specific and simple—else they are difficult to predict and apply, and at the margin, meaningless and manipulable. This was one arguably legitimate reason that in *Citizens United*, the Supreme Court overturned its precedents and narrowed the legal meaning of corruption to consist solely of “*quid pro quo*” corruption—i.e., bribery of government officials—the exchange of something of value for a specific governmental act.¹⁴⁴ As a result of the Court’s narrow definition, campaign finance laws that have the purpose of reducing corruption understood more broadly are, in the Court majority’s view, unjustified, and so fail under the First Amendment, even if evaluated under the nominally lighter “commercial speech” doctrine, which as noted above, requires a “substantial purpose” to be served “directly” by laws abridging such speech.¹⁴⁵

The Court’s narrowing is not the only way to give the concept of corruption enough specificity to have legal meaning, as

143. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013). Others have made similar points. See, e.g., Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1038 (2005) (“The form the virus [corruption] takes depends on the form of government it attacks. In regimes of a more popular cast, such as republics and democracies...[t]he essence of corruption...is the pollution of the public by the private.”); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373 (2009) (“Corruption . . . has two meanings It has a broad meaning, describing all kinds of moral decay, and a more specific meaning in the context of politics.”); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 126 (2010) (“Any constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the uncorrupted.”).

144. 130 S. Ct. at 908–11; Heather Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1157–58 (2011) (*Citizens United* “substantially narrowed the definition of corruption”).

145. See text accompanying *supra* notes 85–93.

illustrated by the Court's own analysis. "The fact that speakers may have *influence* over or access to elected officials," Justice Kennedy wrote, "does not mean that these officials are corrupt," and "[i]ngratiation and access . . . are not corruption."¹⁴⁶ In one of the more astonishing sections of any Supreme Court opinion ever written, Kennedy acknowledges:

If elected officials succumb to *improper influences* from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.

From this sensible sentence, he reverts to catechism: "it is our law and our tradition that more speech, not less, is the governing rule," and "bans on speech that are asymmetrical to preventing *quid pro quo* corruption" are unconstitutional. In sum, to Kennedy and the Court majority, corruption as a legal concept excludes "influence," "ingratiation," and even "improper influences."¹⁴⁷ Excluding these moderately broader conceptions of corruption from its legal meaning was not necessary to limit the potential reach of laws justified by corruption. One is put in mind of Lewis Carroll's Humpty Dumpty when he said, "in a rather scornful tone" that "'When I use a word . . . it means just what I choose it to mean — neither more nor less.'"¹⁴⁸

Commentators have criticized the Court's radically narrowed definition as too narrow, and have offered their own, broader definitions. Zephyr Teachout draws on the ideological history of early U.S. history to argue that corruption, as understood at that time, involved "excessive private interests influencing the exercise of public power."¹⁴⁹ Larry Lessig argues that the best conception of corruption is a type of dependency of an agent or institution on some one or group other than the principal or intended beneficiary of the institution, such that the effectiveness of the agent or institution is impaired.¹⁵⁰ Richard Hasen advances "rent-seeking" as a new and broader understanding of corruption that

146. 130 S. Ct. at 908–11 (emphasis added).

147. *Id.* (emphasis added).

148. LEWIS CARROLL, *THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE* 123 (Henry Altemus 1897) (1871).

149. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 9, 38, 276 (2014). Teachout notes that corruption was cited more often in the U.S. Constitutional convention than "factions, violence, or instability," that it was discussed on more than a quarter of the convention's days, and that Madison recorded the use of the word 54 times. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352–53 (2009).

150. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* (2011).

could justify laws governing lobbying consistent with the First Amendment.¹⁵¹ Sam Issacharoff advances a conception of corruption in which “the threat to democratic governance may come from the emergence of a ‘clientelist’ relation between elected officials and those who seek to profit from relations to the state.”¹⁵² No doubt others could be advanced.

Each of these definitions has appeal, and they obviously overlap. Each is consistent with a recent synthesis of research in political science on what stock market reactions to various events tell us about how corporations achieve political influence: “trust relationships are necessary to support potential corrupt practices and . . . cronyism based such relationships is a more prevalent practice than *quid pro quo* exchanges of money for political favors.”¹⁵³ Each of these broader conceptions of corruption represents a vision of how to restore legal meaning to the legitimate goals of campaign finance reform.

B. THE RISK OF RUSSIA

Here, however, I want to argue that the corporate takeover of the First Amendment is a large part of an emerging form of corruption not *solely* of American government, but also of an institution that has been at least as important to America’s history—its “free enterprise” system, consisting of free market capitalism constrained by law. Others have emphasized the way that corporate speech “trumps”¹⁵⁴ based on the First Amendment risks corrupting the American political system,¹⁵⁵ which is no doubt true. Instead, I want to emphasize that the existence and power of those same trumps can also and as importantly corrupt the economic system. If an economically healthy but politically

151. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012).

152. Issacharoff, *supra* note 143, at 121.

153. Jeff Milyo, *Corporate Influence and Political Corruption: Lessons from Stock Market Reactions to Political Events* (University of Missouri Dept. of Economics, Working Paper, 2013), available at http://economics.missouri.edu/working-papers/2013/WP1323_milyo.pdf.

154. A note on rhetoric: First Amendment legal entitlements are generally called “rights” when applied to individuals, but are more properly conceived as “trumps” when applied to businesses. Individuals assert the “right” to speak as an end in itself; businesses (other than expressive businesses) use equivalent legal entitlements as an instrumental means to another goal, that of profits or economic rents. For more on “rents,” see text accompanying notes 147-54 *supra*.

155. See Teachout, *supra* note 143; Lessig, *supra* note 150; Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 491-92 (2015).

closed system is bad, a country like Russia that combines both despotism and economic malaise is worse. Both are risks of the corporate takeover of the First Amendment.

The corporate takeover of the First Amendment is at its heart the use by elite members of society of specific legal tools to degrade the rule of law.¹⁵⁶ These tools are those sketched in operation in Part I.C and Part II: the increasing and broadening use by corporations of challenges under the First Amendment to laws and regulations generally, and especially and increasingly laws that do not constrain expressive businesses (such as media companies), but any communicative or expressive activity of any business, no matter how incidental to the purpose and goals of the business, and no matter how little any ordinary individual (even a shareholder or employee of the business) might care about the expression in question. Concentrated, moneyed interests, represented by those in control of the country's largest business corporations, are increasingly able to turn law into a lottery, reducing law's predictability, impairing property rights, and increasing the share of the economy devoted to rent-seeking rather than productive activity.

Companies are increasingly able to persuade courts—not all of them, all of the time, but enough of them, enough of the time—to exploit the “fit” requirement of the *Central Hudson* test to achieve de- or re-regulatory goals not obtainable through the political process, as corrupt as that is becoming. The result is not simply de- or re-regulation, moreover—not simply a New *Lochnerism*,¹⁵⁷ though it is that, too. Rather, the result also

156. By “rule of law” I have in mind conventional understandings, such as that agreed-upon by H.L.A. Hart and Lon Fuller, despite their disagreements on other points, in which laws are general, published, prospective, clear, understandable, free from contradictions, not changed too frequently, and congruent with authorized or official action. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 347 (1983); LON L. FULLER *THE MORALITY OF LAW* 145 (1969); cf. JOHN RAWLS, *A THEORY OF JUSTICE* 235 (1971) (“A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.”), which, as Peggy Radin has shown, can be viewed as similar to if also substantively different from the Fuller/Hart definition, in Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781,787–88 (1989), with the essential test being whether a dictatorship could be viewed as adhering to the rule of law.

157. For others noting the similarity between the use of the First Amendment to achieve de- and re-regulatory goals and the use of the Fourteenth Amendment to do the same in the *Lochner* era, see, for example, Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2015); Vicki Jackson, *Constitutional Law in an Age of Proportionality*, YALE L.J. (forthcoming 2015).

270 *CONSTITUTIONAL COMMENTARY* [Vol. 30:223]

undermines the rule of law more generally. Precedents are overturned,¹⁵⁸ *stare decisis* becomes a joke;¹⁵⁹ constitutional entrepreneurialism runs amok. Radicals in pinstriped suits rewrite whole elements of long-established legal order. Under First Amendment threat, laws become quantum objects—partly there, partly not there. As a system, they cease to have several of the key indicia of the “rule of law,” including consistency, predictability, and publicity.¹⁶⁰

Companies created to take business risks with enormous resources, derived from dispersed and hence rationally apathetic owners, increasingly place bets not on new technologies or marketing strategies, but on legal and political “innovation”—what in business schools is taught under the Orwellian name “non-market strategies.”¹⁶¹ Consistent with the 1971 Powell memo,¹⁶² government affairs offices grow,¹⁶³ and strategic planning generates decision trees down many branches of which a friendly panel of the D.C. Circuit overturns regulations, should an agency dare to enforce them.¹⁶⁴ Agencies risk resources, demoralization, and loss of reputation and status when they lose these battles.¹⁶⁵ They trim their sails, and reduce their enforcement efforts. Knowing that they have a hard time enforcing the laws they have, agencies also reduce their regulatory activity,¹⁶⁶ and ignore (or at

158. *Virginia Pharmacy* overturned *Valentine; Bellotti* was inconsistent with *UAW-CIO* and *Pipefitters*; *Citizens United* overturned *Austin* and *McCConnell*.

159. Adam Liptak, *Thomas is Getting a New Chance to Break Precedent (if Not Silence)*, N.Y. TIMES, Feb. 24, 2014, at A15 (“You are the justice who is most willing to re-examine the court’s precedents,” Judge Diane S. Sykes told [Justice Thomas] in November, at an annual dinner sponsored by the Federalist Society, the conservative legal group. Justice Thomas responded . . . ‘That’s because of my affinity for *stare decisis*,’ he said . . . Then he let out a guffaw.”).

160. See *supra* note 144.

161. See, e.g., MGMT-450 Strategic Management in Non-market Environments, KELLOGG SCHOOL OF MANAGEMENT (course overview describing course on “non-market strategies” including use of “legislatures, regulatory bodies, or courts”), available at <http://tinyurl.com/oht5cww> (last visited Feb. 6, 2015).

162. See *supra* note 82.

163. JOHN P. HEINZ, EDWARD O. LAUMANN, ROBERT L. NELSON & ROBERT SAINTSBURY, *THE HOLLOW CORE* (1993).

164. See, e.g., John M. de Figueiredo & Rui J. P. de Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation*, 4 BUS. & POLITICS 161 (2002).

165. See, e.g., Robert A. Kagan, *Adversarial Legalism and American Government*, in *THE NEW POLITICS OF PUBLIC POLICY* 88 (MARC K. LANDY & MARTIN A. LEVIN EDS., 1995) (explaining that litigation drains agency resources, causing agencies to alter their behavior in an effort to avoid it).

166. See, e.g., John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 1, 913–26 (2015) (describing delays and effects of litigation challenging securities regulations); Kagan, *supra* note 165; Bruce Kraus &

least impose long delays on implementing) directives from Congress.

With the degradation of the rule of law come economic consequences. The rule of law—including stability in law and regulation—is essential to secure property rights, and “[e]conomists from Adam Smith (1776) to Douglas C. North (1981) agree that poor protection of property rights is bad for growth.”¹⁶⁷ Efforts to use of the First Amendment by corporations to achieve non-expressive ends commonly represent what economists call “rent seeking,”¹⁶⁸ or in more legal language, socially wasteful transfers, or in ordinary language, theft, waste and graft. When successful, rent seeking transfers wealth from one person to another, but more importantly, it represents a net wasteful investment in overall welfare, since one person’s gain is another’s loss, and the exercise of transferring wealth requires resources.¹⁶⁹

As with corruption, the concept of rent seeking has multiple potential meanings, and however defined is not a simple, uniform set of behaviors.¹⁷⁰ Rent seeking can take different forms in different contexts, and flow in multiple directions. In classic public choice narratives, rent seeking is all about the use by government

Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. REG. 289, 342 (2013) (“Cost-benefit litigation has substantially slowed the pace of financial reform.”).

167. Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *Why Is Rent Seeking So Costly to Growth?*, 83 Am. Econ. Rev. Papers and Proceedings 409 (1993), available at http://scholar.harvard.edu/files/shleifer/files/rent_seeking.pdf; see also Noel D. Johnson, Courtney L. LaFountain & Steve Yamarik, *Corruption is Bad for Growth (Even in the United States)*, 147 PUB. CHOICE 377 (2011); Ignacio Del Rosal, *The Empirical Measurement of Rent-Seeking Costs*, 25.2 J. ECON. SURVEYS 298 (2011); Russell S. Sobel & Thomas A. Garrett, *On the Measurement of Rent Seeking and Its Social Opportunity Cost*, 112 PUB. CHOICE 115 (2002).

168. For a standard if ideologically tinged articulations of the concept of rent seeking, see Robert D. Tollison, *Rent Seeking*, in PERSPECTIVES ON PUBLIC CHOICE 506, 506 (Dennis C. Mueller ed., 1997) (“Rent seeking is the socially costly pursuit of wealth transfers.”).

169. As noted by Hasen, *supra* note 151 at n.232 (citing Charles Anderton, *Teaching Arms-Race Concepts in Intermediate Microeconomics*, 21 J. ECON. EDU. 148, 158–59 (1990)) (“On occasion, lobbying activities to defeat earlier-imposed rent-seeking legislation could in isolation be efficient. For example, a lobbyist may successfully get the government to remove a protective tariff. Overall, however, a culture of fighting over transfers is likely to be inefficient, akin to the usual inefficiencies of arms races.”).

170. Paul Dragos Aligica and Vlad Tarko distinguish several types of rent-seeking societies in history before arguing that “crony capitalism” represents a new type of society. *Crony Capitalism: Rent Seeking, Institutions and Ideology*, 67 KYKLOS 156, 157 (2014) (“Crony capitalism is yet another type of rent-seeking society, distinct of those three, and that its key distinguishing feature is that the prevailing rent-seeking structure is legitimized by means of a populist ideology.”).

officials of power to award monopolies or bar entry to new businesses unless bribes are paid. In development economics, it often represents simple bribes for subsidies, grants, underpriced loans, or tax breaks. It can involve simple information advantages, which may permit insider trading or the equivalent in non-securities markets.

Less well appreciated is that rent seeking can also occur through the courts. It can represent bribes to judges to rule in favor of bribe-payers in disputes, or a flow of benefits—speaking fees, status-enhancing social invitations, non-monetary benefits such as free travel—in return for advancing a broad-scale legal ideology that will produce systematic benefits to the rent-seekers over time. Corporate managers can seek rents from the government to benefit their shareholders, government officials can seek to extract rents from corporations, and corporate managers can seek rents from shareholders, too (generally understood as a form of “agency costs” in the economic and law-and-economics literatures), and use corporate political activity to advance their personal goals.¹⁷¹

171. For evidence on corporate political activity generally being associated with corporate agency costs, see Rajesh K. Aggarwal et al., *Corporate Political Donations: Investment or Agency?*, 14 BUSINESS AND POLITICS (2012) (explaining that political activity public companies spent less on R&D and political donations correlated negatively with long-term firm-specific stock performance); Coates, *supra* note 5 (stating that corporate political activity leads to higher incidence of corporate CEOs becoming high government officials, and is correlated with and partly results in lower corporate value); Holly Brasher & David Lowery, *The Corporate Context of Lobbying Activity*, 8 BUSINESS AND POLITICS (2006) (explaining that public companies, with dispersed owners, more likely to lobby than otherwise similar private companies, with concentrated owners); Paul K. Chaney, Mara Faccio & David Parsley, *The Quality of Accounting Information in Politically Connected Firms*, 51 J. ACC'T & ECON. 58 (2011) (finding that earnings quality of politically connected firms is significantly poorer than those not politically connected); Mara Faccio, *Differences Between Politically Connected and Non-Connected Firms: A Cross-Country Analysis*, 39 FIN. MGT. 905 (2010) (arguing that politically connected firms have higher leverage and market shares but underperform relative to non-connected firms); Mara Faccio, Ronald W. Masulis & John J. McConnell, *Political Connections and Corporate Bailouts*, 56 J. FIN. 2597 (2006) (discussing that politically connected firms and more likely to need and obtain bailouts and perform worse than non-connected companies, including those that also obtained bailouts); Michael Hadani & D. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, 34 STR. MGT. J. 165 (2013) (political investments by public companies are negatively associated with market performance); Russell Sobel & Rachel Graefe-Anderson, *The Relationship Between Political Connections and the Financial Performance of Industries and Firms*, (George Mason University Mercatus Center, Working Paper No. 14-18, 2014), available at <http://mercatus.org/publication/relationship-between-political-connections-and-financial-performance-industries-firms> (“We find little evidence to support the idea that political activity undertaken by corporations leads to improved performance for firms and their shareholders at both the industry and firm level. We do however find a robust and significant positive relationship between political activity and executive compensation.”);

As corporate activity becomes enmeshed in any or all of these types of rent seeking, they lose strategic focus on other, socially beneficial methods to make a profit: to innovate, to deliver goods and services efficiently, to pursue efficient cost-cutting, to seek synergistic combinations of assets. Once corporate success depends on rent seeking, advancement within the corporation will depend on learning the levers of power in courts, legislators, and regulatory agencies, and different skills and forms of human capital will be rewarded. Rent seeking crowds out economically valuable activity, attracts investment and “talent,” and shapes careers.¹⁷² Businesses become increasingly aimed at exploiting market imperfections that conventional laws and regulations are meant to address. “An increase in rent seeking activity may make rent seeking more (rather than less) attractive relative to productive activity.”¹⁷³ Real investment returns fall, faced with the risk of such exploitation. When, for example, consumers pay over \$100 million per year for pomegranate juice, in substantial part because a company has convinced consumers that the juice reduces cholesterol, promotes a healthy heart and prostate, and slows tumor growth, when a government agency attempts to force the seller to prove the health claims in the same way that a drug company would have to do, only to have a court strike the requirement down under *Central Hudson*, the result is a waste of social resources, on multiple levels, with multiplier effects as others observe the result, and respond accordingly.

At the end of the rent-seeking road is Russia, blessed with natural resources but neither democracy nor the rule of law nor sustained economic growth. I concede that Russia’s history is

Frank Yu & Ziaoyun Yu, *Corporate Lobbying and Fraud Detection*, 46 J. FIN’L & QUANT. ANAL. 1865 (2011) (discussing that public firms engaged in lobbying and fraud are less likely than those not engaged in lobbying to be detected as fraudulent, and evade fraud detection for longer, allowing managers more time to sell shares and leading to greater misallocation of resources during fraudulent periods).

172. Others have advanced this point about campaign finance regulation. See e.g., Hasen, *supra* note 151; Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1112–13, 1124–25 (2002) (arguing that anti-rent-seeking was one of the goals of the Progressive-era restrictions on corporate political activity, noting that the corporate form “provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation”); Edward Glaeser et al., *The Injustice of Inequality*, 50 J. MONETARY ECON. 199 (2003). To my knowledge, however, no one has connected the harms of rent-seeking to the broader corporate takeover of the First Amendment—which includes the campaign finance cases involving corporate activity, but extends to many other kinds of deregulatory uses of the First Amendment.

173. Murphy et al., *supra* note 167.

among its burdens, that the U.S. has robust republican traditions on which it can draw, and that the U.S. will not resemble Russia anytime in the near future. But it is precisely the force of history that creates worries about the path we are on, and whether it points towards anything like Russia. How far down that road we have already traveled is a good question. Some might argue that we have already moved some way down that road, pointing to the recent financial crisis and recession, which was caused in part by the deregulation of the financial industry over the past thirty years, including through litigation or threat of litigation. Pessimists might also suggest that the repeated non-compliance by the country's largest banks with basic laws and regulations, the increased participation in party politics by trade groups and public companies, and the evident fact that the tax system has failed to accomplish the goal of fairly distributing the burdens of citizens based on its benefits. Pessimists might also note that in some models of the political economy, rent seeking can tip affairs from a healthy to an unhealthy equilibrium in a rapid fashion.¹⁷⁴ More optimistic observers might argue that the rule of law tends to have an inertial power, and so to be resilient, and that the U.S. economy remains the strongest in the world, despite (or even because of) the past thirty years of legal change. Such judgments are contestable, unlikely to be resolved at such a high level of generality. The *risks* associated with a degraded rule of law, the risks of moving *towards* Russia, however, seem uncontestable.

The risks of Russia are the risks that structural constraints on private corporate power—illustrated in the business history outlined at the outset of this Article—were meant to address. Heavy controls on corporate entities trying to move outside the business of business and into government activity date back to the Stuart period in England. The implementation of public finance was wrested away from the King by Parliament, a shift reflected in the U.S. in the vesting of the power to tax and spend in Congress. Monetary powers were hived off with the emergence of the Bank of England, eventually reflected in the U.S. in the Federal Reserve's unique separation from private business and ordinary politics alike. A government monopoly over the creation and governance of multi-owner private legal entities was adopted in the Bubble Act, as eventually reflected in the U.S. in the effectively centralized powers in the Securities and Exchange Commission, with its authority over the New York Stock

174. See, e.g., *id.*

2015]

CORPORATE SPEECH

275

Exchange, and, with the characteristic quirkiness of American federalism, in the Delaware courts. Commerce and banking were separated, by custom in the U.K. and in the U.S. by law—the National Bank Act and the Bank Holding Company Act. Corporate economic power in the U.S. was further cabined by the Sherman Act, the Tillman Act, and the Hatch Act. Each of these structural constraints and controls emerged long before the Supreme Court invented an activist First Amendment jurisprudence, much less before that jurisprudence was extended to businesses or, still later, commercial speech. These structural constraints can best be understood as preserving room for free enterprise activity separate from the affairs of government—at securing the economic benefits of growth by insuring that “we are all servants of the laws, for the very purpose of being able to be [free].”¹⁷⁵ Let us see that they survive the corporate takeover of the First Amendment.

175. THE ORATIONS OF MARCUS TULLIUS CICERO 164 (C.D. Yonge trans., 1867)