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Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation

by Linda L. Berger

INTRODUCTION

When a corporation participates in the public sphere, its participation often takes the form of money. Corporate money must be given to someone to bring corporate participation into being—money to spend on public relations, advertising, or lobbying, or money to spend in a political campaign. Though the form is the same, the Supreme Court has treated these modes of corporate participation very differently. On the one hand, corporate money is seen as speech when it is the means used for corporations to sell products or state positions on issues. On the other, a majority of the Rehnquist-O'Connor Court perceived corporate money spent in election campaigns as the root of evils threatening the political process.¹

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1. In the 2006 Term, the Supreme Court will consider a case whose result may significantly alter the 2003 decision in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), upholding a pre-election prohibition on "electioneering communications" funded by corporations and unions. Id. at 362; see Wis. Right to Life v. Fed. Election Comm'n, 127 S. Ct. 1145 (2007). In McConnell the Court upheld the ban against a facial challenge, but Wisconsin Right to Life later challenged the provision as applied to the anti-abortion group. See Wis. Right to Life v. Fed. Election Comm'n, 466 F. Supp. 2d 195 (D.D.C. 2006). The lower court first held that the McConnell decision precluded as-applied challenges, but in
Transforming corporate money into protected speech is metaphorical; it requires three metaphors acting together to compose the full picture—(1) the corporation must be viewed as a person, (2) spending money must be viewed as speech, and (3) the free market must be viewed as the appropriate model for analyzing free speech issues. With those metaphors mapping the way, corporate money talks, and it is protected as speech.

Isolating money as the reference point for corporate participation in election campaigns is metonymical; once money is designated as the stand-in to refer to an entire concept, it is again metaphorically transformed, but with a different result. Corporate money in election campaigns is portrayed as the wellspring of evil, a source of temptation, a taint or a poison, a torrent that will flood the market and drown individual voices. These metaphors free regulatory impulses; if money corrupts, tempts, poisons, and flows out of control, it must be subject to regulation.

At first glance, the outcome seems ironic: for the purposes of commercial speech analysis, corporate spending to create and distribute advertising and images is increasingly accepted as speech equal to that

2006, the Supreme Court ruled that its opinion in McConnell did not bar further challenges to the law as applied to actual advertisements. Wis. Right to Life v. Fed. Election Comm'n, 546 U.S. 410, 410 (2006). The three-judge panel authorized to hear constitutional challenges to the Bipartisan Campaign Finance Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.), then held (2-1) that the ban on electioneering communications violated the First Amendment as applied to the advertisements sponsored by a nonprofit "ideological advocacy" corporation because they were not "express advocacy" or its functional equivalent and because the government had failed to show a compelling interest in regulating the advertisements. Wis. Right to Life, 466 F. Supp. 2d at 197, 210. The Supreme Court established a briefing schedule for the appeal in January 2007. Wis. Right to Life, 127 S. Ct. 1145. In McConnell Justice O'Connor, who has since been replaced by Chief Justice John Roberts, Jr., supported the ban; Chief Justice William Rehnquist, since replaced by Justice Samuel Alito, Jr., did not.

2. This phrase was used at least as early as JACOB A. RIIS, THEODORE ROOSEVELT, THE CITIZEN 391 (1904) and SINCLAIR LEWIS, BABBITT 168 (1922).

3. Even if commercial speech receives lesser protection than political speech, it is still treated as speech. See infra notes 74–81 and accompanying text.

4. See Developments in the Law—Corporations and Society, Free Speech Protections for Corporations: Competing in Markets of Commerce and Ideas, 117 HARV. L. REV. 2272, 2272 (2004) (noting that the different results seem counterintuitive); see also McConnell v. Fed. Election Comm'n, 540 U.S. at 248 (Scalia, J., concurring in part and dissenting in part) (noting that the Court had disapproved of restrictions on tobacco advertising but was now approving restrictions on what he termed "the right to criticize the government").

5. Commercial speech is speech referring to commercial transactions and can be engaged in by individuals, partnerships, and corporations. Corporate speech is any speech made on behalf of a corporate source. Charles D. Watts, Jr., Corporate Legal Theory under the First Amendment: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 319 n.6 (1991).
of other speakers in the marketplace of ideas; for the purposes of regulating corporate participation in elections themselves, corporate spending is "only money." Speech in the metaphorical market deserves protection; money in metonymical isolation requires regulation.

This Article examines the metaphorical and metonymical framing of corporate money in recent Supreme Court decisions about campaign finance regulation. In an earlier article, I focused on the use of metaphor to shape decisions about commercial speech protection by analyzing the briefs filed in *Nike v. Kasky*, a lawsuit in which Nike challenged California's attempted regulation as commercial speech of what Nike characterized as political speech. Similar metaphorical influences affected early decisions about the regulation of corporate spending in election campaigns. More recently, however, a metonymical move to isolate corporate money and then to focus on its malevolent tendencies has displaced the earlier view of corporate money as speech. This movement is best depicted in *McConnell v. Federal Election Commission*, the Supreme Court's 2003 decision on the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In *McConnell* a majority of the Court severed corporate money from the concepts of corporate speech and political participation in election campaigns and focused instead on corporate money's potential to corrupt lawmakers, buy influence, flood the market, and distort the election process.

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7. 539 U.S. 654 (2003). The Supreme Court dismissed its writ as improvidently granted after receiving the briefs and hearing oral arguments.

8. See id. at 666-67.


11. Erik S. Jaffe, *McConnell v. FEC: Rationing Speech to Prevent "Undue" Influence*, 2004 CATO SUP. CT. REV. 245, 245 (2004) (arguing that by focusing on the money rather than on the political speech or participation that money buys, the "Court devalued the First Amendment interests at stake and strengthened a rhetorical similarity between campaign spending and bribery"). The Supreme Court considered two campaign finance cases in the 2005 term; neither opinion directly addressed the corporate spending issues examined in this Article. See Randall v. Sorrell, 126 S. Ct. 2479, 2500 (2006) (holding that a Vermont campaign finance statute's expenditure and contribution limits were unconstitutional); *Wis. Right to Life*, 546 U.S. at 412 (reversing and remanding with instructions to consider as-applied challenge to ban on corporate expenditures in federal election campaigns to include electioneering communications). As discussed supra note 1, on remand, the lower court in *Wisconsin Right to Life* found that the ban violated the First Amendment as applied to the disputed advertisements. The Supreme Court is scheduled to hear the appeal from that decision in the spring of 2007. *Wis. Right to Life*, 127 S. Ct. 1145.
This Article will examine rhetorical choices in the debate about how to view corporate participation in election campaigns. Choices among different ways of portraying the target of governmental action affect judicial, lawyerly, and public understanding, reasoning, and evaluation. Competing rhetorical moves appear to lead to different results: the marketplace of ideas in which corporations speak goes unregulated for First Amendment purposes, while the corporate money from which potential evils flow must be regulated to protect the election process. Courts may find it useful to behave as if these outcomes are determined by neutral principles, but it may be only the frame selected that makes it appear to be so.

I. METAPHORICAL MAPPING OR METONYMICAL STAND-IN

[N]either metaphor [nor] metonymy can take the stand as witness without perjuring itself. Metaphor can “swear to tell the truth, the whole truth” but would lie if it implied that it also tells “nothing but the truth.” In contrast, metonymy can “swear to tell the truth . . . and nothing but the truth” but is unable to promise to tell “the whole truth.”

Metaphor and metonymy allow us to account for abstract and unfamiliar concepts by making connections to things we already know. While metaphor makes connections by imprinting a world on a word (from a source domain to a target domain), metonymy isolates essences and aspects as it displaces one word with an associated word, with a part of the whole, or with “that which surrounds or accompanies it, or


the traces of its retreat."\textsuperscript{15} Because it focuses on only one aspect of the target, metonym cannot tell the whole truth; because it superimposes the characteristics of the source domain onto its target, metaphor cannot tell "nothing but the truth."

Although neither is contiguous with "the truth," metaphor and metonymy communicate meaning; they are thought to constitute the basis for much of our understanding of the world.\textsuperscript{16} The traditional view of metaphor was that it relied on resemblance or similarity: a metaphor was based on two entities that resembled each other in crucial ways.\textsuperscript{17} In metonymy (a word which I use to encompass the tropes traditionally identified as metonymy and synecdoche), "a thing is displaced by an attribute or something with which it is contiguous. Metonymy is the trope of shared association rather than similarity, of shared context or convention rather than the deeper logic of a shared meaning."\textsuperscript{18} In metonymy, meaning is displaced rather than transferred.\textsuperscript{19} To call a thing by another name is a metaphor; to identify or capture a thing by one of its aspects is metonymy.\textsuperscript{20} Though they work in different ways, metaphor and metonymy often work together.

In the case of metaphor, a decision-maker may conclude that one thing is sufficiently like the other to justify treating them the same way; this is so even though metaphor makes connections across domains (the target and the source are from different worlds or are of a different order). This is similar to the process of legal reasoning by analogy but happens without an explicit discussion or examination of similarities and differences. In the case of metonymy, a decision-maker may conclude that the association between the one thing and the other within the same domain is "so close that one may stand for the other as its crucial attribute."\textsuperscript{21} Again, the conclusion is drawn implicitly, not explicitly, without conscious examination of the closeness of the association or the crucial nature of the attribute.

\textsuperscript{15} Id.
\textsuperscript{16} George Lakoff, The Contemporary Theory of Metaphor, in Metaphor and Thought 202, 244 (Andrew Ortony, ed., Cambridge Univ. Press 2d ed. 1993) (1979) [hereinafter Lakoff, Contemporary Theory].
\textsuperscript{17} Halper, supra note 12, at 39-40.
\textsuperscript{18} Id. at 39.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 41.
A. Metaphor is More Than the Truth

Metaphor, formerly maligned and misunderstood, is ascendant. Literal descriptions of truth—of how things are—are viewed as impossible. In earlier times, "metaphor was seen as a matter of language not thought." Quintilian described metaphor and other figures of speech as "a purposeful deviation in sense or language from the ordinary simply form... [or] that which is poetically or rhetorically varied from the simple and immediately available means of expression." In contrast, contemporary theorists claim that "the locus of metaphor is not in language at all, but in the way we conceptualize one mental domain in terms of another." As a result, metaphor "is primarily conceptual, conventional, and part of the ordinary system of thought and language."

Metaphor requires us to imagine a new idea "as" a more familiar one or an abstract concept "as" a concrete object. In this way, metaphor is crucial to accounting for how we see and understand the world; it is both a product (the perspective or frame which we impose when we see one thing "as" another) and a process (the way in which understanding and persuasion come into existence through mappings from one domain to another). Although similarity seems to be its basis, an initial unrelated-

22. For examples, see Justice Cardozo's metaphoric warning that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it," Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926); or Justice Potter Stewart's statement that "the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation,"" Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting); or Justice Oliver Wendell Holmes's statement that "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis," Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

23. See, e.g., CULLER, supra note 13, at 188 (rhetoric is flourishing, and metaphor is its focus; "it is scarcely an exaggeration to say that metaphor is more respectable than rhetoric itself").


26. QUINTILIAN, INSTIT. ORATORY, IX, i, 10-14.

27. Lakoff, Contemporary Theory, supra note 16, at 203.

28. Id.
ness is the starting line—the reader must make an imaginative leap to see the resemblance.

Central to development of contemporary metaphor theory was a concept contributed early in the twentieth century by I.A. Richards: that metaphor works as “two thoughts of different things active together and supported by a single word, or phrase, whose meaning is a resultant of their interaction.” Metaphor reflects “a borrowing between and intercourse of thoughts, a transaction between contexts.” As metaphor helps us understand the unfamiliar concept, it also shapes our thoughts about the new concept because it maps on top of the new experience the structures, inferences, and reasoning methods of the old.

Another of the early theorists, Max Black, argued that the use of one complex system to select, emphasize, and organize relationships in another system was a distinctive intellectual operation, one that created meaning. Black explained the interaction theory of metaphor as a process of filtering and organizing, using one system as a lens for understanding another, rather than a process of comparison. That is, in the metaphor Man is a Wolf, the properties and relationships commonly believed to be true of man interact with the properties and relationships commonly believed to be true of Wolf to produce new meaning. Rather than comparing objects to determine what similarities they share, Black suggested that we use an entire system to filter or screen or organize our conception or our perspective of some other system. “The metaphor selects, emphasizes, suppresses, and organizes features” of Man by implying statements about Man that normally apply to Wolf.

Over the last twenty years, the study of metaphor in legal analysis has been greatly influenced by the research and theory of George Lakoff, a professor of linguistics, and Mark Johnson, a professor of philosophy. According to their cognitive theory of metaphor, using and

29. I.A. Richards, The Philosophy of Rhetoric 94 (1936). Richards is credited with the early development of New Rhetoric, a theory which suggested that ambiguity is essential to the use of language and that meaning results from a series of interactions. Id. at 94 (emphasis added).
30. Id. at 94-94.
31. Id. at 92-94.
32. Max Black, Models and Metaphors: Studies in Language and Philosophy 41 (1962) (noting that “the principal subject is ‘seen through’ the metaphorical expression”). Id. at 39-44.
33. Id.
34. Id.
35. Id. at 44-45.
36. For background on cognitive theory and research about metaphor, see, for example, Mark Johnson, The Body in the Mind: The Bodily Basis of Meaning, Imagination,
choosing metaphor is not "mere rhetoric." Instead, they conceive of metaphor as "a cognitive process by which we use a concrete, experienced source domain to structure and understand a more abstract domain." Like schema, analogy, and narrative, metaphor is a stored structure that makes a new concept meaningful by mapping or transferring relationships and inferences from one concept to another. These processes are cognitively efficient because they allow people to make decisions without having to gather complete information.

According to Lakoff and Johnson, metaphor is a pervasive and powerful cognitive mechanism because it is absorbed through long, constant, and unconscious experience. People absorb a system of primary metaphors automatically and involuntarily as they go about their daily lives. Metaphor thus draws on tacit knowledge, knowledge that has been embedded through long and repeated experience. What we "know" from such experience is believed more deeply than anything we learn by listening or reading.

Moreover, because a particular metaphor is physically, environmentally, and culturally embedded, it may be more or less persuasive in certain times and places. Given an appropriately embedded metaphor, the


37. Winter, Transcendental Nonsense, supra note 36, at 1115 n.25.

38. See Dan Hunter, Reason is Too Large: Analogy and Precedent in Law, 50 EMORY L.J. 1197, 1212 (2001). According to Hunter, analogy differs from metaphor because "analagies are used to explain or predict reasoning directly by reference to the analog. Metaphors . . . may carry an underlying cognitive structure that constrains thinking, but they do not determine the outcome of a case." Id. at 1210.


40. LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, supra note 24, at 47.

41. Id.
metaphor can import an organizational structure that is not already there.\textsuperscript{42} While other organizational schemas provide frameworks for analysis, a metaphorical system can provide not only the framework but also create and fill in all the slots in the framework. In addition to structure, metaphor influences reasoning because it allows us to borrow patterns of inference and methods of evaluation from the source and transfer them to the target.\textsuperscript{43} Finally, metaphor derives some of its persuasive power from its ability to be present without calling attention to itself; it is hard to question an unannounced position based on deeply rooted, but unnoticed, metaphors.\textsuperscript{44}

Spreading beyond everyday conceptual metaphors are the larger systems that Lakoff calls “idealized cognitive models”; legal categories are created and legal rules are interpreted within these larger systems.\textsuperscript{45} An idealized cognitive model is a folk theory or cultural model that is used to organize knowledge. For example, the marketplace of ideas entails a variety of speakers, listeners, arguments, debates, openings, closings, responses, buyers, sellers, wares, competition, and free trade. These models affect how we categorize and reason about categories. Because “even the ‘simplest’ rule makes sense only against the backdrop of a massive cultural tableau that provides the tacit background assumptions that render it intelligible,”\textsuperscript{46} these models also affect how we interpret rules.

B. Metonymy is Less Than the Truth

To isolate one aspect of a thing as a reference point for the whole concept is to engage in the process of metonymy. Metonymy is not an understudy (a metaphor from another world) but a stand-in. In a metonym, the reference word stands in for, is associated with, represents the essence of, or displaces a larger concept.\textsuperscript{47} For example, any

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\textsuperscript{42} Lakoff & Turner, More Than Cool Reason, supra note 36, at 63-65.  \\
\textsuperscript{43} Id. at 65.  \\
\textsuperscript{44} Id. at 63.  \\
\textsuperscript{45} Lakoff, Women, Fire, supra note 36, at 68-76.  \\
\textsuperscript{46} Winter, A Clearing in the Forest, supra note 36, at 101-03 (explaining how we know, without having to think about it, that humans are not animals for purposes of the rule prohibiting “live animals on the bus”).  \\
\textsuperscript{47} Literary theorist Jacques Lacan has written at length about metaphor and metonymy. In Lacanian theory:

Metaphor is the substitution of one word for another. It is the imaginary attempt to turn signification into meaning. It is the fiction that we can freeze meaning . . . .

Metonymy is the substitution of word for mere word, of slidings of meaning below and above the bar of signification. In metaphor, the signifier stands for the
representation of a concept with a word is a metonymy—the word stands for the concept it expresses. Like metaphor, metonymy is not merely a matter of language, but can “structure not just our language but our thoughts, attitudes, and actions.” Like metaphor, metonymy is grounded in experience: it often involves direct physical associations or cause and effect relationships.

In contrast to metaphor’s imaginative leap from surface unrelatedness to recognition of resemblance, metonymy has been described as a more accidental connection based on proximity or direct association. “Metonymy is the evocation of the whole by a connection. It consists in using for the name of a thing or a relationship an attribute, a suggested sense, or something closely related, such as effect for cause . . . the imputed relationship being that of contiguity.”

Traditional categories of figures of speech describe two forms of metonymy: metonymy, which is based on a relationship of direct association, and synecdoche, which is based on a relationship through categorical hierarchy (the part for the whole or the whole for the part). Both kinds of metonymy depend on contiguity. So, for example, to refer to Frank Sinatra as “old blue eyes” or to the United States as “the red, white, and blue” is to use a metonymy. Metonymy ranges widely: it is the use of the part for the whole (sail for ship, hands for workers); the whole for the part (“the law” for police officers, “the court” for judges); the producer for the product (Picasso for the painting); the object used for the user (the press for journalists); the controller for the controlled (Nixon bombed Hanoi); the institution for the people responsible (the government calls the shots); the place for the institution (Wall Street decided to rally); the place for the event (Pearl Harbor); the effect for the cause (red in the face for embarrassment); the substance for the form (lead for bullet).

In addition to describing metaphor and metonymy as the two “poles” of the organization of language (one pertaining to selection, metaphor, and one pertaining to combination, metonymy), Roman Jakobson applied
the terms to non-verbal communication. Thus, metonymy has been associated with movies, where the falling leaves of calendar pages "stand in" for time passing and moving railroad engine wheels stand in for a journey, and with advertisements, the tomato as a metonym for Italy. Judith Harris suggested "street metonymy" examples: the simplest use of metonymy involves the naming of visceral parts for the whole—ranging from "brain" to "big mouth" to those that "liken[] the subject to his or her reproductive organs."

Lakoff and Johnson differentiate metaphor from metonymy: metaphor serves the primary function of building understanding through its usefulness as "a way of conceiving of one thing in terms of another," while metonymy serves primarily a referential function, by allowing "us to use one entity to stand for another." In contrast to metaphor, where one conceptual domain is understood in terms of another, one schematic structure is mapped onto another schematic structure, and the logic of the source domain is mapped onto the logic of the target domain, "[m]etonymy involves only one conceptual domain . . . [with] mapping occurring within [that] single domain . . . and not across domains." Metonymy is used primarily to refer to one entity in a schema by referring to another entity in the same schema and that entity is "taken as standing for one other entity in the same schema, or for the schema as a whole." Thus, one use of metonymy is the "evocation of an entire schema via the mention of a part of that schema."

II. EVOLUTION: THE METAPHORICAL VIEW OF CORPORATE SPENDING

Recent Supreme Court decisions applying the First Amendment to state regulation of commercial speech have viewed the use of corporate money to buy advertising as if it were speech. This view is framed by the primary metaphor that a corporation is a person, together with the free market model for First Amendment analysis. Given a metaphori-
cal target onto which an unregulated market’s structure and assumptions have been mapped, it has seemed only natural to treat a corporation as an equal competitor in the marketplace of ideas.

A. The Corporation is a “Person”

For a variety of purposes, the corporation had to become some “thing.” As John Dewey wrote long ago, using the word “person” to stand for a corporation could have meant nothing more than designating a unit with rights and obligations, with the extent of each right and obligation to be determined by how it matched up with the nature and characteristics of the unit.60 Such a designation would have allowed decision-makers to make judgments based on specific contexts and thus “to reject some undesirable consequences of legal personality.”61 Instead, the courts have followed three theories of corporate being that carry inherent consequences.62

First, if the corporation is viewed as an artificial entity that is purely a creation of state statute, the corporation receives little First Amendment protection. In this view, free speech values in corporate expression are limited to the public interest in the free exchange of ideas, and limits on corporate speech might well be acceptable.63 Under this approach—known as the “grant theory” because powers and rights have been granted by the state—corporations are not the same as individuals, do not have the same constitutional rights, and can be regulated in ways that individuals could not be.64 This view holds the state responsible for its creation of large economic concentrations within corporations and

60. John Dewey, The Historic Background of Corporate Legal Personality, 35 Yale L.J. 655, 656 (1926).
63. Under the artificial entity theory, judicial decisions were based primarily on the corporation’s relationship with the state. In Trustees of Dartmouth College v. Woodward, for example, the Supreme Court limited the corporation’s power to the original charter granted by the state: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.” 17 U.S. 518, 636 (1819).
the resulting redistribution of political power. When the Court upholds regulation of corporate spending in the campaign finance context, it appears to be applying some version of this theory.

The second and third views—that the corporation should be treated as a group of individuals or as a real and discrete entity with attributes similar to those of a person—lead to the conclusion that corporations have First Amendment rights that are indistinguishable from those of individuals. Under the group or “aggregation theory,” courts emphasize that human individuals constitute the corporation, with the corporation protecting those individuals’ rights. Under this theory, corporations should be viewed not as organizations that are “robotically driven by profit-maximization but rather as devices created and organized to facilitate human self-realization.”

The third approach treats the corporation as an autonomous and real entity, separate from its creation by the state and from the individuals who work for it. The Supreme Court has consistently followed this approach to corporate property rights. More debate accompanied the

67. Watts, supra note 5, at 362-63.
68. See, e.g., Bank of the U.S. v. Deveaux, 9 U.S. 61, 86 (1809) (rejecting the argument that corporations were citizens within the meaning of the Constitution but allowing corporate litigants to plead as parties for federal diversity purposes).
70. Watts, supra note 5, at 336-40. In the case cited for establishing the principle that a corporation is a person, Santa Clara County sued a railroad company for failure to pay taxes. The railroad argued six defenses, including that corporations were persons. Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 409-10 (1886). One of the other five defenses was found successful. Id. at 418. Although not included in the reported opinion, Chief Justice Waite apparently told the attorneys waiting to hear the opinion that the Court “does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution applies to these corporations. We are all of opinion that it does.” THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 104, 108 (2002).
extension of individual liberty rights to corporate persons, but the Court incrementally extended those rights.\textsuperscript{71} Once the corporation is accepted as a "person" indistinguishable from any other person, First Amendment doctrine foreordains the conclusion:

American free speech doctrine has never been comfortable distinguishing among institutions. Throughout its history, the doctrine has been persistently reluctant to develop its principles in an institution-specific manner, and . . . to take account of the cultural, political, and economic differences among the differentiated institutions that together comprise a society.\textsuperscript{73}

B. The Corporation Speaks by Spending Money

In order to extend First Amendment protection to corporate speech, the Court had to shift its focus from the speaker to the speech and from the speech to the means of production. These shifts were made possible first by recognizing only two kinds of speakers—private speakers and the government—and then by assuming that the First Amendment is intended to protect all private speakers against government regulation.\textsuperscript{74} Because corporations fall into the private category, they must be protected the same as any other speaker, either because the corporation is a person or because the corporation is a group of persons. As the Supreme Court said in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York}, a corporation's advertising can be viewed as "expression by an informed and interested group of persons of their point of view."\textsuperscript{75}

The Court also decided that because spending money is a way to speak, it should be a mode of protected speech.\textsuperscript{77} Without this equation of speech and money, "an issue might have arisen as to whether [or how] a corporation even could speak."\textsuperscript{78} Finally, through the market metaphor, the rights of listeners became important. By taking these


\textsuperscript{72} See \textit{Aviam Soifer, Reviewing Legal Fictions}, 20 GA. L. REV. 871, 877 (1986).


\textsuperscript{75} 447 U.S. 557 (1980).

\textsuperscript{76} \textit{Id.} at 581 (Stevens, J., concurring).

\textsuperscript{77} \textit{See id.} at 566-67.

\textsuperscript{78} Greenwood, supra note 74, at 1013.
steps, the Supreme Court moved from protecting the rights of individuals to speak freely to protecting speech itself, thus supporting the free market’s operation by prohibiting the government from limiting the stock of information available to consumers and voters. 79 As a result, although in 1942 the Court had ruled that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising,” 80 by 1976 the Court had extended First Amendment protection to the communication, its source, and its recipients because “the free flow of commercial information is indispensable” to the functioning of a free market economy. 81

At about the same time, the Supreme Court seemed to extend similar protection to corporate spending related to election campaigns. In First National Bank v. Bellotti, 82 the Court relied on the rights of listeners in the “market” to explicitly state that the First Amendment protects corporate speech. 83 Writing for the majority, Justice Powell asserted that “[t]he 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.” 84 Justice Powell acknowledged that some “purely personal guarantees” of the Constitution were limited to individuals, 85 but he was unmoved by Justice White’s argument that “what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.” 86 After Bellotti, it appeared that protected speech would encompass a corporation’s spending of money for lobbying, political advertisements, and other attempts to influence the political process. 87 However, as will be discussed in detail below, later cases examining campaign finance regulation appeared to find that

83. Id. at 776-86.
84. Id. at 777.
85. Id. at 778 n.14.
86. Id. at 804-05 (White, J., dissenting).
87. See Redish & Wasserman, supra note 69, at 243 (arguing that the Court’s decisions protecting corporate speech are a better fit with First Amendment theory than the campaign financing decisions that have shown some “hesitancy to protect profitmaking corporate speech”).
corporate spending in election campaigns posed different concerns than individual speech.\textsuperscript{88}

C. \textit{In the Marketplace of Ideas, All Speakers Are Equal and More Speech Is Always a Good Thing}

Before the market metaphor beat the competition, early metaphors for free speech were based on diverse images of truth.\textsuperscript{89} John Milton expressed the relationship between truth and falsehood as a battle between foes and characterized truth as a free-flowing stream of information.\textsuperscript{90} John Stuart Mill used the battle metaphor, but cautioned that the concept that truth always triumphs "is one of those pleasant falsehoods \ldots which all experience refutes."\textsuperscript{91} Nonetheless, Mill wrote that the result of silencing expression is

that it is robbing the human race \ldots. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.\textsuperscript{92}

These early conceptions provided a limited model for development of First Amendment doctrine.\textsuperscript{93} Then, in his dissent from an opinion affirming a conviction under the Espionage Act,\textsuperscript{94} Justice Holmes sketched a new view, writing that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."\textsuperscript{95} Although Justice Holmes wrote about the "free trade in ideas" and "the

\textsuperscript{88} See Developments in the Law—Corporations and Society, supra note 4, at 2272 (noting that commercial speech appears to have gained greater protection even as the Supreme Court approves greater regulation of corporate political speech).


\textsuperscript{91} \textit{JOHN STUART MILL}, \textit{ON LIBERTY} 30-31 (Stefan Collini ed., Cambridge Univ. Press 1989).

\textsuperscript{92} \textit{Id.} at 20.

\textsuperscript{93} \textit{Winter, A Clearing in the Forest}, supra note 36, at 268.

\textsuperscript{94} Barbour Espionage Act, ch. 30, § 1, 40 Stat. 217 (1917) (repealed 1948).

\textsuperscript{95} Abrams v. United States, 256 U.S. 616, 630 (1919) (Holmes, J., dissenting).
competition of the market" in 1919, it was Justice Brennan who first wrote about the "marketplace of ideas" in 1965.  

The marketplace metaphor contained basic conceptual metaphors, those combined with the economic experience of the market to "entail" a whole set of associations and inferences: "ideas are commodities; persuasion is selling; speakers are vendors; members of the audience are potential purchasers; acceptance is buying; intellectual value is monetary value; and the struggle for recognition in the domain of public opinion is like competition in the market." The marketplace metaphor carries over from the source domain of economic activity the idea that value can be measured by demand as well as the "cultural values of freedom and individual autonomy." In addition, the market metaphor supports a cultural belief that reason will allow us to distinguish truth from untruth, and good from bad, and that we will make the right decisions in the long run.

The marketplace has competitors. Cass Sunstein argues that the metaphor is inconsistent with the conditions required for democratic self-government. Under the model of an economic market, "American law protects much speech that ought not to be protected. It safeguards speech that has little or no connection with democratic aspirations and that produces serious social harm." Others believe that the structure and operation of the market hurt its ability to provide and protect a range of voices: "the marketplace's inevitable bias supports entrenched power structures or ideologies." As a result, merely protecting

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96. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers."). At least one author believes that the change was significant:

Brennan localized the metaphor; he gave the market a sense of place. Brought down from the Holmesian skies, the marketplace of ideas grounds "free trade" in a specific locale and context. . . . [It] connotes diversity and pluralism at ground level without resting on theories of abstract, truth-generating invisible hands.


98. Id. at 272.

99. Id.


102. Id.

expression "does not guarantee an environment where new ideas, perceptions, and values can develop."\textsuperscript{104} Similarly, others complain that free market capitalism gives too much influence to some, "not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities."\textsuperscript{105} The result is a greater threat than corruption of individual elected officials: it poses "the structural threat of a monopolized marketplace of ideas."\textsuperscript{106} Just as the market metaphor has been used to support a laissez-faire approach by government in the regulation of speech,\textsuperscript{107} it could also serve "those who envision the Court as a kind of New Deal regulator that intervenes intermittently to guard against market failure."\textsuperscript{108} And other market-based metaphors, including one based on antitrust regulation, have been proposed.\textsuperscript{109}

Although "[t]he invisible market in which thought is exchanged and truth discovered has been evoked in a breathtaking array of situations,"\textsuperscript{110} First Amendment doctrine could draw on other historical images. Several commentators have suggested the assembly or public meeting metaphor. So, for example, the marketplace need not be the economic model.\textsuperscript{111} The market could instead be depicted as the Greek agora, which served both as a market and as a central meeting place. As a public assembly for the exchange of views, the marketplace must include diverse and plural voices rather than a few overpowering ones.\textsuperscript{112} Such a conception of the market could focus attention on protecting the process of the exchange of views, allowing government regulation to assure effective access, to guard against monopolies, and to avoid unequal results.

Alternatives to the free market model for regulation of campaign financing also include Justice Breyer's concept of active liberty—"reading the First Amendment not in isolation but as seeking to maintain a

\textsuperscript{104} Id. at 86.
\textsuperscript{105} Cole, First Amendment Antitrust, supra note 100, at 237.
\textsuperscript{106} Id.
\textsuperscript{107} Cole, Agon, supra note 96, at 894.
\textsuperscript{108} Tsai, supra note 89 at 234; see also Pamela S. Karlan, Politics by Other Means, 85 VA. L. REV. 1697, 1699 (1999). In part, market rhetoric makes sense "given both the explicit role money plays and the long pedigree of market analogies involving speech." Id. Regulation of campaign finance "occupies a somewhat uneasy ground between the pure marketplace of ideas, which enjoys a heavy presumption against government interference, and the pure economic marketplace, where, at least since the New Deal, government regulation is presumptively constitutional." Id.
\textsuperscript{109} Cole, First Amendment Antitrust, supra note 100.
\textsuperscript{110} Tsai, supra note 89, at 232.
\textsuperscript{111} Cole, Agon, supra note 96, at 894.
\textsuperscript{112} Id.
system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions.\textsuperscript{113} Another commentator has suggested that even if money spent in political campaigns is regarded as speech, there are strong justifications for regulation based on "the need to preserve the viability of the democratic system from the harmful influences of market disparities" and to isolate the political process "from market disparities in the name of political equality."\textsuperscript{114}

III. DIVERGENCE: METAPHOR AND METONYMY IN CAMPAIGN FINANCE ANALYSIS

SCALIA: I thought—I thought what that case said and what many of our other cases say, with regard to expenditures in particular, is that you're not talking about money here. You're talking about speech. So long as all that money is going to campaigning, you're talking about speech.

And when you say you don't need any more speech than this, that's a very odd thing for—for a—a United States Government to say. Enough speech. You don't need any more than this. And that's the reason the expenditure limits, as opposed to contribution limits, were regarded quite differently in \textit{Buckley} and I think should still be regarded differently today. You're constraining speech. It's not money you're constraining. Contribution limits, you're constraining money, but when you say you can't expend more than this on your campaign, you're saying, no, no, no, this is enough speech. We're going to—we,

\textsuperscript{113} \textsc{Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution} 39 (2005). Noting that a small number of individuals and groups contribute a majority of the money in political campaigns, Justice Breyer focuses on the concern that the few will have undue influence. In pursuit of active liberty, he writes, the First Amendment can be understood "as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process." \textit{Id.} at 46. This concept does not mean that campaign finance regulation is always constitutional but instead recognizes "that basic democratic objectives, including some of a kind that the First Amendment seeks to further, lie on both sides of the constitutional equation." \textit{Id.} at 48. On the one side, these "include protection of the citizen's speech from government interference; [on the other side,] seen in terms of active liberty, they include promotion of a democratic conversation." \textit{Id.} at 48; see also Frances R. Hill, \textit{Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law}, 60 U. MIAI. L. REV. 155 (2006).

\textsuperscript{114} Yoav Dotan, \textit{Campaign Finance Reform and the Social Inequality Paradox}, 37 U. Mich. J.L. Reform 955, 962 n.24, 1007-09 (2004) (citing a range of articles criticizing the \textit{Buckley} decision). "In the political sphere of liberal democracy, liberties must be equal, or else they do not exist at all. We must therefore ensure that economic disparities, in the form of campaign dollars, will not interfere with or distort the political process." \textit{Id.} at 1008-09.
the State, are going to tell you how much you should campaign. That's very unusual in—in American democracy.\textsuperscript{115}

The First Amendment is implicated in some way when the government regulates campaign financing. In its first campaign finance decision, the Supreme Court decided to view limits on campaign contributions as mere constraints on money, but to treat limits on campaign spending as infringements on free speech rights.\textsuperscript{116}

A. What stands for corporate money? What does corporate money stand for?

Money, an abstraction that stands for an abstraction, is an ideal candidate to be described and understood through metaphor. Because "[m]oney is the purest form of the tool . . . an institution through which the individual concentrates his activity and possessions in order to attain goals that he could not attain directly,"\textsuperscript{117} money could be depicted as any goal or product that can be obtained by money (in other words, money is what you can buy with it). The embodiment of abstract economic value,\textsuperscript{118} money has no inherent individual characteristics. "It is a purely transparent mediator of exchange . . . Value is defined not in terms of what it is, but in terms of what it is not—the alternative for which it can be traded."\textsuperscript{119}

This lack of inherent characteristics allows money to be metaphorically depicted\textsuperscript{120} in extraordinarily disparate ways—as a symptom of health, satisfaction, and wellbeing; as the root or source of growing evil;\textsuperscript{121} as greed and power; as a poisonous liquid or an uncontrollable flood; as dirty and sinful; as siren or temptress; as disease or illness;\textsuperscript{122} even as


\textsuperscript{116} For other views, see Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U. C. DAVIS L. REV. 663, 687 (1997) (suggesting that both contributions and expenditures should not be limited but that the identities of contributors should be made public).


\textsuperscript{118} Id. at 120.


\textsuperscript{120} At the same time, money can "stand in" as a concrete domain to describe another abstract concept—for example, time is money.

\textsuperscript{121} "The love of money is the root of all evil." 1 Timothy 6:10.

\textsuperscript{122} Corruption is a disease of the body politic. Like a virus invading a physical body, hostile forces spread through the political body . . . . In regimes . . . such as republics and democracies, the virus shows itself as private interests. Its agents are greedy individuals, grasping factions, and private corporations and organiza-
voting.\textsuperscript{123} Several images of money have dominated campaign finance analysis—money is speech, money flows like water, money drowns out other voices, money buys influence, money poisons the process. In \textit{McConnell v. Federal Election Commission},\textsuperscript{124} the majority opinion characterized the campaign finance law being challenged as "Congress' most recent effort to confine the ill effects of aggregated wealth on our political system."\textsuperscript{125} This depiction taps into a long history, the same concern having been expressed more than a century earlier when the Court said there are "two great natural and historical enemies of all republics, open violence and insidious corruption . . . . [T]he free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents . . . cause of anxiety."\textsuperscript{126}

Although concerns about democratic processes might be used to support regulation of campaign financing,\textsuperscript{127} the Court has explicitly accepted only one variation of that concern over the last twenty-five years—corruption or the appearance of corruption.\textsuperscript{128} The starting point for allowing regulation was quid pro quo corruption—when money literally takes the place of democratic decision-making because an issue is decided on the basis of an exchange of money for a vote. Beyond quid pro quo corruption is the appearance of such corruption: "[s]imply the taint or suspicion of such corruption may erode the public's confidence in the political process."\textsuperscript{129} Also linked to the concern about corruption is "the fear that one group or class in society . . . will use its greater access to money in order to exert an excessive or unhealthy influence on public policy."\textsuperscript{130}

The first time that the Court was asked to decide whether spending money during an election campaign constituted a protected "speech" activity, a majority of justices decided that it did.\textsuperscript{131} In \textit{Buckley v. Valeo},

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\textsuperscript{123} See, e.g., \textit{Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance} 4 (2002) (suggesting that reform efforts focus on the similarities between campaign contributions and voting rather than on models for regulating the economy).
\textsuperscript{124} Id. at 224 (emphasis added).
\textsuperscript{126} Ex parte Yarbrough, 110 U.S. 651, 658, 667 (1884).
\textsuperscript{127} livre.
\textsuperscript{131} See Buckley v. Valeo, 424 U.S. 1 (1976).
\end{flushleft}
Valeo, the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (the “Act”), as amended in 1974; in the wake of Watergate, the Act set maximum limits on all contributions and expenditures in connection with federal elections and established the Federal Election Commission.

First, the Court assumed that the contribution and spending limits affected “the most fundamental First Amendment activities”—public discussion of political issues and candidate qualifications. Second, the Court rejected the argument that limitations on giving and spending money in political campaigns were limitations on conduct with only incidental effects on the rights of free speech and freedom of association. Finding that communication was dependent on spending money, the Court concluded that money should be treated as if it were speech.

Although the Buckley decision did not directly address the use of corporate funds in election campaigns, it established as given the relationship between spending and speech. Moreover, the Court held that campaign finance regulation would be governed by a form of strict scrutiny, refusing to apply the intermediate scrutiny test for conduct that communicates: “The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.” To much subsequent criticism, the Court upheld contribution limits but barred limits on spending in support of candidates, deciding that both campaign contributions and

132. Id.
134. The Federal Election Campaign Act of 1971, as amended in 1974, is set out in the appendix to the per curiam opinion in Buckley. See Buckley, 424 U.S. at 144-80.
135. Id. at 14.
136. Id. at 15, 16.
137. Id. at 19.
138. Id. at 16.
139. See, e.g., Richard L. Hasen, The Untold Drafting History of Buckley v. Valeo, 2 Election L.J. 241, 242 (2003) (the Buckley decision was a compromise “draft[ed] by committee”). Prof. Kathleen Sullivan has suggested that the decision was an “attempt to solve an analogical crisis by splitting the difference.” Sullivan, supra note 116, at 667. Buckley required the court to choose between two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech. It treated campaign contributions as more like voting, where individual efforts may be equalized, and campaign expenditure as more like speech, where they may not.

Id.
expenditures were forms of political speech, but that the government's interest in preventing corruption was compelling only when it came to campaign contributions. Accordingly, the limit on contributions was narrowly tailored and survived strict scrutiny.\textsuperscript{140} In contrast, independent spending presented less threat of corruption, and the limits on spending represented "substantial rather than merely theoretical restraints" on speech because they would exclude most individuals and groups from effectively using available means of communication.\textsuperscript{141}

The \textit{Buckley} opinion isolated the "money" metonym for contribution limits but focused on the "speech" metaphor for spending limits:

\begin{quote}
A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication . . . .\textsuperscript{142}
\end{quote}

Speech interests are only indirectly involved: "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."\textsuperscript{143} On the other hand, spending limits directly restrain speech: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\textsuperscript{144} The Court rejected the argument that the government could restrict spending to equalize political influence, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."\textsuperscript{145}

For very different reasons, six of the current Supreme Court justices have at one time or another declared their willingness to re-examine or overrule \textit{Buckley}. Justice Clarence Thomas would instead "begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech

\begin{footnotesize}
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\item 140. \textit{Buckley}, 424 U.S. at 23-29.
\item 141. \textit{Id.} at 19-20.
\item 142. \textit{Id.} at 21.
\item 143. \textit{Id.}
\item 144. \textit{Id.} at 19.
\item 145. \textit{Id.} at 48-49.
\end{itemize}
\end{footnotesize}
are central to the First Amendment."\textsuperscript{146} This view has been joined by Justices Kennedy and Scalia.\textsuperscript{147} Justices Breyer and Ginsburg would reinterpret some parts of Buckley, perhaps adjusting the line between contributions and expenditures, particularly for independently wealthy candidates.\textsuperscript{148} On the other hand, Justice Stevens has criticized Buckley's premise that money is speech. Instead, he writes that "[m]oney is property; it is not speech," and as such it is not entitled to the same protection as "the right to say what one pleases."\textsuperscript{149}

B. Assuming a Free Market for Campaign Finance Regulation, Corporate Money Speaks

The Court directly addressed the constitutionality of limits on corporate spending just two years after Buckley when, in 1978, it decided First National Bank v. Bellotti,\textsuperscript{150} "a landmark case which establish[ed] the doctrine that corporations, as well as individuals, are entitled to the freedom of speech protected by the First Amendment."\textsuperscript{151} In Bellotti, the Court considered a challenge to the constitutionality of an amendment to the Massachusetts Corrupt Practices Act,\textsuperscript{152} the amendment explicitly prevented banks and other corporations from spending corporate funds to oppose any referenda on a personal income tax. This amendment was the latest in a series of efforts to improve the prospects of a proposed change in the state income tax structure, a process that required a constitutional amendment, which in turn required popular approval in a direct referendum.\textsuperscript{153}

Concluding that the use of corporate funds had contributed to the defeat of previous measures, the legislature passed several versions of a statute barring the use of corporate funds to influence referenda that did not "materially affect" a business corporation; the amendment at

\textsuperscript{146} Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part). In Austin v. Mich. Chamber of Commerce, Justice Scalia asserted that "Buckley v. Valeo should not be overruled, because it is entirely correct," but the comment likely was intended to refer to only one aspect of the holding. 494 U.S. at 683 (Scalia, J., dissenting). Elsewhere, Justice Scalia wrote that he continued to believe Buckley was wrongly decided. McConnell, 540 U.S. at 248 (Scalia, J., concurring in part and dissenting in part).

\textsuperscript{147} Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409-10 (2000) (Kennedy J., dissenting); id. at 410 (Thomas, J., dissenting).

\textsuperscript{148} Id. at 404-05 (Breyer, J., concurring).

\textsuperscript{149} Id. at 398-99 (Stevens, J., concurring).

\textsuperscript{150} 435 U.S. 765 (1978).

\textsuperscript{151} Patton & Bartlett, supra note 65, at 495.

\textsuperscript{152} MASS. GEN. LAWS ANN. ch. 55 §§ 1-42 (West 2006).

\textsuperscript{153} Bellotti, 435 U.S. at 767-68.
issue specifically stated that a referenda on a personal income tax did not materially affect a business corporation. The First National Bank of Boston and other corporations claimed that barring corporations from commenting on the tax referendum violated the corporations’ right to free speech.

In its 5-4 decision, the *Bellotti* majority stated that “[t]he 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.” The holding in *Bellotti* was read broadly, but Justice Powell’s opinion included several suggestions that it might not extend so far. First, he was careful to distinguish between speakers and speech and declined to address the question of whether corporations have First Amendment rights, saying he preferred to answer the question whether the statute “abridges expression that the First Amendment was meant to protect.” Further, Justice Powell reserved the question of “whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities.” In another footnote, Justice Powell suggested that “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.” As for the arguments that corporate wealth might exert undue influence and destroy popular confidence, Justice Powell said the arguments would merit consideration if they “were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests.”

The narrow question in *Bellotti* was only whether the advocacy expenditures of corporations in an “issue election,” rather than an

154. *Id.* at 768-69 & n.3.
155. *Id.* at 770.
156. *Id.* at 777. In *Pacific Gas & Electric Co. v Public Utilities Commission*, 475 U.S. 1 (1986), the Court followed *Bellotti* in recognizing the interest of listeners in receiving information and the irrelevance of the speaker in determining whether the speech was protected. *Id.* at 8, 16. It appeared after these two decisions that corporate spending on “political” issues (the speech at issue in *Pacific Gas* was considered political, not commercial) could not be regulated just because of the speakers’ corporate status.
158. *Id.* at 778 n.13.
159. *Id.* at 788 n.26.
160. *Id.* at 789.
election involving candidates, were protected by the First Amendment. The Court determined that the arguments advanced for distinguishing between corporate spending and the spending of individuals and associations were insufficient to justify such a distinction in that circumstance. Two principal justifications were advanced in favor of treating corporate spending differently than individual spending: (1) "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government" and (2) "the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." According to the plurality opinion, these interests—although they might be more important "in the context of partisan candidate elections"—were either not implicated in the ballot referendum amendment or were not served by the regulation.

Justice Powell reasoned that corporate speech in this context should be protected because of its value to the political decision-making process. Given the importance to the process of discussions about candidates, structures and forms of government, and the manner in which government is operated, otherwise protected expression does not lose protection simply because its source is corporate. As the opinion put it, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."

In Bellotti, the Court assumed that corporations should be protected equally in the discussion of governmental affairs—and the holding seemed to assert that the spending "of for-profit corporations was entitled to exactly the same protection that the First Amendment provides for the speech of individuals." Although a majority of the Court has never adopted the argument that the First Amendment should not apply to the corporate form, at least not in the same way that it does to individuals, some commentators have concluded that the Court's

161. Id. at 767.
162. Id. at 787-88.
163. Id. at 787.
164. Id. at 787-88.
166. Redish & Wasserman, supra note 69, at 236.
subsequent decisions implicitly overrule *Bellotti* and hold that "[c]orporate speech is not protected by the First Amendment."\(^{169}\)

C. Assuming a Regulated Market for Campaign Finance Regulation, Corporate Money Threatens

[O]utside of the corporate context, . . . [i]ndividuals are able to advocate unpopular causes with their money and that is not a concern of Title II, but in the corporate context, this Court has drawn a distinction, and that's not a distinction this Court just drew in the *Austin* decision . . . .

It starts really from the Tillman Act in 1907 which recognized that corporations are different. Corporations posed unique risks of corruption, so in 1907, corporations and corporations alone were barred from making contributions to candidates.\(^{170}\)

The Supreme Court's latest major decision on campaign financing appears to endorse the conclusion that efforts by at least some corporations to influence election campaigns may be considered on a constitutionally different basis than efforts by individuals.\(^{171}\) In this way, *McConnell v. Federal Election Commission*\(^ {172}\) follows in the footsteps of *Austin v. Michigan Chamber of Commerce*\(^ {173}\) and *Federal Election Commission v. Massachusetts Citizens for Life*,\(^ {174}\) the first cases to indicate that election-related spending by business corporations might deserve somewhat different protection from that afforded to speech by individuals.\(^ {175}\) These decisions found compelling state interests in

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169. *Id.* at 1074. The argument that corporations are not First Amendment speakers has been expressed as follows:

The right to speak can apply to corporations only if the mythology of their "personness" is accepted as reality. But corporations as such do not speak or think or have ideas. Natural persons alone engage in those activities. Corporate actions are the medium of expression of those natural persons who control them. To restrict "corporate" speech is in reality to restrict the forms of speech available to those specific individuals. To permit unrestricted corporate speech is to grant to certain individuals a special state-created mechanism for speaking.


171. *Kerr, supra* note 64, at 95.


175. Different treatment for corporate participation based on the speaker's corporate status appears to be limited to corporate spending directly related to elections, not, for example, to "political" speech unrelated to election campaigns. *See Developments in the
legislative concerns about the distorting and corrupting effects of corporate money.176

Despite Buckley, Bellotti, and the protests of dissenting justices, treating corporations differently than individuals for the purpose of campaign finance regulation has a long history. Congress first barred direct financial involvement by corporations in election campaigns in 1907 with the enactment of the Tillman Act,177 which was followed in 1925 by the Federal Corrupt Practices Act.178 The goals of these acts were to protect the political process from undue influence and to protect corporate shareholders from having their money used for purposes they might not support. Campaign finance reform efforts continued with the Federal Election Campaign Act of 1971,179 followed by a series of amendments and establishment of the Federal Election Commission in 1974.180

The threatening appearance of corporate money began to re-emerge in Federal Election Commission v. Massachusetts Citizens for Life,181 even though the Court in that case held unconstitutional a federal law barring expressive corporate expenditures in connection with a federal

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176. Professor Richard Hasen has suggested that four cases, including McConnell, make up the “New Deference quartet” in which the Supreme Court showed greater deference to legislative judgments. Richard L. Hasen, Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns, 78 S. CAL. L. REV. 885 (2006) (discussing Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377 (2000); Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm’n, 533 U.S. 431 (2001); Fed. Election Comm’n v. Beaumont, 539 U.S. 146 (2003); and McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003)). In these cases, Professor Hasen contends that the Court has lowered the level of scrutiny, expanded the scope of corruption to include the appearance of corruption, and lowered the evidentiary burden for proving corruption or its appearance. Id. at 886–87. However, with the death of Justice Rehnquist, the retirement of Justice O’Connor, and the addition of two new members to the Supreme Court, Professor Hasen predicts that “further expansion of the New Deference seems the least likely possibility.” Richard L. Hasen, No Exit? The Roberts Court and the Future of Election Law, 57 S.C. L. REV. 669, 677 (2006).


election. The successful as-applied challenge was brought by a not-for-profit corporation, and in upholding the challenge, the Court majority appeared to endorse Congress's power to regulate campaign spending by for-profit corporations. Justice Brennan noted that the restriction might have been permissible if its aim had been to control the "corrosive influence of concentrated corporate wealth" that interferes with the marketplace of ideas. That corrosive influence was not present in the case before the Court because Massachusetts Citizens for Life ("MCFL"), a nonprofit corporation opposed to abortion, was not an enterprise organized for economic gain and so did not pose the danger of corruption. Thus, the First Amendment protected the expression of corporations like MCFL because they were more like voluntary political organizations than business firms.

The Court delineated three characteristics of MCFL that differentiated it from the "business" corporation: (1) it was formed to promote political ideas so its supporters provided money to the corporation only for political reasons; (2) it had no shareholders so its supporters would not suffer economically if they withdrew support because they disagreed with its political activity; and (3) it was not established by a union or business corporation and did not accept contributions from such entities and so was not a conduit for the "type of direct spending that creates a threat to the political marketplace." On the other hand, the Court expressed concern that "the unfair deployment of wealth for political purposes" can corrupt the marketplace not just by bribery, but because "competition among actors in the political arena [will not be true] competition among ideas." Because of the three distinctive features noted, MCFL did not pose the dangers that Congress was worried about when it enacted the legislation.

In *Austin v. Michigan Chamber of Commerce*, the Court found a corporation that did pose the dangers that Congress was worried about. As a result, the Court upheld state legislative limitations on corporate political contributions and spending. Expressing concern about the immense wealth of corporations and about protecting shareholders, a majority in *Austin* upheld a state statute precluding

182. *Id.* at 265.
183. *Id.* at 257.
184. *Id.* at 263.
185. *Id.*
186. *Id.* at 264.
187. *Id.* at 259.
189. *Id.* at 661-65.
190. *Id.* at 668-69.
corporations from making contributions to, or independent expenditures on behalf of, state political candidates.\textsuperscript{191} Although the Michigan Chamber of Commerce was a nonprofit corporation (like MCFL), three-fourths of the corporation's 8,000 members were for-profit business corporations, and its purpose was to promote economic conditions favorable to business.\textsuperscript{192} This allowed the Court to distinguish the Michigan Chamber from MCFL.\textsuperscript{193} Justice Marshall's opinion for the Court recognized an expansion of the government's interest in deterring corruption beyond quid pro quo corruption to "a different type of corruption in the political arena: 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."\textsuperscript{194}

The majority decision in \textit{Austin} surprised commentators—primarily because it diverged so abruptly from the apparent holding in \textit{Bellotti}—and it too was criticized.\textsuperscript{195} Criticism was aimed primarily at the Court's acceptance of Michigan's argument that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption."\textsuperscript{196} Rather than the kind of corruption discussed in \textit{Buckley}—quid pro quo corruption where money is exchanged for votes—the \textit{Austin} Court's rationale seemed to embrace a much broader view of corruption. The expanded rationale was based on the "grant theory" that because state law gives corporations advantages that make it possible for them to accumulate wealth, corporations may be able to use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"\textsuperscript{197} Therefore, the majority found a compelling government interest in preventing corruption and held that the government interest justified restriction of "'the influence of political war chests funneled through the corporate

\textsuperscript{191} Id. at 657-66.
\textsuperscript{192} Id. at 656.
\textsuperscript{193} See id. at 661-65.
\textsuperscript{194} Id. at 659-60. Justice Brennan joined the majority but wrote a separate concurrence emphasizing the importance of the state's interest in protecting dissenting shareholders or members. Id. at 669-78 (Brennan, J., concurring).
\textsuperscript{195} See Prescott M. Lassman, Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce, 78 Va. L. Rev. 759 (1992) for an extended discussion of \textit{Austin}.
\textsuperscript{196} \textit{Austin}, 494 U.S. at 658.
\textsuperscript{197} Id. at 659 (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).
form. It is not only their wealth that justifies the regulation of corporations, according to the majority opinion, it is "the unique state-conferred corporate structure that facilitates the amassing of large treasuries." In these circumstances, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."  

Reasoning diverging from the *Bellotti* rationale can be found in other cases. In *Federal Election Commission v. Beaumont*, where a nonprofit advocacy corporation challenged restrictions on corporate spending and contributions, a majority determined that corporate contributions warrant less protection "since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information." As noted earlier, in his concurrence in *Nixon v. Shrink Missouri Government PAC*, Justice Stevens suggested that money is not speech, but property. And Justice Breyer, in a concurrence joined by Justice Ginsburg, wrote that the case involved "constitutionally protected interests . . . on both sides of the legal equation." Although "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech," on the other side are the constitutionally protected interests of protecting the integrity of elections and making electoral participation a more democratic process. Restrictions on campaign spending "aim to democratize the influence that money itself may bring to bear upon the electoral process."  

IV. McCONNELL: IT'S ONLY MONEY

By the time the Supreme Court decided *McConnell v. Federal Election Commission*, corporate money used in election campaigns had taken

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199. *Id.* at 660.
200. *Id.*
202. *Id.* at 161 n.8 (citations omitted).
204. *Id.* at 396 (Stevens, J., concurring).
205. *Id.* at 400 (Breyer, J., concurring).
206. *Id.*
207. *Id.* at 401.
on a fearsome guise. The majority opinion treated corporate money as the stand-in for all forms of corporate participation in election campaigns—and then depicted this metonymical stand-in as the root from which evil might grow. Given this potential for growing evil, the government had to step in to protect the political process: “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self-protection.” Congress’s understandable goal was to control the spread, “to confine the ill effects of aggregated wealth on our political system.”

Although the Court in Buckley had distinguished between contribution limits (which it said restrained only money) and expenditure limits (which it said restrained protected speech), the majority in McConnell specifically upheld limits on expenditures by corporations and national political parties but claimed not to be overruling Buckley. Even though much of the regulation imposed by the Bipartisan Campaign Reform Act of 2002 (“BCRA”) is not limited to corporations, the majority opinion focused throughout on corporate wealth and influence. Thus, the majority opinion opened by quoting the 1894 observation of Elihu Root in arguing for restriction of corporate campaign contributions before the New York Constitutional Convention: “[The idea is to prevent] the great aggregations of wealth from using their corporate funds . . . [to send members of the legislature to these halls in order to] vote for their protection and the advancement of their

209. When I refer to the “majority opinion,” I am referring to the majority that upheld Titles I and II of BCRA. That majority opinion was a joint opinion of Justices Stevens and O’Connor, joined by Justices Souter, Ginsburg, and Breyer. Id. at 114-224.
210. Id.
211. Id. at 223-24 (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934)).
212. Id. at 224.
216. Justice Kennedy notes that the majority opinion:

opens with rhetoric that suggests a conflation of the anticorruption rationale [used by the Court in earlier decisions] with the corporate speech rationale [under which Justice Kennedy states that the Court “has said that the willing adoption of the entity form by corporations and unions justifies regulating them differently”]. The conflation appears designed to cast the speech regulated here as unseemly corporate speech. The effort, however, is unwarranted, and not just because money is not per se the evil the majority thinks. Most of the regulations at issue . . . do not draw distinctions based on corporate or union status.

540 U.S. at 290-91 (Kennedy, J., concurring in part and dissenting in part).
interests as against those of the public."²¹⁷ The opinion went on to quote Root as characterizing the use of corporate wealth to elect public officials who will then serve corporate interests as "a constantly growing evil" and as claiming that this evil "has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government."²¹⁸ Appearing to agree that corporate speech regulation may derive "from the special nature of the corporate form," the Court was able to justify "regulation of corporate political spending in candidate elections in order to address the potential for real or apparent corruption of democratic processes," and the Court was able to defer to the "legislative judgment that corporate treasuries represent a threat of corruption when deployed directly in candidate elections."²¹⁹

The corporate spending provision upheld by the McConnell majority was contained in Title II of BCRA. It barred "corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections."²²⁰ This provision prohibited corporations from funding any "electioneering communications" from their general treasuries; these communications were defined as advertising that mentioned the name of a federal candidate within sixty days of the election. As in Austin, the Court determined that there is a compelling state interest in regulating "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."²²¹

The McConnell decision was fragmented. Four authors delivered three opinions of the Court. In addition, Justices Scalia, Thomas, Kennedy,
Rehnquist, and Stevens filed separate opinions concurring or dissenting in parts of the majority opinions. 222

A. Money as the Root of Evil

The majority in *McConnell* disassociated corporate money that enters election campaigns from the speech or political participation that the money can buy; in other words, the majority isolated as “only money” what corporations contribute to the electoral process. In this way, the majority was able to treat the corporation’s First Amendment interests as less important than the government’s interests in regulating the adverse effects of corporate money. 223 There are many good arguments that this is the appropriate result—corporations differ from individuals in ways that are important for self-expression or self-government 224—but the majority never acknowledges that it is adopting such an argument.

In the joint opinion of Justices Stevens and O’Connor upholding Titles I and II, the majority first depicted corporate money as the ability to buy influence:

> More than a century ago the “sober-minded Elihu Root” advocated legislation that would prohibit political contributions by corporations in order to prevent “the great aggregations of wealth, from using their corporate funds, directly or indirectly,” to elect legislators who would “vote for their protection and the advancement of their interests as against those of the public.”

The goal of the current legislation was “to purge national politics of what was conceived to be the pernicious influence of “big money” campaign contributions.”

In addition to buying influence, large financial contributions threaten both actual corruption and “the eroding of public confidence in the

222. *Id.* at 109-10.

223. Jaffe, *supra* note 11, at 279. Jaffe claims that “[b]y characterizing as corrupt a candidate’s ‘gratitude’ for supportive political speech, and responsiveness to those who support or generate such speech, the Court indict[s] the fundamental political mechanism—free speech—enshrined in the Constitution.” *Id.* Moreover, by characterizing some influence as undue, the “Court implicitly endorses an influence-rationing, and hence speech-rationing, theory of politics that collapses in the end to a revolutionary one-person-one-voice principle alien to our Constitution.” *Id.*

224. See, e.g., *Meir Dan-Cohen, Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* 109-10 (1986) (describing the corporate right as derivative of the rights of listeners and therefore able to be discarded).


226. *Id.* (quoting Auto. Workers, 352 U.S. at 572).
electoral process through the appearance of corruption."\(^{227}\) Even without corruption, undue influence itself leads the public to buy into the " cynical assumption that large donors call the tune."\(^{228}\) Not only might donors be seeking influence, they might also be interested in "avoiding retaliation, rather than promoting any particular ideology."\(^{229}\) Rather than an opportunity to speak or participate in the political process, campaign fundraisers are "педdling access" to federal candidates and officeholders.\(^{230}\) Because money is the source of evil, including the result that officeholders will vote according to the wishes of their largest contributors, the best means of prevention is "to identify and to remove the temptation."\(^{231}\) In fact, "[i]mplicit . . . in the sale of access is the suggestion that money buys influence."\(^{232}\)

As for the restriction in Title II on spending by corporations and labor unions on "electioneering communications," the majority determined there was a compelling state interest for the restrictions: prior decisions "represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."\(^{233}\) The majority wrote that "[w]e have repeatedly sustained legislation aimed at 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."\(^{234}\) Once money is isolated as the source of potential evil, "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection."\(^{235}\)

B. Money as Speech

Justices Scalia and Thomas viewed corporate money through a different lens. The majority's decision upholding Titles I and II of BCRA constitutes "a sad day for the freedom of speech",\(^{236}\) the legislation

\(^{227}\) Id. at 136 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm'n, 459 U.S. 197, 208 (1982)).
\(^{228}\) Id. at 144 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).
\(^{229}\) Id. at 148.
\(^{230}\) Id. at 150.
\(^{231}\) Id. at 153.
\(^{232}\) Id. at 154.
\(^{233}\) Id. at 205 (quoting Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 155 (2003)).
\(^{234}\) Id. at 205 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).
\(^{235}\) Id. at 223-24 (quoting Burroughs, 290 U.S. at 545).
\(^{236}\) Id. at 248 (Scalia, J., concurring in part and dissenting in part).
itself is "the most significant abridgement of the freedoms of speech and association since the Civil War." Money is not a root of evil, but a necessary means to give voice to corporations. Failing to recognize this, the majority has:

smile[d] with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government . . . . [T]his legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations.  

Not only do these entities have the resources to make their criticism heard, they have much to express: "giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views." Thus, "[a] candidate should not be insulated from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.  

Rather than a compelling state interest, the legislation itself has no goal other than to regulate speech. Justice Scalia criticizes the Court's "cavalier attitude toward regulating the financing of speech" and he explains that "[d]ivision of labor requires a means of mediating exchange, and in a commercial society, that means is supplied by money." Even if the target is money, "where the government singles out money used to fund speech . . . it is acting against speech as such." All corporations are doing is associating with others to disseminate ideas; like those who engage in "singing or speaking in unison," they are "merely pooling financial resources for expressive purposes." Recognizing that one proposition might justify the decision—"that the particular form of association known as a corporation does not enjoy full First Amendment protection"—Justice Scalia responds that "the text of the First Amendment does not limit its application in this fashion . . . [n]or is there any basis in reason why First Amendment rights should not attach to corporate associations."  

237. Id. at 264 (Thomas, J., concurring in part and dissenting in part).  
238. Id. at 248 (Scalia, J., concurring in part and dissenting in part).  
239. Id. at 257-58.  
240. Id. at 258.  
241. Id. at 251-52.  
242. Id. at 252.  
243. Id. at 255.  
244. Id. at 256.
Turning to the marketplace model, Justice Scalia insists that the use of corporate money "to speak to the electorate is unlikely to 'distort' elections" because:

'[t]he premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech."^{245}

Moreover, even if some benefit could be obtained "by muzzling corporate speech [it would be] more than offset by the loss of information and persuasion that corporate speech can contain."^{246} As for the future, Justice Scalia warned that the "federal election campaign laws ... can be expected to grow more voluminous, more detailed, and more complex in the years to come—and always, always, with the objective of reducing the excessive amount of speech."^{247}

Justice Thomas similarly defends the marketplace, saying that:

the fundamental principle that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" is cast aside in the purported service of preventing "corruption," or the mere "appearance of corruption." Apparently, the marketplace of ideas is to be fully open only to defamers, nude dancers, pornographers, flag burners, and cross burners.^{248}

Moreover, Justice Thomas writes:

the "corrosive and distorting effects" described in *Austin* are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that "the ultimate good" has been "reached by free trade in ideas," or that the speaker has survived "the best test of truth" by having "the thought ... get itself accepted in the competition of the market."^{249}

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245. *Id.* at 258-59.
246. *Id.* at 259.
247. *Id.* at 264.
248. *Id.* at 265 (Thomas J., concurring in part and dissenting in part) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam)) (citations omitted).
249. *Id.* at 274 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).
V. NOT MERE RHETORIC

Simply put, lawyers are rhetors. They make arguments to convince other people. They deal in persuasion.\textsuperscript{250}

It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.\textsuperscript{251}

With a firm grasp on the right answer, lawyers and jurists claim to be able to distinguish rhetoric from reality; their right answer is "reality," the other side's argument is "mere rhetoric." Metaphor and metonymy are rhetorical—they do not claim to offer literally true statements about reality (about "how things are"); instead, they offer ways of advancing understanding and persuasion by saying that one thing is, or is like, or is associated with, another.

From \textit{Buckley v. McConnell}, the Supreme Court has projected blurred images of "how things are" with regard to the use of corporate money in election campaigns.\textsuperscript{252} It is true that the Court has not explicitly held that the First Amendment applies differently to corporations than to individuals, and the Court has explicitly held that the government cannot restrict corporate "speech" in connection with ballot referenda (Bellotti). But the Court has also specifically held that the government can sometimes limit the use of corporate "money" for both candidate contributions and campaign expenditures (Austin, McConnell). However, if a nonprofit corporation exists solely for political advocacy purposes, its candidate contributions and campaign spending cannot be restricted.


\textsuperscript{251} Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 684 (1989) (Scalia, J., dissenting). The poetic metaphor to which Justice Scalia objected was the majority's use of the word "corruption" to refer to the distorting effects of wealth on political debate, which is broader than the term's "original meaning"—quid pro quo exchanges of money for votes. \textit{Id.} Elsewhere in the opinion, Justice Scalia describes the majority's decision as an attempt to make one valid proposition out of two invalid ones:

When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption."

Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain. \textit{Id.} at 685.

\textsuperscript{252} \textit{See McConnell}, 540 U.S. at 286 (Kennedy, J., concurring in part and dissenting in part) (the decision purports to follow \textit{Buckley} "but the majority, to make its decision work, must abridge free speech where \textit{Buckley} did not.").
(Massachusetts Citizens for Life). Commentators have suggested that reconciling principles can be found to explain these decisions. But the Court has not explained what they are. As one commentator put it, "[s]omewhere between Austin and McConnell, the Supreme Court has rejected [the holding] that corporate speech is entitled to the same level of protection as individual speech.... Yet the Court has failed to acknowledge, much less explain, the consequences of that implicit overruling."

Rather than trying to distinguish rhetoric from reality, the thesis of this Article is that rhetorical choices should be treated rhetorically. The argument that "money is speech" would therefore be treated as a metaphor—that is, with the understanding that the argument is a way "to cast some light on the subject precisely by departing from literal description" but that it is neither a statement of the truth nor a statement based on explicit similarity. Then, the argument's consequences would be up for grabs, the subject of further argument and persuasion, of further rhetoric.

253. See, e.g., James Weinstein, Campaign Finance Reform and the First Amendment: An Introduction, 34 ARIZ. ST. L.J. 1057, 1064-65 (2002) ("[A] consistent theme emerges: it is not the corporate form that matters but the dangers to the political process presented by business corporations given special privileges by state law to amass wealth, dangers that are not presented by voluntary non-profit corporations organized for political purposes."); Developments in the Law—Corporations and Society, supra note 4, at 2288 ("The reconciling principle seems to be that although a corporation cannot have its speech per se limited simply because it is a corporation, the unique features of a corporation may nonetheless provide sufficiently compelling justifications for some regulations of speech.").

254. McCoy, supra note 168, at 1076.


Consider the statement: "Abortion is murder," a statement that in the abstract, could be intended and received as a literal truth, a metaphor, or an analogy. If it is a metaphor, we know that the speaker believes that abortion is not literally murder, but is seeking to cast some light on the subject precisely by departing from literal description. ("Holmes was a lion of the law." "Michael Jordan is God.") But if the statement is an analogy, the speaker is claiming, and should be understood to be claiming, that abortion really is murder in the relevant respects; there is no acknowledgement that the statement is literally untrue. I believe that this is a large difference between metaphor and analogy, though I must be tentative on this point.

Id.

256. See Black, supra note 24, at 38-39. Black notes that the "representational aspect" of metaphor is similar to that of charts, maps, and other devices for "showing 'how things are,' devices that need not be perceived as mere substitutes for bundles of statement of facts. In such cases we speak of correctness and incorrectness, without needing to rely upon those overworked epithets, 'true' and 'false.'" The interactions between two systems that occur in metaphor can be made explicit and "are then proper subjects for the
Figures of thought cast both light and shadows, the most significant ones being those that keep us from seeing the ways in which their uses ties us to other ways of thinking and deciding. Once we use a metaphor or metonym, the statement becomes part of a larger system of associations, many of which we do not control unless we bring them to the surface. If such figures of thought are pervasive, but mostly unrecognized, and their implications not under control, then pointing them out is useful; it identifies the shadows and illusions, and it shines light on underlying themes. For example, before the decision in *Austin*, David Cole wrote that the Court’s approach “was premised on two metaphors that obfuscated the structural threat posed by the use of concentrated wealth: a laissez-faire model of ‘free trade in ideas’ and ‘quid pro quo’ corruption.” In *Austin*, Cole writes, the Court “effectively adopted a new metaphor: First Amendment antitrust . . . . [This metaphor recognizes] the structural nature of the problem that concentrated wealth poses for freedom of speech.” As a result, the Court “properly upheld limited government intervention designed to correct the distorting effects of corporate wealth.”

The rhetorical claim of this Article is that envisioning corporate spending in election campaigns as “speech” is metaphorical, while referring to it as “only money” is metonymical. The metaphorical understanding relies on a series of assumptions: that the corporation is acting like a person, that the corporate spending is just another way to speak, and that the free market model is the appropriate way to resolve First Amendment issues. On the other hand, using “only money” as the metonymical stand-in displaces attention from the status of corporate contributions and expenditures as activities within a political process.

Constitutional analysis should not depend on such assumptions or displacements. Rather than assume “that the acts of a corporation represent the expression of its constituent individuals,” judicial decision-makers instead should “use the insights of corporate law to ask whether corporate spending implicates individuals’ expressive rights.” Accepting the metaphorical view of the corporation as a person allows the decision-maker to treat the corporation as if it were identical for all purposes to individual human beings. Once corporations were assumed

determination of appropriateness, faithfulness, partiality, superficiality, and the like. Metaphors that survive such critical examination . . . generate insight about ‘how things are’ in reality.” *Id.* at 39.

258. *Id.* at 238-39.
259. *Id.* at 239.
to be the same as other marketplace actors, equal treatment was required—neutrality is a cardinal principle of First Amendment doctrine. 261 Failing to question the aptness of the marketplace of ideas model leads the decision-maker to conclude that the corporation always needs protection from government regulation because its voice is necessary to the debate from which truth will emerge.

Similarly, accepting the metonymical reference to corporate participation in election campaigns as "only money" allows the decision-maker to treat corporate contributions and expenditures as if they were identical for all purposes to corrupting or distorting means of influence such as fraud, coercion, and bribery. Failing to question the aptness of the regulation model leads the decision-maker to conclude that corporate money in election campaigns always needs to be regulated.

Because these processes provide simple answers to legal questions, they divert attention away from the differences among forms of organization and forms of participation in political activity and from the different treatments that perhaps should result. 262 Instead of considering complex questions and making relevant distinctions, decision-makers simply apply to institutions the ideas and rules that grew out of other contexts. 263

Unseen metaphor and metonym allow legal authors to subordinate and suppress underlying questions and assumptions, to assert that the legal process is governed by neutral principles, and to disclaim that the

261. As noted earlier, in a variety of contexts, various Supreme Court Justices have declared that they are unable to differentiate between individuals and institutions or among different kinds of institutions or to restrict the speech of some "to enhance the relative voice of others." Buckley v. Valeo, 424 U.S. 1, 49 (1976). Justice Brennan wrote that any such distinction among institutions is "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union or individual." Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 780 (1986) (Brennan, J., concurring) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781 (1985) (Brennan, J., dissenting)) (brackets in original). Once the speaker is entitled to neutral treatment, the state cannot regulate because "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). But see Frederick Schauer, Principles, Institutions, and the First Amendment, 112 HARV. L. REV. 84 (1998) (suggesting that First Amendment protection for governmental institutions should depend on their particular characteristics); Frederick Schauer, Towards an Institutional First Amendment, 89 MINN. L. REV. 1256 (2005) (same); Randall P. Bezanson, Institutional Speech, 80 IOWA L. REV. 735, 781 (1995) (proposing different protection for individual speech than for institutional speech produced by organizations and corporations).

262. DAN-COHEN, supra note 224, at 44.
263. Id. at 5.
author has personal intent. Uncovering metaphor and metonym helps counteract such subordination and suppression and allows us to proceed thoughtfully and imaginatively. Rather than unthinking acceptance of unstated assumptions and associations, thinking imaginatively about rhetorical choices is a fundamental method of increasing understanding.


265. TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 170 (1983) ("Part of the power" of legal texts is "suppression of what might be called their modes of production.").

266. If, for example, the decision-maker looks beyond the metaphor, it becomes apparent that protection of corporate speech is based almost entirely on the rights of listeners. Because the corporation has no independent rights, "there is nothing to protect corporate speech against limitations whose purpose is to promote the listeners' First Amendment interests." DAN-COHEN, supra note 224, at 109-10. Because the corporate right is derivative, its purpose is to safeguard the rights of others. Id. at 110. If protection of corporate statements is found to be ineffective, "it can always be discarded in favor of better ways to attain the same goals." Id. So, for example, when a regulation is designed to protect the interests of listeners, it should be reviewed less stringently because corporate speech protection is based on the same listeners' interests. Id. at 111.

267. "If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc." KENNETH BURKE, A GRAMMAR OF MOTIVES AND A RHETORIC OF MOTIVES 504 (1962).