

University of Minnesota Law School Scholarship Repository

Minnesota Law Review

2013

Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine

Deven R. Desai

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Desai, Deven R., "Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine" (2013). *Minnesota Law Review*. 291.
<https://scholarship.law.umn.edu/mlr/291>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Article

**Speech, Citizenry, and the Market: A
Corporate Public Figure Doctrine**

Deven R. Desai[†]

Introduction	456
I. Speech by a Corporation: From Corporate Personhood to Corporate Citizenry	459
A. Corporate Speakers	460
B. Corporations Speak About Matters of Public Importance	462
C. The Politics of Products and Processes	466
II. Speech About the Corporation: Against Saving Corporate Face	475
A. The Nature of Corporate Face	476
B. Barriers to Speech About Public-Figure Corporations	479
C. The Virtue of Decentralized Authority	489
III. Establishing the Corporate Public Figure Doctrine	496
A. Increasing Speech	496
B. Enabling Speech About the Corporate Public Figure	499
Conclusion.....	509

[†] Associate Professor, Thomas Jefferson School of Law. This Article has benefitted from the input of Jack Balkin, Ashutosh Bhagwat, Margaret Chon, Julie Cohen, Anthony Falzone, Brett Frischmann, Mark Lemley, Lyrrisa Barnett Lidsky, Lisa Ramsey, Neil Richards, Sandra Rierson, Paul Schwartz, Daniel Solove, and Rebecca Tushnet. The attendees of U.C. Berkeley School of Law lecture series, IP Scholars, 2012, at Stanford University School of Law, and Freedom of Expression Scholars Conference, 2013, at Yale Law School were most helpful as well. Ryan Calo and Stanford Law School's Center for Internet and Society's provision of research space and support aided this work also. I thank all for their help. Copyright © 2013 by Deven R. Desai.

[Editor's Note: For further discussion of *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, see Ashutosh Bhagwat, *Truthiness: Corporate Public Figures and the Problem of Harmful Truths*, 98 MINN. L. REV. (forthcoming April 2013).]

INTRODUCTION

Corporations no longer exist in a purely commercial world. Corporate policies intersect with and shape a host of political issues, from fair trade to gay rights to organic farming to children's development to gender bias to labor and more. Thus Google urges countries to embrace gay rights; Mattel launches a girl power campaign; activists question Nike's labor practices, McDonald's food processing, and Shell Oil's business practices; and bloggers police the Body Shop's claims about its manufacturing practices.¹ The social, political, and commercial have converged, and corporate reputations rest on social and political matters as much as, if not more than, commercial matters.

The proposition that corporations are people for First Amendment purposes reveals that, if so, corporations are often public figures.² Like other public figures, corporations affect public affairs, take political positions, engage in matters of public concern and controversy, and have reputations. A foundational commitment of free speech law, perhaps the foundational commitment, is that public figures don't and can't own their reputations. Yet through trademark and commercial speech doctrines, corporations have powerful control over their reputa-

1. See *infra* note 177 and accompanying text; *infra* Part III.B.

2. This Article follows the logic of expanded speech rights for corporations to its conclusion. It shows that if such expansion is at hand, certain outcomes are required. Nonetheless, there are reasons to question whether such an expansion is well grounded or wise. Several other authors have excellent discussions of why corporations are different than individuals for speech and other purposes. See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L. REV. 981, 987–90 (2009) (arguing that commercial entities are “created for . . . instrumental purposes” and have “a morally different status than living, flesh-and-blood people”); see also Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment “Public Figure”: Nailing the Jellyfish*, 68 IOWA L. REV. 35, 65–69 (1982) (tracing the Supreme Court's different approaches to corporate personhood depending on the question presented); cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (connecting the protection of someone's good name to dignity). Ashutosh Bhagwat has made a strong argument that the nature of an association matters for constitutional analysis of whether a corporate entity has speech rights. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1023–25 (2011). A corporate entity not engaging in associational speech should not be afforded the same protection as one engaged in other speech, including commercial speech. *Id.* Bhagwat defines associational speech as “speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials).” *Id.* at 981. As I argue, corporate commercial claims have become political, associational, and commercial at the same time, which is why maintaining boundaries on corporate speech has become difficult.

tions. If corporations are people for free speech purposes, as a constitutional matter, their control over their reputations can be no greater than the control other public figures have. Recognizing corporations as public figures has broad implications for defamation, libel, trademark, and other corporate reputation-protection doctrines. These shifts achieve symmetry in the law and ensure that speech rights are properly balanced. Corporations cannot have it both ways. Corporations want and receive many of the same legal rights as natural persons. They should be subject to the same limits as other powerful, public figures.

Part I of this Article establishes the nature of corporate citizenry and speech. Although *Citizens United v. Federal Election Commission*³ is well-known as it relates to federal election law and super PACs, its statements regarding the nature of corporations as persons and the scope of corporate speech rights are equally, and perhaps more, important. Part I focuses on the contours of First Amendment law and corporate speech as they intersect to treat corporations as members of society engaging in politics. I argue that economic decisions by corporations and consumers have become influential to many political decisions, and may be political decisions themselves, such that corporations of almost any size engage in politics. Combining the logics of *Citizens United* and *New York Times Co. v. Sullivan*,⁴ I show that First Amendment law that grants corporations speech rights also demands room for robust speech about corporate citizens as public figures.

Despite First Amendment jurisprudence and the public-figure nature of corporations, certain laws squash critical speech about corporations. Part II demonstrates how these laws shield the reputations of public-figure corporations. First Amendment jurisprudence makes decentralized authority a virtue.⁵ This tenet prefers a wide range of information sources and debate to help society question those in power and as a vital element of the political process. That is part of why reputation-protection doctrines meet constitutional challenges: such doctrines erect barriers to questioning public officials and figures.⁶ Nonetheless, commercial speech and trademark doctrines limit information from many sources and protect reputa-

3. 558 U.S. 310 (2010).

4. 376 U.S. 254 (1964).

5. See *infra* Part II.C.

6. See *infra* Part II.B.

tions.⁷ The very premise that commercial matters, and by extension trademark law, are not political reveals the flaw. Once deemed a matter of commercial speech, constitutional scrutiny is lower.⁸ Currently, limits on the way people comment on and criticize corporations are allowed because of the mistaken belief that politics are not in play. A corporate public figure is, however, political. Just as we would not limit the ability to question and identify human public figures for speech, we should not do so for corporate public figures. But that is what the law enables.

For example, the factors that permit a corporation to bring a dilution claim—national fame and being a household name—track that “rare” creature in First Amendment law, the general-purpose public figure.⁹ Dilution law, however, shields the reputation of the nationally famous corporation. Thus, a nationally famous corporate person is treated differently than its natural-person counterpart and may use that fame to quash speech rather than having that fame open the door to more speech about it. This result is at least perverse, and I argue it is unconstitutional.

Trademark law’s confusion doctrine also favors a corporation’s speech about the corporation over other speech. Trademark law’s approach to reputation protection follows an overstated, narrow view that almost all speech not from the corporation leads to reputational harm and consumer confusion.¹⁰ When considered misleading commercial speech, critical commentary involving trademarks is easily banned because such speech receives less First Amendment protection than noncommercial speech. Under this view, speech not from the corporation is misleading and must be eliminated in the name of protecting consumers from any confusion, even if consumers are the ones trying to share information about the corporation

7. See *infra* Part II.B.

8. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 562–63 (1980) (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” (citation omitted)).

9. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (“[T]ruly involuntary public figures must be exceedingly rare. . . . Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”).

10. See Mark McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 69 (2012).

or its products and services.¹¹ Instead of many voices questioning corporate public figures, society ends up with an impoverished ability to discuss and challenge them.

Given increased ability for speech by corporations, we need to rebalance speech rules and increase our ability to speak about corporations. I conclude that the logic of the Supreme Court's jurisprudence regarding corporate speech and public figures requires that the law recognize a corporate public figure doctrine. In Part III I set out what a corporate public figure doctrine would look like in practice. I show that corporations can often qualify as either general- or limited-purpose public figures and address the implications of such a result.

The powerful, public, and political nature of corporations demands that we ensure an increased ability to speak about them. An ever-widening range of sources—newspapers, radio, television, blogs, ratings sites, social media reviews, and more—offers society numerous ways to understand and debate any issue. Corporations vigorously use those resources to speak and persuade society about corporate goods and services, political candidates, and social policies, and the Supreme Court has ensured that they may do so. Yet laws protecting corporate reputation interfere with anyone else's ability to speak about those same corporations. A corporate public figure doctrine would allow increased speech about the corporation, provide more information to both the political- and the consumer-information marketplace, and reorder speech laws so that corporations have speech rights and obligations in balance with natural persons.

I. SPEECH BY A CORPORATION: FROM CORPORATE PERSONHOOD TO CORPORATE CITIZENRY

Citizens United provides a clear statement that, as far as speech is concerned, the law affords corporations much the same rights as people.¹² An underlying, driving force in the

11. See McKenna, *supra* note 10, at 70 (“Indeed, courts routinely say that trademark law targets ‘confusion of any kind.’” (footnote omitted)).

12. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” (citations omitted)); *id.* at 386 (Scalia, J., concurring); *cf. id.* at 394 (Stevens, J., dissenting) (“The basic premise underlying the Court’s ruling is . . . the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its ‘identity’ as a corporation.”). The law regard-

analysis is that corporations are members of society that participate in our democracy.¹³ This vision embraces the corporation as engaging in public life, acting for political ends, and having a reputation. If corporations seek to be recognized as participants in society with commensurate speech rights, they are claiming a type of citizenship, which we must understand. It turns out that the nature of these citizens indicates they are often public figures.

A. CORPORATE SPEAKERS

The Supreme Court has taken the broad approach that almost any corporation has speech rights in the eyes of the law. A close reading of *Citizens United* reveals that the Supreme Court believes that corporations have the same speech rights as natural people.¹⁴ Given that the case was about a narrow question concerning what constitutes “electioneering communication,”¹⁵ and ostensibly was to resolve some incoherence in campaign finance jurisprudence,¹⁶ it is odd that the Court went to great lengths to discuss the First Amendment rights of corporations and the idea that corporations have the same speech rights as people. Why the Court chose to reach beyond the narrow election law issue and whether that was the correct approach are good questions but are better explored by others.¹⁷ Here, examining how the Court reached its conclusion about corporate speech reveals the Court’s unwillingness to draw distinctions not only between corporations and people but also among types of corporations.

None of the several possible objections to this result worked for the Court. One could argue that corporations simply do not have speech rights. Yet, as Justice Kennedy’s opinion

ing whether corporations have many, if not all, the same rights as people is complex and changing. That debate will be important, but it is well beyond the scope of this Article, which seeks to show the way the Court’s First Amendment jurisprudence and the current nature of corporations should affect corporations’ status as public figures.

13. Cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing that digital technologies require that freedom of speech promote a “democratic culture” that allows many to speak and participate in democracy).

14. See 558 U.S. at 319, 323–24, 343 (majority opinion).

15. *Id.* at 322–23.

16. See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 588–90 (2011).

17. See, e.g., *id.*

pointed out, “[t]he Court has recognized that First Amendment protection extends to corporations,” and in political speech cases that protection persists.¹⁸ One could argue that corporations are not really part of political debates the same way people are. To rebuff that position, the Court painted a picture of corporations as “contribut[ing] to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”¹⁹

For the Court, when it comes to speech, all corporations are equal and can be important in the public sphere. The word *corporation* evokes images of large, profit-maximizing entities with hundreds, if not thousands, of employees, worth millions, if not billions, of dollars. Yet, a contention that only certain corporations are important enough to have speech rights fails. As Justice Scalia explained, the corporate form encompasses many entities including “colleges, towns and cities, religious institutions, and guilds.”²⁰ As with large, for-profit corporations, one can appreciate the importance and role of these institutions in society. Large or small, for-profit or non-profit, type of industry—none of these metrics matter. After all, the corporation at issue, *Citizens United*, was a small, non-profit corporation with “an annual budget of about \$12 million.”²¹ Its income was based on individual and some corporate donations.²² It was quite different than even number 500 on the *Fortune 500*,²³ which had a market capitalization of around \$2.8 billion and \$283 million in profits in one year alone.²⁴ Nonetheless, *Citizens United* was characterized like so many “corporations and voluntary associations [that] actively petitioned the Government and expressed their views in newspapers and pamphlets” since the beginning of our country.²⁵ That such a small entity does not map to the possibly august stature and power of more familiar entities is

18. *Citizens United*, 558 U.S. at 342 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 n.14 (1978) (speech rights do not disappear “simply because its source is a corporation”).

19. *Id.* at 343 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion)).

20. *Id.* at 388 (Scalia, J., concurring).

21. *Id.* at 319 (majority opinion).

22. *Id.*

23. See *Fortune 500*, CNN MONEY (May 23, 2011), http://money.cnn.com/magazines/fortune/fortune500/2011/full_list/401_500.html.

24. *Fortune 500, Snapshot*, CNN MONEY (May 23, 2011), <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/927.html>.

25. *Citizens United*, 558 U.S. at 389 (Scalia, J., concurring).

irrelevant. Just as the Court explained that “[t]he identity of the speaker is not decisive in determining whether speech is protected,”²⁶ it layered in an idea that the type of corporation does not matter. By conflating all corporations as being equal, one can declare, “[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.”²⁷ A small, political corporation is the same as Apple, Exxon, Microsoft, IBM, Chevron, GE, Google, and Wal-Mart. All corporations are now *equally* “the principal agents of the modern free economy.”²⁸ Thus we have a picture of all corporations as having the same speech rights as natural persons. We also start to see corporations as participants in public debate and vital parts of our political and economic life, which is a step toward recognizing the possible public-figure nature of corporations.

B. CORPORATIONS SPEAK ABOUT MATTERS OF PUBLIC IMPORTANCE

Citizens United and *New York Times Co. v. Sullivan* asked the same question: what are the limits when someone, corporate or otherwise, speaks about a public figure?²⁹ The principles offered in *Citizens United* trace back in part to *Sullivan*. On the surface, *Sullivan* involved quite a different matter than *Citizens United*. *Sullivan* addressed “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”³⁰ *Citizens United* addressed speech by a corporate entity in an election context.³¹ But both cases address corporate speech about a public figure. As this chart shows, the factual parallels between *Citizens United* and *Sullivan* are striking.

26. *Id.* at 342 (majority opinion) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion)).

27. *Id.* at 393 (Scalia, J., concurring).

28. *Id.*

29. *Id.* at 319–20 (majority opinion); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *But see* Baker, *supra* note 2 (arguing that corporations are different than individuals).

30. *Sullivan*, 376 U.S. at 256.

31. 558 U.S. at 318–19.

	<i>Citizens United</i> ³²	<i>Sullivan</i> ³³
Entity	Activist political entity (non-profit)	Press (for-profit); activist political entity (non-profit)
Purpose	Advocate defeat of candidate	Highlight racial injustice/raise money
Object of Speech	Candidate for office	Public official
Accuracy of Speech	"[E]xtended criticism The narrative may contain more suggestions and arguments than facts" ³⁴	"It is uncontroverted that some of the statements contained in the paragraphs were not accurate descriptions of events which occurred in Montgomery." ³⁵
Medium	Pre-paid video on demand: "The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." ³⁶	Newspaper advertisement

32. Citizens United released a documentary film, *Hillary: The Movie*, critical of the then-Senator. *Id.* at 319–20. The corporation offered the film through video-on-demand (VOD) services. *Id.* at 320. VOD can involve a fee paid by individual viewers, or it can be offered free to the viewer. *Id.* Citizens United chose to pay a cable distributor \$1.2 million to carry the film as a VOD option free to the cable company's subscribers. *Id.* Because the film advocated the defeat of a political candidate and the expenditure to allow the film to reach people occurred within 30 days of the 2008 Presidential primary elections, concerns arose about whether Citizens United would run afoul of section 441b of the Bipartisan Campaign Reform Act of 2002. *Id.* at 321.

33. *Sullivan* involved a political entity using a mass communication medium to make assertions about a political matter and actor. *The New York Times* had run an advertisement that was critical of actions taken by the State of Alabama against protestors during the civil rights movement. *Sullivan*, 376 U.S. at 256–58. The advertisement listed several ways the State had acted, including police actions. *Id.* The advertisement argued that these acts were part of a "wave of terror" aimed at denying the civil rights of the protestors. *Id.* at 256. The facts asserted were not always accurate, and the *Times* did not check the facts. *Id.* at 258–61.

34. *Citizens United*, 558 U.S. at 325.

35. *Sullivan*, 376 U.S. at 258.

36. *Citizens United*, 558 U.S. at 325.

Both cases engage with questions regarding the truth of speech about public figures, the importance of speech about public matters, whether the medium of speech matters, and whether the identity of the speaker allows for limits on speech. Both entities addressed a political matter, called out behaviors by public figures, stretched the truth, were inaccurate in some instances, and used a paid form of mass communication to reach an audience. And, both cases favored more speech and less protection for laws shielding the reputation of a public figure.

As a constitutional matter, the ability to criticize public officials trumps reputation protection and is to be fostered;³⁷ the medium of the message does not matter. The medium in *Sullivan* was a paid commercial advertisement in *The New York Times*. When urged that the speech was not protected because of the medium used, the Court ignored the medium and looked to its content, which “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”³⁸ In addition, the *Sullivan* Court advanced the idea that not just the press, but anyone should be able to “promulgat[e] . . . information and ideas” broadly.³⁹ Prohibiting something as creative as buying an advertisement to advance a point of view would “shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”⁴⁰ The Court favors enabling, not hindering, many voices, which can and should use almost any means to reach as many people as possible, especially when those voices are new and challenging.

37. See *Sullivan*, 376 U.S. at 264 (noting the claim for libel was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct”); see also Mary-Rose Papandrea, *The Story of New York Times Co. v. Sullivan*, in *FIRST AMENDMENT STORIES* 252–55 (Richard W. Garnett & Andrew Koppelman eds., 2012) (tracing the later nuances of reputation protection by the Supreme Court).

38. *Sullivan*, 376 U.S. at 266 (citations omitted).

39. *Id.*

40. *Id.* The Supreme Court’s commitment to protecting mediums to allow political engagement persists and is seen, for example, in *Reno v. ACLU*, where the Court embraced the Internet as a way for anyone to become a “town crier” or “pamphleteer” pressing his or her views to the world. 521 U.S. 844, 870 (1997).

Even when criticism lacks accuracy or may be libel per se—that is, words that “tend to injure a person[’s] . . . reputation” or “bring [him or her] into public contempt”⁴¹—in political matters, laws protecting reputation lose out.⁴² The tolerance for speech, even speech that has inaccuracies or that challenges opinions, is high because “public men, are, as it were, public property, and discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.”⁴³ As with mediums, the context of the message matters more than the label.⁴⁴ When facing a tradeoff between protecting reputation and possibly limiting debate on public issues, the debate “should be uninhibited, robust, and wide-open,” even if that exchange “include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴⁵

Combining the logic of *Citizens United* with *Sullivan* allows for some observations. First, the provision of an outlet for expression for those who may not have the same distribution reach as the traditional press is necessary to permit the dissemination of a wide range of ideas and opinions, even, and perhaps especially, those that challenge and “antagoni[ze]” us.⁴⁶ Second, corporations have broad speech rights. Like natural persons, corporations can use all mediums, including paid advertisements in newspapers and video-on-demand services, to reach the public about matters of public concern.⁴⁷ Third, laws that protect the reputation of or limit this ability to speak about public figures are suspect and likely to be ruled unconstitutional.⁴⁸ Fourth, thus far in the analysis, corporations are the speakers. The result is an explicit goal to expand commentary

41. *Sullivan*, 376 U.S. at 267 (internal quotation marks omitted).

42. *Id.* at 269 (“[I]nsurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression . . . can claim no talismanic immunity from constitutional limitations.”).

43. *Id.* at 268 (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263–64 (1952)) (internal quotation marks omitted).

44. *Id.* (noting the Court will not give weight to the “mere labels” of state law).

45. *Id.* at 270.

46. *See id.* at 266.

47. *Cf. id.* at 270 (finding a national commitment to fostering “wide-open” debate on issues of public importance).

48. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 385 (2010) (Roberts, C.J., concurring) (“Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at [certain] time[s] . . .”).

on public affairs, including commentary by corporations.⁴⁹ If corporations can speak freely about public figures, corporations, just like natural people, may become public figures because of their speech and position in society.

C. THE POLITICS OF PRODUCTS AND PROCESSES

Corporations have gained speech rights, and the exercise of those rights leads to obligations and limits on those rights. The same politics and logic of privatization that have moved corporations to being at perhaps an apex of importance in our society and politics demands that society have a greater ability to question and probe corporations. Corporations touch vast areas of individual and political life. As Justice Scalia has said, corporations are “the principal agents of the modern free economy.”⁵⁰ How individuals engage with the modern free economy can also affect the politics of that economy, either indirectly or through express political acts.⁵¹ This dynamic reveals a problem. Private market behaviors are supposed to “serve [an] expansive evaluative function,” but “consumers [must] receive an informational context that is appropriately robust for the role they are being asked to serve.”⁵² The Supreme Court has said that we need to have an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁵³ It thus has championed many voices speaking about public figures. That same reasoning applies when corporations and their goods or services are where that political activity takes place. When the Court acknowledged that consumer interest “in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate,”⁵⁴ it seemed to separate commercial and

49. *See id.* at 364 (majority opinion) (“On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”).

50. *Id.* at 393 (Scalia, J., concurring).

51. *See infra* notes 80–81 and accompanying text.

52. Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 535 (2004).

53. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

54. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). The Court reiterated this point in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), and *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

political information when in fact it captured the importance of commercial information as political and connected to public decision making.⁵⁵ Such information allows people to know “who is producing and selling what product, for what reason, and at what price.”⁵⁶ The public interest at stake is enabling well-informed decision making, based not only on price but on the who and the why of production, so that “intelligent opinions as to how that system ought to be regulated or altered” are possible.⁵⁷ The Court connected commercial information to political matters and how we order society.⁵⁸ Thus, I argue that the distinction between commercial and political has collapsed so much that the need to ensure a high flow of information about corporations and their goods and services is great, regardless of the label on such information. Furthermore, just as distinctions between public figures and public officials make no sense, as policy is no longer set through “formal political institutions” but through “a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government,”⁵⁹ so too for corporations.⁶⁰ Distinctions between human public figures and corporate public figures make no sense. Recognizing corporations as public figures increases safeguards that ensure information about these important actors will be available to society.

The public, political debates by and about corporations, the nature of manufacturing, and the effect of purchasing decisions indicate that corporations may qualify as public figures or be part of a discussion of public concern more often than one might expect.⁶¹ If so, rules that impose liability or damages without fault are not allowed by the Constitution.⁶² A possible objection to corporations being treated as public figures is that they are private and their work is not about matters of public

55. We protect commercial information not because it enables economic efficiency in the marketplace, but because it is relevant to public decision making in a democracy. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 39–40 (2012).

56. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

57. *Id.*

58. *Id.* (“[A]llocation of our resources in large measure will be made through numerous private economic decisions.”).

59. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

60. See Fetzer, *supra* note 2, at 63 (noting corporate influence closely resembles “public sectors of power”).

61. See *infra* Part III.A.

62. POST, *supra* note 55, at 11.

concern.⁶³ And yet from *Citizens United*, one has a vision of corporations as often fully engaged in public debate with “voices that best represent the most significant segments of the economy.”⁶⁴ Objections that corporations are private miss the point. Private, natural people may become public figures. Any person who is a public official involved with public affairs “runs the risk of closer public scrutiny than might otherwise be the case,” and a private figure may be a public figure subject to similar scrutiny.⁶⁵ In *Gertz v. Robert Welch, Inc.*, the seminal case regarding a private individual—that is, someone not elected or appointed to public office—being deemed a public figure, the Supreme Court set out the key question: one must examine whether the person “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”⁶⁶ The Court’s description of the characteristics and ways in which someone becomes a public figure shows why some corporations are likely to be seen as public figures:

For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.⁶⁷

This description of general-purpose public figures seems to foreshadow Justice Scalia’s proclamation about the general importance of corporations almost forty years later.

Furthermore, corporations can distribute their messages in ways that matter for constitutional analysis. In *Gertz*, the Court relied on public figures’ “significantly greater access to the channels of effective communication and hence . . . more realistic opportunity to counteract false statements than private

63. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (granting a business credit report “no special protection” when the speech was “solely in the individual interest of the speaker and its business audience”); Deana Pollard Sacks, *Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court’s Established Speech-Tort Jurisprudence*, 2010 CARDOZO L. REV. DE•NOVO 418, 426–27 (noting that private matters are of “reduced constitutional value” and receive less “First Amendment protection from tort liability”).

64. *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 354 (2010).

65. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974).

66. *Id.* at 351.

67. *Id.* at 345.

individuals normally enjoy” to support the idea that public figures must be subject to more, not less, speech about them.⁶⁸ Corporations often have access and resources to counteract any speech about them that may be false or troubling. In *United States v. Alvarez*, the Court recently addressed a regulation of false speech and struck it down in part because four Justices believed that “the dynamics of free speech, of counterspeech, of refutation, can overcome [a] lie.”⁶⁹ Justice Breyer’s concurrence, which Justice Kagan joined, acknowledged the power of more accurate information to “counteract the lie.”⁷⁰ *Alvarez* saw average citizens’ ability to engage in counter-speech as enough power to combat a lie. Given corporations’ concentrated wealth, newfound power to create super PACS, and ability to employ sophisticated public relations and communications campaigns either through in-house or hired companies, corporations can rival, if not exceed, the access many human political figures can afford. In other words, corporations can engage in counter-speech as needed and so can meet the counter-speech criteria for being a public figure.⁷¹

Connecting *Citizens United* and *Gertz* shows that corporations can be general-purpose public figures easily and, short of that, often can be limited-purpose public figures. This chart helps illustrate the connection.

68. *Id.* at 344.

69. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion).

70. *Id.* at 2556 (Breyer, J., concurring).

71. See Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 909–10 (2000) (noting a corporation’s ability to engage in counter-speech supports treating the corporation as a limited-purpose public figure under *Gertz*).

Entity	Citizens United, the entity, as possible public figure	
	<i>Gertz</i> Person	Corporation
Public or Private	Private	Private
Prominence in Society	Yes	Yes
Thrust to forefront for particular controversy in order to influence the resolution of the issues involved	No	Yes
Significantly greater access to media	No	Yes
General Public Figure	No	No
Limited Public Figure	No	Yes

It is the use of speech rights that matters. In expanding corporate speech rights, the Supreme Court has not differentiated between national and smaller, unknown corporations.⁷² Just as with natural persons, all corporations may speak. And just as with natural persons, a corporate speaker who is not a general-purpose public figure may become a limited public figure through its participation in society and exercise of speech rights.⁷³ For example, Citizens United was not a public figure in general;⁷⁴ it would, however, have met the limited-purpose public figure criteria. Citizens United certainly “thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.”⁷⁵ Citizens United, the corporate person, used its resources to “enjoy significantly

72. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 354–56 (2010) (holding that the expenditures ban unconstitutionally silences both non-profit and for-profit organizations, as well as corporations both large and small).

73. See *Gertz*, 418 U.S. at 351 (noting one becomes a limited-purpose public figure by “injecting [one]self . . . into a particular public controversy”).

74. At the time of the *Citizens United* decision, Citizens United, the corporation, was not a household name and lacked prominence in society.

75. *Gertz*, 418 U.S. at 351.

greater access to the channels of effective communication”⁷⁶ as it partnered with cable services to offer an expensive video-on-demand (VOD) version of its communication.⁷⁷ Any corporation can engage in similar behaviors. As such, one can see that corporations can often become limited public figures.

In addition, the Court addressed whether a corporation’s ability to influence the resolution of an issue could be restricted in *Sorrell v. IMS Health Inc.*⁷⁸ There the Court further cemented a corporation’s ability to speak and influence matters, as it protected corporate speech even if its marketing was more persuasive than other speech.⁷⁹ Corporations use their greater resources to speak and persuade, and the Supreme Court blesses such activity just as it would for individuals. That many corporations may behave as and qualify as public figures, especially when they choose to speak, seems clear. But when someone speaks about corporate public figures, the question of when a corporation or its practices are the subject of public concern arises.

The way society makes and uses goods can influence the global marketplace⁸⁰ and has political implications.⁸¹ That is why we need to be able to speak about corporations as much as corporations are allowed to speak about whatever they wish to speak. What we buy, what we use, how we make, and how we use have moved beyond pure, personal cost evaluations.⁸² Today the idea that purchasing choices are “purely private concerns”⁸³ is less clear and often inaccurate. Even when a corpo-

76. *Id.* at 344.

77. *Citizens United*, 558 U.S. at 320 (noting *Citizens United* was to pay \$1.2 million to make the VOD programming available at no extra charge to the viewer).

78. 131 S. Ct. 2653, 2670 (2011).

79. *Id.* (“Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”).

80. *See* Kysar, *supra* note 52, at 529 (explaining that “[g]lobalization . . . has enhanced the flow of information, not merely goods, and information regarding processes increasingly is finding its way downstream”); *id.* at 641 (noting that consumers are responding accordingly, since “consumer preferences may be heavily influenced by information regarding the manner in which goods are produced”).

81. *See* Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393, 438 (2002) (“[C]onsumption patterns may identify one as a liberal, moderate Republican, radical feminist, or born-again Christian.”).

82. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

83. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

ration is not the direct, obvious provider of a governmental service, the move toward making markets a key way in which we organize society blurs, if not eliminates, the line between the public and private nature of corporations. Corporations are major political and economic actors. Consumers are voting for policy through the market and “may well come to view such preferences as their most appropriate mechanism for influencing the policies and conditions of a globalized world.”⁸⁴ Not all corporations will qualify as public figures, and not all business processes will qualify as public concerns. Matters of purely private concern will remain subject to less speech protection.⁸⁵ Yet, consider questions about diamond-mining practices, child labor issues, oil drilling methods, food-production methods’ effect on health, and corporate outsourcing policies.⁸⁶ Corporations’ role in these matters is precisely why Justice Scalia was correct in his assessment about the importance of corporations in society.⁸⁷ Furthermore, corporations often embrace environmental, organic, fair-trade, fair-labor, or other positions as part of their overall image as corporate citizens.⁸⁸ They also lobby on all manner of regulatory matters related to the way they conduct their respective businesses. These issues are of public concern.⁸⁹

Given consumer activism and the greater ability to share information about a good and whether to purchase it, corporations and consumers face increased claims about whether exercising a purchasing choice is wise or good from a political point of view. For example, the locavore movement focuses on eating food grown within 100 miles of where one lives.⁹⁰ It also tries to

84. Kysar, *supra* note 52, at 535.

85. See, e.g., *Dun & Bradstreet*, 472 U.S. at 759 (“[S]peech on matters of purely private concern is of less First Amendment concern.”).

86. See generally NAOMI KLEIN, NO LOGO (2002) (arguing corporations and their brand strategies have political implications).

87. See *supra* note 50 and accompanying text.

88. See, e.g., Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2315 (2009) (“[M]arks now express—whether implicitly or explicitly—environmental, human rights, and labor characteristics, as well as classic health and safety standards . . .”).

89. See *infra* notes 284–94 and accompanying text.

90. Margot Roosevelt, *Local-Food Movement: The Lure of the 100-Mile Diet*, TIME, June 11, 2006, <http://content.time.com/time/magazine/article/0,9171,1200783,00.html>. See generally Pallavi Gogoi, *The Rise of the ‘Locavore’*, BLOOMBERG BUSINESSWEEK (May 20, 2008), <http://www.businessweek.com/stories/2008-05-20/the-rise-of-the-locavorebusinessweek-business-news-stock-market-and-financial-advice> (detailing the rise of the local food movement, which Gogoi defines as food grown within 250 miles of

reduce fossil fuel use in growing and delivering food.⁹¹ The movement is connected to sustainability goals and issues, but some debate the movement's effectiveness for environmental goals.⁹² Regardless, the shift has changed the way people and companies such as Google approach buying and consuming food.⁹³ Even the paper-or-plastic question of fifteen years ago is not as simple today. Some consumers may believe that paper is better than plastic for the environment but face evidence that one is merely choosing between two products that are harmful to the environment.⁹⁴ The potential options don't stop there. What about biodegradable plastic bags?⁹⁵ Perhaps compostable bags are the best choice? Some believe that bring-your-own-bag (BYOB), i.e., using a reusable bag, is the best environmental choice.⁹⁶ Cities, counties, and even states may pass laws banning certain materials or levying a charge for use of one material over another.⁹⁷ Companies making the bags lobby about what is the correct choice. Companies, such as Whole Foods, may choose one option before a law is passed to signal a com-

where one lives).

91. Gogoi, *supra* note 90 (noting concern over "food miles" and "carbon footprints").

92. Compare Vasile Stanescu, "Green" Eggs and Ham? *The Myth of Sustainable Meat and the Danger of the Local*, 8 J. FOR CRITICAL ANIMAL STUD. 8, 8 (2010) (arguing that the locavore movement needs to be "reunderstood and rearticulated"), with Kathy Rudy, *Locavores, Feminism, and the Question of Meat*, 35 J. AM. CULTURE 26, 26 (2012) (offering a "qualified endorsement of local eating").

93. See, e.g., Marion Nestle, *What Google's Famous Cafeterias Can Teach Us About Health*, THE ATLANTIC, July 13, 2011, <http://www.theatlantic.com/health/archive/2011/07/what-googles-famous-cafeterias-can-teach-us-about-health/241876/> (noting how Google's food program is "designed to promote . . . environmental values").

94. See, e.g., Anne Thompson, *Paper or Plastic—What's the Greener Choice?*, NBC NEWS (May 7, 2007 7:37 PM), http://www.nbcnews.com/id/18538484/ns/nightly_news/t/paper-or-plastic-whats-greener-choice/ (stating paper bags create more air pollution, while plastic bags produce more solid waste).

95. See, e.g., BusinessGreen, *Europe Considers Plastic Bag Ban*, GUARDIAN ENVIRONMENT NETWORK (May 20, 2011, 11:23 AM), <http://www.guardian.co.uk/environment/2011/may/20/europe-plastic-bag-ban> (distinguishing between plastic bags that will biodegrade naturally and those that will not).

96. See, e.g., Thompson, *supra* note 94.

97. See, e.g., David Zahniser & Abby Sewell, *L.A. OKs Ban on Plastic Bags at Checkout*, L.A. TIMES, May 24, 2012, <http://articles.latimes.com/2012/may/24/local/la-me-0524-bag-ban-20120524> (noting that Los Angeles is the largest city to pass such a ban, while San Jose, San Francisco, Long Beach, and Santa Monica already have such bans in place).

mitment to a political ideal.⁹⁸ News outlets report on the matter,⁹⁹ as do online sources.¹⁰⁰ Some statements challenge beliefs and claims about bags.¹⁰¹ Food production and recycling are but two areas where commerce, corporations, and politics intersect. For example, energy, health care, “Made in the U.S.A.,” birther claims, and marriage equality have all been part of public battles where activists across the political spectrum have urged consumers to vote with their dollars.¹⁰²

The jurisprudence that demands increased corporate speech rights also mandates increasing the ability to speak about corporations when they exercise those rights. Several doctrines, however, limit speech about corporations and act as reputation shields. In essence, when the corporation, rather than a natural person, is the subject of speech, it is allowed to

98. See *A Better Bag*, WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/mission-values/environmental-stewardship/better-bag> (last visited Nov. 2, 2013) (noting that reusable bags are the “eco-nomical” option).

99. See, e.g., Jane Black, *Plastic Bags Headed for a Meltdown*, WASH. POST, Feb. 6, 2008, at F1.

100. See, e.g., *Paper vs. Plastic—The Shopping Bag Debate*, GREENFEET BLOG (Feb. 25, 2009, 2:51 PM), <http://web.archive.org/web/20120125030733/http://blog.greenfeet.com/index.php/paper-vs-plastic-the-shopping-bag-debate/reducing-your-footprint/121> (accessed by searching for original URL in the Internet Archive index).

101. *Compare Myth: Paper Is Better than Plastic*, REUSEIT.COM, <http://web.archive.org/web/20130208060558/http://www.reuseit.com/learn-more/myth-busting/why-paper-is-no-better-than-plastic> (last visited Nov. 2, 2013) (accessed by searching for original URL in the Internet Archive index) (challenging the contention that paper is better than plastic), and *Do Plastic Bag Bans Help the Environment?*, NPR (Jun. 5, 2012, 12:00 PM), <http://www.npr.org/2012/06/05/154354092/do-plastic-bags-bans-help-the-environment> (noting that with bag choice, “everything is [a] tradeoff[]”), with *Top 10 Myths About Plastic Grocery Bags*, AM. PROGRESSIVE BAG ALLIANCE, http://www.plasticsindustry.org/files/about/fbf/myths%2Bfacts_grocerybags.pdf (last visited Nov. 2, 2013) (highlighting trade group’s claim about plastic bags’ impact on environment).

102. See, e.g., Justin Gillis, *To Fight Climate Change, Students Aim at Portfolios*, N.Y. TIMES, Dec. 5, 2012, at B1–B2 (energy); Janean Chun, *John Metz Denny’s Obamacare Surcharge Stirs Big Mess for Restaurant Chain*, HUFFINGTON POST (Nov. 20, 2012, 9:01 AM), http://www.huffingtonpost.com/2012/11/20/john-metz-denny-s-obamacare-surcharge-_n_2146735.html (health care); Tim Cuplan, *Foxconn Plans American Expansion as Clients Seek Made in U.S.A.*, BLOOMBERG (Dec. 6, 2012, 10:01 AM), <http://www.bloomberg.com/news/2012-12-06/foxconn-plans-american-expansion-as-clients-seek-made-in-u-s-a-.html> (made in the U.S.A.); Nate C. Hindman, *At ‘Dump the Trump’ Macy’s Rally Sparks Fly*, HUFFINGTON POST (Nov. 21, 2012, 11:21 AM), http://huffingtonpost.com/2012/11/21/trump-macys-dump-the-trump_n_2170136.html (birther claims); *infra* notes 299–304 and accompanying text (gay marriage and same-sex rights).

save face, which it should not be allowed to do.

II. SPEECH ABOUT THE CORPORATION: AGAINST SAVING CORPORATE FACE

A cluster of laws and doctrines protects corporate reputation despite the constitutional desire for more speech about public figures. The Lanham Act favors reduced speech about corporations and raises barriers to speech based on the idea that distortion is a harm to be prevented. Part of the problem is that the subject matter of corporate reputational laws is traditionally understood as a type of commercial speech, which receives less protection than other speech.¹⁰³ That position underestimates the way in which these laws also act as reputation-protection laws. For example, trademarks have moved far beyond the commercial sphere. Trademarks have become brands; that is, they now are more about allowing corporations to protect reputation and persona than preventing unfair competition and advancing consumer protection.¹⁰⁴ Precisely because trademarks have become reputation devices, trademark law runs into constitutional speech problems.¹⁰⁵ In fact, corporate reputation doctrines reach conclusions that run contrary to the Supreme Court's speech jurisprudence. We do not question and hamper the ability of a critic to challenge a public figure. We do, however, question and limit the ability to critique a corporate public figure. When choosing between saving corporate face and the right to speak about a corporation or its goods and services, the right to speak should trump.

103. POST, *supra* note 55, at 41.

104. See, e.g., Dan Burk & Brett McDonnell, *Trademarks and the Boundaries of the Firm*, 51 WM. & MARY L. REV. 345, 361 (2009) (noting that a trademark is a reputational asset).

105. See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 398 (1990) (noting the "Constitution . . . favor[s] public access to the tools of expression," which include trademarks); Laura Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 715 (2009) (arguing that trademark law deserves First Amendment protection); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 381 (2008) (stressing that "[t]rademarks consist of language").

A. THE NATURE OF CORPORATE FACE

Corporations have a being; it is their brand and all that goes with it. A corporation's word mark is its given name—its logo, its face.¹⁰⁶ Google, Mattel, and Rolex can be the names of political figures just as Hillary Clinton, Mitt Romney, and Barack Obama are names of political figures. The bitten apple, interlocked Gs, and golden arches can be the faces of political figures just as pictures of George W. Bush and Bill Clinton capture the faces of political figures.¹⁰⁷ Beyond these familiar aspects, corporations see themselves not only as people but as having identities, personalities, and souls personified by their brands.¹⁰⁸ Corporations speak of injury to their reputations in much the same way people refer to reputational injuries in libel.¹⁰⁹ This self-perception conforms to corporations' claims to greater recognition as people in the speech context and elsewhere. Like a person, corporations seem to assert:

He hath disgraced me, and hindered me half a million; laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies; and what's his reason? I am a [Corp].¹¹⁰

as they wage campaigns against those who might use their marks and logos to criticize.

106. See Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 198 (“Famous trademarks are the functional equivalent of famous names . . . [a trademark] functions as the visual ‘likeness’ of its incorporeal owner as well.”).

107. Cf. *id.* at 195–96 (“Famous trademarks offer a particularly powerful means of conjuring up the image of their owners, and thus become an important, perhaps at times indispensable, part of the public vocabulary.”).

108. See, e.g., MARCEL DANESI, BRANDS 33 (2006) (explaining that brands are personalities with identities); cf. CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 24, 33–34 (2004) (discussing brand personality as reflecting the internal connection between the brand and employees who become “the soul” of the brand, as well as reflecting consumer needs).

109. Despite corporations' greater ability to claim personhood, they do not have the same dignity interests as people, and thus the issues at stake for a person bringing a libel claim are not the same as for a corporation. See generally Baker, *supra* note 2. Baker summarizes the argument that “respect for individual autonomy does not require protecting the speech of artificially created and instrumentally valued commercial entities.” *Id.* at 990. I argue here that those reasons are being ignored or are eroding so that corporate reputation claims are starting to function like dignitary interests.

110. WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 3, sc. 1; see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (“But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.” (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3)).

Like Shylock, corporations seek revenge.¹¹¹ Like Sullivan, corporations seek to prevent speech about their public roles and acts. Mattel may be the most notorious example of such behaviors. In two cases, Mattel went after uses of Barbie that depicted the icon in ways to which Mattel objected.¹¹² The artists commented on Barbie and on society's view of women.¹¹³ Although the cases came out in favor of the speech, the defendants spent the equivalent of millions of dollars defending the suits.¹¹⁴ Mark holders also try to shut down consumer gripe sites, sites that criticize the corporation behind the mark.¹¹⁵ Tactics include sending cease-and-desist letters to "wear down" critics and taking advantage of the "disparity" in legal skills between the corporation and the critic.¹¹⁶ Some have called these behav-

111. See WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 3, sc. 1 ("[A]nd if you wrong us, shall we not revenge?"). The rest of Shylock's speech asks whether he, a Jewish man, does not have eyes, hands, organs; is not subject to the elements; would not laugh if tickled, bleed if pricked; just as any other Christian and impliedly any other person. *Id.* Corporations as of yet do not have such capabilities, but they can and do seek revenge. See, e.g., Steve Silberman, *Mattel's Latest: Cease-and-Desist Barbie*, WIRED, Oct. 28, 1997, <http://www.wired.com/culture/lifestyle/news/1997/10/8037> (reporting that a Mattel attorney allegedly claimed the company wanted a defendant's house); cf. Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1839–42 (2007) (addressing abusive trademark litigation spawned by policing requirement); K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL'Y 609, 631–38 (2004) (examining instances of abusive trademark litigation); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1045–46 (2005) (discussing the damages available to trademark and other intellectual property holders for misuse of their intellectual property).

112. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (criticism of Barbie by juxtaposing a nude Barbie and various kitchen appliances); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (reference to Barbie in a song by the band Aqua).

113. See *Walking Mountain*, 353 F.3d 792; *MCA Records*, 296 F.3d 894.

114. The artist in one case sought expenses and fees of \$1.6 million after prevailing. *Walking Mountain*, 353 F.3d at 815.

115. Jonathan L. Schwartz, *Making the Consumer Watchdog's Bark as Strong as Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense*, 16 ALB. L.J. SCI. & TECH. 59, 70–72 (2006); Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 1, 3–5 (2005).

116. Schwartz, *supra* note 115, at 71–72.

iors trademark bullying.¹¹⁷ In the case of the small artist and Mattel, only pro bono representation made the defense possible.¹¹⁸ After an appeal and remand the defendants won an award of “\$1,584,089 in attorney’s fees and \$241,797.09 in costs.”¹¹⁹ Despite that victory, the overall result is incorrect. The tactics match the ones at issue in *Sullivan*: “There is no doubt that these Southern officials were hoping to use libel law to curb press coverage of the civil rights movement.”¹²⁰ The claims in *Sullivan* totaled \$3 million, the claims against the New York Times for other reporting on Birmingham were for another \$3.15 million, and the press in general faced close to \$300 million in potential libel damages.¹²¹ The Court recognized that the suits were chilling speech.¹²² By using cease-and-desist letters and strategic lawsuits that, even when decided correctly, impose terrifying costs, mark holders generate the sort of chilling effects First Amendment doctrine seeks to remove.¹²³

Like natural people, corporations claim personal rights but do not wish to be subject to appropriate limits on those rights.¹²⁴ Rather than having many sources for information about a corporation, a corporation prefers to be the central and only source of information about the corporation and not to be criticized.¹²⁵ That ideal, however, runs contrary to the Supreme

117. See, e.g., Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625; Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 853 (2012).

118. The artist in the case was represented by the ACLU. See *Walking Mountain*, 353 F.3d at 795.

119. *Mattel, Inc. v. Walking Mountain Prods.*, No. CV99-8543RSWL(RZX), 2004 WL 1454100, at *4 (C.D. Cal. June 21, 2004).

120. Papandrea, *supra* note 37, at 237.

121. *Id.*

122. *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring in the result).

123. See Lidsky, *supra* note 71, at 859–61 (examining how corporations use defamation suits to chill speech, especially by those without resources to defend against such suits).

124. See, e.g., JOHN STUART MILL, ON LIBERTY 21–22 (Ticknor & Fields, 2d ed. 1863) (noting the way in which people invoke the government as vindicating or interfering with rights depending on the issue and perspective rather than following a general principle).

125. See Stacey L. Dogan & Mark A. Lemley, *Parody as Brand* 10–11 (Stanford Law Sch. Pub. Law and Legal Theory Research Paper Series, Working Paper No. 2,170,498, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170498##. A tradition of clearing rights and aggressive suits against those who use intellectual property in ways rights holders dislike undermines First Amendment protection for many creators. See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L.

Court's preference for more, not less, speech about public figures.

Once corporate reputation laws enter the picture, an imbalance in corporate speech law emerges. Imagine telling Citizens United, the entity, that it could not speak about then-Senator Clinton or, if allowed to speak, could not in any way mislead or be aggressive in its claims, let alone use then-Senator Clinton's name or face to deliver the political message. Corporate reputation laws open this possibility all too easily when it comes to speaking about the corporation.¹²⁶ None of which is to say these laws ignore speech entirely. Rather, they have a narrow view of speech and fail to accommodate it well.

B. BARRIERS TO SPEECH ABOUT PUBLIC-FIGURE CORPORATIONS

The traditional lines between commercial and non-commercial speech, between corporation and person, and between private and public are gone.¹²⁷ Nonetheless, threats to speech about public-figure corporations persist. For example, trademark law was once separate from constitutional concerns, because trademarks were easily understood as commercial speech. In essence, commercial speech is speech that proposes a commercial transaction.¹²⁸ Such speech—if truthful, non-misleading, and about lawful activity—can be regulated as long as the regulation serves a substantial government interest, directly advances that interest, and is no more extensive than necessary to serve that interest.¹²⁹ Noncommercial speech, however, “even if false, can only be regulated under much more

REV. 1899, 1911–16 (2007). Even major studios pay high fees to identify and clear rights and to obtain expensive errors and omissions insurance, regardless of First Amendment defenses. *Id.* at 1915–16. Documentarians and individual filmmakers face the same costs and often forego use of and references to famous people (because of the right of publicity), copyrighted material, and trademarks, because otherwise the film cannot be made. *Id.* The culture forces requesting permission, which is the opposite of what should happen when public figures and concerns are at hand.

126. Lidsky, *supra* note 71, at 945 (“[P]owerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse.”).

127. This point has greater force today, but the Supreme Court has acknowledged the issue for First Amendment analysis since at least 1967. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163–64 (1967).

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

129. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

limited circumstances.”¹³⁰ Thirty years ago Robert Denicola asserted, “The information conveyed through the use of a trademark generally relates not to the momentous philosophical or political issues of the day, but rather to the details of prospective commercial transactions—the source or quality of specific goods or services.”¹³¹ Thus, limits on commercial speech were considered “exempt from constitutional scrutiny.”¹³² When Denicola wrote about trademarks and speech, he faced unsettled “doctrine and policy” regarding the justifications for trademark protection including a growing turn to a property approach to trademarks, as seen in stronger misappropriation and dilution theories of trademark.¹³³ The ideas of corporate speech were nowhere near as developed as today, yet he already saw that “trademark law must ultimately respond to basic constitutional interests.”¹³⁴ Given expanded trademark protection, expanded corporate speech, and the politics of products and processes, the world of 1982 is gone, and the concerns motivating Denicola thirty years ago have come to fruition.

These concerns have converged and provide corporations with a speech advantage.¹³⁵ Today the information conveyed through a trademark often concerns the political issues of the

130. Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 738 (2007) [hereinafter Tushnet, *Trademark Law*].

131. Denicola, *supra* note 106, at 158–59; accord *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (“[T]rademark law . . . ‘reduce[s] the customer’s costs of shopping and making purchasing decisions,’ . . . for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.” (alteration in original) (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:01[2] (3d ed. 1994)); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 265–66 (1987) (arguing that trademarks are justified as promoting economic efficiency).

132. Denicola, *supra* note 106, at 159.

133. *Id.* at 160, 172, 183. *But see* Ramsey, *supra* note 105, at 395 (differentiating between protection doctrines for trademarks as commercial speech and trademarks as noncommercial speech).

134. Denicola, *supra* note 106, at 160.

135. Corporations are sensitive to speech protection imbalances when they hinder corporate ability to advance a message. One understanding of the recently decided *Kasky v. Nike, Inc.* case, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003), is a claim that “it was unfair that Nike’s critics could say almost anything, subject only to the lax constraints of defamation law, while Nike’s responses were subject to strict liability for falsehood.” Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1465 (2009) [hereinafter Tushnet, *Fighting Freestyle*].

day, especially when considering source and quality of goods and services.¹³⁶ A paradox arises here because of the idea of trademark law as consumer-protection law.¹³⁷ In the political realm, the scale tips to more information, even inaccurate information, as the foundation for rich debate and, over time, informed decision making. In the commercial realm, speech is limited, in part because it is not seen as being on par with political speech, and in part to limit information to accurate and true statements that enhance the marketplace and, arguendo, consumer welfare.¹³⁸ Often the law does not protect untruthful speech, and the First Amendment allows laws that limit speech as a way to “insur[e] that the stream of commercial information flows cleanly as well as freely.”¹³⁹ In words that seem to echo trademark law’s likelihood of confusion test, the Supreme Court has said, “[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication *more likely* to deceive the public than to inform it.”¹⁴⁰ Trademark law arguably protects consumers by removing misleading speech and improving information in the marketplace.¹⁴¹ A presumption here is that truth in commercial contexts is easier to find and offer than in political

136. See Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 1039–40 (2012) (discussing anti-branding and political actions based on corporate policies).

137. See, e.g., Burk & McDonnell, *supra* note 104, at 352 (“[T]rademark law contains a substantial component of consumer protection . . .”).

138. Cf. *United States v. Alvarez*, 132 S. Ct. 2537, 2544–45 (2012) (plurality opinion) (discussing distinctions in false statement of fact cases and their value to society).

139. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976); see Tushnet, *Trademark Law*, *supra* note 130, at 737–38.

140. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (emphasis added).

141. See Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010) (“When it works well, trademark law facilitates the workings of modern markets by permitting producers to accurately communicate information about the quality of their products to buyers If competitors can falsely mimic that information, they will confuse consumers, who won’t know whether they are in fact getting a high quality product. Indeed, some consumers will be stuck with lemons.”). For some, the claim is that when it comes to passing off in trademark, the consumer is ill-equipped to protect herself. See Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 20 (1992).

contexts.¹⁴² Commerce is also presumed to be apolitical; often it is not. Speech rules from *Citizens United* and *Sorrell* unfetter a corporation's ability to speak about political stances and the politics of their products. The shift allows corporations to use aggressive and pervasive advertising across the full range of media, such as television, radio, the Internet, mobile displays, billboards, infomercials, and print, to achieve their goals. At the same time, a corporation would prefer not to have others use the same means to criticize them. Current laws about corporate criticism play right into this strategy, as they hinder the ability to use speech to question and police corporations.

For example, dilution law explicitly protects corporate reputation; yet, as I argue, a corporation qualifying for dilution protection is also a public figure, and as such dilution claims are constitutionally prohibited. Dilution protects famous marks.¹⁴³ Federal dilution law defines famous marks as marks "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."¹⁴⁴ It is a reputation law that seeks to eliminate "blurring" or "tarnishment" of the mark.¹⁴⁵ Uses that may transfer recognition from one realm to another are prohibited unless coming from the mark holder.¹⁴⁶ Factors indicating that a mark is famous include amounts spent and areas reached by advertising, how much and where goods and services have been sold, and the extent of actual recognition.¹⁴⁷ This language comes from a recent revision, which was designed, in part, to move away from dilution protection for "niche" marks, or locally famous marks, and make dilution pro-

142. Cf. Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial Speech Doctrine*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 294, 312 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008) (noting that with political speech we "presume a fully rational citizen," but those opposed to regulation "presume a careful and competent consumer," whose conduct is "plainly inconsistent with the behavior of idealized speech-evaluators"); Richard H. Weisberg, *The First Amendment Degraded: Milkovich v. Lorain and a Continuing Sense of Loss on Its 20th Birthday*, 62 S.C. L. REV. 157, 179–80 (2010) (arguing a proper reading of *Sullivan* accepts a thinking, deliberating audience).

143. 15 U.S.C. § 1125(c)(1) (2012).

144. *Id.* § 1125(c)(2)(A).

145. See Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 564 (2008) [hereinafter Tushnet, *Gone in Sixty Milliseconds*].

146. 15 U.S.C. § 1125(c)(1).

147. Tushnet, *Gone in Sixty Milliseconds*, *supra* note 145, at 514.

tection only available for national brands that have “household” recognition.¹⁴⁸

Perhaps to the surprise of corporations that lobbied for dilution protection, marks meriting dilution protection correspond to general corporate public figures.¹⁴⁹ A human is “a general purpose public figure only if he or she is a well-known celebrity, his name a household word. . . . They are frequently so famous that they may be able to transfer their recognition and influence from one field to another.”¹⁵⁰ A corporation that qualifies for dilution protection is, like a human general public figure, by definition nationally or “widely” known like a “celebrity,” a “household” name, and its recognition and influence—what dilution law calls “fame”—is easily applied to many realms.¹⁵¹ Unlike the way the law treats human public figures, dilution law is a shield for the corporate public figure. The essence of a dilution claim is that, unlike confusion-based trademark doctrines, holders of famous marks can sue junior users “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.”¹⁵² The classic rationale that regulation of false or misleading speech is allowed evaporates with dilution, for dilution does not require that the speech deceive or confuse consumers and never even asks whether it was false.¹⁵³ As part of dilution’s reputation-protection structure, an act that may transfer recognition from one realm to another—a criteria that tips toward allowing more speech about a natural person—is prohibited. As Rebecca Tushnet has argued, dilution law enables mark holders “to sta-

148. See Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*, 1143, 1157–58 (2006).

149. See Sandra L. Rierison, *The Myth and Reality of Dilution*, 11 *DUKE L. & TECH. REV.* 212, 214 (2012) (“Properly viewed, the federal dilution statute is a legislative precursor to the type of corporate personification underlying the Supreme Court’s analogous treatment of corporate speech under the First Amendment in *Citizens United* and is equally misplaced.” (footnote omitted)).

150. *Tavoulareas v. Piro*, 817 F.2d 762, 772 (1987) (en banc) (quoting *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1293 (D.C. Cir. 1980)) (internal quotation marks omitted).

151. See, e.g., Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 *IOWA L. REV.* 63, 117 (2009).

152. 15 U.S.C. § 1125(c)(1) (2012). Federal dilution law has been revised since its initial passage in 1995. Under the revision, a claim may still only be brought by the holder of a famous mark, but the junior user’s use must be “likely to cause dilution by blurring or dilution by tarnishment of the famous mark” for there to be a remedy under the cause of action. See *id.*

153. See Tushnet, *Trademark Law*, *supra* note 130, at 738.

bilize the meaning of a mark,” rather than face the “robust competition in the marketplace of ideas” the First Amendment fosters, and it “favors meanings approved by established producers above meanings offered by challengers.”¹⁵⁴ This image protectionism is exactly the opposite of what First Amendment law requires when a public figure is at stake.

Dilution law fails to accommodate the criticism that should be possible for a public figure. Federal dilution law lists some exemptions for certain types of speech, such as fair use, comparative advertising, and news commentary.¹⁵⁵ The exemptions seem to enable commentary this Article seeks to foster, but do not go far enough. First, plaintiffs often bring state dilution claims as part of their lawsuits, but the Act does not reach state dilution laws and trademark infringement claims.¹⁵⁶ Second, the exemptions simply do not cover what they should, and analysis ends up asking traditional, fact-intensive trademark law questions, such as whether the use was for the defendant’s goods or services or to designate source in a confusing manner, murky issues regarding whether a parody was properly made, and difficult questions of fair use, rather than focusing on the criticism and commentary inquiries needed for speech about public figures.¹⁵⁷ In one case the use of Louis Vuitton marks to make and sell a handbag-styled, plush chew toy for a dog was deemed a parody and allowed.¹⁵⁸ In contrast, when Hyundai used Louis Vuitton marks in a television advertisement by altering the mark to LZ and placing the altered mark on a basketball that appeared for one second in a thirty-second commercial, the court found that Hyundai had diluted the Louis Vuitton mark.¹⁵⁹ Hyundai claimed it was using the mark to comment on the changing meaning of luxury, and the commercial showed ironic images challenging what luxury means, such as “policemen eating caviar in a patrol car; large yachts parked beside modest homes; . . . [and] an inner-city basketball game played on a lavish marble court with a gold hoop.”¹⁶⁰ That did

154. Tushnet, *Gone in Sixty Milliseconds*, *supra* note 145, at 561.

155. 15 U.S.C. § 1125(c)(3).

156. See William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 106–07 (2008).

157. See *id.* at 108–09; Rierson, *supra* note 149, at 212.

158. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

159. *Louis Vuitton Malletier, S.A. v. Hyundai Motor America*, No. 10 Civ. 1611 (PKC), slip op. at 1 (S.D.N.Y. Mar. 22, 2012).

160. *Id.* at 2.

not matter. Hyundai was not able to meet the fair use exemption, because it was not commenting solely on Louis Vuitton, and there was intent to use the mark.¹⁶¹ The inquiry incorrectly focused on intent to misappropriate the mark rather than asking whether the use was to make a false statement about the company—an inquiry that would allow the speech instead of preventing it.¹⁶² And, a more general problem appears. As one commentator has put it, the exemptions make the analysis “ambiguous” and thus defeat the goal of increased speech, because the hurdles put us in a world of late case resolution and uncertainty about liability¹⁶³—the opposite of what we should want if we are to be able to question corporate public figures.

Trademark law encounters further problems as it tries to protect consumers from false and misleading speech. A core understanding of trademark law today is that its purpose is to “facilitate the transmission of *accurate* information to the market.”¹⁶⁴ But the source of that transmission is the mark holder.¹⁶⁵ Mark holders, not consumers, bring trademark suits.¹⁶⁶ The idea is that the mark holder will police its mark, and consumers benefit as a result. In the rare cases where there truly is passing off—using a mark to deceive consumers about what they are buying—trademark law protects consumers,¹⁶⁷ and the concerns of this Article are not present. As a constitutional matter, the ideal of protecting consumers by preserving the

161. *Id.* at 14–15.

162. *Cf.* *Stewart v. Rolling Stone LLC*, 181 Cal. Rptr. 3d 98, 119 (2010) (“[T]here was no evidence of any intentional collusion to misappropriate plaintiffs’ identities.”).

163. McGeveran, *supra* note 156, at 109; *accord* Rierson, *supra* note 149, at 267–68 (noting that even where parody is found, “courts must engage in a fact-specific weighing of factors in these types of cases to determine whether the use will ‘impair the distinctiveness’ of the famous trademark or harm its reputation,” and finding parody is “not a foregone conclusion” (footnote omitted) (quoting *Louis Vuitton*, 507 F.3d at 265)).

164. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 548 (2006) (emphasis added).

165. Desai, *supra* note 136, at 985.

166. *See* 15 U.S.C. § 1114(1) (2012); *cf.* BeVier, *supra* note 141, at 21 (“[I]f a consumer’s interest in not being deceived by a passer-off is going to be protected at all, it will have to be by . . . the owner of the trademark.”).

167. *See, e.g.*, Deven R. Desai, Response, *An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2130 (2012); Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1570–71. *But see* McGeveran, *supra* note 156, at 68 (“The test has expanded far beyond its roots in cases involving direct commercial competitors.”).

quality of information in the marketplace appears sound, but when probed the ideal falls apart.

The current system allows the object of the speech to control the content of that speech, which is a backwards result for public figures. We would not allow Sullivan or Hillary Clinton to dictate whether and how people could comment on them as public figures. Yet, trademark law relies on mark holders to decide when the public should be able to see or hear an opinion about the mark holder. As with the defamation suit at issue in *Sullivan*, trademark law enables threatening letters and lawsuits that chill speech.¹⁶⁸ Trademark enforcement practices, including sending cease-and-desist letters and increasing numbers of “strike suits” designed to force quick settlements, are “standard practice in the face of virtually any use,” even legal uses.¹⁶⁹ If a case reaches a court, the test applied—the likelihood of confusion test—asks whether the use in question is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association” between the plaintiff and defendant or their products.¹⁷⁰ The test is, however, quite poor at accommodating speech.¹⁷¹ The multifactor test is fact-extensive, requires experts, and is rarely amenable to summary judgment.¹⁷² In addition, because trademark law embraces consumers as dullards who are easily confused when purchasing,¹⁷³ almost any hint of confusion, even in expression cases, can be found to be an infringing use.¹⁷⁴ The Lanham Act is subject to a broad reading, and courts grant injunctions with a small showing or belief that some use of a mark “indicate[s] a trademark owner’s mere approval of a defendant’s product or service.”¹⁷⁵ Confusion analysis thus chills speech “regardless of the ultimate outcome.”¹⁷⁶

168. See, e.g., Ramsey, *supra* note 105, at 404 (discussing examples of such enforcement actions).

169. McGeeveran, *supra* note 156, at 64.

170. 15 U.S.C. § 1125(a)(1)(A) (2012).

171. See generally Ramsey, *supra* note 105 (arguing that First Amendment scrutiny should apply when trademark law chills speech).

172. McGeeveran, *supra* note 156, at 71.

173. See, e.g., Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 887 (2004) (“[O]rdinarily prudent consumers have also been characterized as ‘credulous,’ ‘inexperienced,’ and ‘gullible.’” (footnote omitted) (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:93 (4th ed. 1996))).

174. See generally McGeeveran, *supra* note 156 (discussing cases and proposing a fair use statute for trademarks).

175. Rebecca Tushnet, *Running the Gamut from A to B: Federal Trade-*

Another speech problem occurs when commercial and non-commercial speech mix. In *Nike, Inc. v. Kasky*, after allegations that Nike “mistreat[ed] and underpa[id] workers at foreign facilities,” Nike engaged in a campaign to protect its image, including taking out advertisements, issuing press releases, writing op-eds, and sending letters to university presidents and athletic directors, some of its main constituents or customers.¹⁷⁷ Kasky, a private citizen, claimed Nike had made false and misleading statements about its labor practices and sued Nike for unfair and deceptive practices under California law.¹⁷⁸ Despite all the advertising and marketing efforts in its campaign, Nike argued its speech was *noncommercial*, because it did “more than propose a commercial transaction” and was related to more than just “economic interests of the speaker and its audience.”¹⁷⁹ Nike claimed it was engaging in a general public debate and offering its “opinion on matters of public concern.”¹⁸⁰ If accepted, Nike’s speech would have come under the heightened scienter required before one can find tort liability for such speech.¹⁸¹ Yet Nike’s communication was an advertisement, concerned a product, and had an economic motivation, and thus arguably fit the definition of commercial speech.¹⁸² If so, Nike was making a statement about its products, not general labor issues, and one could limit Nike’s commercial speech and factual statements while still allowing Nike to speak about general politics.¹⁸³ This view ignores, however, that many people buy goods based on politics. To say that Nike’s speech was not political is incorrect. As Justice Breyer explained in his dissent, Nike was responding to claims about “a matter that [was] of sig-

mark and False Advertising Law, 159 U. PA. L. REV. 1305, 1313 (2011) [hereinafter Tushnet, *Running the Gamut*].

176. McGeeveran, *supra* note 156, at 71.

177. 539 U.S. 654, 656 (2003). The Supreme Court decision was a dismissal of the writ of certiorari as improvidently granted but offers insights about the problems of commercial speech doctrine. *See also* *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003); *accord* Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1148 (2004).

178. *Nike*, 539 U.S. at 656.

179. Chemerinsky & Fisk, *supra* note 177, at 1149 (footnote omitted) (quoting Brief for the Petitioners at 22, *Nike*, 539 U.S. 654 (No. 02-575)) (internal quotation marks omitted).

180. *Id.*

181. Kysar, *supra* note 52, at 575 n.215.

182. Chemerinsky & Fisk, *supra* note 177, at 1147–48 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

183. *Id.* at 1148–50.

nificant public interest and active controversy” and where advocacy for action had been made.¹⁸⁴ Nike’s speech was simultaneously commercial speech and political speech, with the two aspects “inextricably intertwined.”¹⁸⁵

The political nature of commerce indicates that a corporation should be allowed to speak, but allowing someone to police that speech through lawsuits would be disfavored. Justice Breyer claimed the choice was binary, between First Amendment protection only for truthful commercial speech and the First Amendment commitment to protecting “the liberty to discuss publicly and truthfully all matters of public concern” as well as creating “breathing space” for speech on matters of public concern, including “potentially incorporating certain false or misleading speech.”¹⁸⁶ The tradeoff is the familiar one from *Citizens United*: truth testing or more speech on public matters. Breyer sided with more speech. He indicated a statute that allows an individual to bring a suit for false advertising when the individual has suffered no harm would be unconstitutional, because the threat of such suits would chill *corporate speech*.¹⁸⁷ He further questioned the general idea of a private attorney general being able to go after mixed political speech.¹⁸⁸ Breyer noted that such a law would handicap commercial speakers—often corporations—in ways noncommercial speakers were not.¹⁸⁹ Although Justice Breyer’s analysis is consistent with the idea that laws favoring less speech are likely unconstitutional, it highlights that, yet again, corporate speech is protected, while avenues to challenge corporations are closed.

Like other public figures, corporations need policing. Consumers may wish to take up causes and go after corporations in court, but regulations allowing consumers to police corporate speech are few¹⁹⁰ and suspect under the Court’s views on restricting corporate speech. All that remains to discipline a corporation is speech about the corporation. That solution, however, reveals the asymmetry of commercial speech law when a

184. *Nike*, 539 U.S. at 677 (Breyer, J., dissenting).

185. *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

186. *Id.* at 676.

187. *Id.* at 679–80.

188. *Id.* at 681.

189. *Id.*

190. See Tushnet, *Fighting Freestyle*, *supra* note 135, at 1460 (noting California changed the law to “preclude future Kaskys” from bringing such suits, and few states allow such suits).

consumer tries to talk about a corporation. Speech about a corporation is often subject to greater, not less, regulation, because of the conceit that the subject matter is less important than non-commercial speech. Justice Breyer recognized a potential harm of having a private attorney general being able to go after mixed political speech,¹⁹¹ but given that corporations are the private actors bringing trademark suits, they too are private attorneys general who may go after mixed speech about them. Again, corporations receive the benefits of speech, but without the limits placed on natural persons. Corporations speak with almost no limits. Corporations may use reputation laws to thwart speech about corporations. And, lawsuits to hold corporations accountable for their assertions are not allowed. The confluence of these results narrows the number of speakers about a corporation. The Supreme Court's speech jurisprudence, however, favors "decentralization"—reducing barriers to speech about public figures and increasing the number of decentralized sources of information, not limiting them.

C. THE VIRTUE OF DECENTRALIZED AUTHORITY

Decentralization is supposed to help society have more perspectives—even false or distorting ones and especially critical, challenging ones—so that debate can take place. Corporate reputation laws, however, work to limit the numbers of speakers about a corporation in the name of advancing truthful speech.¹⁹² That position is untenable when considering a public-figure corporation. *Citizens United* examined the truth-value of speech as a question of distortion—"the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."¹⁹³ The truth-value of speech arises in *Sullivan* as both factual-error and defamation issues.¹⁹⁴ Taken together, these cases show that First Amendment law not only tolerates turbulence about issues and possibly confusing statements from myr-

191. *Nike*, 539 U.S. at 681 (Breyer, J., dissenting).

192. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

193. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 348 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

194. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) ("If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.").

iad sources about public figures and/or public matters, but also embraces that muddiness as a way to have a larger debate that is not subject to only one view of an issue.¹⁹⁵ Put differently, the Court seeks to increase the *amount* of information and puts less weight on the information's *truth-value*.¹⁹⁶

The possibility of a speaker, corporate or otherwise, being so powerful as to distort speech simply does not matter in the decentralized approach to speech. *Citizens United* rejected the concept of antidistortion in favor of allowing more, not less speech. Antidistortion was designed to prevent corporations “from obtaining ‘an unfair advantage in the political marketplace’ by using ‘resources amassed in the economic marketplace.’”¹⁹⁷ That a corporation may amass great wealth and use it is not a surprise. Mitigating such a possibility might even be laudable. But individuals can also amass similar wealth, and the First Amendment does not turn on financial status.¹⁹⁸ Furthermore, the Court noted that the antidistortion ideal would apply to a media corporation and allow Congress to ban such a corporation's speech.¹⁹⁹ According to the Court, “By suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”²⁰⁰ Thus, the antidistortion rule, if followed, would deny corporations the right to speak in the same way that individuals speak and be tantamount to censorship that prevents the public from receiving information.²⁰¹ Such a rule could not stand. In the face of virulent factions, banning one or the other faction “destroy[s]

195. As shown later, this point clashes directly with the way trademark law operates and has large implications for speech and trademark law. *See infra* pp. 140–42.

196. *Cf.* Desai, *supra* note 167, at 2127.

197. *Citizens United*, 558 U.S. at 313 (quoting *Austin*, 494 U.S. at 659); *see also* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011).

198. *Citizens United*, 558 U.S. at 349–52 (“The First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976))).

199. *Id.*

200. *Id.* at 354 (emphasis added).

201. *See* *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (rejecting “enforced silence” in favor of more speech to counter false statements); *Citizens United*, 558 U.S. at 354 (“The censorship we now confront is vast in its reach. The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’ And ‘the electorate [has been] deprived of information, knowledge and opinion vital to its function.’” (emphasis added) (citations omitted)).

the liberty” of some factions and is “worse than the disease.”²⁰² It is better to have more speech by all manner of speakers and let the public determine “what is true and what is false.”²⁰³ All of these points fit into the view that the solution to possibly distorting views is to have all speak rather than have a centralized decision about what speech to allow.

The antidistortion approach to speech was doomed for another reason: the Court’s high tolerance for false, inaccurate statements in the realm of political speech. The antidistortion perspective may be correct that certain corporate views could overwhelm other speakers’ voices and possibly eliminate precisely the wide range of speech the *Citizens United* Court vaunted. Antidistortion principles also sought to manage the way in which large corporate donations can corrupt the political process.²⁰⁴ The perspective that certain corporate speech will be false and distort the factual record cannot, however, get around *Sullivan*. Recall that *Sullivan* involved a claim of libel and left the defendants with truth as a defense.²⁰⁵ The Court resoundingly rejected truth testing in favor of speech. When the First Amendment is at issue, “any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker” is not recognized.²⁰⁶ Such tests would force the speaker to assess and prove the truth of statements; that endeavor, even for true statements, presents great uncertainty and potential costs such that speakers would self-censor for fear of actions and possible judgments against them.²⁰⁷ Truth matters, but under the actual malice standard set forth in *Sullivan*, a defendant must speak “with knowledge that [the publication] was false or with reckless disregard of whether it was false or not.”²⁰⁸ This standard permits a huge range of speech by punishing only the most egregious false statements. Such a standard accommo-

202. *Citizens United*, 558 U.S. at 354–55 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (B. Wright ed., 1961)).

203. *Id.* at 355.

204. *Id.* at 447 (Stevens, J., concurring in part and dissenting in part) (noting that the majority “badly errs both in explaining the nature of [anticorruption, antidistortion, and shareholder protection] rationales, which overlap and complement each other, and in applying them to the case at hand”).

205. See *supra* note 34 (discussing the facts of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

206. *Sullivan*, 376 U.S. at 271.

207. *Id.* at 278–79.

208. *Id.* at 279–80.

dates the fact that “erroneous statement is inevitable in free debate.”²⁰⁹ The standard also ensures that “constitutional protection [for speech] does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”²¹⁰ Furthermore, “[i]njury to . . . reputation,” even if based on “utterance[s] contain[ing] ‘half-truths’ and ‘misinformation,’” is not sufficient to trump speech about public officials.²¹¹ The *Sullivan* Court, like the *Citizens United* Court more than 45 years later, championed the ability of anyone—corporation, association, or individual—to criticize public officials (and by extension public figures) and discuss public affairs. Rules that interfere with that ability are likely unconstitutional.

At the same time, the Court’s free speech jurisprudence reflects a dedication to a type of symmetry when considering what speech is allowed and how speech is made. *Sullivan* recognized that public officials have broad immunity against libel if the statement is made as part of the official’s duties.²¹² In a move to rebalance speech rights, the *Sullivan* Court held that “[i]t would give public servants an unjustified preference over the public they serve, if *critics* of [public officials] did not have a fair equivalent of the immunity granted to the officials themselves.”²¹³ Justice Goldberg’s concurrence in *Sullivan* adds another dimension to this symmetry. The underlying logic seems to be that *if* the press was able to smear the public official, and the official had little ability to counter that speech, a distortion problem may be present.²¹⁴ That was not the case, because public officials have sufficient means for counter-speech through the media.²¹⁵ Because there was symmetry regarding speech platforms, there should be “an absolute privilege for criticism of official conduct” by citizens and the press.²¹⁶ *Citizens United* and *Sorrell* also rejected rules that distinguish amongst speak-

209. *Id.* at 271.

210. *Id.*

211. *Id.* at 272–73.

212. *Id.* at 282 (recognizing “the utterance of a federal official to be absolutely privileged if made ‘within the outer perimeter’ of his duties” (quoting *Barr v. Mateo*, 360 U.S. 564, 575 (1959))).

213. *Id.* at 282–83 (emphasis added).

214. *See id.* at 304–05 (Goldberg, J., concurring in the result).

215. *Id.* (arguing that even in the face of “unsubstantiated opinions or deliberate misstatements,” a public official should and could engage in counter-speech because she could avail herself of her “equal if not greater access than most private citizens to media of communication”).

216. *Id.* at 304.

ers and instead favored applying the same speech rules to all.²¹⁷ One way to understand *Citizens United's* rejection of the antidistortion ideal is as a peculiar form of symmetry. The Court adhered to the idea that all manners of speech in all mediums are equal, and its discussion of the way in which any and all speakers may soon avail themselves of a range of mediums, including the Internet, tracks a desire to avoid carve-outs for a specific type of speaker or medium and instead treat all the same.²¹⁸ For the Court, the possibility of all having the same options to speak is more important than whether one speaker may be better at, or have more powerful ways of, using those options.

Furthermore, the Supreme Court's recent decision in *United States v. Alvarez* supports the idea that even when faced with false statements of fact that involve misuse of a powerful symbol—the Medal of Honor—corrective counter-speech is favored over restricting speech.²¹⁹ The parallel to the interests advanced for dilution and trademark confusion claims was strong.²²⁰ In those areas, however, if a plaintiff can show a dilution or a likelihood of confusion when another uses the plaintiff's mark, harm is presumed and an injunction is issued.²²¹ In contrast, not only did Justice Kennedy reject the general position “that false statements receive no First Amendment protection,”²²² he rejected the claim that the government interest in protecting the integrity of the award—not “dilut[ing] the value

217. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 353–54 (2010).

218. *See Citizens United*, 558 U.S. at 350–52, 364 (“There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

219. Both the opinion by Justice Kennedy, which three Justices joined, and the concurring opinion by Justice Breyer, which one Justice joined, look to more information and corrective speech as better ways to solve inaccurate statements than bans on false speech. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion); *id.* at 2556 (Breyer, J., concurring).

220. *Id.* at 2554 (Breyer, J., concurring) (“Statutes prohibiting trademark infringement present, perhaps, the closest analogy to the present statute.”). Justice Breyer makes the connection between trademark law and the case but conflates confusion doctrine and dilution doctrine.

221. *See, e.g.,* Sandra L. Rierson, *IP Remedies After eBay: Assessing the Impact on Trademark Law*, 2 AKRON INTELL. PROP. J. 163, 164 (2008) (“In trademark law, like patent law (at least prior to the *eBay* decision), the case law reflects a strong presumption that injunctive relief goes hand-in-hand with a finding of liability—either in the form of trademark infringement or, more recently, dilution.”).

222. *Alvarez*, 132 S. Ct. at 2545 (plurality opinion).

and meaning of military honors,” and not letting misuse tarnish the symbol—was sufficient to overcome the interest in free speech.²²³ For Kennedy, the claimed harm—protecting the symbol’s value and reducing public confusion about the symbol—lacked connection to the remedy.²²⁴ Instead of the restriction on speech like that which trademark law fosters, *Alvarez* looked to counter-speech and better information sources for people to check potentially false statements as ways to cure the possible confusion and harm the false use of the symbol might create.²²⁵

Yet corporate reputation doctrines are asymmetrical to, and reach different conclusions for, the same questions the Court addresses in public figure speech cases. The following chart illustrates the divergence in treatment.

	Antidistortion/ Politics	Confusion/Commerce Law
Truth Test	No	Yes
Reputation Protection	No	Yes
Allows Muffling of Voices	No	Yes
Tolerance for Inaccuracy	Yes	No

The very doctrine that the Supreme Court rejects—the antidistortion doctrine—because it “muffle[d] . . . voices”²²⁶ and “deprived [the electorate] of information, knowledge and opinion vital to its function,”²²⁷ reappears in trademark law under the guises of dilution and likelihood of confusion doctrines. Only here the roles are reversed. The corporate speaker is privileged and shielded from scrutiny as it presses its views about

223. *Id.* at 2545–49.

224. *Id.* at 2549.

225. *Id.*; *id.* at 2560 (Alito, J., dissenting).

226. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 354 (2010) (quoting *McCannell v. Fed. Election Comm’n*, 540 U.S. 93, 257–58 (2003)).

227. *Id.* (quoting *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 144 (1948)).

itself, while everyone else faces hurdles to speak.²²⁸ Like the world before *Sullivan*, the public figure is protected and has superpowers, whereas the speaker is unprotected and faces penalties for speech.²²⁹ Instead of relying on the more powerful speaker to use its resources for counter-speech, challenging speech is simply quashed. Beyond the traditional speech rules under which people operate, corporations use trademark law to protect their name, face, and reputation. Trademark law privileges the mark holder's view of its mark and the information the corporation offers for processing its version of the truth over others' and suppresses challenges to what the mark stands for lest those challenges confuse consumers, even in cases where the "protection doesn't protect consumers."²³⁰ This position makes little sense for speech about a corporate public figure.

If corporations are afforded the same speech rights as and against individuals and across all mediums, individuals should have the same rights against corporations. Given corporations' important role in society as speakers, as shapers of our world, and as influencers of politics, the law should allow for more discussion about corporations' business practices, goods, and services—not less. As between a corporation's access to media and ability to present a message on an issue and an individual's, a corporation often has greater access to the media to respond—not less. Yet glaring areas of the law undermine, if not negate, the ability to speak about corporations. These laws protect corporate reputation and interfere with the Court's commitment to speech symmetry. They favor a corporation's speech about its goods, services, and the corporation itself while suppressing other speech about the corporation. They embrace antidistortion principles, rather than rejecting them. If the principles of decentralized provision of information—including information about political matters, regardless of some inaccu-

228. Accord Tushnet, *Gone in Sixty Milliseconds*, *supra* note 145, at 56 ("Dilution is a doctrine that favors meanings approved by established producers above meanings offered by challengers. . . . [To] the extent that truthful commercial speech promotes democratic values, [it is] antidemocratic.").

229. Cf. Tushnet, *Trademark Law*, *supra* note 130, at 749 ("[I]f it is true that commercial speech is as relevant and vital to modern citizens as political speech, then suppressing competition is analogous to silencing political opponents and certainly merits skepticism. Like partisan officials deciding which political speech to pursue, trademark owners may see harm where there is only competition.").

230. Tushnet, *Running the Gamut*, *supra* note 175, at 1360.

racies, and matters related to corporations—are to have force, laws that protect corporation reputation have to be rethought.

III. ESTABLISHING THE CORPORATE PUBLIC FIGURE DOCTRINE

Public-figure jurisprudence should shape the way we govern commentary about corporations. Thus, I propose a corporate public figure doctrine. Dissolving lines about what is commercial speech, expanding corporate power to stop speech, and shrinking ways to police corporations demand increased speech about corporations and lead to one conclusion: we need a safe harbor for speech about corporations. A corporate public figure doctrine provides the contours of such a safe harbor. Such a doctrine creates the possibility for more speech about corporations and rebalances free speech law so that corporate speech rights are subject to the same obligations and limits as the speech rights of natural persons.

A. INCREASING SPEECH

A corporate public figure doctrine would ensure high information flow and public debate about the politics of commerce.²³¹ How much information we allow into a debate involves an inherent tradeoff. First Amendment law and corporate reputation law strive to balance between judgment calls about what is good information that allows us to make better decisions, and bad information that hinders our ability to understand an issue.²³² Corporate reputation law tends to limit information and privileges corporations as sources of information.²³³ First Amendment jurisprudence favors the provision of more information by individuals, groups, and the press and relies on the ability of people to parse amongst different pieces of information, even inaccurate information, instead of restricting information flow.²³⁴ The First Amendment's actual malice

231. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”).

232. Cf. POST, *supra* note 55, at 34 (“Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones.”).

233. See *supra* Part II.A.

234. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“But to

test reflects the choice for more information, not less. Actual malice requires that the defendant knew the publication was false or made with “reckless disregard of whether it was false or not.”²³⁵ Given the passions involved in political and public issues, the standard requires something more than “ill will or ‘malice’ in the ordinary sense of the term.”²³⁶ It does not matter that the allegedly defamatory material is published with an eye toward profit.²³⁷ The core issue is whether the defendant “made the false publication with a ‘high degree of awareness of . . . probable falsity,’ or must have ‘entertained serious doubts as to the truth of his publication.’”²³⁸ Thus it seems that most assertions about a public-figure corporation would be privileged unless someone offered an outright lie and knew it was a lie.²³⁹

The Lanham Act is the missing piece of corporate reputation doctrine, where applying actual malice runs into problems but should not. Indeed, the actual malice threshold has been applied to limit some corporate reputation doctrines. Trade libel and slander of title actions—sometimes collectively known as injurious falsehoods²⁴⁰—have been held constitutional when limited to cases involving knowingly false statements and a

insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.”).

235. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

236. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

237. *Id.* at 667 (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”).

238. *Id.* (citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant*, 390 U.S. at 730).

239. *Alvarez*, however, points to a preference for corrective speech rather than a ban, even when an outright lie is the issue. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion). Lyrissa Lidsky has argued that the standard undermines actual malice’s power when applied to non-media defendants and offers the opinion that privilege is an alternative defense for non-media speakers. See Lidsky, *supra* note 71, at 915–18. Relying on fact and opinion distinctions means that the gross, hyperbolic statement is protected and misstatement of fact, a key part of what *Sullivan* protected, is lost. See Weisberg, *supra* note 142, at 183. Reliance on the fact-opinion distinction reverts the law to the pre-*Sullivan* era and demands truth-testing. *Id.* Truth-testing is part of the way that current corporate reputation laws thwart speech. Applying actual malice to corporate public figures allows the sort of aggressive claims and misstatement of facts at issue in *Sullivan* and *Citizens United* and avoids the truth-testing problems the opinion inquiry raises. It also maps to the idea that the audience is able to sort statements to find the truth. See *id.*; *infra* notes 312–17 and accompanying text.

240. See 2 ROBERT D. SACK, *SACK ON DEFAMATION* § 13:1.1 (4th ed. 2011).

showing of actual malice.²⁴¹ Actual malice is the threshold for liability in a trade libel case involving a public figure under the Restatement of Torts, and Judge Sack offers it as the probable requirement in his treatise on First Amendment law.²⁴² Applying actual malice standards to trademark and false advertising law would track how the Court manages other corporate reputation doctrines. The section of the Lanham Act that addresses false advertising “creates a cause of action strikingly similar to, and that may act as a substitute for, one for injurious falsehood.”²⁴³ The section concerning trademarks uses almost the exact same language as the false advertising provisions.²⁴⁴ Yet trademark and false advertising law are treated quite differently than other corporate reputation laws, with injunctions being common, no intent requirement for deception, and no requirement for special damages related to the speech at issue.²⁴⁵ These doctrinal results directly conflict with how we treat public figures. They work to protect corporate public-figure reputation rather than to allow society to scrutinize them as it might any other public figure.

The use of actual malice standards when speaking about corporate public figures allows consumers, commenters, the press, and others to engage in unfettered speech about corporations. This approach rebalances the current system, which favors expanded, barely restricted corporate speech but limits speech about corporations. Such an approach could arguably place all corporate speech beyond the reach of not only much of trademark and false advertising law, but also agencies that regulate corporate speech.²⁴⁶ In that sense, Rebecca Tushnet identifies precisely the problem this Article tries to address.

241. See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (trade libel); *SCO Group, Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1296 (D. Utah 2010) (slander of title); see also Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner at 5, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210).

242. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. d (1977); 2 SACK, *supra* note 240, § 13:1.4 (“A public plaintiff probably must, under the First Amendment, prove ‘actual malice’ in a disparagement case as in a libel or slander case.”).

243. 2 SACK, *supra* note 240, § 13:2.

244. See Tushnet, *Fighting Freestyle*, *supra* note 135, at 1475 n.82 (“[T]he language barring falsity and misleading representation is the same in the statute, and courts have interpreted both provisions to require a showing of likely deception.”).

245. See 2 SACK, *supra* note 240, § 13:2.

246. Tushnet, *Fighting Freestyle*, *supra* note 135, at 1479.

Current Supreme Court jurisprudence seems to go to the heart of commercial speech and consumer protection ideals and eviscerates them in favor of more speech and corrective speech by all.²⁴⁷ I am not saying this turn is necessarily desirable, and I acknowledge its problems.²⁴⁸ Rather, I believe that First Amendment jurisprudence has gone this route. This shift requires that we offer proper protection for those who would speak about corporate practices. When increased speech is all that remains, barriers to such speech should be torn down.

B. ENABLING SPEECH ABOUT THE CORPORATE PUBLIC FIGURE

A few hypothetical situations help illustrate how a corporate public figure doctrine would operate. Suppose Corporation A (CA) is a leading maker of tractor equipment. CA's tractors may be used for a variety of purposes. On the one hand, customers may use the tractors to increase their farms' yield and reduce labor needs to allow for investment in costlier but more environmentally friendly farm techniques.²⁴⁹ On the other hand, some customers may use the tractors to tear down forests, fill in wetlands, or remove settlements.²⁵⁰ Now consider Corporation B (CB), a leading maker of toys for girls. CB's doll is the most popular doll for girls. On the one hand, the doll is part of a campaign for girl power and has promoted positive careers, from surgeon to fashion designer to producer to an African-American female Presidential candidate.²⁵¹ On the other

247. See Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misladingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 257 (2007) ("[T]he consequence of turning false advertising law into a subtopic of First Amendment law would be a substantial, possibly near-total, contraction of its scope.").

248. Cf. *id.* ("[A]dvocates of full constitutional protection for commercial speech need to explain what they mean when they say that commercial fraud would still be actionable in their proposed constitutional regime.").

249. Cf., e.g., *Code of Conduct: Environment and Sustainability*, CATERPILLAR, <http://www.caterpillar.com/company/strategy/code-of-conduct/commitment/environment-and-sustainability> (last visited Nov. 2, 2013) ("We strive to create stockholder value by providing customers with solutions that improve the sustainability of their operations.").

250. See, e.g., Blake Sobczak, *Caterpillar Pulled from Social Indexes*, ASSOCIATED PRESS, June 27, 2012, available at <http://bigstory.ap.org/article/caterpillar-pulled-social-indexes> (describing Israeli military's use of "armored Caterpillar bulldozers to raze Palestinian houses").

251. See, e.g., Simone Brummelhuis, *Career Barbie (Now 50) Is on a Mission and Advocates Girl Power*, THE NEXT WOMEN (March 29, 2009), <http://www.thenextwomen.com/2009/03/29/career-barbie-now-50-is-on-a-mission-and-advocates-girl-power>; *I Can Be . . .*, BARBIE, http://icanbe.barbie.com/en_us/

hand, the doll may be seen as lacking anatomical normality, promoting consumerism, and at times offering images of girls as unable to handle mathematics.²⁵² A third corporation, Corporation C (CC), is a leading soda pop maker. It has promoted its products as being all-American and “Classic.”²⁵³ It has also altered its ingredients over time. At one point, the soda had a little cocaine in it.²⁵⁴ Later, CC switched from using sugar as a sweetener to corn syrup.²⁵⁵ In addition, CC has issued reports on its commitment to sustainability.²⁵⁶

Now, suppose that someone criticized any of these corporations by making broad claims regarding their practices, the honesty of their assertions, their role in culture, and so on. The critic used print, the Internet, and local radio advertisements to further the campaign. The critic also used the corporation’s trademarks in the campaign—a practice sometimes compared to hijacking—because they are the name and face of the corporation.²⁵⁷ In some cases, the critic may be using the marks in advertisements for the critic’s products, such as when SodaStream, a maker of do-it-yourself soft drink machines, used Coke bottles and cans in a marketing campaign to highlight container waste and landfill created by soda makers’ products.²⁵⁸ Comparative advertising parodies are another possibility. In *Deere & Co. v. MTD Products, Inc.*, MTD animated Deere’s mark so that it was smaller than the original mark and

index.html (last visited Nov. 2, 2013) (offering a range of Barbies with different careers and promoting the idea that “Barbie lets you be anything you want to be”).

252. See, e.g., *Life in Plastic*, ECONOMIST, Dec. 21, 2002, at 20; *Teen Talk Barbie Turns Silent on Math*, N.Y. TIMES, Oct. 21, 1992, at D4.

253. See Desai, *supra* note 136, at 983.

254. See, e.g., Douglas H. Boucher, *Cocaine and the Coca Plant*, 41 BIOSCIENCE 72, 75 (1991) (noting Coca-Cola “contained a minute amount of cocaine” in its original formula).

255. See, e.g., Desai, *supra* note 136, at 983.

256. See, e.g., *The Coca-Cola Company Releases Sustainability Report*, CSRWIRE (Feb. 4, 2011, 3:00 PM), http://www.csrwire.com/press_releases/31545-The-Coca-Cola-Company-Releases-Sustainability-Report.

257. Cf., e.g., Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love That Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 807–09 (2010) (giving examples of trademarks parodied in campaigns against major corporations).

258. See Duane D. Stanford, *SodaStream Takes Marketing Tactic to Coca-Cola’s Hometown*, BLOOMBERG (June 20, 2012, 4:12 PM), <http://www.bloomberg.com/news/2012-06-20/sodastream-takes-marketing-tactic-to-coca-cola-s-hometown.html>.

ran away.²⁵⁹ Criticism via a product is another option. In *Coca-Cola Co. v. Gemini Rising, Inc.*, the defendant offered a poster styled like a Coca-Cola ad that read “Enjoy Cocaine” in contrast to Coca-Cola’s “Enjoy Coca-Cola” mark,²⁶⁰ a commentary that seems appropriate given that cocaine was once an ingredient in the drink. Sometimes the commentary will be about a corporate image and how its products shape society. For example, Barbie was used in music and art to critique images of femininity and consumer society.²⁶¹ The antibrand movement has reworked brands to expose child labor (Old Navy), the dangers of cigarettes (Joe Camel), Dow Chemical’s inaction after the Bhopal disaster, British Petroleum’s responsibility for the Gulf of Mexico, and more.²⁶² And suppose a given corporation threatened to sue or sued the speaker.²⁶³ How would the issue turn out? Under current doctrine, the critic would face large costs and injunctions, and possibly need to reach an appellate court before the speech was vindicated.²⁶⁴ Like the defendants in *Deere* and *Gemini*, some defendants might lose after a long, expensive battle, because, as described above, the inquiry focuses on the incorrect questions about misappropriation of the mark and confusion of consumers rather than whether the statements are false and whether the issue is about a corporate public figure.²⁶⁵ Under the proposed approach, a defendant would argue that the corporations are public figures, and that they must meet the actual malice standard under *Sullivan*.²⁶⁶

The advantages here are two-fold. In determining whether a plaintiff is a public figure, courts may use an evidentiary hearing.²⁶⁷ That early determination allows a court to resolve cases where actual malice is not at issue and saves considera-

259. 41 F.3d 39, 45 (2d Cir. 1994) (enjoining the advertisement at issue).

260. 346 F. Supp. 1183, 1186 (E.D.N.Y. 1972) (enjoining the printing, distribution, and sale of the poster at issue).

261. See *supra* notes 112–19 and accompanying text.

262. See Katyal, *supra* note 257, at 807–09.

263. See, e.g., Stanford, *supra* note 258 (noting that Coca-Cola sent cease-and-desist letters to SodaStream alleging both trademark infringement and violation of advertising laws).

264. See, e.g., McGeeveran, *supra* note 156, at 61–62, 62 nn.59–64 (explaining the obscurity of the relevant areas of trademark law and the substantial costs produced by trademark litigation).

265. See *supra* Part II.B.

266. See *supra* Part III.A.

267. See 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:121, at 2-150 (2d ed. 2005).

ble costs.²⁶⁸ If the plaintiff has not argued there was actual malice but only negligence, and the defendant cedes negligence, and if all other elements are in place, the case turns on whether the plaintiff is a public figure.²⁶⁹ If the plaintiff is a public figure, she loses; if not, she wins.²⁷⁰ The actual malice determination is subtler but has similar benefits. Actual malice requires clear and convincing evidence.²⁷¹ Under *Sullivan*, defendants do not have an immediate bonus regarding burden of proof to prevent litigation costs.²⁷² Rather, the higher standard makes summary judgment a favored strategy, because plaintiffs have a difficult time overcoming that standard.²⁷³ The standard results in potentially early resolution and thus lower costs.²⁷⁴ As such, a corporate public figure doctrine enables earlier determination of the speech issues.

An examination of what the public figure analysis for corporations would look like illustrates how the approach would work and why it should increase the amount of information about corporations rather than reduce it, as is the case today.

Corporations can qualify as either general- or limited-purpose public figures. Under standard public figure doctrine, the general-purpose public figure is the exception, and the limited-purpose figure status is more likely.²⁷⁵ Corporations, however, can fit into either category rather easily.²⁷⁶ Determining whether the plaintiff is a public figure and what type of public

268. *See id.* at 2-150 to -151.

269. *Id.* at 2-150.

270. *Id.*

271. *See* 2 SMOLLA, *supra* note 267, § 12:74, at 12-80 (“The more nuanced and proper understanding is that the *substantive First Amendment standards* are themselves high, requiring ‘clear and convincing evidence’ of ‘actual malice,’ and summary judgment is ‘favored’ only to the extent that there inures in this substantive standard a relatively difficult burden for plaintiffs to overcome.”).

272. *See id.* at 12-80.3 (“*Herbert v. Lando* also casts serious doubt on the notion that the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment, at least to the extent that such a presumption exceeds the balance struck between the rights of publishers and defamation plaintiffs in *New York Times v. Sullivan*.”).

273. *Id.* at 12-80.

274. *Id. But cf.* Lidsky, *supra* note 71, at 915–18 (arguing that actual malice is easier to overcome for plaintiffs suing non-media speakers and offering an opinion privilege to augment the defense).

275. *See* *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

276. *Fetzer*, *supra* note 2, at 84–85.

figure, general- or limited-purpose, is a question of law.²⁷⁷ The Court of Appeals of the District of Columbia has explained:

A person becomes a general purpose public figure only if he or she is a well-known celebrity, his name a household word. Such persons have knowingly relinquished their anonymity in return for fame, fortune, or influence. They are frequently so famous that they may be able to transfer their recognition and influence from one field to another. Thus, it is reasonable to attribute a public character to all aspects of their lives.²⁷⁸

If CA is Caterpillar; CB, Mattel; and CC, Coca-Cola, they qualify as general-purpose public figures quite well.²⁷⁹ Although corporations are not giving up anonymity, they seek and, in these examples, attain “fame, fortune, and influence.”²⁸⁰

An additional way to analyze the issue is to ask whether the corporations’ marks would qualify for federal dilution protection. As explained above, dilution protects famous marks of corporations with much the same levels of “fame, fortune, and influence,” and the same ability “to transfer their recognition and influence from one field to another” as human public figures.²⁸¹ If a corporation has a viable dilution claim, courts should find that the corporation is also a general-purpose public figure.²⁸²

Even if one chooses to avoid declaring a famous corporation a general-purpose public figure, or if CA, CB, and CC were not Caterpillar, Mattel, and Coca-Cola, but instead were local corporations, they may often be limited-purpose public figures. Courts have applied a three-part test to determine whether someone is a limited-purpose public figure.²⁸³ First, the controversy must be determined “because the scope of the controversy in which the plaintiff involves himself defines the scope of the

277. See *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc); see also *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966) (“[I]t is for the trial judge in the first instance to determine whether the proofs show respondent to be a ‘public official.’”).

278. *Piro*, 817 F.2d at 772 (citations omitted) (internal quotation marks omitted).

279. See 1 SACK, *supra* note 240, § 5:3.7, at 5-46 to -47.

280. See *id.* (explaining that the nature of being a public corporation and “go[ing] public” is a voluntary action leading to mandatory public scrutiny, and thus concluding that treating public corporations as public figures is consistent with the First Amendment and SEC laws).

281. See *supra* notes 143–54 and accompanying text.

282. See *supra* notes 143–54 and accompanying text.

283. See, e.g., *Piro*, 817 F.2d at 772–73; *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296–98 (D.C. Cir. 1980); see also *Trotter v. Jack Anderson Enters.*, 818 F.2d 431, 433–34 (5th Cir. 1987) (adopting the test).

public personality.”²⁸⁴ The issue must be public such that “persons actually [are] discussing it” and must affect more people than just the ones directly involved in it.²⁸⁵ Criticisms about CA’s approach to the environment, CB’s approach to women’s place in society, or CC’s approach to health are issues people discuss in the news, on blogs, and elsewhere. They also reach more than the disputants. For these examples, the first prong would be met.

Second, the plaintiff must have more than a “trivial or tangential” role in the controversy.²⁸⁶ Whether the role was more than trivial will turn on whether the corporations asserted some influence on outcomes or made statements about the issues at hand.²⁸⁷ In our examples, Caterpillar, Mattel, and Coca-Cola have all taken public stands by touting their roles in sustainability,²⁸⁸ empowering girls and women,²⁸⁹ and health matters.²⁹⁰ So even if not deemed general-purpose corporate figures, they would meet this part of the evaluation. If, however, a corporation of any size—national, state, or local—has not made statements on an issue, would it still be a limited-purpose public figure? Answering that question would require investigation of facts about lobbying, public relation campaigns, and similar acts that demonstrate the role of the company.²⁹¹ It does not

284. *Piro*, 817 F.2d at 772.

285. *Id.* (quoting *Waldbaum*, 627 F.2d at 1297).

286. *Id.* at 773 (quoting *Waldbaum*, 627 F.2d at 1297).

287. *See, e.g., id.* at 773–74 (describing the statements made by the plaintiff regarding public policy toward the oil industry, and the influence plaintiff exercised as the head of Mobil).

288. *See supra* notes 249–50 and accompanying text; *cf., e.g., Global Issues: Engaging with Government*, CATERPILLAR, <http://www.caterpillar.com/cda/components/fullArticle?m=484235&x=7&id=3449560> (last visited Nov. 2, 2013) (stating Caterpillar’s commitment to political advocacy on its own behalf).

289. *See supra* notes 251–52 and accompanying text; *cf., e.g., MATTEL, PLAYING RESPONSIBLY: 2009 GLOBAL CITIZENSHIP REPORT 40* (2009), available at <http://corporate.mattel.com/about-us/2009GCReport.pdf> (listing learning, health, girl empowerment, and joy as Mattel’s publicly advocated philanthropic priorities).

290. *See supra* notes 255–56 and accompanying text; *cf., e.g., 2011/2012 Sustainability Report*, COCA-COLA (Nov. 7, 2012), <http://www.coca-colacompany.com/sustainabilityreport/> (providing links to, among other things, pages detailing Coca-Cola’s public commitments to fighting obesity, increasing nutrition education, and more).

291. *Cf.* 1 SMOLLA, *supra* note 267, § 2:32, at 2-51 (“No magical number of media appearances is required to render a citizen a public figure The court must ask whether a reasonable person would have concluded that the

take much for a corporation's acts to make it a limited-purpose public figure. The question turns on whether the corporation's activity could foreseeably generate public attention.²⁹² A corporation's local interactions, activities, and policies, such as community-development projects, advocacy on city and county councils, negotiated tax breaks, employment policies, and so on, would favor treating even a somewhat unknown corporation as a limited public figure.²⁹³ One might wish to say that the corporation did not seek the limelight but, like a person, a corporation cannot say it did not want the attention.²⁹⁴

Last, the germaneness question would follow a similar fact inquiry, but a corporation's greater general power to shape policy as compared to an individual indicates that many issues could be germane more often than expected. The issue must be "germane to the plaintiff's participation in the controversy."²⁹⁵ If the statements about the corporation were about the issues on which it spoke or where it had influence, they would, of course, be germane.²⁹⁶ A broad claim that Mattel supports war or Coca-Cola hates same-sex marriage rights or Caterpillar dislikes NASA's space program would not seem to be germane. For human defamation plaintiffs, courts will not allow a private person to be deemed a limited-purpose public figure unless the statement has some connection to the controversy, and "[m]isstatements wholly unrelated to the controversy" are not protected.²⁹⁷ But claims that selling goods from or investing in former apartheid South Africa supported racism helped change policy at both the corporate and state level, which in turn sped the decline of that regime.²⁹⁸

plaintiff would play or was seeking to play a major role in determining the outcome of the controversy.").

292. *See id.* at 2-51 to -52.

293. *See, e.g.,* Chafoulias v. Peterson, 668 N.W.2d 642, 654 (Minn. 2003), *reh'g granted*, 668 N.W.2d 642, 666-67 (Minn. 2003) ("By seeking public and government support for development projects that have a significant impact on Rochester, [defendant] has assumed a position that invites attention and comment about the manner in which he conducts his business affairs.").

294. *See id.; cf.* 1 SMOLLA, *supra* note 267, § 2:32, at 2-51 ("It is no answer to the assertion that one is a public figure to say, truthfully, that one does not choose to be.").

295. *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (en banc) (quoting *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980)).

296. *See Waldbaum*, 627 F.2d at 1298 (holding that the statements made must be related to "plaintiff's participation in the controversy").

297. *Id.*

298. *See Jennifer Frankel, The Legal and Regulatory Climate for Invest-*

The recent Chick-fil-A gay rights debate illustrates how quickly a topic can become germane. The President of Chick-fil-A was quoted as saying “he endorses ‘the biblical definition of the family unit.’”²⁹⁹ The issue quickly turned into an indictment of the company in general. Some mayors claimed they would not allow the restaurant to open in their cities.³⁰⁰ Other political candidates urged people to eat more Chick-fil-A to show support for the company’s president and his family.³⁰¹ Although the president seemed to separate his beliefs from how he ran his workplace, some argued that because he made money from the restaurants, and then he and the company donated to conservative financial groups that oppose gay rights, protesting and boycotting Chick-fil-A would help gay rights.³⁰² The examples and the process issues discussed above show that corporations are influencing public policy, and consumers are asked to vote with their dollars as a way to support or protest a given policy. Thus, a claim that failing to offer same-sex rights in the workplace undermines LGBT rights or choosing to offer such rights undermines family values could be germane as a general matter. As another example, after Google, Nabisco, and J. C. Penney chose to support gay and lesbian rights, they faced some consumer backlash and received some consumer support.³⁰³ Thus, one might argue that any large company that employs many people ought to support or reject gay rights. In-

ment in Post-apartheid South Africa: An Historical Overview, 6 CARDOZO J. INT’L & COMP. L. 183, 189–90 n.40, 191–94 (1998) (describing a “code of conduct” for American companies operating in South Africa that required equal treatment for and desegregation of black employees and included the general exhortation to “[w]ork to eliminate laws and customs which impeded social and political justice [and] [s]upport the ending of all apartheid laws”).

299. See Mark Oppenheimer, *Few Resist the Temptation to Opine on Chick-fil-A*, N.Y. TIMES, Aug. 4, 2012, at A15.

300. *Id.*

301. *Id.*

302. See Bill Barrow, *More Than Gay Marriage Driving Chick-fil-A Flap*, SAN JOSE MERCURY NEWS, Aug. 4, 2012, http://www.mercurynews.com/top-stories/ci_21233680/more-than-gay-marriage-driving-chick-fil-flap.

303. See, e.g., *American Family Association Calls for Boycott of Google over Company’s Support of LGBT Rights*, HUFFINGTON POST (July 12, 2012, 1:45 AM), http://www.huffingtonpost.com/2012/07/11/american-family-association-google-video_n_1666218.html; Kevin Burra & Curtis M. Wong, *Oreo Cookies’ Gay Pride Backlash: 25 Companies and Products Boycotted for Supporting LGBT Rights*, HUFFINGTON POST (June 28, 2012, 3:00 PM), http://www.huffingtonpost.com/2012/06/28/oreo-backlash-companies-anti-gay-boycott_n_1634767.html; Heba Hasan, *Anti-Gay Group Slams JCPenney over Father’s Day Ad*, TIME, June 3, 2012, <http://newsfeed.time.com/2012/06/03/anti-gay-group-slams-jepenneys-over-fathers-day-ad/>.

deed, the Chick-fil-A controversy resulted in a commitment not to support and donate to anti-gay groups.³⁰⁴ Inquiring into a corporation's social policies is just as germane as inquiring into a public official's social policies.³⁰⁵ The topics become germane as a corporation chooses its policy for such matters and participates in controversy when it makes such decisions. The way in which a corporation makes its goods, offers it services, and runs its business are analogous to a public official's fitness-for-office question—just as our commercial decisions are analogous to our political decisions.³⁰⁶

Corporations can wield enough power that they often influence and alter the course of human events at the international, national, state, and local level. Determining what is germane is difficult, because corporations have burst the bounds of the limited commercial actor. As corporations' importance increases and we are asked to use the market to express and support political ideas, many issues could be deemed germane. In sum, whether a corporation is a limited-purpose public figure should be a broad, lenient inquiry. The increased deference to corporate speech and the reasons supporting such increased power to speak push the corporation into the public figure realm and lead to the need for an increased ability to question the corporation.

Under *Citizens United*, however, corporations have the same speech rights as people.³⁰⁷ Thus, corporations will be able to assert claims about other corporations.³⁰⁸ In such a world, corporations will have to engage in lawsuits or even more spending for counter-speech, i.e., more advertising, as they

304. See Tiffany Hsu, *Chick-fil-A Vows to Stop Donating to Anti-Gay Groups*, L.A. TIMES, Sept. 19, 2012, <http://articles.latimes.com/2012/sep/19/business/la-fi-chick-fil-a-gay-20120920>.

305. An inquiry into public officials' fitness for office makes comments about dishonesty, malfeasance, or improper motivation germane. See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1298 n.33 (D.C. Cir. 1980); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273 (1971); cf. *Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir. 1987) (en banc) (holding that issues of nepotism at the corporate management level are germane).

306. Compare *supra* note 305 and accompanying text, with *supra* notes 301–02 and accompanying text.

307. See *supra* note 12 and accompanying text.

308. See *supra* notes 19–20 and accompanying text (discussing the Supreme Court's desire to have corporations participate in "the public debate").

launch broad claims about each other.³⁰⁹ These activities are arguably already part of our media and advertising landscape.³¹⁰ Consumers and activists may also hurl broad claims about a corporation into the fray.³¹¹ As such, consumers will have to sort an ever-increasing stack of information and must be able to parse that information to use it.³¹² That result maps to the world of deference to speech by all speakers and reliance on counter-speech that the Supreme Court has embraced.³¹³

Put differently, the world of centralized information sources is no longer our world.³¹⁴ With the advent of blogs, ratings sites, and social media reviews, consumers look to a range of speech sources to determine the truth.³¹⁵ With greater sources of information and lower costs to find it, the law has perhaps moved to an all-out information war model rather than one with paternal notions of centralized information sources.³¹⁶ The Supreme Court's preference for increased speech by all, and its embrace of information technology and counter-speech to correct a false claim instead of banning the speech, points to a new world where all speak, and it is believed that the mixing and mashing of ideas will allow the best answers to arise to

309. Cf. Lidsky, *supra* note 71, at 909–10 (“[M]any publicly held corporations can even finance intensive media campaigns to rehabilitate a damaged corporate reputation.”).

310. See, e.g., Jeanine Poggi, *CBS and Time Warner Cable’s Smear Campaigns Could Backfire*, ADVERTISING AGE (July 29, 2013), <http://adage.com/article/media/cbs-time-warner-cable-smear-campaigns-backfire/243341/>.

311. Cf., e.g., Matt DeLong, *Google: ‘Legalize Love’ Campaign Isn’t About Gay Marriage*, WASH. POST, July 8, 2012, http://www.washingtonpost.com/blogs/innovations/post/google-legalize-love-campaign-isnt-about-gay-marriage/2012/07/08/gJQAN3PQWW_blog.html (describing the misinterpretation of Google’s Legalize Love campaign, which is not intended to support gay marriage, but rather to “support[] workers in countries that criminalize homosexuality”).

312. Cf. *supra* note 142 (discussing the level of competence and rationality that consumers, as an audience, are presumed to have).

313. See *supra* note 40 and accompanying text.

314. See Balkin, *supra* note 13, at 33.

315. See *id.* at 11 (discussing blogs and amateur media criticism sites, among other things, as complements to traditional mass media).

316. See BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY 21–23 (2003) (arguing that the United States is in a fourth information revolution, one characterized by information abundance, where decentralized actors make political decisions, rather than one where the government and a few large organizations drive the process from a central point).

correct falsehoods and lead our decisions.³¹⁷ If so, and if corporations are to have even greater power to speak, we must protect the ability for such a distributed marketplace of ideas and information to function. Right now, corporations can speak more than ever before, maintain privileges as central sources of information about themselves, and wield great power to suppress speech about their affairs.³¹⁸ Applying a corporate public figure doctrine to corporate reputation law enables all to participate in the marketplace of ideas. Failing to do so upsets the balance required to ensure that all information is shared and available to society, not just one side's view.

CONCLUSION

Free speech law is unbalanced. In *Citizens United* the Supreme Court embraced corporate speech rights about politics. In *Sorrell*, the Court further championed a corporation's right to speak about commerce. A commitment to having more sources of information available to individuals and society as they make decisions underlies part of the Court's justifications for these decisions. But the role of corporations in society was an important aspect of the decisions as well. Corporations are indeed important actors in society. As the Court has said, corporations are key parts of our politics and economy. Corporate policies about labor, the environment, gay rights, and more shape our society and the options for how we live. As society moves to an ever-increasing reliance on the market and private provision of goods, corporations become all the more important for political matters. Consumers and corporations now lobby the market and society about what to buy based on social and political reasons as much as, if not more than, pure price and quality pleas. Corporate rights to do so are clear; others' rights to question and offer counter-speech to corporate claims are not. When consumers or other groups question a corporation, corporations can and do use corporate reputation laws to prevent such speech. Corporations thus have increased speech rights while speech about them is unduly limited. This mistake can be cured once we understand that if corporations have speech rights like people, corporations must be treated like the people to whom they are often most similar: public figures.

317. Cf. POST, *supra* note 55, at 36–37 (arguing that the ability to partake in public debate trumps the interest in limiting speech to educate the public with perfectly accurate information).

318. See *supra* note 125 and accompanying text.

Reordering free speech law to recognize corporate public figures would meet its core goals: increasing the overall amount of information in the marketplace and preventing a public figure from using reputation laws to squelch speech about them. Once that is done, corporations will be like people—able to lobby, persuade, advertise, and engage in politics, and open to the same scrutiny as any other person who does likewise.