

Markets, Free Speech, and Commercial Expression

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This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Justice Roberts, for a unanimous Court in *Valentine v. Chrestensen*, 316 U.S. 52, at 54 (1942).

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados. Justice Stevens, for a unanimous Court in *44 Liquormart v. Rhode Island*, 517 U.S. 484, at 495-496 (1996) (citing Franklin, 1731).

These two brief passages from Supreme Court opinions, separated by 54 years, deliver unanimously expressed, yet starkly different, sentiments about the value of commercial advertising. The first succinctly denies 1st Amendment protection to commercial speech; while the second notes its historical centrality to "our culture." What accounts for this change in perspective? In part, we argue, the shift can be attributed to basic changes in the economic infrastructure—movement toward a consumer economy (consumption far exceeds production, an imbalance that is exacerbated by ongoing transferal of industrial production to external job markets),¹ and impressive expansion of information systems. In addition, the corporate sector in general, and the advertising industry in particular, have deployed a litigation strategy to change 1st Amendment parameters that is reminiscent of other, more familiar, organized court-centered efforts, and we invoke an interest group framework to assess their strategic activities and influence.

A consumption-based economy requires a complex order-distribution matrix, a well organized debt management system, as well as a significant and growing population with discretionary income. In addition, a highly sophisticated communications structure allowing product and service marketers to optimize effective audience reach is essential to sustained growth. The tools of the “information age,” the plethora of business and personal communications mechanisms that became available in the last quarter of the 20th century are perfectly tailored for those purposes. Moreover, a consumer-driven economy requires extensive advertising in order to stimulate and sustain demand. These are all corporate activities. Thus, we have, in essence, a corporate-dominated, but individual consumer-centered economy. Note, for example, that on the evening of September 11, 2001, while addressing the nation in response to the terrorist attacks earlier that day, President Bush stated “Our financial institutions remain strong, and the American economy will be open for business, as well.”² In the coming days, he would exhort Americans to show their patriotism by making purchases and even suggested a trip to *DisneyWorld*.³

Legal defense is a major part of doing business, and it is built into the corporate design. Major businesses and industry associations have deep pockets, with the necessary resources to devote to sustained effort wherever it is required. Moreover, corporations are not burdened with public interest baggage. Partisanship is an inefficient distraction, witnessed by the fact that in politics business groups support “winners” regardless of affiliation. They enter politics to win, not to make noise. And, the process of litigation has always been a central part of the overall corporate political strategy. Similarly, they sell services and products to all. We are all

consumers, no matter what our politics. Our buying habits are correlated with our information consumption (e.g., our preferred television and radio programs, subscriptions to magazines and newspapers, website preferences, and the like), and advertising dollars are largely responsible for our range of information choices. Outlets that do not deliver sufficient audience share to corporate sponsors do not survive in the information marketplace (see e.g., Baker 1992; Collins and Skover 1993). Indeed, Barnouw (1968, at 8-20) reports that emergence of the radio broadcast networks directly threatened the survival of the newspaper industry, primarily because they drew away huge portions of advertising revenues, and many of the nation's dailies disappeared in the first third of the 20th century. In fact, broadcast news bureaus were created when NBC and CBS were forced to generate their own news coverage in 1933 because the wire services, historically associated with newspaper publication, refused to provide them with feed, a tactical move designed to save print media from extinction. "The networks faced a choice: they could give up the pretense of being news media...or gather their own news" (Barnouw 1968, at 19).

Thus, as Justice Stevens noted, commercial advertising does have an historical relationship with the viability of information markets.⁴ That fact does not push it beyond a constitutional threshold, however, and commercial speech has not been granted protections afforded to other forms of expression and information that its dollars make possible. Only in the last 25 years has the Court moved to elevate the speech of advertising to protected status.⁵

Information Markets and the 1st Amendment

As communication technologies have exploded to encompass a wider range of activities, corporations have moved quickly to secure their positions as information sources and distributors. Since the introduction of the radio early in this century, followed by broadcast television, cable television, and computer networks, the communications system has grown exponentially, and information has been converted into a market commodity, owned and distributed by corporations.⁶ With only occasional voices of dissent,⁷ corporations have enjoyed “personhood” with potential to be conferred any and all protections under the Bill of Rights for more than a century.⁸ Indeed, as we shall see, personhood status has provided entrée to the 1st Amendment domain.⁹

At the same time, information markets have consolidated, with a shrinking number of mega-corporations controlling an increasing proportion of sources and outlets. Bagdikian (1997, at 21) reports that the information markets were dominated in 1981 by forty-six corporations; by 1997 that number had declined to only twenty-three. Put another way, Compaine (in Compaine and Gomery 2000, at 562-563) notes that the top four media companies accounted for 24.13% of 1997 total market revenues, an increase from 18.79% in 1986. The top twenty corporations now control about two-thirds of the entire market, and the concentration of power does not seem to be slowing down. Because the information markets are so heavily dependent upon advertising revenue (see the recent bidding war between CBS and ABC over David Letterman, and ABC’s open willingness to drop Ted Koppel, as a blatant example), it is hard to envision anything other than continued consolidation. Advertisers want access to audiences, and the media exist

primarily to deliver them. Again, Justice Stevens' 44 *Liquormart* observations acknowledge this understanding of the communications universe.

General Trends in 1st Amendment Development

Table 1 maps changes in the Supreme Court's 1st Amendment speech docket over the past five decades (1953-2000 terms) (Spaeth 2001) and shows rather stark differences in the issues the justices have taken on for development. First, it is clear that the current contingent of Justices has decided not only to reduce the total number of cases they consider, but also to de-emphasize speech issues. Through the 1960s and '70s, free expression questions were at the core of one of every twelve cases decided by the Court; whereas during the 1990s this diminished to only about one of twenty. We can also see obvious shifts within the 1st Amendment docket that closely track the political-economic context. Given the national preoccupation with the international communist threat, it is not surprising that internal security issues (loyalty oaths and the like) dominated the judicial agenda. Nearly 60% of all speech cases in the 1950s, and about 40% in the 1960s, fall into this category. Protest demonstrations of various types received serious attention by the Court in the 1960s, '70s and into the 1980s; while conscientious objector cases peaked in times of war. The Court itself has also influenced its docket by changing the contours of speech rights. Pornography/obscenity rose to a peak in the 1970s and has declined since *Miller v. California* (413 US 15, 1973). Libel and slander litigation rose gradually, after *New York Times v Sullivan* (376 US 254, 1964), through the 1980s and then virtually disappeared. These are all familiar trends. However, commercial speech, once nonexistent, has become the Court's single most emphasized issue, composing nearly one-quarter of the speech

docket over the last decade. This, we argue, reflects both the changed economic realities as noted above as well as the politics of communications markets.

(Table 1 about here)

The notion of free speech lay constitutionally under-developed for more than a century.¹⁰ The socio-political context of the late teens and early 1920s was marked by intense fear of anarchy and world communism and consequent government speech repression. Indeed, Jacob Abrams¹¹ and his colleagues went to prison for their speech, as did Schenck,¹² Frohwerk,¹³ Debs,¹⁴ Gitlow,¹⁵ Whitney,¹⁶ and a host of others.¹⁷ Nonetheless, even in that sequence of cases, the Court began to develop an understanding of free expression broader than that which had previously prevailed (e.g., Rabban 1997). Among all of them, Whitney's case gave rise to one of the most eloquent and influential statements from the bench regarding the purpose of the 1st Amendment. In his often cited concurring opinion, Justice Brandeis not only touches all theoretical bases, but his focus is squarely on the rights of the speaker — not the audience.¹⁸ Accordingly, by guaranteeing protection for expression of even what many would consider repugnant political views, we enhance our entire socio-political enterprise. The Brandeis view of individual free speech rights¹⁹ was a minority position in 1927 but gradually gathered substantial agreement among judges and justices.²⁰

The central emphasis, however, has not always been placed upon the speaker. Listeners, too, sometimes have rights that must be considered.²¹ In addition, the Court has taken cases to fill out the speech landscape with such issues as the public-private forum distinction,²² the right not to speak,²³ and the right to receive information.²⁴ The public-private forum question centers

on property, or space, who owns it, and to what purposes it may be put. The last two -- the rights not to speak and to receive information -- initially were found to be important liberty offshoots of the general speech guarantee accorded to individuals; the first, to protect them from forced allegiance to an orthodox point of view (including religious), and the second to enhance their access to a full menu of information choices. Each involves individual privacy interests as well. Once conceived, however, these 1st Amendment seeds have led to multiple birthrights; they are fully entangled in the reconstruction of speech into a form of property.²⁵ The press is clearly implicated, since it is in the information distribution business. Indeed, it has become quite difficult to distinguish between the 1st Amendment's "press" and "speech" clauses. As Chief Justice Burger noted in 1978, "The speech clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the press clause focuses specifically on the liberty to disseminate expression broadly. . . . Yet there is no fundamental distinction between expression and dissemination" (*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 1978, Burger, C.J., concurring). Press owners, for their part, also possess speech rights, which means that they will naturally desire to exercise editorial control over content and will balk at dissemination of ideas with which they do not wish to be associated (i.e., the right not to speak).

Finally, corporations have points of view to express as well. Indeed, they are major players in the legislative process, expending huge sums of money to lobby members of Congress and state legislatures and to move public opinion in their favor (e.g., Winkler 1999). They have products to sell, and they devote huge sums of money to distribute information (advertising) they

hope will persuade us to buy their line of offerings.²⁶ We should expect them to seek the same protections as those granted their individual and press constitutional siblings.

Table 2 reinforces these observations. The presence of individuals in 1st Amendment litigation has steadily declined since the middle of the last century. In the 1950s nearly 30% of all principal parties (appellants and appellees) were individuals, but by the 1990s this had dwindled to 7.5%. At the same time, corporate participation in the Court's speech docket has increased from nearly zero in the 1950s to a much more pronounced level by the 1990s (14%). Indeed, after government agencies and media litigants (many of which are also large corporate entities), corporations now have the highest profile of any other category of parties.

(Table 2 about here)

The focal point of 1st Amendment analysis is undergoing significant change, and corporations are absorbing an increasing share of the free speech universe. How has this happened?²⁷ How have corporations been able to exploit constitutional provisions that were written explicitly for purposes of protecting and guaranteeing rights of individuals, that nowhere mention (or even hint at) corporate entities?

The Corporate Venture

In 1936 the Supreme Court found, for the first time, that the 1st Amendment (via the Fourteenth) protects the speech of a corporation — in this case a press corporation — from more than prior restraint of publication.²⁸ Justice Sutherland, for a unanimous majority, wrote that the press has a critical role to play in our democratic system keeping the public informed: “. . . .since informed public opinion is the most potent of all restraints upon misgovernment, the suppression

or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves” (*Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250, 1936).

Grosjean was a major breakthrough, although its reach extended solely to press corporations and specifically only to print journalism. Historically, significant broadcast regulation has been allowed on the argument that, due to its finite physical limits, the electromagnetic spectrum is a scarce public resource. Because of the scarcity problem, a broadcaster is given exclusive rights to a frequency but must abide by regulations promulgated to ensure that it operates in the public interest.²⁹ Justice Frankfurter first articulated the scarcity rationale in *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943): “[radio broadcasting] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody” (at 213). On the basis of this understanding, the Court thus upheld the FCC’s authority to allocate broadcasting frequencies and to regulate and monitor the content of broadcasters’ transmissions.³⁰

Through the New Deal era general business corporations made little headway in asserting rights under the 1st Amendment. As one observer has noted, “[w]ith the possible exception of publishing corporations, which claimed the 1st Amendment exempted them from government antitrust prosecutions, Bill of Rights issues were completely overshadowed by other constitutional questions during the New Deal” (Mayer, 1990, at 598). Nonetheless, a case did come to the Court in 1939 with significant corporate free speech overtones. Three years after

Grosjean, the Court invalidated a Jersey City ordinance that barred individuals, labor associations, and the ACLU from distributing literature, finding that only the individuals could seek protection under the 1st Amendment (*Hague v. CIO*, 307 U.S. 496, 1939). Justice Stone noted in his concurring opinion that "[a corporation] cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons" (at 527).³¹ A more bread-and-butter issue for the business community is selling goods and services and the "speech" associated with that core venture—advertising. In *Valentine v. Chrestensen* (316 U.S. 52, 1942) the Court unanimously found no room within the 1st Amendment rubric for commercial advertising.³²

After World War II, a transformation began to take shape in both the economic market structure and in the legal conceptualization of property.³³ To those who abide by the marketplace analogy,³⁴ the First Amendment presumes a system of speech markets controlled by the forces of supply and demand, without benefit of government restriction. Indeed, the state must remain neutral with regard to content and viewpoint. Regulation intended to maintain the speech market within certain boundaries is not only highly suspect, it is prohibited. Some observers regard *Tornillo* (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 1974), where the Court struck down a Florida "right of reply" statute and upheld the right of newspaper owners to exercise full editorial control over what they publish, as the quintessential marketplace model opinion.³⁵ In essence, the Court recognized that newspaper space (and hence the ability to publish) is property, and with ownership comes the right to restrict access. In this case newspaper owners have "negative speech rights," allowing them to refuse publication of

perspectives with which they disagree. Government, on the other hand, must butt out of such decisions.

Another shift occurred in 1975. In *Bigelow v. Virginia* (421 U.S. 809) the Court upheld the right of a Virginia newspaper to publish an advertisement for a New York abortion clinic, finding that "[t]he advertisement . . . did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" Hence, a state legislature cannot "bar a citizen of another State from disseminating information about an activity that is legal in that State." During the very next term, the Court went a major step further, explicitly welcoming commercial speech into the 1st Amendment domain. In response to a consumer advocacy group's claim that citizens have a right to receive pricing information on prescription drugs, the Court struck down a ban against advertising by pharmacists, finding that "free flow of commercial information" is "indispensable" to individual recipients' ability to make rational economic decisions (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, at 765, 1976).

Note that the Court's reasoning created a perfect opening for corporations to locate product and service advertising squarely within the 1st Amendment zone of protection by advocating that only the "free flow of commercial information" will serve the public interest. After all, individual citizens not only have a right to receive information, but access to commercial information might be as important as access to political information.

The stage was clearly set for the non-media corporation to enter 1st Amendment terrain.³⁶ For a number of years the Massachusetts state legislature had seen its attempts to win voter

approval of tax referenda thwarted, with large corporations waging massive advertising campaigns to defeat the measures. Finally, the lawmakers legislated a ban on such expenditures, so long as a referendum did not directly affect corporate assets. The corporations sued, and the Court, in *First National Bank of Boston v. Bellotti* (435 U.S. 765 1978), struck down the legislation. Justice Powell, speaking for the Court, reasoned in part

The court below framed the principal question in this case as whether and to what extent corporations have 1st Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The 1st Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" 1st Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the 1st Amendment was meant to protect. We hold that it does. (at 775-776)

In other words, the Court changes the analytical focus from the rights of the speaker to the rights of the audience. Moreover, Powell continued,

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. (at 777, notes omitted).

So the Court, in essence, places corporate speakers on the same 1st Amendment footing as individual speakers. In fact, to minimize confusion on this point, Justice Powell notes that "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment" (at 780, n15, citing *Santa Clara*). And finally, erasing the distinction between press and business corporations for analytical purposes, he states flatly that "the press does not have a monopoly on either the 1st Amendment or the ability to enlighten" (at 781).

Justices White, Brennan, and Marshall countered in dissent, arguing that the true purpose of the 1st Amendment is to protect the “use of communication as a means of self-expression, self-realization, and self-fulfillment” (at 804). Justice Rehnquist also dissented to express dismay with the majority’s direction and to assert that corporations are merely artificial entities, created by the state, and possessing only those rights that the state wishes to grant them (at 822). As a consequence, in his view a corporation cannot claim a liberty right to engage in political activity.

Divided though it was, the *Bellotti* Court established new compass settings for subsequent 1st Amendment navigation. The focus is starkly different from that expressed by Brandeis in *Whitney* and the near universal sentiment that had gravitated toward it for fifty years as the dissenters pointed out. The earlier speaker-centered mainsail was diminished in favor of one that is audience-centered and driven by economic market decisions. Indeed, in the same opinion where he reasoned “that public discussion is a political duty” (*Whitney*, at 376), Brandeis also argued, in smaller part, that the value of speech might best be determined by market forces: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence” (at 377). The *Bellotti* majority took that notion to heart, fully accepting the commodification of speech. Thus, the public has a right to information, from whatever source, so that it can make “enlightened” decisions. In other words, the 1st Amendment guarantees us a free market in communication of ideas. And, because no distinction can be made among potential speech, information, idea, or knowledge sources, all are equalized. There is no tenable difference among

individuals, press corporations, business corporations, or any other organization for that matter -- we are all protected equally by the 1st Amendment in the speech market from government interference. It sounds like *laissez faire* economics in new garb (Flynn 1987). Indeed, Sunstein (1993, 4) argues that the marketplace model has become so dominant that “it is difficult to identify ... competing views” (also see Schauer 1992; Tushnet 1982).

Bellotti can also be read as an affirmation of the transformations taking place in the larger political economy. By 1978 the economy had become global and we were moving headlong into the “information age,” in which information is a primary market product, communication is a method of distribution, and we are all consumers (See and cf, Hurst, 1970; Gilder, 1989; Reich, 1991; Collins and Skover, 1993; Barber, 1995; Boyle, 1996).

Bellotti, pregnant with doctrinal potential, soon produced progeny, as the Court allowed the new vision to come to term. A child was born in 1980, for example, when for the first time, commercial advertising of business corporations found protection under the 1st Amendment on the rationale that such communications provide consumers with important information (*Central Hudson Gas & Electric Corp. V. Public Utilities Commission*, 447 U.S. 557). Justice Powell again delivered the lead opinion, creating a four-part test that subsequent Courts have continued to apply in reviewing state regulations on commercial speech. Accordingly, a court must first determine whether the message is deceptive or related to illegal activity. If it is neither, it is protected under the Constitution, and the government is held to a relatively high standard. If a regulation is to be upheld, the state must demonstrate substantial interest, the restriction must

directly advance that interest, and the speech limitation must not be any “more extensive than necessary to further the state’s interest.”

Justice John Paul Stevens concurred, admitting that he was experiencing difficulty distinguishing between commercial and non-commercial speech. More significantly, however, Stevens finds support in the 1st Amendment genealogical tree of precedent, homing in on the market notions from the same Brandeis passage that we noted earlier:

Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in *Whitney*, explain my reaction to the prohibition against advocacy involved in this case. . . . The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. . . . But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech. (*Central Hudson*, 447 U.S. 557, 581-582, 1980) (Stevens, J., concurring).

As he had done in *Bellotti*, Justice Rehnquist dissented from the further extension of Bill of Rights protections to corporations, accusing the Court of resuscitating *Lochner*, reviving substantive due process, and wrongly manipulating the *laissez faire* theoretical model (at 589), and he charges Stevens with misappropriating Brandeis:

Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one. The sort of "advocacy" of which Mr. Justice Brandeis spoke was not the advocacy on the part of a utility to use more of its product. Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere. . . . Unfortunately, although the "marketplace of ideas" has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions. (at 595-597) (Rehnquist, J, dissenting).

Another birth occurred in 1986 (*Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1). At issue here was whether space in a mailing envelope that accompanies a monthly bill sent to customers of a public utility constitutes a public or a private forum. The Court determined that such space is privately held, and a Powell-led plurality found that corporations have a negative free speech right not to be associated with the speech of others.

In what was a pivotal 1990's era case, Justice Stevens wrote for a splintered majority who found a state's restriction on liquor advertising to be "paternalistic" and an unconstitutional abridgment of the public's right to receive important information (*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 1996).³⁷ *44 Liquormart* is noteworthy for several reasons. First, four justices (Stevens, Kennedy, Ginsburg, and Thomas--in a separate concurrence) express acceptance of the notion that truthful commercial speech regarding a legal product or service should be elevated to first-tier, strict-scrutiny status. Accordingly, individual citizens not only have a right to receive information, but access to commercial information is "indispensable" in much the same way that access to political information is "indispensable" (*Virginia State Bd. of Pharmacy*, at 765; also see, e.g., *Bellotti*). Since 1976 (*Virginia State Bd. of Pharmacy*) the Court has taken on an increasing number of related cases, especially in the last decade (recall Table 1). Although commercial speech has yet to be fully embraced by a majority of Justices as deserving highest tier status under the 1st Amendment,³⁸ corporations have made significant inroads in that direction.³⁹ Moreover, acceptance of a "marketplace" understanding of expression is at least implicit and increasingly explicit in judicial opinion regarding corporate commercial speech rights.⁴⁰

The marketplace pedigree traces from Milton and J.S. Mill to Holmes and to some aspects of the Brandeis *Whitney* concurrence, so it is on solid doctrinal footing.⁴¹ Corporate litigants, who have appeared with increasing frequency (Table 2) in 1st Amendment cases, have presented arguments for understanding speech in market terms for at least the last twenty-five years. An additional indicator of corporate strategy is the fact that the major advertising and manufacturing trade associations have recruited one of the most prominent speech advocates, Burt Neuborne. Professor Neuborne has a long history of arguing cases before the U.S. Supreme Court, primarily as a representative of the ACLU. His line of attack as a civil libertarian has been a consistent one, in which he has often argued for further development of the citizen's right to receive information in an open speech marketplace without paternalistic government restriction. In a number of 1990's era cases, however, Neuborne also represented advertisers and major manufacturers in an *amicus* capacity pressing for further protection of commercial speech.⁴² That he can represent both with essentially the same set of arguments is most interesting.⁴³

In large measure, a marketplace vision has prevailed. The *44 Liquormart* opinions express much of this understanding of the value of advertising and a rejection of a paternalistic governing regime.⁴⁴ In addition, among the current membership, only Justice O'Connor⁴⁵ and Chief Justice Rehnquist, as we have noted above, have expressed significant reticence about this approach. We are not arguing that Professor Neuborne is responsible for the success of the marketplace understanding of free speech. Indeed, this represents a primary thrust of corporate speech litigants. But his presence in this role does add a dimension of credibility that the typical

corporate attorney would not.

Finally, Justice Stevens' *44 Liquormart* lead opinion, from which we quoted at the beginning, embraces the notion that corporations have represented an important source of speech dating back to the founding. Furthermore, *44 Liquormart* suggests that corporate expression is inherently valuable and should be located in the top constitutional tier, a view that directly reflects analysis presented in an *amicus* brief filed by the American Advertising Federation (AAF) and three other advertising associations. Indeed, the entire tract was devoted to constructing an historical argument to support full constitutional protection of commercial speech.⁴⁶ The ACLU came on board to file a supportive brief reiterating its position against paternalistic government and in favor of an open speech market.⁴⁷ Indeed, the case attracted a varied array of 35 *amici* who collaborated to file nine briefs, only two of which argued to uphold the advertising ban.

An Interest Group Perspective

Assessments of interest groups in litigation often address the institutional role of the Supreme Court in the broad scheme of government (e.g., Vose 1972; Caldeira and Wright 1988; 1990; Songer and Sheehan 1993). Research below the High Court level is primarily devoted either to the strategies employed by some especially visible group, such as the ACLU, NAACP, and NOW (e.g., Ivers and O'Connor 1987; O'Connor 1980; George and Epstein 1991; but see Songer and Kuersten 1995), or to the influence of organizations in developing a specific constitutional issue, such as civil rights, the death penalty, or the rights of the disabled (e.g., Tauber 1998; Caldeira and McGuire 1990, 1994; Olson 1990; Sorauf 1976; O'Connor 1980;

Epstein 1985; Vose 1959). Most interest group research focuses exclusively on advocacy organizations; while corporations receive only cursory attention.

We know that individual large corporations and industry umbrella organizations influence public policy as a matter of routine (e.g., Coleman 1982). To say that they effectively lobby legislatures and executive agencies at all levels of government is to state an accepted political truism. We take for granted that they are fierce players in the legislative and rule-making processes and that they play hard ball. What we do not take for granted is their policy effort and influence in the judicial process.

Reporting on the 1987 term of the Court, for example, Epstein (1991, 355) notes that “conventional wisdom certainly holds that public interest groups and civil rights/liberties groups dominate litigation. Although they are supporting players, ... they are far from the leading participants. That distinction belongs to commercial groups and governmental interests.” In fact, among all cases decided by the Court in 1987, it was not even close. Commercial and business entities topped the list of both litigation sponsors and *amicus curiae* participants. Similarly, Caldeira and Wright (1988, 1990), having assessed *amicus curiae* interjections over a series of terms, place corporations and business, trade, and professional associations among the most active participants at both the *certiorari* and plenary stages. In fact, evidence indicates that corporations have a long history of intense involvement in the judicial policy process (see, e.g., Winkler 1999; Wolfskill 1962; Vose 1959), perhaps simply as an extension of their overall lobbying effort (Cortner 1968, at 287).⁴⁸

Table 3 presents the history of *amicus curiae* activity in commercial speech cases from

1970-2001. First, this genre of legal conflict has produced a fairly steady flow to the Court, and it has consistently attracted third parties bearing briefs attempting to persuade the Justices in one direction or another. Each 1970s era case drew an average of about 4 external briefs. That jumped to better than 6 per case in the 1980s, where it seems to have leveled off. Looking at the number of *amici*, however, the picture takes on more intriguing dimensions. The first decade saw most parties participating separately, but that changed dramatically in subsequent decades. Third party presence more than doubled to 10.5 per case in the 1980s, and then sky-rocketed to nearly 24 in the most recent string of cases.

(Table 3 about here)

During the initial phase of commercial speech litigation, which involved several cases questioning bans on advertising by attorneys, pharmacists and optometrists, third party input came primarily from advocacy organizations challenging the restrictions and professional associations arguing to sustain them. The issue mix began to change in the 1980s, as regulations on advertising of all types came under fire, and the range of advocacy groups seeking to influence the Court not only broadened but there was a general up-tick in their numbers. Indeed, in an unusual alliance of viewpoints, the Washington Legal Foundation (usually far to the right), Public Citizen (on the left), and the ACLU filed parallel briefs in several cases challenging restrictions on market-based speech. In addition, there was a significant increase in effort by government agencies and a somewhat smaller increase among corporations and trade associations. The activity level soared abruptly after 1990, with 310 third parties collaborating to file 80 briefs in 13 cases.

Once again, government agencies increased their presence in this line of litigation. Each case in the last decade came to the Court with an average of well over six parties representing the public sector appended to it. By contrast, the efforts of advocacy organizations dropped considerably below their earlier levels, but their decline was more than compensated for by a dramatic upsurge across the corporate sector, including professional and media associations. When combined with the data presented earlier, it is rather clear that the business world has made a serious commitment to influence the law of commercial speech. The only way to change the law through the courts is to file litigation objecting to existing regulations, and after trial, to engage the appeals process all the way to the U.S. Supreme Court if need be. The corporate sector has done this, and their profile before the Court has risen considerably. The only way to “lobby” the judiciary is to interject formal legal arguments as an interested third party. The corporate sector has done this as well, and their *amicus curiae* portfolio has thickened dramatically. Engaging the judicial process is an expensive proposition, although *amicus* participation is much less costly than involvement as primary litigant and expense sharing on individual briefs lowers the outlay to individual parties. But, as they have shown in other decision-making arenas, cost is not a barrier.

Conclusions

The 1st Amendment is obviously important to our system. In fact, the protections for free speech that it guarantees are unique in constitutional government. Equally important is the manner in which the Supreme Court construes its language for that determines in large measure

what it means. The Court's interpretive focus has undergone a significant change, and our analysis raises a number of questions that deserve further investigation.

First, there seems to be real correspondence between the larger political economy and the Court's 1st Amendment speech doctrine. Is this mere coincidence, or is there a cause-effect relationship at work? Second, development of commercial speech doctrine has attracted the effort of organizations not usually associated with the same side of policy debates. In fact, the ACLU, which was founded early in the 20th century explicitly to promote the free speech rights of individuals, has aligned itself with the corporate sector as well as groups like the Washington Legal Foundation, to advance the cause of commercial speech. How did this happen, and has it produced any internal organizational soul-searching and/or debate?

By 1990 the direction of the Court was clear. The only real countervailing outcome occurred in 1986 where the Court asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." (*Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, at 345-46 (1986) (see Kurland 1986). Since then, however, the Court has avoided the *Posadas* rationale, and it does not appear likely that the Court will revive the notion that government may ban all advertising of an activity that it permits but has power to prohibit.⁴⁹ In addition, we have seen an impressive show of force by the corporate community at the High Court level. Was this expansion in activities a coordinated, concerted effort to influence legal development? Was it matched in the Courts below?

The internal dynamics among the Court membership need to be further assessed. The Court membership has remained quite stable, but the law has evolved noticeably. In addition, where a Justice Brandeis (e.g., *Whitney*) or Marshall (e.g., *Stanley v. Georgia*, 394 US 557 (1969)) once wrote with passion and perspicuity about the speech rights of individuals, we find sober, impassive and unremarkable interpretive language in support of corporate rights.

As we move into an era where speech takes place primarily under corporate auspices, will the true relevance of the 1st Amendment decline? After all, the constitution applies to government censorship and/or restriction, not to similar controls imposed by private concerns. For example, the right not to speak has been invoked as critical to media corporations who naturally want to exercise editorial control over information disseminated under their banner, and to their corporate sponsors who do not wish to be associated with particular viewpoints or modes of expression. One can easily see how this might conflict with the public's right to receive information. The November, 1995, editorial decision by CBS to nix a "60 Minutes" interview with a former tobacco executive and local affiliates' editorial decisions to ax anti-smoking ads provide an important case in point. CBS, quite naturally, denied it, but there was much speculation at the time that advertising revenue was a major factor in the decision calculus.

Indeed, the scarcity argument justifying regulation of the broadcast industry, which has prevailed for more than 50 years, is now being seriously challenged. Not only has the number of broadcast stations dramatically increased and will likely proliferate with the conversion to digital broadcast allowing more signal streams in the same bandwidth, but the nation's households are rapidly being equipped to receive cable and satellite transmissions.⁵⁰ The FCC, in the interest of

promoting diversity of viewpoint in the information marketplace, has imposed ownership restrictions on cable companies, mandating that no corporate entity can have an ownership stake in more than 30 percent of the national cable system (horizontal limit), and imposing a channel-occupancy rule limiting the amount of affiliated channels a cable company can carry to 40 percent of its first 75 channels (vertical limit).⁵¹ But the limits have come under a frontal assault, with cable corporations arguing that they constitute an arbitrary infringement on their 1st Amendment rights to reach as large an audience as possible. In March, 2001, the U.S. Circuit Court for the District of Columbia agreed, striking down the restrictions, while recognizing the FCC's mandate to promote diversity of viewpoint (*Time Warner Entertainment Co. v. FCC* (D.C. Cir., No. 94-1035, 2001)).⁵²

In light of the impressive array of apparent choices in programming available to individuals, the FCC's task of locating and defending an appropriate restriction on information market share ownership seems daunting. However, some have argued that information, particularly that involving public affairs, should be considered a public good, and its distribution should not be left to commercial interests and private choices (see e.g., Sunstein 1993, 68-75). If left entirely to economic forces, we are likely to see the already obvious market consolidation to continue. Survival depends upon the ability to attract advertising dollars, setting up a competition that will drive most outlets to the center and will favor those with the largest audience share. It would seem only a matter of time before minor competitors are absorbed or simply drop out.⁵³

Marketplace theorists would argue that, were these things to happen, they would result from free individual choices. This is as it should be. Under our 1st Amendment, government is prohibited from making those decisions for us and must remain entirely neutral. Any intervention by the state should be facilitative to the market; if its actions are not content-neutral, they violate the constitution. Communications technologies are changing far faster than anyone can possibly keep up with. Justice Holmes' "marketplace of ideas"⁵⁴ is not what it once was. To take the archetypical problem as an example, the street corner speaker has become little more than an interesting historical image; the handbill run off on a hand-cranked printing press in the pamphleteer's backroom is merely a museum piece representing an era we no longer remember.⁵⁵ The idea plaza is rapidly becoming electronic, and the individual with a minority point of view or an unpopular message is pushed ever further into the advertisement-free fringe of speech-space – e.g., the local access cable channel that nobody watches, an obscure website visited only by a few converts and law enforcement officials, or the disembodied exchange in electronic chat rooms and newsgroups where the like-minded "converse" back-and-forth among their converted selves.⁵⁶

We are not arguing that commercial speech deserves no constitutional protection. It does convey information, sometimes important information that can have more significance than the first-order speech that its dollars make possible. However, the relationship between commercial speech and what has been traditionally considered "core" speech is a complex one that deserves more assessment. Adopting a marketplace model to weigh the value of competing forms of expression assumes articulation of unfettered consumer preferences, overlooking the fact that

advertisements are a critical market mechanism. Granting constitutional protection to commercial speech bears a certain resemblance to giving a 1st Amendment nod to PAC contributions and expenditures (see *Buckley v. Valeo*, 424 U.S. 1, 1976 and its offspring). Indeed, there is considerable concern that corporate PAC dollars might overwhelm rival policy preferences that are less well funded and at the very least exert disproportionate influence in the policy process. Note also the coincidence of timing in the *Buckley* decision and the Court's choice to reconsider the constitutional value of advertising.

NOTES

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1. According to government statistics, personal consumption expenditures crossed the \$1 trillion threshold in 1975 (current dollars, or 1949 in constant dollars). By contrast, the annual value added to manufacturing numbers in the \$billions. U.S. Department of Commerce, Bureau of Economic Analysis, available online at <http://www.bea.gov> (visited March 18, 2002).
 2. Statement by the President in Address to the Nation, September 11, 2001, available online at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (visited March 19, 2002).
 3. Indeed, on September 28, Bush encouraged a Chicago O'Hare crowd to "Do your business around the country. Fly and enjoy America's great destination spots. Get down to Disney World in Florida. Take your families and enjoy life, the way we want it to be enjoyed" (Allen and Schneider 2001).
 4. The first daily newspaper (1784) in the United States, the *Pennsylvania Packet and General Advertiser*, as the name implies, devoted well over half of its space to advertising (Presbrey 1929, at 161). As journalism historian, Frank Mott (1963, at 157) notes, most of the daily newspapers of that era, "used page one for advertising, sometimes saving only one column of it for reading matter" (also see Goodrum and Dalrymple 1990, at 17-19).
 5. What is remarkable about Stevens' opinion is that he seems to argue that messages delivered in merchandising ads, themselves, contain inherently valuable information.
 6. Balkin (1990, at 405ff) argues that ownership of the "means of communication" is tantamount to exercising control of access to free speech in a technology-driven information market.
 7. Justice Douglas articulated his thoughts on the matter in a 1949 dissent, joined only by Justice Black:

It has been implicit in all of our decisions since 1886 that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. . . The Court was cryptic in its decision. It was so sure of its ground that it wrote no opinion on the point, Chief Justice Waite announcing from the bench. . . . There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary. We are dealing with a question of vital concern to the people of the nation. It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they

want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation. (*Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-581 (1949) (Douglas, J., dissenting)).

Also see Justice Black's own dissent from eleven years earlier in *Connecticut General Life Insurance v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting). And, as we shall discuss later, Chief Justice Rehnquist expressed significant reservations in the 1980s and '90s, but again in the form of dissent.

8. Just three decades ago, no corporation (with the exception of press corporations) could successfully lay claim to Constitutional free speech rights, at least in the federal courts (see Winkler 1999, at 1258). As of 2002, corporations of all types are nearing 1st Amendment parity with us humans. Throughout most of the 19th century, business corporations were considered artificial entities, chartered by state governments and allowed to operate under whatever regulatory scheme the various states put into play. The question was, of course, heavily litigated, but judges consistently held that, while flesh and blood real people could sue and be sued, own property and accrue debts under the company banner, corporations themselves could not be construed as having entitlement to Constitutional rights and privileges (see Winkler 1999). See e.g., *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809); *Bank of Augusta v. Earle*, 18 U.S. 519 (1839) (corporations are not citizens within the meaning of Article IV privileges and immunities clause); *Paul v. Virginia*, 75 U.S. 168 (1868) ("the term citizen . . . applies only to natural persons . . . not to artificial persons created by the legislature", at 177). In 1886 the Court had a dramatic change of heart, finding in *Santa Clara County v. Southern Pacific Railroad* (118 U.S. 394 1886) that, for purposes of the equal protection clause of the Fourteenth Amendment, corporations are persons. Chief Justice Waite abruptly closed the door to any debate of the issue, interrupting oral arguments to state flatly: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." Also see Tushnet (1982, at 255-56); Rivard (1992).

9. After decades of exercising nearly unbridled influence in the electoral system, corporations attracted increasing political heat by the end of the 19th century, and in 1907 they were restricted from making campaign contributions to candidates for federal office under the Tillman Act (34 Stat. 864, 1907). The law was challenged soon thereafter as an unconstitutional infringement on free speech (*U.S. v. U.S. Brewers' Association*, 239 F. 163 (WD PA 1916). U.S. District Judge W.H. Seward Thomson upheld the statute but refused to consider the corporations' 1st Amendment claim, stating simply that the law "neither prevents, nor purports to prohibit, the freedom of speech or of the press" (at 169; quoted in Winkler 1999, at 1258).

10. Sunstein (1993, 4) observes that "before 1919, there were very few speech cases in the federal courts. Government censorship did occur, and courts rarely concluded that such censorship violated the free speech principle." There is a considerable literature on pre-1919 developments. See e.g., Graber (1991); Rabban (1997).

11. *Abrams v. U.S.*, 250 U.S. 616 (1919).

12. *Schenck v. U.S.*, 249 U.S. 47 (1919).

13. *Frohwerk v. U.S.*, 249 U.S. 204 (1919).

14. *Debs v. U.S.*, 249 U.S. 211 (1919).

15. *Gitlow v. New York*, 268 U.S. 652 (1925).

16. *Whitney v. California*, 274 U.S. 357 (1927).

17. As David Kairys (1990, 237-238) notes, prior to the Great Depression era, "one spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they, the local business establishment, or other powerful segments of the community did not want to hear."

18. In part, Brandeis argued:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. . . . Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. . . . Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. *Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring).

19. Some have argued that this articulation of 1st Amendment rights came to predominate not due to the Brandeis effort, but because of the influence of others such as Chief Justice Charles Evans Hughes and Zechariah Chafee, Jr. (Graber 1991, at 122-164). Indeed, Chafee apparently felt that Brandeis had little of substance to offer to the development of free speech doctrine, but merely, in *Whitney*, had reiterated Holmes' "clear and present danger" standard (Graber 1991, at 133).

20. For example, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court struck down an Ohio statute nearly identical to the one under which Ms Whitney had been prosecuted, finding that KKK members enjoy the right to express their views, even if they threaten (in a general sense) the security of the state, and even if some individuals (in this case Blacks and Jews) are left fearful.

21. Protection of the rights of captive audiences against unwanted, undesirable expression has developed over time (cf, *Cohen v. California*, 403 U.S. 15, 1971 (audiences must simply avert their eyes and ears when in public places); *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 1970 (upholding federal law mandating that mail recipients of unsolicited erotic materials can request that they be permanently removed from distribution lists); *FCC v. Pacifica Foundation*, 438 U.S. 726, 1978 (upholding government restrictions on "indecent" daytime radio broadcasts to prevent assault on unwilling audience members in their homes); *Frisby v. Schultz*, 487 U.S. 474, 1988 (upholding ban on picketing that targets a single residence). Voluntary audiences have gained freedom from government interference in their choices — so, for example, in the obscenity/pornography field adults are not limited to a child's menu (see, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 1989 ("dial-a-porn" services); *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S.Ct. 2374, 1996 ("indecent" material on cable public access channels); *Reno v. ACLU*, 521 U.S. 844, 1997 ("indecent" and "offensive" communications on the internet).

22. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), articulates the Court's current approach, dividing property into three categories: traditional public forum, limited public forum, and private, or nonpublic, forum. Although the issue was raised in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court did not decide whether the Internet is a public or private forum for speech purposes. In fact, the Internet has qualities of both. It was established under government authority, is used extensively by government agencies at all levels, but has been

developed largely by the corporate sector.

23. cf., *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Aboud v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *US v. United Foods*, 121 S. Ct. 2334 (2001).

24. cf., *Winters v. NY*, 333 U.S. 507 (1948); *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

25. Balkin (1990) addresses the long-standing and integral association between property ownership and speech.

26. In fact, twenty U.S. Corporations spent more than \$1 billion on advertising in 1999. See AdAge.Com for daily reports and annual analyses of advertising expenditures. Online at <http://www.adage.com/page.cms?pageId=597> (updated daily) (visited October 17, 2001).

27. Sunstein (1993) has noted a related underlying “shift from the mid-century effort to protect political dissenters to a system of free speech ‘laissez-faire’” (at 3).

28. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court invalidated a state’s attempt to prevent publication of stories critical of law enforcement on the argument that the 1st Amendment’s primary purpose had been to block such government actions against the free press. Apparently a few federal judges at the district and circuit levels issued a few opinions that at least in part supported the 1st Amendment claims of small presses prior to *Grosjean*, the most noteworthy being Judge Learned Hand’s opinion in *Masses Publishing Company v Patten*, 246 F. 24 (2nd Cir. 1917) (granting injunction against enforcement of the Espionage Act of 1917 that would have prevented the press from publishing). See Gunther (1975); Rabban (1997, at 260-262).

29. For an excellent study of the development of regulatory theory and the experience during the second quarter of the 20th century, see Barnouw (1968). Also, Bollinger (1991, at 67ff) provides a very good discussion of the scarcity rationale development. Powe (1987), however, makes an excellent point regarding trends in the information market: “The number of broadcast outlets expands yearly, whereas the number of daily newspapers has been declining for decades.... [T]he result is clear: newspapers are scarce; broadcasting outlets are not” (at 207).

30. The film industry now finds sanctuary for its product in the 1st Amendment. But such protection did not arrive easily; indeed movies were initially excluded from coverage altogether. In *Mutual Film Corp. v. Industrial Comm’n*, 236 U.S. 230, 244 (1915) the Court stated that motion pictures “[are] not to be regarded . . . as part of the press of the country.” Some thirty years later, the Justices saw things differently, finding that “moving pictures . . . are included in the press whose freedom is guaranteed by the 1st Amendment” (*U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); also see, e.g., *Winters v. New York*, 333 U.S. 507 (1948) (literature a protected form of expression)). Variations in the technological medium of conveyance does seem to make a difference. As a general rule, courts address new media by analogizing to existing technologies. At times they have been reluctant to extend analytical models and the Constitutional principles derived from them into unfamiliar terrain. For example, when the U.S. Supreme Court first encountered electronic surveillance (*Olmstead v. U.S.*, 277 U.S. 438) in 1928 the Court found that because there was no physical intrusion nor anything tangible seized, a telephone wiretap did not implicate the Fourth Amendment. Four decades later (*Katz v. U.S.*, 389 U.S. 347, 351 (1967)) the Court reversed itself, finding that “the Fourth Amendment protects people not places.” However, in 2001, in the first such case to be presented, the Court found that government surveillance of a home using thermal imaging technology constitutes a search and thus requires a warrant (*Kyllo v. US*, 121 S. Ct. 2038 (2001)).

31. citing *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907).

32. In so doing, the Court overturned an opinion from the prestigious Second Circuit whose two-judge majority had experienced great difficulty drawing a clear constitutional line between commercial and non-commercial speech (*Chrestensen v. Valentine*, 122 F.2d 511 (2nd Cir. 1941)). U.S. District Judge Hulbert had also ruled in Chrestensen’s favor, finding the city ordinance involved to be in violation of equal protection and an abridgement of free speech. *Chrestensen v. Valentine*, 34 F.Supp. 596 (SDNY 1940). The case involved a two-sided handbill. On one side was a business advertisement, soliciting customers to visit a submarine at a state pier on New York’s East

River; on the other was a protest against the city government which had prevented the proprietor from docking at city owned facilities.

33. Mayer (1990, at 601) marks the point of change to be around 1960: "After 1960 what may be called Modern Regulation and Modern Property came to define the political economy. Modern Regulation targets social goals such as environmentalism. It is intrusive, and involves regularized inspections conducted principally by federal agencies (for example, EPA and OSHA) overseeing a wide array of economic sectors. Modern Property includes not only government-created wealth in the form of government contracts, but also the currency of post-industrial society — knowledge and information. In response to these changes, corporations invoked the Bill of Rights to protect novel forms of property and to challenge modern regulatory structures."

34. [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. (*Abrams v. U.S.*, 250 U.S. 616, 630 (Holmes, J., dissenting)).

So goes the "marketplace of ideas theory," a principle which analogizes thought to products and unencumbered expression to commercial competition in a free market. Under such conditions, the public will "purchase" the good concept, reject the bad, and demand the cultivation or combination of notions containing some element of worth. The free market, then, ultimately yields practical, valuable ideas -- in conceptual terminology, it yields truth. (Notwithstanding, of course, the fact that Holmes, himself believed that truth was "generally illusion"! (Holmes, 1918)). The notion can be traced to any number of intellectual forebears, but probably none so influential and forceful as J.S. Mill. According to Mill, an open speech marketplace performs three vital functions. First, it may be an essential counterweight to opinions which, though widely held and sanctioned, are in fact false. Second, if popular inclinations are indeed true, erroneous dissenting opinions will strengthen belief in the veracity of the received wisdom. And, third if conflicting visions each hold a piece of the truth, their free intermingling will result in a more legitimate opinion -- a truer truth, if you will (Mill, 1972, at 85-123).

35. See, e.g., Sunstein, 1995, at 1760. He also notes that "[t]he FCC has at times come close to endorsing the market model, above all in its decision abandoning the fairness doctrine. (See *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5055 (1987)). When the FCC did this, it referred to the operation of the forces of supply and demand, and suggested that those forces would produce an optimal mix of entertainment options" (*Id.*). Also see *Alliance for Community Media v. FCC*, 56 F.3d 105 (DC Cir. 1995) (*en banc*) (upholding editorial control rights to cable television owners and endorsing a marketplace First Amendment theory).

36. For an excellent account of early 20th century corporate political speech, see Winkler (1999). Also, see Winkler (1998) for a very good analysis of *Bellotti* and its aftermath.

37. Also, e.g., see his separate concurrence in a 1995 commercial speech case involving government restrictions on beer labeling that finds him in substantial agreement with the corporate position:

Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the 1st Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good. One of the vagaries of the "commercial speech" doctrine in its current form is that the Court sometimes takes such paternalistic motives seriously. (*Rubin v. Coors Brewing Company*, 514 U.S. 476, at 497, 1995 (Stevens, J., concurring) (citations omitted)).

38. Commercial speech is still subject to regulation, but regulations must be "limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques" (*Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, at 574 (1980) (Blackmun, J., concurring)).

39. In the 25 years since the Court explicitly recognized in *Virginia Pharmacy* that commercial speech is entitled to 1st Amendment protection, it has repeatedly struck down restrictions on dissemination of commercial speech, while referring to the consumer's right to receive information relevant to making economic choices in a range of contexts. *E.G. Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977) (information on availability of real estate);

Carey v. Population Services, Int'l., 431 U.S. 678, 701 (1977) (information about birth control devices); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (information on price and availability of routine legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (information on availability of electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (information on availability of legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (information by mail about birth control); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (information on availability of legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (information on legal services); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990) (information on legal services); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face information about accountant's services); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994) (information concerning lawyers' qualifications); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (product ingredient labeling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (newspaper advertising of liquor store prices); *Greater New Orleans Broadcasting Association v. US*, 527 U.S. 173 (1999) (advertising of legal gambling on radio and television); *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404 (2001) (outdoor tobacco advertising).

40. For example, in 1993, writing for a majority striking down a Florida ban on direct solicitation, or advertising, by Certified Public Accountants, Justice Kennedy wrote:

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the 1st Amendment." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

41. In a 1644 speech before the English Parliament criticizing censorship laws, Milton articulated the notion that free expression helps to prevent human error through ignorance (Milton 1644). And in a mid-19th century essay, John Stuart Mill (1859/1972) expanded upon this conceptualization in noting the value inherent in the free exchange of ideas.

42. Indeed, Neuborne has represented the Association of National Advertisers, filing amicus curiae briefs in a number of cases during the last decade. See e.g., *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *Valley Broadcasting Co. v. U.S.*, 107 F.3d 1328 (9th Cir. 1998); *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1997).

43. For example, in 1983 Neuborne argued that a congressional ban on editorializing by broadcasters receiving public money violated viewers' 1st Amendment "rights to express and to receive the views of noncommercial broadcasters on issues of public interest and importance" in an amicus brief prepared on behalf of the ACLU (*FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). *Brief on Behalf of the American Civil Liberties Union, as Amicus Curiae* (filed September 13, 1983)). Also see, e.g., *Webster v. Reproductive Health Services* (492 U.S. 490, 1989), where Neuborne, again representing the views of the ACLU and several other organizations (*Brief Amici Curiae of the American Civil Liberties Union, The National Education Association, People For The American Way, The Newspaper Guild, The National Writers Union, and The Fresno Free College Foundation*. Filed March 30, 1989), argued against a state restriction on abortion counseling, reasoning that a state cannot accomplish a policy goal by silencing speech and thereby restricting the flow of information to potential hearers.

By 1992 Neuborne was representing a very different set of parties, although the thrust of his legal position had not changed, even if his clientele base had broadened. In *City of Cincinnati v. Discovery Network, Inc.* (507 U.S. 410, 1993), the brief *amici* filed on behalf of the Association of National Advertisers (and several other trade associations) assails a local ordinance against freestanding news racks, located on public property and holding commercial advertisements, as an affront to democratic process, the autonomy rights of individual citizens, and a subversion of the marketplace of ideas.

"[T]he assertion by Cincinnati that commercial speech is less important than noncommercial speech is wrong, both at the level of society and the individual. The 1st Amendment protects political democracy and free markets by

assuring the uncensored flow of information on which each depends. Political democracy requires robust free speech protection in order to assure that voters receive information needed to make an informed choice. Free markets also depend upon informed choice. . . . Consumers vote with their dollars, just as citizens vote with their ballots.” *Brief Amici Curiae of Association of National Advertisers, Inc.; American Association of Advertising Agencies; National Association of Manufacturers; Grocery Manufacturers of America, Inc.; and National Food Processors Association in support of respondents.* (filed June 1, 1992).

To demonstrate the compatibility between the 1st Amendment free speech rights of individuals and corporations, the Association of National Advertisers filed an amicus brief with the Supreme Court in late 1993 to support Margaret Gilleo's litigation against the *City of Ladue*. *City of Ladue v. Gilleo*, 114 S.Ct. 2038 (1994). She was seeking the right to place a sign displaying a political message on the front lawn of her home in the face of a local ordinance prohibiting such displays (although certain types of signs were permissible). (*Brief Amicus Curiae of the Association of National Advertisers, Inc., in support of respondent.* (filed December 13, 1993).

44. Such paternalism has also been rejected by the Court with regard to pornography. See e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

45. Justice O’Connor has expressed opposition primarily in cases involving advertising by attorneys. She would prefer that such matters be left to the states to determine for themselves by applying their respective codes of professional ethics. See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (O’Connor, J., for the Court) (attorney advertising in the form of direct mail solicitations); *Edenfield v. Fane*, 507 U.S. 761 (1993) (O’Connor, J., dissenting) (direct, in-person advertising by Certified Public Accountants).

46. *Brief of Amici Curiae American Advertising Federation, 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In subsequent litigation, this kind of direct approach has flowered. For example, in *Greater New Orleans Broadcasting Association* (1999), striking down restrictions on casino gambling advertisements, the AAF reiterated its version of history to promote full 1st Amendment protection of commercial speech. Also see, e.g., AAF amicus briefs filed in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404 (2001).

47. See, e.g., ACLU amicus briefs filed on behalf of corporate speech litigants in *Greater New Orleans Broadcasting Assn., Inc. v. U. S.*, 527 U. S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404 (2001).

48. Cortner noted that “[m]uch of the litigation initiated by corporations and labor unions, for example, is simply the pursuit of goals which they also seek by lobbying in the legislative or executive branches or in the bureaucracy.” In an analysis of all Canadian Federal Court and Supreme Court decisions between 1988 and 1998, Hein (2000) finds that 38% of the claims challenging government actions and policies were launched by corporations. Corporations are far and away, the single most active and aggressive litigant among all organization types. In addition, evidence from earlier periods of Canadian history indicates that business litigants “filled the judicial system to advance pecuniary and proprietary claims. They also attempted to influence public policy. This became very apparent during the 1930s, when corporations invoked the division of powers to obstruct the growth of the welfare state” (Hein 2000, at 8).

49. In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), upholding a ban on broadcast of lottery ads.

50. As of 1994, 60 percent of all homes were cable-connected. See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, at 2451 (1994). For a discussion of satellite communications see, e.g., Gibbons, 1995, at 1391ff.

51. The FCC wrote these regulations (47 C.F.R. s 76.503-04) to implement Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act).

52. Writing for the court, Judge Stephen Williams stated that "constitutional authority to impose some limit is not authority to impose any limit imaginable."

53. Moreover, individuals increasingly are able to customize their programming and information menu according to their own preferences, without the bother of confronting irrelevant data or opposing viewpoints. This, of course, is a perfectly rational strategy for avoiding information "overload." But it will also present the discriminating information consumer with a net reduction (perhaps a significant one) in perspective and communications diversity.

54. "The best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S 616, 630 (1919) (Holmes, J., dissenting).

55. See Graber (1991) for thorough consideration of a range of these historically significant 1st Amendment scenarios.

56. But the electronic newsgroup is not necessarily a safe-haven, because nearly all are operated by private individuals or corporations, and it is not at all clear that the 1st Amendment applies. See e.g., Naughton (1992). Nor is it clear that anonymity offers any protection. In fact, anonymity is largely a myth. An increasing number of civil lawsuits have been filed against "John Doe" defendants by business and corporate plaintiffs allegedly harmed by anonymous Internet postings, claiming such wrongs as defamation and unauthorized disclosure of proprietary information. Through the discovery process, message board operators and Internet service providers are served with subpoenas seeking the identities of anonymous posters. Many online services comply with such subpoenas as a matter of course, without notice to their users, because they do not want to jeopardize losing significant advertising dollars. For example, "since June 1988, American companies fighting . . . cyber-smears reportedly have been filing one or two lawsuits a week in Santa Clara County, Calif., the home of Yahoo! Inc" (Bell 1999, at T3). Also see e.g., *Xircom, Inc. v. John Doe*, Case No. CIV 188724 (Cal. Superior Ct, Ventura County, 1999); *Raytheon Co. v. John Does 1-21*, Civil Action No. 99-816 (Mass. Superior Ct, Middlesex County, 1999).

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Table 1
Distribution of 1st Amendment Issues, 1954-2001

ISSUES	1950- 1959 N proportion	1960- 1969 N proportion	1970- 1979 N proportion	1980- 1989 N proportion	1990- 2001 N proportion	Total N proportion
Commercial Speech			9 0.079	10 0.104	13 0.265	32 0.078
Defamation	1 0.022	10 0.097	15 0.132	9 0.094	1 0.020	36 0.088
Internal Security	27 0.587	41 0.398	9 0.079	5 0.052		82 0.201
Conscientious Objectors	6 0.130	4 0.039	7 0.061	1 0.010		18 0.044
Protest Demonstrations		17 0.165	10 0.088	8 0.083	2 0.041	37 0.091
Porn/Obscenity	5 0.109	12 0.117	24 0.211	11 0.115	4 0.082	56 0.137
Other	7 0.152	19 0.184	40 0.351	52 0.542	29 0.592	147 0.360
Total 1st Amendment (N)	46	103	114	96	49	408
Total Cases Decided (N)	672	1143	1415	1450	916	5596
1st Amend proportion of total	0.068	0.090	0.081	0.066	0.053	0.073
			9	10	13	32

Source: Spaeth (2001)

Table 2
1st Amendment Parties (Appellant + Appellee)

	1950- 1959 N proportion	1960- 1969 N proportion	1970- 1979 N proportion	1980- 1989 N proportion	1990- 2001 N proportion
Individuals	30 0.288	69 0.284	32 0.116	28 0.123	8 0.075
Media	5 0.048	21 0.086	50 0.182	24 0.105	16 0.150
Organizations	9 0.087	30 0.123	33 0.120	52 0.228	21 0.196
Government	46 0.442	99 0.407	119 0.433	86 0.377	40 0.374
Corporations	3 0.029	6 0.025	12 0.044	16 0.070	16 0.150
Other*	11 0.106	18 0.074	29 0.105	22 0.096	6 0.056
Total (N)	104	243	275	228	107

*attorneys, govt employees

Source: Spaeth (2001)

Table 3
***Amicus Curiae* Activity in Commercial Speech Litigation before the U.S. Supreme Court**

<i>Amici</i>	Total n	1970-1979		1980-1989		1990-2001				
		Cases n	Total n	<i>Amici/case</i>	Total n	<i>Amici/case</i>	Total n	<i>Amici/case</i>		
Advocacy Organizations	79	9	15	1.67	10	34	3.4	13	30	2.31
Government	140		6	0.67		48	4.8		86	6.62
Professional Associations	65		13	1.44		5	0.5		47	3.62
Media & Associations	52		1	0.11		1	0.1		50	3.85
Corporations & Associations	60		2	0.22		12	1.2		46	3.54
Advertising Associations	57		1	0.11		5	0.5		51	3.92
			38	4.22		105	10.50		310	23.85
	Total briefs filed		37	4.11		63	6.30		80	6.15

Source: Spaeth (2001)