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# What is the sound of a corporation speaking? How the cognitive theory of metaphor can help lawyers shape the law

Linda L. Berger\*

## I. Introduction

Metaphor is a **lens**.<sup>1</sup> Through this sentence, I intend to call your attention to metaphor's power to focus, to filter, and to block. Even though this quality could be phrased as a similarity — a metaphor is like a lens because it focuses and filters — metaphor is more than a figure of speech based on similarity. Metaphor is a **map**.<sup>2</sup> Its power to shape and direct your understanding by superimposing a known structure onto a new concept makes metaphor fundamental to thinking and learning.

Metaphor is **conversation**.<sup>3</sup> Its meaning comes from an interaction between the target — an abstract or unfamiliar concept — and the source — something concrete and already known — and between the qualities and properties that each of these entails. The interaction emphasizes certain perspectives of the target and the source, and it expands your view of each. So, for example, the map metaphor draws your attention to the shaping and directing qualities of a map rather than to its depictions of distances and boundaries. The interaction of the word **map** with the word **metaphor** helps you see the map-like qualities of a metaphor: that it guides you along certain paths, that it points you toward particular landmarks, and that it imprints understood forms onto uncharted ideas. The interaction may cast light on the

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\*© Linda L. Berger 2004. Professor of Law, Thomas Jefferson School of Law. I very much appreciate the assistance and comments of my research assistant, Michael Thompson; my colleagues, Marybeth Herald, Carol Parker, Michael Smith; and the anonymous reviewers.

1. The concept of metaphor as a filter or lens comes from Max Black, *Models and Metaphors: Studies in Language and Philosophy* 41 (Cornell U. Press 1962) (“We can say that the principal subject is ‘seen through’ the metaphorical expression — or, if we prefer, that the principal subject is ‘projected upon’ the field of the subsidiary subject.”).

Throughout the article, I will use boldface type when I wish to emphasize that a particular word or phrase is a metaphor or that the argument being made is grounded in metaphor.

2. Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 Emory L.J. 1197, 1212 (2001).

3. See I.A. Richards, *The Philosophy of Rhetoric* 92-94 (Oxford U. Press 1936).

metaphor-like qualities of a **map** as well, revealing that maps shape our views as much as they direct our journeys.<sup>4</sup>

Metaphor is **grounded**.<sup>5</sup> It grows out of our physical beings, our neural networks, and our experiences in the world. Although grounded, metaphor is **imagination**. It springs from our capacity to see one thing as another, giving us legs and eyes to make the leap from there to here.

Together, these concepts form the core of the cognitive theory of metaphor.<sup>6</sup> This theory reconstructs the foundation in which metaphor was seen as merely literary or rhetorical in contrast with the “real” literal and scientific world. In cognitive theory, metaphor is not only a way of seeing or saying; it is a way of thinking and knowing, the method by which we structure and reason, and it is fundamental, not ornamental.

This article will argue that better understanding of metaphor’s cognitive role can help lawyers shape the law. According to cognitive theory, metaphor molds our understanding, our reasoning, and our evaluation in persuasive and invisible ways. If metaphor is not merely a literary device but instead creates meaning, it is a particularly powerful and inescapable method of using language to persuade. To argue against a dominant metaphor, lawyers must be able to uncover it; to argue for a new metaphor, lawyers must be able to imagine it. Studying the work of cognitive researchers builds such perception and imagination: the more we know about the work of the mind, the use of language, and the means of persuasion, the more critical, insightful, and persuasive we can be.<sup>7</sup>

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4. See e.g. Black, *supra* n. 1, at 44 (“If to call a man a wolf is to put him in a special light, we must not forget that the metaphor makes the wolf seem more human than he otherwise would.”)

5. See Richards, *supra* n. 3, at 12 (“We shall do better to think of a meaning as though it were a plant that has grown — not a can that has been filled or a lump of clay that has been moulded.”).

6. For its understanding of cognitive theory and research about metaphor, this article relies primarily on the following books and articles: George Lakoff & Mark Johnson, *Metaphors We Live By* (U. of Chicago Press 1980) [hereinafter Lakoff & Johnson, *Metaphors We Live By*]; George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (U. of Chicago Press 1987) [hereinafter Lakoff, *Women, Fire*]; Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason* (U. of Chicago Press 1987); George Lakoff & Mark Turner, *More than Cool Reason: A Field Guide to Poetic Metaphor* (U. of Chicago Press 1989) [hereinafter Lakoff & Turner, *More than Cool Reason*]; Mark Johnson, *Moral Imagination: Implications of Cognitive Science for Ethics* (U. of Chicago Press 1993); George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (Basic Books 1999) [hereinafter Lakoff & Johnson, *Philosophy in the Flesh*]; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1987) [hereinafter Winter, *Standing*]; Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105 (1989) [hereinafter Winter, *Transcendental Nonsense*]; Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (U. of Chicago Press 2001) [hereinafter Winter, *A Clearing in the Forest*].

7. David M. Zlotnick, *The Buddha’s Parable and Legal Rhetoric*, 58 Wash. & Lee L. Rev. 957, 1008 (2001) (suggesting that legal writers undertake more self-conscious use of rhetoric).

As a way to explore metaphor's role in shaping the law, the article focuses on how a particular lawsuit was influenced by metaphor, in particular, by the primary metaphor that a **corporation is a person** within the more complex metaphorical system suggested by the **marketplace of ideas** model for First Amendment protection. The interaction of these two metaphors has guided the development of First Amendment doctrine protecting the **speech** of corporations. Without these metaphors, statements issued by corporations would not qualify for First Amendment protection; corporations are artificial entities without ideas or views, without a voice to express them, without an interest in self-realization, and without a vote in democratic self-government. Because of these metaphors, it is almost impossible to overcome the assumption that corporations speak and that they should be welcome to engage in debate with other voices in a marketplace free of government regulation.

Rather than to criticize the development of corporate speech doctrine, the purpose of this article is to uncover and examine the use of metaphor in the lawyers' arguments and the judges' decision making.<sup>8</sup> The next section, section II, describes the cognitive theory of metaphor; section III examines the metaphors underlying First Amendment protection for corporate speech; section IV analyzes the use of metaphor in the briefs filed in the U.S. Supreme Court in a lawsuit brought by a consumer activist against Nike, Inc., alleging violation of California's false advertising and unfair competition statutes.<sup>9</sup> Following that analysis, section V of the article will conclude with a series of recommendations for practicing lawyers.

## II. Constructing the cognitive theory of metaphor

Often viewed as "[a] figure of speech in which a term is transferred from the object it ordinarily designates to an object it may designate only by implicit comparison or analogy,"<sup>10</sup> metaphor is seen in cognitive theory as far more meaningful than that. By asking that we imagine a new idea "as" a more familiar one or an abstract concept "as" a concrete object, metaphor enables us to perceive and understand the unfamiliar. Psychological and linguistic researchers believe that metaphor is a powerful imaginative tool because it embodies experience and reflects the way the mind works.<sup>11</sup> Growing out of our physical and mental experience, grounded in a cultural and social context, metaphor shapes thought by mapping onto the new experience the structures, inferences, and reasoning methods of the old.

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8. Unconsidered acceptance of a metaphor can relieve judicial decision-makers "of the obligation of thought." Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 Iowa L. Rev. 995, 1020 (1998).

9. *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003). The Supreme Court dismissed its writ as improvidently granted after receiving the briefs and hearing oral arguments.

10. *The American Heritage Dictionary of the English Language* (William Morris ed., New College Ed., Houghton Mifflin Co. 1979).

11. See generally Lakoff & Johnson, *Philosophy in the Flesh*, *supra* n. 6

## A. The discovery of the anti-foundation

In the first extended philosophical treatment of metaphor, Aristotle sowed the seeds of the fundamentalist view<sup>12</sup> that metaphor is false, dangerous, and suspect.<sup>13</sup> In the *Poetics*, Aristotle wrote that “[m]etaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species, or on grounds of analogy.”<sup>14</sup> This description appears to restrict metaphor to words rather than sentences, to depict metaphor as a departure from literal use (laying the groundwork for the separation of figurative or literary language from literal language), and to suggest that metaphor is based on similarities. Much later, the fundamentalist view of metaphor echoed these concepts; in particular, fundamentalists insisted that you could distinguish between the content and the expressive functions of language and that knowledge could be reduced to a system of literal and verifiable sentences.

This view predominated until the 20th century when I.A. Richards, a literary critic, advanced new arguments. First, he claimed that metaphor is a principle of thought, not just a matter of language. “Thought is metaphoric, and proceeds by comparison, and the metaphors of language derive therefrom.”<sup>15</sup> Second, he wrote, metaphor is not a deviation from the norm, but runs throughout ordinary thought and language; ordinary ways of thinking are structured by metaphor. Third, Richards claimed, metaphor raises issues about the nature of knowledge and reality and should not be treated as a mere rhetorical device or stylistic ornament. Fourth, Richards theorized that metaphor works as “two thoughts of different things active together and

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12. The traditional view is referred to by many names: fundamentalism, foundationalism, positivism, objectivism, rationalism. In these views, rational thought and literal, permanent truth is contrasted with emotion, expression, and subjective or contingent truth. “By ‘fundamentalism’ I mean the view that all meaning is specifiable in sets of literal concepts and propositions that can apply directly to our given experience and that reasoning is a rule-like activity that operates logically and linearly with these concepts.” Mark Johnson, *Law Incarnate*, 67 Brook. L. Rev. 949, 952-63 (2002). Lakoff calls the fundamentalist view “objectivism” because “[m]odern attempts to make it work assume that rational thought consists of the manipulation of abstract symbols and that these symbols get their meaning via a correspondence with the world, objectively construed, that is, independent of the understanding of any organism.” Lakoff, *Women, Fire*, *supra* n. 6, at xii.

13. See Mark Johnson, *Introduction: Metaphor in the Philosophical Tradition*, in *Philosophical Perspectives on Metaphor* 3, 3-4 (Mark Johnson ed., U. of Minn. Press 1981); but see Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 Leg. Writing 113, 118 (1996) (arguing that Aristotle thought that metaphor provides insights not achievable by other means).

14. Aristotle, *The Poetics*, in *The Rhetoric and The Poetics of Aristotle*, 223, 251 (7457b lines 8-11) (Ingram Bywater trans., Random House 1954).

15. Richards, *supra* n. 3, at 94. 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. For an application of this theory to the teaching of legal writing, see Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155 (1999).

supported by a single word, or phrase, whose meaning is a resultant of their interaction.” Metaphor “is a borrowing between and intercourse of thoughts, a transaction between contexts.”<sup>16</sup> Finally, Richards wrote, metaphors not only rely on images and similarities but also express concepts and dissimilarities; because their meaning is a product of a special interaction, they cannot be reduced to paraphrase.<sup>17</sup>

Since the 1980s, the study of metaphor has been much affected by the research and theory of George Lakoff, a professor of linguistics, and Mark Johnson, a professor of philosophy. In a series of books published between 1980 and 1999, Lakoff and Johnson developed a theory called “experientialism.”<sup>18</sup> In this theory, metaphor refers “to a cognitive process by which we use a concrete, experienced source domain to structure and understand a more abstract domain.”<sup>19</sup> These authors claim that the experientialist approach can resolve the concerns of both objectivism, which seeks understanding from objective measurements in the external world, and subjectivism, whose gauges are based on internal or personal standards. The experientialist approach overcomes the separation of humans from their environment by suggesting instead that our understanding of the world is reached through our interaction and “constant negotiation with the environment and other people.”<sup>20</sup>

#### B. Building the framework

Cognitive scientists study thinking: how we gather information and what we do with it.<sup>21</sup> In particular, cognitive science studies the processes involved in thinking, memory, learning, and recall; it attempts to link (1) behavioral levels of response to stimuli to (2) the cognitive level of thought processes to (3) the biological level of neural pathways.<sup>22</sup> Cognitive scientists have found that expert problem solving involves a process of recognizing patterns and retrieving solutions from a stored repertoire acquired by encountering similar problems in the past. Experts appear to understand information and develop interpretations by matching the new information to schema (knowledge structures), scripts, or models that embody prototypical expectations about the world. These structures are cognitively efficient because they allow people to make decisions without complete information.<sup>23</sup> Not only do they make it easier for us to understand simple objects and concepts, they also can give meaning to more complex activities and sequences of events that unfold over

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16. Richards, *supra* n. 3, at 92-94.

17. *Id.*

18. *See supra* n. 6.

19. Winter, *Transcendental Nonsense*, *supra* n. 6, at 1237 n. 25.

20. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 230.

21. Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, 324 (1997).

22. Hunter, *supra* n. 2, at 1204.

23. *See* Lustbader, *supra* n. 21, at 325-327 & n. 20.

time.<sup>24</sup> 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.<sup>25</sup>

1. *What is metaphor's cognitive status?*

At the heart of the new metaphorical theory is that “[m]eaning is neither ‘in us’ nor ‘out there’ but resides in the imaginative processes by which we order experience and make it meaningful.”<sup>26</sup> I. A. Richards first suggested that metaphor had such a cognitive basis in the 1930s. Some thirty years later, in an essay called *Metaphor*, the philosopher Max Black argued that the use of one complex system to select, emphasize, and organize relations in another field was a distinctive intellectual operation, one that could not be explained as comparison or by literal paraphrase, and that in some cases, the use of the metaphor created the similarity in meaning rather than merely reflecting it.<sup>27</sup>

According to Lakoff and Johnson, cognitive science supports the claim that metaphor shapes thinking.<sup>28</sup> Research shows that thinking about abstract concepts is “embodied,” often unconscious, and mostly metaphorical.<sup>29</sup> Thinking is “embodied” because “the same neural and cognitive mechanisms that allow us to perceive and move around also create our conceptual systems and modes of reason.”<sup>30</sup> The mental structures we use are meaningful because they are connected to our bodies and our physical experiences. Basic-level concepts grow out of our “motor schemas and our capacities for gestalt perception and image formation” while primary metaphors projected by our brains allow us to “conceptualize abstract concepts on the basis of inferential patterns used in sensorimotor processes that are directly tied to the body.”<sup>31</sup>

Everyday reasoning is structured and molded by a series of cognitive metaphors. These metaphors are cognitive because they organize thinking and experiential because they arise out of physical experience. Conceptual metaphors are reflected in linguistic metaphors. There is, for example, a communal, cognitive, conceptual metaphor that argument is war; its structure is reflected in linguistic expressions. The metaphor shapes what we do and

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24. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Leg. Educ. 313, 338 (1995).

25. Hunter, *supra* n. 2, at 1212. According to Hunter, analogy differs from metaphor because “analogies 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 1209-10.

26. Winter, *A Clearing in the Forest*, *supra* n. 6, at 106.

27. Black, *supra* n. 1, at 38-44.

28. Support for this claim is provided throughout the Lakoff & Johnson sources cited in *supra* n. 6.

29. Lakoff & Johnson, *Philosophy in the Flesh*, *supra* n. 6, at 3.

30. *Id.* at 4.

31. *Id.* at 77-78.

how we understand what we do; it structures the steps we take when we argue.<sup>32</sup>

[W]e don't just *talk* about arguments in terms of war. We can win or lose arguments. See the person as an opponent. We attack his positions and we defend our own. We plan and use strategies. . . . Many of the things we *do* in arguing are partially structured by the concept of war . . . . There is a verbal battle, and the structure of an argument — attack, defense, counterattack, etc. reflects this.<sup>33</sup>

## 2. How does metaphor work?

The word metaphor is a metaphor derived from experience, coming from the Greek words that mean “to carry over” and suggesting that the meanings and ideas associated with one thing are carried over to another.<sup>34</sup> Before its reconstruction, metaphor was believed to carry over meaning by substitution or comparison. In either view, metaphor was an indirect way of presenting an intended literal meaning, which is that A is like B in certain respects. Both substitution and comparison have been criticized on the grounds that (1) “[a]ny two objects are similar in *some* respects and the comparison view does not explain how we are able to pick out the relevant similarities”; (2) these theories overlook the sometimes crucial role of differences and fail to explain how the metaphorical assertion may be true even if the similarity is false; and (3) many metaphors simply are not based on literal similarities.<sup>35</sup> For example, the conceptual metaphor that **More is Up** is based not on similarity, but on the correlation between adding more things to a pile and seeing the top of the pile go “up.”<sup>36</sup>

A third view, that the source and the target interact to create meaning, was derived from I. A. Richards' argument that meaning is generated from the interaction between two thoughts present at the same time.<sup>37</sup> As Max Black explains this theory, in the metaphor **Man is a Wolf**, the system of associated commonplaces of Man — that is, the properties and relationships commonly believed to be true of man — interacts with the properties and relationships commonly believed to be true of Wolf to produce new meaning.<sup>38</sup> The comparison is not between actual properties but instead between the concepts

32. See Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 Wis. Women's L.J. 225 (1995) for an argument that the metaphor shapes the adversary system and affects those who work within it.

33. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 4.

34. Terence Hawkes, *Metaphor* 1 (Methuen & Co. 1972).

35. Johnson, *supra* n. 13, at 24-27.

36. Lakoff & Johnson, *Metaphors We Live By*, *supra* note 6, at 15-16.

37. Richards, *supra* n. 3, at 93. See also Eva Feder Kittay, *Metaphor: Its Cognitive Force and Linguistic Structure* 13-14 (Clarendon Press 1987) (suggesting that the interactionist theory should be called perspectival because metaphor's function is “to provide a perspective from which to gain an understanding of that which is metaphorically portrayed.”)

38. Black, *supra* n. 1, at 39-44.



that the terms of the metaphor call to mind. Rather than comparing objects to determine what is the same, Black suggests that we use an entire system of commonplaces to filter or screen or organize our conception or our perspective of some other system.<sup>39</sup> The metaphor selects, emphasizes, suppresses, and organizes features of Man by implying statements about Man that normally apply to Wolf.<sup>40</sup> In the interaction view, what is expressed by metaphor can be expressed in no other way; the combination results in a new and unique meaning rather than a mere reflection of something else. Because of this complex interaction, paraphrase does not capture the same insight.<sup>41</sup>

Most recently, Lakoff and Johnson sketched an overall theory suggesting that metaphor works because it is absorbed through long, constant, and unconscious experience.<sup>42</sup> Just by living in the world, people absorb a system of primary metaphors — automatically and involuntarily.<sup>43</sup> Understanding comes about through interaction and negotiation with the physical environment and with other people. Our bodies and our physical and cultural environment structure our experience. As experience recurs, categories are formed. These categories and “gestalts” give us a sense of coherence. Some gestalts come directly from prior interactions with and in the physical environment, but we can understand a new experience metaphorically by using a gestalt from one domain to provide a structure for an experience in another.<sup>44</sup>

Metaphor is a projection and an expansion: “To conceive of understanding as grasping, for example, is to gain a sense of ‘grasp’ as a cognitive operation without losing or supplanting its physical meaning.”<sup>45</sup> Metaphor is imaginative rationality<sup>46</sup> because it brings together the reasoning processes of categorization and inference with the capacity to see one thing as another.<sup>47</sup>

### 3. *Why is metaphor a powerful persuasive tool?*

What we “know” from experience is believed more deeply than anything we learn by listening or reading. Metaphor is persuasive because it draws on

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39. *Id.*

40. *Id.* at 44-45.

41. *Id.* at 46. A contemporary of Black’s, Donald Davidson, claimed to the contrary: “metaphors mean what the words, in their most literal interpretation, mean, and nothing more.” Donald Davidson, *What Metaphors Mean*, *Critical Inquiry* 31, 32 (Autumn 1978), reprinted in *On Metaphor* 29 (Sheldon Sacks ed., U. of Chicago Press 1978).

42. Lakoff & Johnson, *Philosophy in the Flesh*, *supra* n. 6, at 47.

43. *Id.*

44. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 230.

45. Winter, *A Clearing in the Forest*, *supra* n. 6, at 65.

46. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 193.

47. Imagination is the necessary link that explains how through metaphor, “[t]hings or ideas which were remote appear now as close.” Paul Ricoeur, *The Metaphorical Process as Cognition, Imagination, and Feeling*, in *On Metaphor*, *supra* n. 41, at 141, 145-57.

tacit knowledge that has been embedded through unavoidable and repeated experience:

[B]y functioning normally in the world, we automatically and unconsciously acquire and use a vast number of [primary] metaphors. Those metaphors are realized in our brains *physically* and are mostly beyond our control. They are a consequence of the nature of our brains, our bodies, and the world we inhabit.<sup>48</sup>

Although many concepts are literal, such as a “cup” as the object you drink from or “to grasp” as the action of holding, such literal concepts have only a skeletal structure without metaphor.<sup>49</sup>

Because a particular metaphor is physically, environmentally, and culturally embedded, it may be more or less persuasive in certain times and places. So, for instance, the inhabitants of a planet without gravity would not understand the primary metaphor that **Good is Up**. A person living outside a market-based economy would not appreciate a complex metaphorical system based on a **marketplace of ideas**.

Given an appropriately embedded metaphor, the metaphor can import an organizational structure that is not already there.<sup>50</sup> When seeking to understand a new concept or to persuade another about a particular view of that concept, the power to impose a preferred organizational structure is important because we understand best within a context of structures and categories. Metaphor also supplies options.<sup>51</sup> While other organizational schema provide frameworks, a metaphorical system can create and fill in all the slots in the schema. 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.<sup>52</sup>

Finally, metaphor derives much of its persuasive power from the quietness of its presence; unlike an announced position, it is hard to question a position based on assumptions that are rooted in entrenched, but unnoticed metaphors.<sup>53</sup> We understand and reason by drawing on an inventory of structures such as schemas and metaphors. These structures work well because they operate “constantly, unconsciously, and automatically.”<sup>54</sup> To the extent that we use a conceptual schema or a conceptual metaphor, we have already accepted its validity. When someone else uses it, we are predisposed to accept its validity. Barely noticed, very conventionalized schemas and metaphors are rarely questioned.<sup>55</sup>

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48. Lakoff & Johnson, *Philosophy in the Flesh*, *supra* n. 6, at 59.

49. *Id.* at 58-59.

50. Lakoff & Turner, *More than Cool Reason*, *supra* n. 6, at 63-65.

51. *Id.* at 64.

52. *Id.* at 65.

53. *Id.* at 63.

54. *Id.*

55. *Id.*

### C. Supporting the legal extension

For lawyers, the cognitive theory of metaphor promises to make law shaping more imaginative, more human, and more flexible. Like others, many legal thinkers have treated metaphor with skepticism, believing that it is an “imprecise and inessential rhetorical embellishment whose principal, if not only, purpose is to emphasize a logical point and make it more memorable.”<sup>56</sup> By explaining that legal reasoning emerges from basic human capacities, the cognitive theory of metaphor makes legal reasoning more comprehensible.<sup>57</sup> Legal concepts are neither “literal, context-free principles” nor “arbitrary or radically subjective social constructions.”<sup>58</sup> Instead of discovering objective legal rules or concocting subjective ones, we derive legal rules within a complex community. The rules are constrained by the community’s history, culture, norms, institutions, and practices, but the rules also are flexible and able to evolve in response to changes in human and community conditions.<sup>59</sup>

Cognitive theory can help lawyers re-focus on the interaction between two components of judicial decision making: creation of categories and interpretation of rules.<sup>60</sup> According to the fundamentalist view, categories arise logically and rationally; we designate their common properties and then classify things in that way. Categories are “descriptive, definitional, and rigidly bounded.”<sup>61</sup>

In contrast, recent empirical evidence suggests that category formation is much more imaginative and flexible.<sup>62</sup> First, instead of definitional categories, Lakoff found that many categories are radial, consisting of “a central model or case with various extensions that, though related to the central case in some fashion, nevertheless cannot be generated by rule. Because they may derive from the central case in different ways, the extensions may have little or nothing in common with each other beyond their shared connection to the central case.”<sup>63</sup> Second, rather than the traditional “P or not P” view — an item either falls within or outside a category — many categories are marked by prototypes, and category decisions are not all or nothing. That is, some category members are “more P” than others: James Bond is a more prototypical bachelor than Tarzan or the Pope.<sup>64</sup> This is so because of an

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56. Frost, *supra* n. 13, at 132-34 (describing treatises that dismiss the contributions of metaphor to legal reasoning).

57. Johnson, *supra* n. 12, at 952.

58. *Id.*

59. *Id.*

60. A critic of applying cognitive research to law contends that empirical insights cannot yield answers to the philosophical question of how to understand and characterize mental phenomena and that they appear to be of little help in understanding how to be a better lawyer. Dennis Patterson, *Fashionable Nonsense: Book Review Essay*, 81 Tex. L. Rev. 841 (2003).

61. Winter, *A Clearing in the Forest*, *supra* n. 6, at 69.

62. See generally *id.* at 69-86.

63. *Id.* at 71 (relying on Lakoff, *Women, Fire*, *supra* n. 6, at 91-114).

64. Winter, *A Clearing in the Forest*, *supra* n. 6, at 85-86.

“idealized and conventionalized knowledge structure” in which bachelorhood is a category for unmarried men only within the right context.<sup>65</sup>

Third, categories are created and rules are interpreted within larger systems, which Lakoff calls “idealized cognitive models.”<sup>66</sup> An idealized cognitive model is a folk theory or cultural model that is used to organize knowledge. These highly generalized models are grounded in or draw upon direct physical or cultural knowledge; they are idealized because they do not exactly fit actual situations but they capture our normal expectations as they have been shaped by the environment and our cultural practices and conditions;<sup>67</sup> they produce prototype effects. The model allows for inferential connections between many concepts by means of a single structure that is meaningful as a whole. For example, the words buy, sell, cost, are made meaningful by the model of a commercial transaction that relates them together as a structural activity. The use of any of these words evokes an entire picture.<sup>68</sup>

The typical features of an idealized cognitive model include (1) ontological or “being” entities (actors, objects, places, events, states, actions); (2) properties of those entities; (3) time sequences of events and actions; (4) internal structure of events; (5) causal relations between events; and (6) other patterns of inferences and relations among the entities.<sup>69</sup> To illustrate, referring to cyberspace as a place leads to a network of “entailments”: “cyberspace is like the physical world and can be zoned, trespassed upon, interfered with, and divided up into a series of small landholdings.”<sup>70</sup> Similarly, the marketplace of ideas entails a variety of speakers, listeners, arguments, debates, openings, closings, claims, responses, buyers, sellers, markets, products, competition, regulation, 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,”<sup>71</sup> these models also affect how we interpret rules.

These concepts matter to lawyers because they affect their understanding of the law, their analytical ability to critique arguments,<sup>72</sup> and their imaginative ability to craft arguments. Metaphoric language helps both writers and readers think differently about a subject; it thus aids in invention as well as in clarifying an argument. Metaphor helps persuasion by leading an audience to

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65. Lakoff, *Women, Fire, supra* n. 6, at 70-71.

66. *Id.* at 68-76.

67. *Id.*

68. *Id.* at 88.

69. *Id.*

70. Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 Cal. L. Rev. 439, 472 (2003)

71. Winter, *A Clearing in the Forest, supra* n. 6, 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”).

72. See Winter, *Standing, supra* n. 6 (using cognitive theory to “map the underlying conceptual structure of standing law”).

see resemblances and patterns and to make inferences where they might not otherwise be revealed. Because a metaphor is inherently open to interpretation, metaphors can be used to advance uncertain or contradictory ideas.<sup>73</sup> Such “cloaked imprecision” is part of metaphor’s appeal and its peril.<sup>74</sup>

### III. Evolution of a metaphor: an artificial entity becomes a person protected by the First Amendment

The marketplace of ideas in which corporations speak is so central to First Amendment doctrine that it is necessary to remind ourselves that these concepts derive from metaphor: “[t]o ascribe to . . . artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”<sup>75</sup> So conventionalized is the market metaphor that it is difficult to discuss free speech values in the United States without referring to competition among speakers, free trade in ideas, and the power of thought to be accepted in the market. This section examines the contribution of these metaphors to the development of First Amendment protection for corporate speech.

Given a metaphorical target on which the economic market’s structure and assumptions have been mapped, it seems only natural to treat a corporation as an equal competitor. Thus, Justice Stevens, in his concurring opinion to an order dismissing certiorari in *Nike, Inc. v. Kasky*,<sup>76</sup> often referred to the corporation as having person-like qualities: Nike was **besieged** with allegations and **responded** to charges; Nike was **participating** in a public debate about Nike as a good corporate **citizen**.<sup>77</sup>

The metaphorical grant of personhood to corporations has some backing. Treating an object or an abstraction as a person is a basic conceptual metaphor; it allows us to comprehend unfamiliar experiences in terms of familiar “human motivations, characteristics, and activities.”<sup>78</sup> Linguistic analysis indicates that referring to a corporation as if it were a single unit is in line with the way humans generally conceive of institutions made up of a number of individuals.<sup>79</sup> Moreover, personification “works” to some extent; it may seem fair, for example, to make a corporation that does business in a state subject to jurisdiction in that state.<sup>80</sup> But as the metaphor becomes

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73. Zlotnick, *supra* n. 7, at 1007-08.

74. *Id.* at 1008 n. 263.

75. *Pacific Gas & Elec. Co. v. Public Utilities Comm.*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

76. 539 U.S. 654, 123 S. Ct. 2554 (2003).

77. 123 S. Ct. at 2554-55.

78. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 33.

79. Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. Rev. 563, 595 (1987); see also Charles D. Watts, *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. Miami L. Rev. 317, 322-25 (1991).

80. Schane, *supra* n. 79, at 569-72.

entrenched, it entails many assumptions: a corporation can be somewhere; it can act and move, sue and be sued; it can see, hear, speak; it can perceive and understand; it can formulate ideas and adopt views; it can express those ideas and views. And because it can do all these human things, the corporation must be treated as an equal participant in the free market of ideas.

#### A. Theories of corporate being

Because an abstraction cannot sue or be sued, the corporation had to become some “thing.” For legal purposes, as John Dewey wrote, using the word “person” to stand for a corporation could have meant nothing more than designating it as a unit with rights and obligations, with the extent of each right and obligation to be determined by its fit with the nature and characteristics of the unit.<sup>81</sup> This approach could award corporations and other entities legal capacity but still allow courts to make distinctions so that corporations would be treated as persons in some respects and as non-persons for other purposes.<sup>82</sup> Because it does not assume that these entities are persons in all respects, such a theory is more useful than those theories that carry their own consequences; it allows the decision-maker “to reject some undesirable consequences of legal personality.”<sup>83</sup>

Instead of such an approach, three inherently consequential theories of corporate being have been followed: treating the corporation as an artificial entity that is a creature of the state; treating the corporation as a group aggregating a number of individuals; and treating the corporation as a real and discrete entity similar to a person.<sup>84</sup>

Viewed as an artificial entity that is purely a creation of state statute, the corporation receives little First Amendment protection; 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. 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.”<sup>85</sup>

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81. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655, 656 (1926).

82. Martin Wolff, *On the Nature of Legal Persons*, 216 L.Q. Rev. 494, 511 (1938).

83. *Id.* at 512.

84. In corporations scholarship, the current metaphor apparently frames the corporation as a “nexus of contracts.” See generally Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. Davis L. Rev. 779 (2002).

85. 17 U.S. 518, 636-37 (1819).

Viewed as a group of individuals or as a real and discrete entity with attributes similar to those of a person, a corporation gains First Amendment rights that are indistinguishable from those of individuals.<sup>86</sup> Under the group theory, courts emphasize that human individuals constitute the corporation, with the corporation protecting those individuals' rights.<sup>87</sup>

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. Without examination, the Supreme Court has consistently followed this approach to corporate property rights.<sup>88</sup> 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.<sup>89</sup> One of the other five defenses was found successful. 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 of opinion that it does."<sup>90</sup> Because the court reporter included a commentary note stating that the defendant corporations were persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution, the case now stands for a long-established proposition: that corporations are persons.<sup>91</sup>

More debate accompanied the extension of individual liberty rights to corporate persons.<sup>92</sup> In the 19th century, courts usually rejected attempts to grant corporations rights that seemed to derive from exclusively human interests. In the 20th century, though some justices pointed out the irony of extending to corporations the protections that were intended to eliminate racial discrimination,<sup>93</sup> the Supreme Court incrementally did so. Corporations count as persons for the Fourth Amendment's protection against unreasonable searches, the Fifth Amendment's protection against double jeopardy, and the Seventh Amendment's right to trial by jury in civil cases.<sup>94</sup>

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86. Watts, *supra* n. 79, at 362-63.

87. 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).

88. Watts, *supra* n. 79, at 336-40.

89. *Santa Clara Co. v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886).

90. See Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* 104 (Rodale 2002).

91. *Id.* at 107-09.

92. Student Author, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1751-52 (2001).

93. See e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 563, 578 (1949) (Douglas, J., dissenting); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting). According to Justice Black, fewer than one-half of one percent of the cases in which the Court had applied the Fourteenth Amendment invoked it in protection of African-Americans; in more than 50 percent, the plaintiffs asked that its benefits be extended to corporations. *Id.* at 89-90.

94. See the cases listed in Student Author, *supra* n. 92, at 1752 n. 49 and Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 664-65 (1990).

Whether viewed as metaphor or as a convenient legal fiction, this concept has grown “to influence or even control how we think or refuse to think about basic matters.”<sup>95</sup>

### B. Theories of corporate speaking

In its early applications, the First Amendment protected individuals with unpopular or dissenting views. Under current commercial speech doctrine, the First Amendment protects the speech rather than the speaker.

The first step in this evolution was to assume that there are only two categories of speakers, private speakers and the government, and that the First Amendment is intended to protect all private speakers against government regulation.<sup>96</sup> If those assumptions are true, corporations must fall into the private category and 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 *Central Hudson*, a corporation’s advertising can be viewed as “expression by an informed and interested group of persons of their point of view.”<sup>97</sup>

The next step was to assume that spending money is protected speech because it is one way to speak. Without this equation of speech and money, “an issue might have arisen as to whether [or how] a corporation even could speak.”<sup>98</sup> Third, through the market metaphor, the rights of listeners became as important as the rights of speakers. By taking these three steps, the Supreme Court moved from protecting the rights of individuals to speak freely to protecting speech itself, thus supporting the free market of information by prohibiting the government from limiting the stock of information available to consumers and voters.<sup>99</sup>

As a result, although in 1942 the Court had ruled that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising,”<sup>100</sup> by 1976 the Court was extending 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.”<sup>101</sup> The flow of information to consumers remains the primary rationale for protecting corporate speech; this is so even though advertising research suggests that providing information is not the best way to persuade consumers to buy.<sup>102</sup>

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95. Aviam Soifer, *Reviewing Legal Fictions*, 20 Ga. L. Rev. 871, 877 (1986).

96. Greenwood, *supra* n. 8, at 1014-20.

97. *Central Hudson v. Public Service Commn.*, 447 U.S. 557, 581 (1980).

98. Greenwood, *supra* n. 8, at 1015.

99. *Virginia State Bd. of Pharmacy v. Virginia Citizens’ Consumer Council*, 425 U.S. 748, 783 (1976).

100. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

101. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

102. Sarah C. Haan, Student Author, *The ‘Persuasion Route’ of the Law: Advertising and Legal Persuasion*, 100 Colum. L. Rev. 1281, 1297-98 (2000).



In *First National Bank v. Bellotti*,<sup>103</sup> the Court explicitly held that the First Amendment protects corporate speech by relying on the rights of listeners in the market. In *Bellotti*, a state criminal statute prohibited corporate contributions or expenditures to influence referenda not affecting the corporation's business or assets. Writing for the majority, Justice Powell rephrased the question; it was not whether corporations have First Amendment rights. Instead, because the First Amendment "serves significant societal interests," the question was whether the Massachusetts statute "abridges expression that the First Amendment was meant to protect" or "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."<sup>104</sup> Because speech about the referendum issue was core First Amendment speech, "[t]he inherent worth of 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."<sup>105</sup> Justice Powell acknowledged that some "purely personal guarantees" of the constitution were limited to individuals<sup>106</sup> but was unswayed 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."<sup>107</sup>

After *Bellotti*, protected speech included a corporation's spending of money for lobbying, political advertisements, and other attempts to influence the political process.<sup>108</sup> Only in the area of contributions and spending directly associated with political campaigns are corporations found to have speech rights derivative of and different from those of citizens.<sup>109</sup>

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103. 435 U.S. 765 (1978).

104. *Id.* at 775.

105. *Id.* at 777.

106. *Id.* at 778 n. 4.

107. *Id.* at 804-05 (White, J., dissenting).

108. See Martin H. Redish & Howard W. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 243 (1998) (arguing that the Court's decisions protecting corporate speech are a better fit with First Amendment theory than the campaign financing decisions which have shown some "hesitancy to protect profitmaking corporate speech").

109. See Student Author, *Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 Harv. L. Rev. 2272 (2004) (noting that commercial speech appears to have gained greater protection even as the Supreme Court approves greater regulation of corporate political speech). In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld limitations on corporate political contributions and spending. Worried about the immense wealth of corporations and about protecting shareholders, a majority in *Austin* said that a corporation's First Amendment rights are not the same as individuals' and upheld the state statute precluding corporations from making contributions to or independent expenditures on behalf of state political candidates. 494 U.S. at 657-66. In *McConnell v. Federal Election Commn.*, 124 S. Ct. 619 (2003), the Court — in six opinions covering 133 pages — upheld legislation limiting campaign spending by corporations and national political parties. In *Federal Election Commn. v. Beaumont*, 123 S. Ct. 2200 (2003), where a nonprofit advocacy corporation challenged restrictions on corporate spending and contributions, a majority found corporate contributions to warrant less protection "since corporations' First Amendment

## C. Metaphors for free expression

Just as corporations were not always persons protected by the First Amendment, First Amendment values were not always viewed through the prism of the free market. John Milton expressed the relationship between truth and falsehood as a battle between foes, as in the primary metaphor that Argument is War; he also characterized truth as a free flowing stream of information, echoing the primary metaphor that Knowledge is Water.<sup>110</sup> John Stuart Mill used the battle metaphor, recognizing that the concept that truth always triumphs “is one of those pleasant falsehoods . . . which all experience refutes.”<sup>111</sup> Nonetheless, the result of silencing expression is “that it is robbing the human race . . . . 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.”<sup>112</sup>

This “truth-based conception of free speech, organized around the ‘free flow’ and ‘open encounter’ metaphors, provided only a limited model for First Amendment doctrine.”<sup>113</sup> Dissenting from the affirmance of a conviction under the espionage act, Justice Holmes wrote 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.”<sup>114</sup> Although Justice Holmes wrote about the “free trade in ideas” and “the competition of the market” in 1919, it was Justice Brennan who first wrote about the “marketplace of ideas” in 1965.<sup>115</sup> 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.”<sup>116</sup>

Although the metaphor was new, it contained basic conceptual metaphors, the **Mind is a Container** and **Ideas are Objects**. These basic metaphors in turn help generate new and different metaphors when the writer specifies a particular container or object such as **The mind is a machine**,

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speech and association interests are derived largely from those of their members and of the public in receiving information.” *Id.* at 2210 n. 8 (citations omitted).

110. See Winter, *A Clearing in the Forest*, *supra* n. 6, at 267, 397 n. 23 (quoting John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644) in *The Prose of John Milton* 265, 31 (J.M. Patrick ed., 1967)).

111. John Stuart Mill, *On Liberty* 30-31 (Stefan Collini ed., Cambridge U. Press 1989).

112. *Id.* at 20.

113. Winter, *A Clearing in the Forest*, *supra* n. 6, at 268.

114. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).

115. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (“It would be a barren marketplace of ideas that had only sellers and no buyers.”).

116. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 1986 Yale L.J. 886, 894. See also Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* 49-72 (S. Ill. U. Press 1992).

**ideas are products.**<sup>117</sup> They then combine 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.”<sup>118</sup> 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 that constitute our modern notion of free trade.”<sup>119</sup>

The market metaphor is so common that its new-ness is surprising. Although some authors attribute the metaphor to Milton, he used the market image much differently to argue against licensed printing: “truth and understanding are not such wares as to be monopoliz’d and traded in by tickets and statutes, and standards.”<sup>120</sup> The current market metaphor emerged from a particular time and place. Justice Holmes envisioned a free trade in ideas at a time of laissez faire capitalism, when people might easily accept that truth, like economic progress, could emerge from market competition. “Thus, the discontinuity between the framers’ First Amendment (with its focus on the prohibition of prior restraints and the introduction of truth as a defense to charges of seditious libel) and the modern First Amendment (with its more libertarian emphasis) is a function of the radically different social contexts and the distinctive concepts they each make possible.”<sup>121</sup> The Holmes’ concept that competing ideas and robust debate will lead to the discovery of truth has been joined in the marketplace by images of debate as essential to self-government.<sup>122</sup>

#### D. Why the metaphors matter

Personhood has been “a conclusion, not a question.”<sup>123</sup> Referring metaphorically to 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. Referring metaphorically to the marketplace of ideas suggests that the corporation needs protection from government regulation because its voice is necessary to the debate from which truth will emerge.

Because personhood provides a simple answer to the question of how to regard a corporation, it diverts attention away from the differences among

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117. Winter, *A Clearing in the Forest*, *supra* n. 6, at 271.

118. *Id.* at 272.

119. *Id.*

120. *Id.* (quoting Milton, *supra* n. 110, at 303-04).

121. *Id.* at 273.

122. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 3-4.

123. Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. Rev. 1425, 1466 (1992).

forms of organization and from the different treatments that should result.<sup>124</sup> Instead of considering complex questions and making relevant distinctions, decision-makers simply apply to institutions the ideas and rules that grew out of an individualistic context.<sup>125</sup> Moreover, the declaration of personhood not only carries rights and obligations but also shapes social values and can diminish the rights of others.<sup>126</sup> Conferring Bill of Rights protections on corporations legitimizes various acts and functions of corporations. This message reflects existing values, influences future behaviors, and generates new values. Finally, granting corporations such protection poses a greater danger if “the extension of corporate constitutional rights [becomes] a zero-sum game that diminishes the rights and power of real individuals.” If that is the case, “[t]he corporate exercise of first amendment rights frustrates the individual’s right to participate equally in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment.”<sup>127</sup>

As for why corporate personhood is inappropriate for First Amendment purposes, scholars have suggested many reasons. First and most important, protecting corporate speech fails to advance the purposes of freedom of expression: “assuring individual self-fulfillment,” “advancing knowledge and discovering truth,” participating in “decision making by all members of society,” and “achieving a more adaptable and hence a more stable community.”<sup>128</sup> Each of these values is “predictably promoted by guaranteeing the individual liberties.”<sup>129</sup>

Individual self-realization and self-determination are not furthered by corporate speech.<sup>130</sup> Because corporate speech is in some instances required by law, it cannot be regarded as a result of autonomous decisions.<sup>131</sup> When the individual liberty value does not apply, “the First Amendment interest [should be] limited to the artifact of the speech itself and . . . made subject to the larger governmental regulatory objectives related to accuracy, equality,

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124. Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* 44 (U. of Cal. Press 1986).

125. *Id.* at 5.

126. Student Author, *supra* n. 92, at 176.

127. Mayer, *supra* n. 94, at 658.

128. Thomas I. Emerson, *The System of Freedom of Expression* 6-9 (Random House 1970); see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255 (protection is focused on “thought and communication by which we ‘govern’ ”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521, 527 (protection is intended to check “abuse of power by public officials”); Frederick Schauer, *Free Speech: A Philosophical Enquiry* 81-86 (Cambridge U. Press 1982) (protection based mostly on distrust of governmental power).

129. C. Edwin Baker, *Human Liberty and Freedom of Speech* 47-48 (Oxford U. Press 1989).

130. See Greenwood, *supra* n. 8, at 1055-67; see also Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. Ill. L. Rev. 763, 779, 804-11 (arguing that the character evidence rule should not be applied to corporations because its purpose is to protect autonomy and dignity interests not shared by corporations).

131. Greenwood, *supra* n. 8, at 1002. Greenwood argues that publicly traded business corporations “are legally and practically barred from speaking on behalf of any human being.” *Id.* at 1003.

fairness, access, and utility.”<sup>132</sup> Given that the corporate right derives from the listeners’ rights, it is at least possible that the free flow of information and debate necessary for enlightened self-government would be improved if the government suppressed some corporate statements.<sup>133</sup>

Second, corporations are properly viewed as the objects of political actions, not the subjects, and so are not the kinds of political actors crucial to democratic self-government.<sup>134</sup> Third, the Court has assumed that the corporation needs protection from the state rather than examining corporate functioning and corporate law and then making a considered judgment about whether constitutional norms designed to protect individuals from the state should apply as well to powerful organizations.<sup>135</sup> Fourth, large business corporations are not groups of individuals who have joined together for the purpose of individual expression and they are not intended to be instruments of such expression.<sup>136</sup>

Like the assumption of corporate personhood, unquestioning acceptance of the market metaphor carries significant consequences. For example, Prof. Cass Sunstein believes that the marketplace 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.”<sup>137</sup> Others believe that the structure and operation of the market dims its claim to provide and protect a range of voices: “the marketplace’s inevitable bias supports entrenched power structures or ideologies. . . . [P]rotection of expression alone does not guarantee an environment where new ideas, perceptions, and values can develop.”<sup>138</sup> Moreover, because corporate actions reflect the expression of only those persons who control the corporation, “[t]o permit unrestricted corporate speech is to grant to certain individuals a special state-created mechanism for speaking.”<sup>139</sup>

Once corporations are assumed to be the same as other marketplace actors, equal treatment is required. Various Supreme Court justices have declared that they are unable to differentiate between individuals and

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132. Randall P. Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735, 781 (1995).

133. Greenwood, *supra* n. 8, at 1069.

134. *Id.* at 1001.

135. *Id.* at 1006-08.

136. Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 790 Wash. U. L.Q. 1, 39-79 (2001) (pointing out that a large publicly held corporation and a closely held corporation may be completely different in the extent to which shareholders and other corporate constituents participate in decisions).

137. Cass R. Sunstein, *Democracy and the Problem of Free Speech*, xviii (The Free Press 1993).

138. Ingber, *supra* n. 122, at 85-86.

139. William Patton & Randall Bartlett, *Corporate ‘Persons’ and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 Wis. L. Rev. 494, 497.

institutions or among different kinds of institutions<sup>140</sup> or to restrict the speech of some “to enhance the relative voice of others.”<sup>141</sup> Justice Brennan wrote that any such distinction among institutions is “irreconcilable with the fundamental First Amendment principle that “[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.”<sup>142</sup> 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.”<sup>143</sup>

This neutrality principle supports the argument that corporations must be protected persons under the First Amendment: refusing to protect them would subject newspapers, magazines, book publishers, and other similar corporations to restrictions on their publications. This problem could be avoided if, for example, the Court were to adopt Justice Potter Stewart’s position that the Press Clause is a structural provision designed to protect an institution that serves a particular function in self-governance.<sup>144</sup> In that way, even if most corporate statements were excluded from First Amendment protection under the free speech clause, media corporations could still be protected under the freedom of the press clause. Most justices have, however, rejected any claim that media corporations can receive any greater protection than other corporations.<sup>145</sup>

Those who favor First Amendment protection for corporations rely on the value of the information they bring to the market: corporations are said to have a greater interest in and more knowledge and expertise about government actions on issues such as the economy. “To exclude corporate expression from the scope of the free speech clause, then, would be unwisely to shut out from public debate a substantial amount of relevant, provocative, and potentially vital information and opinion on issues of fundamental importance to the polity.”<sup>146</sup> Nonetheless, 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.”<sup>147</sup> Because the corporate right is derivative, its purpose is to

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140. *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); Bezanson, *supra* n. 132 (proposing different protection for individual speech than for institutional speech produced by organizations and corporations)

141. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

142. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 780 (1986) (Brennan, J., concurring) (quoting *Bellotti*, 435 U.S. at 777).

143. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

144. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975).

145. *See e.g. Bellotti*, 435 U.S. at 797-802 (Burger, C.J., concurring).

146. Redish & Wasserman, *supra* n. 108, at 236.

147. Dan-Cohen, *supra* n. 124, at 109-10.

safeguard the rights of others. 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.”<sup>148</sup> 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.<sup>149</sup> In *Bellotti*, for example, the government argued that corporate speech should be limited because corporate wealth and size threatened to drown out other views and thus to undermine the role of the individual in the electoral process.<sup>150</sup>

#### IV. Uncovering metaphor

Corporations like Nike rely on “hired metaphorists” whose job it is “to make some possession stand for happiness or well-being.”<sup>151</sup> Beginning in the 1990s, critics of Nike’s labor practices in foreign countries urged boycotts endangering such persuasive efforts. One critic took advantage of California’s laws allowing private individuals to sue to enforce prohibitions against false advertising and unfair competition.<sup>152</sup>

In *Kasky v. Nike*, Marc Kasky alleged “that Nike, for the purpose of inducing consumers to buy its products, made false representations of fact about the conditions under which they are made.”<sup>153</sup> According to Kasky’s brief in the U.S. Supreme Court, Nike made six false representations in news releases and letters to editors and collegiate athletic program directors: (1) “that its products are manufactured in compliance with applicable local laws and regulations governing wages and working hours”; (2) “that the average line-workers in the factories are paid double the applicable local minimum wage”; (3) “that the workers receive free meals and health care”; (4) “that Nike ‘guarantee[s] a living wage for all workers’ ”; (5) “that the workers are protected from corporal punishment and abuse”; and (6) “that working conditions in the factories are in compliance with applicable local laws and regulations governing occupational health-and-safety and environmental standards.”<sup>154</sup>

Whether part of a political debate or not, each of these representations is the kind of statement that can, more or less, be proven true or false. They therefore seem subject to testing under the California statutes that proscribe “unfair, deceptive, untrue or misleading advertising” and the dissemination of

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148. *Id.* at 110.

149. *Id.* at 111.

150. 435 U.S. at 787-89. As noted earlier, this argument was successful in later campaign financing cases. See *supra* n. 109.

151. Wayne C. Booth, *Metaphor as Rhetoric: The Problem of Evaluation*, in *On Metaphor*, *supra* n. 41, at 47, 67.

152. Cal. Bus. & Prof. Code Ann. §§ 17200, 17500 (West 2002).

153. Br. of Respt. at 1, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1844849) [hereinafter Br. of Respt.].

154. *Id.* at 4-5.

any statements that are “untrue or misleading.”<sup>155</sup> This language has been interpreted to bar “not only advertising which is false, but advertising, which although true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public.”<sup>156</sup>

Nike’s lawyers demurred to the complaint on First Amendment and other grounds, claiming that its statements were absolutely protected as part of a debate about a public issue.<sup>157</sup> The Superior Court sustained the demurrer and dismissed the lawsuit; the California Court of Appeal affirmed the dismissal. The California Supreme Court reversed, concluding that Nike’s representations were commercial speech and thus subject to regulation because “the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products.”<sup>158</sup> The U.S. Supreme Court granted certiorari; thirty-four briefs, including thirty-one amicus briefs, were filed<sup>159</sup> and oral arguments were heard; several months later, the Court dismissed the writ as improvidently granted;<sup>160</sup> the parties subsequently settled, with Nike agreeing to pay \$1.5 million to an advocacy group.<sup>161</sup>

While Kasky, the consumer critic, could have portrayed the lawsuit as a struggle between truth and falsehood or a narrative of David challenging Goliath, Nike’s lawyers and its supporters metaphorically cast the case as an attempt to hobble one speaker in a debate on a public issue. In this debate, Nike was not only a speaker with a right to express its views and ideas, but a uniquely knowledgeable speaker with important and valuable information that would otherwise be withheld from listeners. Even though Nike “spent almost \$1 billion ‘to promote, advertise and market’ its products” in 1997,<sup>162</sup> the briefs of Nike and its supporters expressed concern that Nike might be placed at a competitive disadvantage if the California statutes were to be applied. Nike’s consumer critics would not have to be truthful in their statements (apparently assuming that Nike’s lawyers could not establish the elements of defamation) while the California statute would allow Nike to be found liable for false and misleading statements disseminated on its behalf.

Even though the California Supreme Court decision had seemed on the verge of deciding that some kinds of speakers were less protected, both parties assumed in the U.S. Supreme Court that Nike was a speaker whose

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155. Cal. Bus. & Prof. Code Ann. §§ 17200, 17500.

156. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 948 (2002).

157. *Id.*

158. *Id.* at 946.

159. For a study of the influence of amicus briefs filed in the Supreme Court, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000).

160. *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003).

161. *Nike Settles Lawsuit Over Labor Claims: The company will pay \$1.5 million in a case that used California law to contest the firm’s statements*, L.A. Times C1 (Sept. 13, 2003).

162. Br. of Respt., *supra* n. 153, at 2.



representations might be protected by the First Amendment. Briefs supporting Nike relied on its personhood to blur or obliterate any distinction between a corporation such as Nike and an individual or a group of individuals who had banded together for political purposes; they used the market metaphor to liken Nike's role in the marketplace to the media's watchdog function and to argue that any error in Nike's representations would be corrected by other speakers in the market. Briefs supporting Kasky, although often accepting the speaking role Nike assigned itself, sought to restrict the protection of the marketplace of ideas to truthful commercial speech.

A. The corporation as a person

Some briefs depicted Nike "as" any other speaker, and in particular, as some of the more celebrated protest speakers of the past. Linking the personhood and market metaphors, Nike's own brief most often portrayed the corporation as a participant in a public debate.

1. *The corporation as indistinguishable from other protected speakers*

Amicus briefs filed on behalf of Nike depict the corporation "as" other protected speakers, from the founding fathers who had commercial interests, to the publishers of an advertisement in the New York Times protesting a "wave of terror" during the civil rights protests, to the NAACP in its encouragement of a boycott against discriminatory merchants and the labor union organizers who organized boycotts and urged union membership.<sup>163</sup> These briefs erase distinctions between corporations and individuals, between corporations and groups which have banded together specifically for speech purposes, and between corporations and the newspapers which publish individuals' speech.

First, Nike is portrayed "as" an individual speaker with commercial interests. According to the brief filed by the Business Roundtable,<sup>164</sup> the question presented is whether "**self-interested commercial speakers**" should be able to take part in public debate. The answer comes from American tradition: "From the Stamp Act to the debate over the structure and ratification of the Constitution, many of the most prominent contributors to the founding generation's debates were 'self-interested' commercial actors who addressed matters directly affecting their commercial interests." Throughout American history, "**speakers engaged in commerce,**

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163. For example, Nike is compared to the organizers of a labor boycott in *Thornhill v. Alabama*, 310 U.S. 88 (1940); the organizers of a civil rights consumer boycott in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); and the labor organizer who challenged a Texas statute requiring organizers to register before soliciting workers to join a union, *Thomas v. Collins*, 323 U.S. 516 (1945).

164. Amicus Br. of the Business Roundtable, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 835213) [hereinafter Amicus Br. of the Business Roundtable].

**advancing facts and ideas** that promote their economic self-interest, have long made, and continue to make, valuable contributions to debate on matters of public concern.”<sup>165</sup> Leading up to the Declaration of Independence, British economic restrictions such as the Proclamation of 1763, the Stamp Act of 1765, the Townshend Act of 1767 resulted in “institutional opposition to British policies, and the increasing self-identification of the colonists as having independent political interests.” Included among the “‘long train of abuses and usurpations’ enumerated in the Declaration of Independence were ‘cutting off our Trade with all parts of the world’ and ‘imposing Taxes on us without our Consent.’”<sup>166</sup> Speakers with commercial interests were “essential **participants in the resulting political debate**. . . . [T]he leading editorialists were individuals drawn from the commercial and professional classes.”<sup>167</sup>

The debate about the constitution also involved speakers with commercial interests. “Included in the Continental Congress and the Constitutional convention were many landholders, successful merchants, security-holders, and professionals . . . . [C]ommercial considerations were inseparable from statements of genuinely held political and ideological views.”<sup>168</sup> Not only are corporations like these individual commercial actors important throughout our history, corporations also have taken on the watchdog role that once was taken by the press: if “**corporations were inhibited from speaking freely** on public issues of concern to them — the people would lose an important counter-weight to the power of government, and the constitutional system of democratic and political checks and balances would suffer commensurately.”<sup>169</sup>

Next, Nike’s brief and several amicus briefs depict Nike “as” the speakers in *New York Times v. Sullivan*.<sup>170</sup> In *New York Times*, several individuals and groups purchased a full-page advertisement in the New York Times protesting a “wave of terror” against blacks involved in nonviolent civil rights demonstrations in the south; the advertisement asked for contributions to continue the fight for racial justice.<sup>171</sup> The lawsuit was one of several filed against large media organizations in Southern states,<sup>172</sup> and the Alabama ruling allowing the suit to go forward was viewed as an attempt to use state law to regulate media coverage of the desegregationist side of the civil rights movement.<sup>173</sup> Asserting that many of the allegedly factual statements included in the advertisement were inaccurate, the elected city commissioner of Montgomery sued the New York Times Co. and four individuals who signed

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165. *Id.* at 5.

166. *Id.* at 5-6.

167. *Id.* at 6.

168. *Id.* at 8.

169. *Id.* at 3.

170. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

171. *Id.* at 256-57.

172. *Id.* at 278 n. 18.

173. See Anthony Lewis, *New York Times v. Sullivan Reconsidered*, 83 Colum. L. Rev. 603, 605 (1983).

the ad. The Supreme Court held that the newspaper could not be found liable for defamation without proof of what became known as actual malice. Allowing judgments against the media for mere negligence in publishing defamatory matter about public officials would interfere with “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>174</sup>

According to the amicus brief filed by three advertising industry trade organizations, *Nike v. Kasky* “is one of the most important free speech cases” since *New York Times*.<sup>175</sup> Nike may be even more deserving of protection than the *New York Times*: “Like the *New York Times* case, there is a claim that a corporate speaker has used commercial speech. Unlike *New York Times* . . . in this case there was no attempt to raise funds, no claim of harm, and the Petitioner was responding to public statements attacking it.”<sup>176</sup> Similarly, the amicus brief filed by a number of media groups likens Nike to the speakers in *New York Times*.<sup>177</sup> The lawsuits are similar, according to this brief, because both were based in part on an editorial advertisement and both were part of a concerted strategy to chill press coverage of one side of a public debate.

Less directly, another amicus brief also equates Nike’s statements to the speech of the publishers of books, newspapers, and magazines.<sup>178</sup> This brief argues that the Court has long recognized that “neither a profit motive nor a corporate source warrants lesser First Amendment protection for the **speech of a business entity**.”<sup>179</sup> Because “[t]he most frequently invoked premises of First Amendment protection apply no less clearly when the **speaker happens to be a business entity**,”<sup>180</sup> the quality of protection for individual and corporate speakers must be equal. Given that principle of equal treatment, the California Supreme Court engaged in impermissible viewpoint discrimination when it “**hobbl[ed] the corporate speaker in any debate** over issues of public importance.”<sup>181</sup>

Third, Nike is described “as” an organization of individuals. In their opening brief, Nike’s lawyers obliquely claim that Nike’s statements about working conditions in its factories are indistinguishable from the protest speech of organizations: “If it were the state’s role to assure that listeners reach the decisions it regards as best informed, in commerce or elsewhere, lessened First Amendment protection would necessarily apply to speech

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174. *New York Times*, 376 U.S. at 270.

175. Amicus Br. of the Association of National Advertising et al., at 1, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 835112).

176. *Id.*

177. Amicus Br. of Forty Leading Newspapers, Magazines, Broadcasters, Wire Services, and Media-Related Professional and Trade Associations at 379, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 835613) [hereinafter Amicus Br. of Forty Leading Newspapers].

178. Amici Br. of the Thomas Jefferson Center for the Protection of Free Expression and the Media Institute at 7, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1192678) (relying on *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

179. *Id.* at 7.

180. *Id.* at 9.

181. *Id.* at 5.

intended to encourage consumers to boycott merchants who discriminate against employees or customers on account of race (but see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)) . . . .”<sup>182</sup>

The brief of the Business Roundtable ties individuals with commercial interests to the corporate form and equates the corporation to the individuals who formed it: “individuals have long participated in discussion on public affairs as members and leaders of corporations per se.” Starting with the Massachusetts Bay Company and the Virginia Company and moving on to the railroad corporations, “the corporation’s role in coordinating its members’ activities and protecting their interests” deserves protection.<sup>183</sup> The media group brief also attributes Nike’s statements directly to individuals: “Nothing Inherent in Individuals’ Pursuit of Corporate Interests Justifies Imposing Special Burdens on Their Ability to Participate in Public Debates.”<sup>184</sup> If the corporation’s statements are in reality the statements of individuals, regulation of Nike’s speech unconstitutionally benefits the individuals and interest groups on the other side of the debate. “The First Amendment does not permit a state to disfavor corporate speech in this manner.”<sup>185</sup> Finally, the amicus brief filed by followers of Ayn Rand claims that the case “directly challenges the right of individuals, when acting through a corporation, to engage in **unshackled speech** on matters related to their economic self-interest.”<sup>186</sup>

## 2. *The corporation as a participant in a public debate*

In addition to portraying the corporation “as” other speakers, Nike’s lawyers consistently portray the corporation as a participant in a public debate.<sup>187</sup> Starting with the Questions Presented, the brief asks first, “[w]hen a **corporation participates in a public debate**,” may it be subjected to liability for factual inaccuracies and, second, even if Nike’s speech is commercial speech, “does the First Amendment . . . permit subjecting speakers to the legal **regime**”<sup>188</sup> approved by the California Supreme Court.<sup>189</sup> The brief depicts Nike as the focus of a “passionate worldwide debate over ‘globalization.’”<sup>190</sup> Because of repeated allegations about working conditions at Nike factories around the world, Nike was subjected to “enormous media scrutiny and commentary, much of it pointed and vituperative, coupled with

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182. *Id.* at 8.

183. Amicus Br. of the Business Roundtable, *supra* n. 164, at 9.

184. Amicus Br. of Forty Leading Newspapers, *supra* n. 177, at 13.

185. *Id.* at 14.

186. Amicus Br. of the Center for the Advancement of Capitalism at 2, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 834937).

187. Br. of Pet., *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 898993) [hereinafter Br. of Pet.].

188. **Regime** appears to be a contrasting metaphor, suggesting an unsavory alternative to a free market.

189. Br. of Pet., *supra* n. 187, at i.

190. *Id.* at 2.

demands for legislative action.” Nike **“found itself responding.”** The corporation purchased editorial advertisements (similar to those protected in *New York Times v. Sullivan*, 376 U.S. 254 (1964)). “Nike officials also responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and in letters to officers of national universities.” The **corporation’s “statements conveyed the view** that Nike does act morally.”<sup>191</sup>

Under accepted commercial speech doctrine, the Nike brief argues that Nike’s statements were fully protected political speech because the corporation was participating in a public debate, not advertising a product. The brief characterizes commercial speech doctrine as having extended “the First Amendment’s protective ambit . . . to expression that had for some time been deemed to fall within government’s power to control commerce itself, and thus had received essentially no First Amendment protection at all.”<sup>192</sup> The brief acknowledges that the extension was based on the speech’s “constitutionally significant value to listeners” and that commercial speech is “thought to lack the communicative value of fully protected speech to the speaker and to society generally and in that sense has been said to make less of a ‘direct contribution to the interchange of ideas.’ ”<sup>193</sup> Ignoring its own reference to the fully protected speech of “individuals,” the brief argues that the California decision imperils “speech that contributes to public understanding of important social issues” and that the decision is unfair to Nike because its speech is subject to regulation and the speech of its critics is not.<sup>194</sup>

As their second argument, Nike’s lawyers assert that “Even As Applied to Speech Properly Deemed ‘Commercial,’ The Legal Regime the California Supreme Court Constructed In This Case Stifles Speech In Violation Of The First Amendment.”<sup>195</sup> Because of the broad ruling of the California Supreme Court, **“commercial actors [will be] reticent to speak** until they are virtually certain that all their remarks will in hindsight be found truthful.”<sup>196</sup> Not only has Nike already been restrained or chilled from speaking but also **“[e]xpression on matters of corporate responsibility”** and on “social, political, and moral issues” is more likely to be chilled than product advertising.<sup>197</sup> In the end, “the discovery of truth will be the loser” because the best test of truth is the power to be accepted in the competition of the market.<sup>198</sup>

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191. *Id.* at 1-2.

192. *Id.* at 25.

193. *Id.* at 25-26.

194. *Id.* at 26-27.

195. *Id.* at 37.

196. *Id.* at 38.

197. *Id.* at 40-41.

198. *Id.* at 50.

### 3. *The corporation as a manufacturer of images and products*

Only one amicus brief, filed in support of Kasky by a group called ReclaimDemocracy.org, explicitly rejected the corporation as a person metaphor.<sup>199</sup> Because it is a corporation, the brief asserts, Nike's rights are different from those of individuals. Moreover, because

Nike is in a unique position to know the truth of its statements and its communications are unlikely to be chilled by regulation of the accuracy of statements about its operations[,] . . . **[t]o insulate Nike from liability** for intentionally misleading the listening public regarding its own operations, far from serving the First Amendment, **would instead distort the "marketplace of ideas"** that the First Amendment seeks to protect.<sup>200</sup>

The brief argues that the doctrine of corporate personhood should be rejected because "**corporations are creatures of state law** and should be subordinate, rather than superior, to the governments that create them and allow them to do business."<sup>201</sup>

To undermine the corporation as a person metaphor, the brief details its historical and logical shortcomings. The "Court has never provided a rationale for 'personifying' corporations," and the critical function of the First Amendment is not served in any way by granting free speech rights to business corporations: the use of communication as a means of self-expression, self-realization, and self-fulfillment. Communication by a business corporation does "not represent a manifestation of individual freedom or choice," nor does it "necessarily represent the views of its shareholders, who do not share and have not invested their money for the advancement of 'a common set of political or social views.'" <sup>202</sup>

Another amicus brief more subtly challenges corporate personhood. Rather than engaging in speech, this brief describes Nike as "**engaged in a publicity campaign**."<sup>203</sup> The brief continues to use metaphors from activities other than speaking: "**Nike Has Manufactured An Image of Social Responsibility As A Means of Promoting Product Sales**"; "**Image Promotion Is An Essential Aspect Of Product Promotion**"; and "**Nike Has Cultivated A Corporate Image of Social Progressivity As A Marketing Tool To Promote Product Sales**."<sup>204</sup> Nonetheless, this brief falls back on the dominant metaphor in its closing:

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199. Amicus Br. of Reclaimdemocracy.com, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1844818).

200. *Id.* at 2.

201. *Id.* at 3.

202. *Id.* at 23.

203. Amici Br. of the States of California et al., at 2, *Nike, Inc., v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1844750).

204. *Id.* at 4-9.

In **speaking to consumers** about working conditions in the factories where its products are made, **Nike engaged in speech** that is particularly hardy or durable. Because Nike's purpose in making these statements . . . was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is **unlikely to deter Nike from speaking truthfully** or at all.<sup>205</sup>

## B. The marketplace of ideas

Briefs on both sides of the issue relied on the market metaphor to argue that one outcome or the other would distort the free or the fair operation of the marketplace. Those on Nike's side said the market could run best without government regulation; those on Kasky's side said the market would be distorted by false commercial speech.

### 1. *The marketplace of ideas, like the economy, is self-regulating*

Once Nike becomes indistinguishable from other speakers and part of a public debate, the debate itself is protected and the government should not intervene. The First Amendment presumes "that truth will best emerge from the 'collision' of ideas that results from open channels of communication."<sup>206</sup> As the amicus brief filed by the ACLU indicates, once you accept the dual metaphors, the outcome is apparent: government, including the courts, should not interfere with the market. "[C]ourts are not arbitrators of truthfulness or probity . . . [and] the dispute should be resolved through public debate and not in a courtroom."<sup>207</sup> Nike stands on equal footing with its critics. "In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the judgment of the people in evaluating conflicting arguments on matters of public concern."<sup>208</sup>

In the market, "[c]orporate speech enriches public debate by counteracting the dominance of the new media megacorporations, and of government officials who can command free access to the press."<sup>209</sup> Lesser protection for commercial speech "allow[s] the government to skew the democratic process to achieve a preordained result and reflect[s] a mistrust of citizens' ability to make personal choices based on free and open debate."<sup>210</sup>

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205. *Id.* at 29.

206. Amicus Br. of Pfizer, Inc. at 14-15, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 836067) (urging a constitutional right of reply for commercial entities in debates over matters of public concern).

207. Amici Br. of the ACLU and the ACLU of Northern Cal. at 3, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 721563).

208. *Id.* at 16.

209. Amicus Br. of Pacific Legal Foundation et al. at 8, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 835977).

210. *Id.* at 9.

The self-correction mechanism of the market will guard against any dangers associated with allowing Nike's speech to go unregulated.<sup>211</sup> The media groups who filed in support of Nike describe their common interest in the case as "enforcing the First Amendment's prohibition against governmental interference in public debates."<sup>212</sup> In essence, the brief argues that if business representatives are deterred from speaking to the media, the "chilling effect will deprive the public of access to important news stories and the **clash of competing viewpoints**."<sup>213</sup> Moreover, the California statutes at issue threaten the marketplace because they "threaten to distort the business-related news that the press continues to cover."<sup>214</sup> In the marketplace, when a business practice is a matter of public debate, "the media scrutinize corporate speech and typically place potentially misleading statements into context, thereby providing timely and corrective information." In Nike's case, the brief contends, "every one of Nike's allegedly misleading statements either was never reported or was challenged by counter-speech in the same media outlets in which they were printed."<sup>215</sup> Thus, the brief concludes, "when a company's public statements are designed in part to participate in such public debates," the Court should leave policing to "the **First Amendment's preferred process of investigation, counterspeech and reflection**."<sup>216</sup>

The brief of the Business Roundtable likewise concludes that "[i]n the marketplace of ideas, commercial entities frequently vie with editorialists, public advocacy groups, and other non-governmental entities **to compete for the hearts and minds** of the public concerning issues that affect the entities' economic interests."<sup>217</sup> It would violate the First Amendment's prohibition on viewpoint discrimination for the government to permit one side of public debate — the commercial actor's critics — to engage in full, wide-open, and robust debate while subjecting the commercial actor to a different and more restrictive standard of conduct for speech.<sup>218</sup> Eliminating "the **voice of corporations**" would augment the government or impoverish the debate.<sup>219</sup> Because the First Amendment protects the rights of commercial actors to participate fully in debates on matters of public concern,

when a **commercial actor makes statements concerning its business operations as a part of a public policy debate**, the state's interest in protecting consumers from harm . . . is not properly advanced by restrictions on corporate speech like those at issue here. Instead, the **vigorous counter-speech of advocacy groups**,

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211. Amici Br. of Forty Leading Newspapers, *supra* n. 177.

212. *Id.* at 1.

213. *Id.* at 1-2.

214. *Id.* at 2.

215. *Id.* at 2-3.

216. *Id.* at 29.

217. Amicus Br. of the Business Roundtable, *supra* n. 164, at 24-25.

218. *Id.* at 24-25.

219. *Id.* at 25.



**reporters, and politicians will aggressively counter the corporate statements.** Indeed, consumers themselves can be expected to recognize the self-interested component of corporate speech and discount it accordingly.<sup>220</sup>

From the other side of the unfair labor practices issue, the amicus brief of the AFL-CIO also endorses the concept of unfettered debate in the marketplace.<sup>221</sup> “We vigorously assert that Nike is guilty of unfairly exploiting workers in the production of its goods . . . . [W]e further maintain that Nike’s public statements . . . [have been] unforthcoming and unresponsive and have been calculated more to mislead than to inform.”<sup>222</sup> Nonetheless, the brief concludes that the debate, and by extension all its participants, are protected by the First Amendment. The corporation’s public statements “are **part of a continuing dialogue** . . . . Nike’s withdrawal under legal pressure from the dialogue . . . serves both to diminish the sources of public knowledge about that matter and to frustrate the debate itself.”<sup>223</sup> Once there is a protected debate, both sides must be protected. “[T]he First Amendment incorporates Equal Protection Clause principles in order to provide a check against distortion of the marketplace of ideas and to guard against abuse of individuals and groups holding minority or disfavored views.”<sup>224</sup> What happens under the California statute is “a predictably anti-business bias . . . with the dangerous potential to distort public opinion and policy in an area already prone to political hay-making.”<sup>225</sup>

*2. The First Amendment protects corporations from some kinds of state regulation*

The amicus brief filed by the United States in support of Nike first appears to sidestep the metaphors, but nonetheless assumes that corporations are among those protected from some kinds of state regulation under the First Amendment.<sup>226</sup> The brief poses the question presented as “Whether the First Amendment . . . permits a private party to seek redress for a company’s allegedly false and misleading statements about the production of the goods that the company sells, if the private party himself did not rely on those statements, purchase the goods, or suffer any actual injury by reason of such

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220. *Id.* at 3.

221. Amicus Br. of AFL-CIO, *Nike, Inc. v. Kaskey*, 539 U.S. 654 (2003) (available at 2003 WL 835038).

222. *Id.* at 3.

223. *Id.* at 17.

224. Amicus Br. of Center for Individual Freedom at 22, *Nike, Inc. v. Kaskey*, 539 U.S. 654 (2003) (available at 2003 WL 835292).

225. *Id.* at 24.

226. Amicus Br. for the United States, *Nike, Inc. v. Kaskey*, 539 U.S. 654 (2003) (available at WL 899100).

reliance.”<sup>227</sup> The brief’s answer: although the First Amendment “allows government regulation of speech that is false, deceptive, or misleading,” it does not “allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company’s allegedly false and misleading statements,” regardless of whether the statements are commercial or noncommercial.<sup>228</sup> Traditional forms of government regulation of false advertising do not unacceptably chill or impinge on First Amendment values, but “California’s apparently unique provision that a private party may sue for misrepresentation — even though the party did not reasonably rely on the statement, did not make a purchase, and was not injured in any way — has the capacity to chill protected speech.”<sup>229</sup>

This is so because corporations are like other participants in a public debate: “**Companies like Nike that seek to engage in a debate** on issues of public concern with a connection to their own operations (if only to **respond** to their critics) may well **think** long and hard before subjecting themselves to the risk of a judgment . . . .”<sup>230</sup> Like individual speakers, corporations can be deterred from speaking:

California’s private cause of action may thus **deter commercial speakers** from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the **speakers “believe their statements to be true”** and even though the statements are “in fact true” — “because of doubt whether they can be proved in court or fear of the expense of having to do so.”<sup>231</sup>

*3. Because the marketplace is harmed by false commercial speech, the state may regulate Nike’s representations*

The Kasky brief seeks to distance Nike from individual speakers and refers to its **representations** rather than its speech, but the brief stays within the market context, arguing at length about whether Nike’s representations fall under the established doctrine that some commercial speech can be regulated because of its impact in the marketplace. Here, the core question is described as “[w]hether Nike’s **factual representations** about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading **commercial messages**.”<sup>232</sup>

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227. *Id.* at I.

228. *Id.* at 8.

229. *Id.* at 17-20.

230. *Id.* at 25.

231. *Id.* at 25 (quoting *New York Times*, 376 U.S. at 279).

232. Br. of Resp., *supra* n. 153. The Kasky brief also argues, successfully as it turns out, that the Court has no jurisdiction because there has been no judgment entered against Nike and

After arguing that Nike's representations are commercial speech, the brief asserts the market's limits: the First Amendment protects commercial speech to safeguard the free flow of information but that rationale does not apply to false and misleading statements. "Commercial speech is protected because it conveys truthful information to consumers for them to rely on in making informed purchasing decisions," so the First Amendment permits the government to regulate false or misleading commercial speech. Kasky's allegations about Nike's statements fit precisely into the resulting framework: "**Nike's representations** about the conditions under which its products are made provided factual information for consumers to rely on in their purchasing decisions" and "[i]n making these representations, Nike's purpose was to induce purchases by consumers."<sup>233</sup>

On Kasky's behalf, most amicus briefs accept the metaphor that the corporation is a person but argue that Nike's speech is commercial speech that is not protected by the market. For example, a brief filed by several members of Congress phrased the issue as "whether the First Amendment protects a company's making false factual statements about its products."<sup>234</sup> The brief notes that "[i]f **Nike's speech** is regarded as political and as such is protected by the First Amendment despite its falsity, then Nike will have greater First Amendment protection than its critics. **Nike's speech**, unlike its critics', will not be covered by defamation law, and unless the Court creates a new First Amendment category that would allow prohibition of non-defamatory political speech, states would be powerless to regulate."<sup>235</sup> In contrast, while relying on the marketplace of ideas metaphor, the brief argues that the "marketplace of ideas will not protect consumers from the harms of false statements" when the statements are commercial speech.<sup>236</sup> Another amicus brief filed on behalf of Kasky similarly relies on and distinguishes the marketplace metaphor: "The broad dissemination of truthful information about goods and services is necessary for the efficient allocation of resources. However, **dissemination of inaccurate information distorts our economy**, reduces consumer welfare and injures honest competitors."<sup>237</sup>

To reinforce its first argument that regulation of a business corporation's factual statements about its own operations is necessary "to preserve the integrity of the marketplace of ideas," the reclaimdemocracy.org brief notes that the speech of business corporations has been protected "primarily for its presumed value to the listening public rather than because of a putative right

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because Nike failed to show that the case fell within any exception to the final judgment rule. *Id.* at 11.

233. *Id.* at 29-34.

234. Amicus Br. by Members of the United States Congress at 2, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1844684).

235. *Id.* at 18.

236. *Id.* at 3.

237. Amicus Br. for the National Association of Consumer Advocates at 4, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (available at 2003 WL 1844784).

of **corporate self-expression**.”<sup>238</sup> This hearer-centered basis is different from the traditional speaker-centered First Amendment rationale. Although the right to speak protects self-expression, the right to hear “protects the interchange of ideas rather than protecting the dignity of the speaker.” Because of this difference, “[t]he hearer-centered protection allows more expansive regulation of speech because regulations should safeguard the ability of the listener to evaluate and thus protect the integrity of the marketplace of ideas.”<sup>239</sup>

Adopting the more complex marketplace metaphor, the brief argues that the marketplace of ideas, like the commercial market, “needs accurate information to function efficiently. Within the ‘marketplace of ideas,’ however, the countervailing First Amendment interest in individual self-expression generally prevents regulation of the content of speech.”<sup>240</sup> There is no similar countervailing interest for business corporations. In addition, “unlike in other First Amendment contexts in which the listening public may assess inaccuracies or inconsistencies by comparison with other contradictory speech, the public here cannot adequately assess Nike’s speech because others have limited access to the facts.”<sup>241</sup>

### C. The decision: refusing to decide

After receiving briefs and hearing oral argument, the Supreme Court dismissed the writ of certiorari as improvidently granted.<sup>242</sup> In a concurring opinion, Justice Stevens gave three reasons for dismissing the writ: the judgment entered by the California Supreme Court was not final, neither party had standing to invoke the jurisdiction of a federal court, and the reasons for avoiding premature judgment on novel constitutional questions applied.<sup>243</sup> The case presented novel questions “because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.”<sup>244</sup> Favoring a finding of commercial speech, the complaint alleged that “direct communications with customers and potential customers that were intended to generate sales . . . contained significant faulty misstatements.” Favoring a finding of noncommercial speech, “the communications were part of an ongoing discussion and debate.” “**Knowledgeable persons should be free to participate in such debates** without fear of unfair reprisal,” and “[t]he interest in protecting such participants” from any chilling effects is important.<sup>245</sup>

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238. *Id.* at 5.

239. *Id.* at 6-7.

240. *Id.* at 8.

241. *Id.* at 9-10.

242. *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003).

243. 123 S. Ct. at 2555 (Stevens, J., concurring).

244. *Id.* at 2558.

245. *Id.* at 2558-59.

In a dissenting opinion, Justice Breyer went farther. The case focused, he said, on the protection provided by the First Amendment to efforts by Nike to respond to severe criticisms of its labor practices.<sup>246</sup> “In my view . . . the questions presented directly concern the **freedom of Americans to speak about public matters in public debate . . .**”<sup>247</sup> An action to enforce the California statute “**discourages Nike from engaging in speech.**”<sup>248</sup> Under the California statute, the threat of private individual enforcement “means a **commercial speaker must take particular care** — considerably more care than the speaker’s noncommercial opponents — when speaking on public matters.”<sup>249</sup> Such uncertainty creates “concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not.”<sup>250</sup>

## V. Lessons for Lawyers

The cognitive theory of metaphor provides a lens for studying the written work of lawyers and judges and a map for constructing persuasive legal documents. Understanding how metaphor can affect legal decision making requires us first to focus on the metaphor and then to examine how it shapes and controls our subsequent thinking about a subject.<sup>251</sup> “While metaphors can be abused in many different ways, the most serious and interesting danger is that a given metaphor or its allegorical extension may be transformed into myth. . . . The metaphor is turned into, not only a literal truth, but the literal truth about the principal subject in question.”<sup>252</sup> As the briefs described in Section IV demonstrate, the First Amendment metaphors examined here have achieved almost that status: most lawyers and judges assume that a corporation has the right to compete equally in the marketplace of ideas subject only to state regulation of its advertising of products for sale.

These First Amendment metaphors have created an assumed reality and become “a self-fulfilling prophecy.” They shape future actions; when those actions fit the metaphor, the metaphor is reinforced because it seems meaningful.<sup>253</sup>

The perils of metaphor are not news. They have been well expressed from 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”<sup>254</sup> to Justice Potter Stewart’s statement that “the Court’s task

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246. *Id.* at 2559 (Breyer, J., dissenting).

247. *Id.* at 2560.

248. *Id.* at 2561.

249. *Id.* at 2567.

250. *Id.*

251. Winter, *Standing*, *supra* n. 6, at 1387.

252. *Id.* (quoting Berggren, *The Use and Abuse of Metaphor*, I, 16 Rev. Metaphysics: Phil. Q. 236, 244-45 (1962-63)).

253. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 156.

254. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58 (1926).

is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation' ”<sup>255</sup> to Justice Oliver Wendell Holmes' statement that “[i]t is one of the misfortunes of the law that ideas become **encysted** in phrases and therefore for a long time cease to provoke further analysis.”<sup>256</sup>

The cognitive theory of metaphor offers a corresponding promise to uncover and to build on the power of metaphor. This article thus concludes with three suggestions for practicing lawyers.

First, by studying the use of metaphor and its cognitive effects, we can improve our understanding of how the law develops and how we might affect that development. An awareness of the cognitive power of metaphor, and of other methods of understanding one thing “in terms of” or “as” another, will help lawyers uncover the narratives, metaphors, and analogies that underlie much legal reasoning. Many of these imaginative maps for understanding are so deeply embedded in the development of the law and in our consciousness that we hardly realize they are there. If they go unnoticed, it is impossible to understand their impact or to counteract their effects.

Second, lawyers can and should use metaphor creatively and consciously as a conceptual tool with recognized persuasive power. Metaphor focuses a spotlight on some aspects of a concept, reflects other aspects, and eclipses still others. Metaphor carries over from one source to another attributes, inferences, frameworks, reasoning methods, and evaluation standards. The use of metaphor can help the writer persuade the reader to “make the leap” and to do it “in such a way as to make it seem graceful, compelling, even obvious.”<sup>257</sup> As a result, lawyers should learn to choose and use their metaphors with care and to closely examine those used by others.

In *Kasky v. Nike*, for example, failing to question the corporation-as-a-person metaphor makes it difficult to dispute that Nike is indistinguishable from other competitors in the market or other participants in a debate. Given the results of cognitive research, it seems unlikely that simply uncovering the metaphor would persuade Supreme Court justices to consider the corporation from another perspective. “A safer therapeutic strategy may be . . . to fight metaphor with metaphor,” substituting one that is more consistent with the attributes of corporations while still making “intelligible the treatment of organizations as legal actors.”<sup>258</sup> For example, substituting the metaphor of the corporation as an intelligent machine would force decision-makers to

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255. *Engel v. Vitale*, 370 U.S. 421, 445 (1962).

256. *Hyde v. U.S.*, 225 U.S. 347, 391 (1912).

257. Dan-Cohen, *supra* n. 124, at 42 (quoting Donald Schon, *Generative Metaphor: A Perspective on Problem-setting in Social Policy*, in *Metaphor and Thought* 137 (Andrew Ortony ed., Cambridge U. Press 1993)).

258. Dan-Cohen, *supra* n. 124, at 45. For more on creating new metaphors, see Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 217-21 (Aspen L. & Bus. 2002); George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, in *Philosophical Perspectives on Metaphor* 286, *supra* n. 13, at 318-22.

confront the distinguishing characteristics of corporations because the entity could not just be fit within the prevailing understanding of a person.<sup>259</sup>

By adopting another metaphor, Kasky could have argued not that Nike's speech was of lesser value because it was commercial speech, but instead that what Nike manufactures, distributes, and sells is not speech at all. For example, as did one amicus brief, the lawyers could have suggested that Nike's corporate public relations products should be viewed "as" manufactured images, marketing tools, and cultivated commodities.<sup>260</sup> Viewed as cabbages, cars, or shoes, Nike's representations can be seen "as" part of a process that involves no First Amendment values at all. The public relations products that Nike manufactures and disseminates are like any other product the corporation makes. Like other products, public relations products are made by corporate employees who are not expressing their own ideas or views but instead are responding to corporate designs and directions; the content of the product is influenced not by self-expression or enhancement of knowledge but by sales potential. Like other products, their manufacture, distribution, and sale should be subject to state regulation to protect the public.

Similarly, the marketing of Nike's public relations image could be depicted as the marketing of an investment opportunity. Representations designed to sell the image would be as subject to state regulation as representations that are designed to pique interest in the investment. Just as regulation of statements made in connection with investments is necessary to assure that investors do not make purchases based on inaccurate or misleading information, regulation of statements made in connection with sales of a particular public relations image is necessary to assure that listeners do not buy the image without accurate information.

As for the marketplace of ideas, a lawyer might argue instead that the First Amendment protects the **quest for truth** or the **free flow** of truthful information. "By relying on the Holmes metaphor, we have chosen to highlight competitiveness in the buying and selling of ideas; had a 'quest' metaphor prevailed, we would be highlighting searching, a journey . . ." <sup>261</sup> The battle between truth and falsehood is a conventional metaphor that might also provide an alternative structure for reasoning about First Amendment application, perhaps carrying over concepts of a "fair fight" and a "level playing field."

Third, understanding the cognitive power of metaphor helps lawyers gauge their ability to overturn a longstanding or dominant metaphor as well as the desirability of sidestepping it or tapping into its power. For example, the personification metaphor is both widespread and helpful; it "allows us to

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259. To support this metaphor, Dan-Cohen first tells the story of the evolution of a corporation to illustrate that once established, a corporation could do everything it does without any human beings at all. Dan-Cohen, *supra* n. 124, at 44-51.

260. See *supra* nn. 203-05 and accompanying text.

261. Bosmajian, *supra* n. 116, at 201.

comprehend a wide variety of experiences with nonhuman entities.”<sup>262</sup> Because the metaphor allows us to provide a “coherent account,” it is difficult to resist. Uncovering the metaphor and recognizing its power will allow advocates to make an informed decision about whether to stage a head-on confrontation, rejecting the metaphor altogether, as did the amicus brief filed by ReclaimDemocracy.org<sup>263</sup> — advance from the side, portraying Nike’s representations as manufactured products<sup>264</sup> — or sneak up from the rear, reframing the issue as whether States can allow private parties to sue for false or misleading statements in the absence of actual injury, as did the brief filed by the United States.<sup>265</sup>

The lawyer who wants to influence judicial perceptions and decisions can draw on the insights of cognitive research. A new metaphor can make the target experience understandable in a different light by highlighting some aspects of the target and suppressing others. The new metaphor may entail very specific aspects of the source concept, and in this way, it can give the target a new meaning, sanctioning different actions, justifying revised inferences, and leading to different goals and results.<sup>266</sup> Like the old metaphor, the new metaphor will be more persuasive to the extent that it grows out of bodily experience with the physical environment. The new metaphor, like the old, will be more persuasive to the extent that it accords with our cultural context, fully structures our understanding of the target, and efficiently allows us to borrow methods of reasoning and evaluation from the source.

Rather than a wholly new metaphor, cognitive theory also suggests ways to re-view a current metaphor. So, for example, the marketplace metaphor “need not carry the baggage of economic theory.”<sup>267</sup> 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.<sup>268</sup> Such a conception of the market might focus on the protecting the process of the exchange; this might allow government regulation to assure effective access to the market, to guard against monopolization, and to avoid the unequal results that flow from formal equality.

Although metaphor can lead to unthinking acceptance of inapt, outdated, or invalid doctrines, thinking metaphorically is an inescapable and fundamental method of increasing understanding. “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

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262. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 6, at 33.

263. See *supra* nn. 199-202 and accompanying text.

264. See *supra* nn. 203-04 and accompanying text.

265. See *supra* nn. 226-29 and accompanying text.

266. Lakoff & Johnson, *supra* n. 258, at 318.

267. Cole, *supra* n. 116, at 894.

268. *Id.*



different lights, subjecting to different pressures, dividing, matching, contrasting . . . .”<sup>269</sup> So too with a concept such as **corporate speaking**. Consider it in a new light: what is its sound? how is it made? is it words, phrases, sentences, ideas, views? is it like writing poetry? or is it like making shoes?

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269. Kenneth Burke, *A Grammar of Motives and a Rhetoric of Motives* 504 (World Publ. Co. 1962) (quoted in Bosmajian, *supra* n. 116, at 205).