

ABSTRACT:

SPEECH, CITIZENRY, AND THE MARKET: A CORPORATE PUBLIC FIGURE DOCTRINE

By
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That corporations are people for First Amendment questions is a fait accompli. We can debate the merits or wisdom of that fact, but the fact remains.¹ I argue that under current Supreme Court jurisprudence, corporations are not only people, but corporations are public figures. Like other public figures, corporations affect public affairs, take political positions, engage in matters of public concern and public controversy, and have reputations. Corporations no longer exist in a purely commercial world. A host of political issues from fair trade to gay rights to organic farming to children's development to gender bias to labor and more intersect with and are shaped by corporate policies. Thus Google urges countries to embrace gay rights; Mattel launches a girl power campaign; activists question Nike, McDonald's, and Shell Oil; and bloggers police the Body Shop's claims about its manufacturing practices. The social, political, and commercial have converged, and corporate reputations rest on social and political matters as much, if not more, than commercial matters. A foundational commitment of free speech law, perhaps the foundational commitment, is that public figures don't and can't own their reputations. Yet, through trade libel, trademark, and commercial speech doctrine corporations have powerful control over their reputation. If corporations are people for free speech purposes, as a constitutional matter, their power to control their reputations can be no greater than the power biological public figures have. Corporations cannot have it both ways. Corporations want and receive many of the benefits natural persons receive. They should also be subject to the same rules as other powerful, public figures.

¹ For an excellent discussion of why corporations are different than individuals for speech and other purposes, see C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 Indiana L. Rev. 981, 987-990 (2009) (arguing that commercial entities as "are created for instrumental purposes" and have "morally different status than living, flesh-and-blood people"); cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (connecting protection of someone's good name to dignity) (citations omitted); see also Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment Public Figure: Nailing the Jellyfish*, 68 Iowa L. Rev. 35, 65-69 (1982) (tracing the Supreme Court's different approaches to corporate personhood depending on the question presented).

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INTRODUCTION

That corporations are people for First Amendment questions is a fait accompli. We can debate the merits or wisdom of that fact, but the fact remains.² I argue that under current Supreme Court jurisprudence, corporations are not only people, but corporations are public figures. Like other public figures, corporations affect public affairs, take political positions, engage in matters of public concern and public controversy, and have reputations. Corporations no longer exist in a purely commercial world. A host of political issues from fair trade to gay rights to organic farming to children's development to gender bias to labor and more intersect with and are shaped by corporate policies. Thus Google urges countries to embrace gay rights; Mattel launches a girl power campaign; activists question Nike, McDonald's, and Shell Oil; and bloggers police the Body Shop's claims about its manufacturing practices. The social, political, and commercial have converged, and corporate reputations rest on social and political matters as much, if not more, than commercial matters. A foundational commitment of free speech law, perhaps the foundational commitment, is that public figures don't and can't own their reputations. Yet, through trade libel, trademark, and commercial speech doctrine corporations have powerful control over their reputation. If corporations are people for free speech purposes, as a constitutional matter, their power to control their reputations can be no greater than the power biological public figures have. Corporations cannot have it both ways. Corporations want and receive many of the benefits natural persons receive. They should also be subject to the same rules as other powerful, public figures.

Part I of this Article establishes the nature of corporate citizenry. Although *Citizens United v. Federal Election Commission*³ is well-known as it relates to federal election law and super PACs, Justice Scalia's concurrence regarding the nature of corporations as persons and corporate speech rights is equally, and perhaps, more important. The implications of personhood for corporations are large. Here, I focus on the contours of First Amendment law, corporate personhood, and corporate speech as they intersect to treat corporations as people.

Even if corporations may be citizens, whether their existence is public or private determines the speech implications of their personhood. In Part II, I explain the nature of political corporate citizenry. I argue that the force of

² For an excellent discussion of why corporations are different than individuals for speech and other purposes, see C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 *Indiana L. Rev.* 981, 987-990 (2009) (arguing that commercial entities as "are created for instrumental purposes" and have "morally different status than living, flesh-and-blood people"); cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (connecting protection of someone's good name to dignity) (citations omitted); see also Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment Public Figure: Nailing the Jellyfish*, 68 *Iowa L. Rev.* 35, 65-69 (1982) (tracing the Supreme Court's different approaches to corporate personhood depending on the question presented).

³ *Citizens United v. Federal Election Commission*, 558 U.S. __ (2010)

economic decisions by corporations and consumers has become so central to many political decisions, and may be political decisions themselves, that corporations of almost any size engage in politics. Following the logics of *Citizens United* and *New York Times Co. v. Sullivan*,⁴ I show that First Amendment law favors robust speech about corporate citizens as political actors.

Part III shows that despite First Amendment jurisprudence and the public figure nature of corporations, several laws squash critical speech about corporations. For example, trademark law struggles with speech and favors the corporation's views about the corporation over other speech. As a reputation protection law, trademark law follows an over-stated, narrow view that almost all speech not from the corporation leads to reputational harm and consumer confusion that must be eliminated in the name of protecting consumers, even if consumers are the ones trying to share information about the corporation or its products and services. These doctrinal mistakes have led to an impoverished ability to challenge corporate public figures.

Part IV concludes that the logic of the Supreme Court's jurisprudence regarding corporations as people and speech regarding public figures requires that the law accommodate speech that it currently chills. To talk about a public figure, one uses her name and/or face. To talk about a corporation one should be able to use its trademark and/or logo, but that ability is hobbled. The power, public, and political nature of corporations demands that we correct this imbalance. Such a correction would allow both increased political speech about the corporation and more information to the consumer marketplace.

I. CORPORATE CITIZENRY

Citizen's United provides a clear statement that, as far as speech is concerned, corporations are afforded much the same speech rights as people.⁵ This vision embraces the corporation as a person who engages in public life, acts for political ends, and has a reputation. In short, if corporations seek to be recognized as citizens and behave as such, the nature of these special citizens indicates they are often public figures.

⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵ *See* CU 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'") (Kennedy) (citations omitted); *id.* at 925 (Scalia concurrence); *cf. id.* at 930 ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation.") (dissent of Justice Stevens). The Supreme Court's jurisprudence regarding whether corporations have many, if not all, the same rights as people is complex and changing. That debate will no doubt continue and evolve. It is important but well beyond the scope of this Article which seeks to show the way the law should move given the holding in *Citizens United*.

A. Corporations Are People Too

A close reading of *Citizens United* reveals that the Supreme Court believes that corporations are people. Given that the case was about a narrow question concerning what constitutes “electioneering communication”⁶ and ostensibly was to resolve some incoherence in campaign finance jurisprudence,⁷ it is odd that the Court went to great lengths to discuss the First Amendment rights of corporations and the idea that corporations have the same speech rights as people. Why the Court chose to reach beyond the narrow election law issue and whether that was the correct approach to the case at hand are good questions, but better explored by others.⁸ Here, examining how the Court reached its conclusion about corporate personhood and speech reveals the Court’s unwillingness to draw distinctions not only between corporations and people, but also between types of corporations. This broad approach shows that almost any corporation can be a person with commensurate speech rights in the eyes of the law.

None of the several possible objections to this result work for the Court. One could argue that corporations simply do not have speech rights. Yet, as Justice Kennedy’s opinion points out, “The Court has recognized that First Amendment protection extends to corporations” and in political speech cases that protection persists.⁹ One could argue that corporations are not really part of political debates the same way that people are. To rebuff that position, the Court paints a picture of corporations as “contribut[ing] to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”¹⁰

For the Court, all corporations are equal and important people in the public sphere. Although the word, corporation, evokes images of large, profit maximizing entities with hundreds, if not thousands of employees, worth millions, if not billions, of dollars, a contention that only certain corporations are important enough to have speech rights fails. As Justice Scalia explained, the corporate form encompasses many entities including “colleges, towns and cities, religious institutions, and guilds.”¹¹ As with large, for-profit corporations, one can appreciate the importance and role of these institutions in society. Large or small, profit or non-profit, type of industry; none of these

⁶ *Citizens United v. FEC*, 130 S. Ct. at 886, 888-889. *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”) (citations omitted); see also *Id.* at

⁷ See e.g., Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

⁸ See e.g., Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

⁹ 130 S. Ct. at 900 (citing and quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (stating that speech rights do not disappear “simply because its source is a corporation.”).

¹⁰ *Id.* (citing and quoting *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion)).

¹¹ *Id.* at 926-927.

metrics, however, matters. After all, the corporation at issue, Citizens United, was a small non-profit corporation with “an annual budget of about \$12 million.”¹² Its income was based on individual and some corporate donations.¹³ It is quite different than even number 500 on the Fortune 500,¹⁴ which has a market capitalization of around \$2.8 billion and \$283 million in profits in one year alone.¹⁵ Nonetheless, Citizens United was characterized like so many “corporations and voluntary associations [that] actively petitioned the Government and expressed their views in newspapers and pamphlets” since the beginning of our country.¹⁶ That such a small entity does not map to the possibly august stature and power of more familiar entities is irrelevant. Just as the Court explained that “The identity of the speaker is not decisive in determining whether speech is protected,” it layered in an idea that the type of corporation does not matter. By conflating all corporations as being equal, one can declare “[t]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.”¹⁷ Thus, a small, political corporation is the same as Apple, Exxon, Microsoft, IBM, Chevron, GE, Google, and Wal-Mart. All corporations are now *equally* “the principal agents of the modern free economy.”¹⁸ In this approach, we have a picture of all corporations as people having the same speech rights as natural persons. We also start to see corporations participating in public debate and as vital parts of our political and economic life.

B. Corporations Speak About Matters of Public Importance

Citizens United and *New York Times v. Sullivan*¹⁹ ask the same question: What are the limits when someone, corporate or otherwise, speaks about a public figure?²⁰ Indeed, the principles offered in *Citizens United* trace back in part to *Sullivan*. On the surface, *Sullivan* involves quite a different matter than *Citizens United*. *Sullivan* addresses “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”²¹ *Citizens United* addresses speech by a corporate entity in an election context.²² But both cases engage with questions of truth about speech about public figures, the importance of speech about public matters, whether the medium of speech matters, and whether the identity of the speaker

¹² 130 S. Ct. at 887.

¹³ *Id.*

¹⁴ http://money.cnn.com/magazines/fortune/fortune500/2011/full_list/401_500.html;

¹⁵ <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/927.html>

¹⁶ *Id.* at 926-927.

¹⁷ *Id.* at 929 (emphasis added).

¹⁸ *Id.* at 929 (emphasis added).

¹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, (1964).

²⁰ But see Baker arguing that press is different.

²¹ *Id.* at 256.

²² 139 S. Ct. at 886.

allows for limits on speech. As this chart shows, the factual parallels between *Citizens United* and *Sullivan* are striking.

	<i>Citizens United</i> ²³	<i>Sullivan</i> ²⁴
Entity	Activist political entity (non-profit)	Press (for-profit); Activist political entity (unclear)
Purpose	Advocate defeat of candidate	Highlight racial injustice/raise money
Object of Speech	Candidate for Office	Public Official
Accuracy	“Extended criticism” and “The narrative may contain more suggestions and arguments than facts”	“It is uncontroverted that some of the statements contained in the paragraphs were not accurate descriptions of events which occurred in Montgomery.”
Medium	Pre-Paid Video on Demand; “The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President”	Newspaper Advertisement

Both entities addressed a political matter. Both called out behaviors by public figures. Both stretched the truth and were inaccurate in some instances. Both used a paid form of mass communication to reach an audience. Both cases favored more speech and less protection for protecting the reputation of a public figure.

As a constitutional matter, the ability to criticize public officials trumps reputation protection and is to be fostered.²⁵ The medium of the message does

²³ The corporation had released a documentary film, *Hillary: The Movie*, critical of the then Senator. After a release in theaters and on DVD, the corporation decided to offer the film through video-on-demand (VOD) services. VOD can involve a fee paid by individual viewers or it can be offered free to the viewer. Citizens United chose to pay a cable distributor \$1.2 million to carry the film as a VOD option free to the cable company’s subscribers. The subject matter of the film—advocating the defeat of a political candidate—and the timing of the expenditure to allow the film to reach people—within 30 days of the 2008 primary elections—raised concerns about whether Citizens United would run afoul of section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA). 130 S. Ct. at 887.

²⁴ *Sullivan* involves a political entity using a mass communication medium to make assertions about a political matter and political actor. The *New York Times* had run an advertisement that was critical of actions taken by the state of Alabama against protestors during the Civil Rights Movement. The advertisement listed several ways the state had acted including police actions. The advertisement argued that these acts were part of a “wave of terror” that aimed at denying the civil rights of the protestors. The facts asserted were not always accurate, and the Times did not check the facts. 376 U.S. at 256-261.

not matter. The medium in *Sullivan* was a paid commercial advertisement in the *New York Times*. The Court ignored the medium and looked to its content, which “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”²⁶ In addition, the *Sullivan* Court advanced the idea that not just the press, but anyone should be able to “promulgat[e] [] information and ideas” broadly.²⁷ Not allowing something as creative as buying an advertisement to advance a point of view would “shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”²⁸ More recently, the Supreme Court has equated citizen speech with soapboxes and printing presses of old as it embraced the Internet as away for anyone to become a “town crier” or “pamphleteer” pressing her views to the world.²⁹ Thus, two points emerge about the ability to criticize public officials. First, speech on matters of public interest and concern appears to negate claims that medium, here advertising, controls whether a given speech act is protected. Second, the provision of an outlet for expression for those who may not have the same distribution reach as the traditional press is necessary to permit a wide range of ideas and opinions, even, and perhaps especially, those that challenge and “antagoniz[e]” us.

Even when criticism lacks accuracy or may be libel per se, that is, words that tend to injure a person’s reputation or bring him into public contempt,³⁰ in political matters, laws protecting reputation lose out.³¹ The tolerance for speech, even speech that has inaccuracies or that challenges opinions, is high, because “public men, are, as it were, public property, and discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.”³² As with mediums, the Court went beyond the label and looked at the context of the message. When facing a tradeoff between protecting reputation and possibly limiting debate on public issues, the Court chose raucous debate in all forms: “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

²⁵ 376 U.S. at 264-265 (holding that the claim for libel was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.”); see also Mary-Rose Papandrea, *The Story of New York Times Sullivan* at 18-21 in, *FIRST AMENDMENT STORIES* (Richard W. Garnett and Andrew Koppleman, eds., Foundation Press, 2012) (forthcoming) (tracing the later nuances of reputation protection by the Supreme Court) available at: <http://ssrn.com/abstract=2070690>.

²⁶ 376 U.S. at 266 (citations omitted).

²⁷ 376 U.S. at 266. (citations omitted).

²⁸ 376 U.S. at 266. (citations omitted).

²⁹ See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

³⁰ 376 U.S. at 267. (citations omitted).

³¹ 376 U.S. at 269. (citations omitted) (“insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression ... can claim no talismanic immunity from constitutional limitations.”)

³² 376 U.S. at 268. (citations omitted).

caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³³

Combining the logic of *Citizens United* and *Sullivan* allows for some observations. First, corporations are people with speech rights. They can use all mediums, including paid advertisements in newspapers and video-on-demand services, to reach the public about matters of public concern. Second, laws that protect the reputation of or limit this ability to speak about public figures are suspect and likely to be ruled unconstitutional. Third, thus far in the analysis, corporations are the speakers. The result is an explicit goal to expand commentary on public affairs and especially commentary by corporations. But the same logic that allows corporations to be people and speech actors like natural persons raises a question. When do corporations, through their general status or their actions and words, become political and thus the object of speech? In short, under what circumstances are corporations public figures?

C. Quite Public, Technically Private

Understanding the nature of political corporate citizenry shows that the time for a greater ability to challenge corporations is at hand. I will argue here that as corporate citizens, corporations may speak, but they may also become, and often are, political, public figures, and the proper object of speech. Corporations touch vast areas of individual and political life. Justice Scalia’s view of corporations as “the principal agents of the modern free economy”³⁴ captures the importance of corporations and why we need greater speech opportunities about them. How individuals engage with the modern free economy can affect the politics of that economy indirectly or as an express political act. This dynamic raises a vital question, “[I]f private market behavior is to serve the expansive evaluative function that proponents of the liberal market vision have proposed for it, then consumers should receive an informational context that is appropriately robust for the role they are being asked to serve.”³⁵ The Supreme Court has said that we need to have an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³⁶ It thus championed many voices speaking about public figures. That same reasoning applies when corporations and their goods or services are the locus of that political activity. As the Court has said, “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”³⁷

³³ 376 U.S. at 270. (citations omitted).

³⁴ *Id.* at 929 (emphasis added).

³⁵ Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 535 (2004).

³⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

³⁷ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). The Court has reiterated this point in *Bates v. State Bar of Arizona*, and *Sorrel*. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Sorrel*, *supra* note __ at __.

The public, political debates by and about corporations, the nature of manufacturing, and the effect of purchasing decisions indicate that corporations may qualify as public figures or be part of a discussion of public concern more often than one might expect. A possible objection to corporations being treated as public figures is that they are private and their work is not about matters of public concern.³⁸ And yet from *Citizens United*, one has a picture of corporations as often fully engaged in public debate with “voices that best represent the most significant segments of the economy.”³⁹ As Justice Harlan’s explained in *Curtis Publishing Co. v. Butts*, “policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government” and so distinctions between public figures and public officials make no sense.⁴⁰ The same politics and logic of privatization that have moved corporations to being at perhaps an apex of importance in our society and politics demands a greater level of ability to question and probe corporations. Now that corporations are people, distinctions among human public figures and corporate public figures make no sense either. Furthermore, even when a corporation is not the direct, obvious provider of a governmental service, the move to make markets a key way in which we organize society blurs, if not, eliminates the line between the public and private nature of corporations. As Douglas Kysar explains, “Consumers are express[ing] public values through a market medium that is being endorsed simultaneously as a primary locus of choice, opportunity, and responsibility, individuals may well come to view such preferences as their most appropriate mechanism for influencing the policies and conditions of a globalized world.”⁴¹ Corporations are indeed major political and economic actors, consumers are voting for policy through the market, and so we need to be able to speak about corporations as much as corporations are allowed to speak about whatever they wish to speak.

Under the Supreme Court’s public figure jurisprudence, it is a wonder that corporations are not almost always deemed public figures, despite their ostensibly private nature. Objections that corporations are people but private miss the point. Private, natural people may become public figures. Just as any person who is a public official involved with public affairs “runs the risk of

³⁸ Cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); accord Deana Pollard Sacks, *Snyder v. Phelps: A Prediction Based on Oral Arguments and The Supreme Court’s Established Speech-Tort Jurisprudence*, 2010 Cardozo Law Review De Novo 418, 427 (“Basically, speech of public concern is entitled to more First Amendment protection from tort liability than speech concerning private matters, as the latter is of “reduced constitutional value.”).

³⁹ *Citizens United v. FEC*, 130 S. Ct. at 907.

⁴⁰ 388 U.S. 130, 163-164 (Warren, C.J., concurring); see also Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment Public Figure: Nailing the Jellyfish*, 68 Iowa L. Rev. 35, 63 (1982).

⁴¹ Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 535 (2004).

closer public scrutiny than might otherwise be the case,” a private figure may be a public figure subject to similar scrutiny.⁴² In the seminal case regarding an individual being a public figure, *Gertz v. Robert Welch, Inc.*,⁴³ the Supreme Court set out the key question. One must examine whether the person “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”⁴⁴ The Court’s description of the characteristics and ways in which someone becomes a public figure shows why corporations are likely to be seen as public figures:

For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.⁴⁵

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

Furthermore, just as in *Sullivan* and *Citizens United*, corporations can distribute their messages in ways that matter for constitutional analysis. In *Sullivan*, the speaker had to buy ads to reach its audience. In *Citizens United* the speaker prepaid for VOD so its audience could watch the advertising/film for free. In *Gertz* the Court relies on public figures’ “significantly greater access to the channels of effective communication and hence [] more realistic opportunity to counteract false statements than private individuals normally enjoy”⁴⁶ to support the idea that public figures must be subject to more, not less speech about them. Corporations often have access and resources to counteract any speech about them that may be troubling. As the Court stated when addressing a regulation of false speech in *United States v. Alvarez*, “the dynamics of free speech, of counterspeech, of refutation, can overcome [a] lie.”⁴⁷ Given corporations’ concentrated wealth, new-found power to create super PACS, and ability to employ sophisticated public relations and communications campaigns either through in-house or hired companies, corporations can rival, if not exceed, the access many human political figures can afford.

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

⁴² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-345 (1974).

⁴³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

⁴⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

⁴⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

⁴⁷ *United States v. Alvarez* at 15.

	<i>Gertz</i>	<i>Citizens United</i>
Entity	Person	Corporate Person
Public or Private	Private	Private
Prominence in Society	Yes	Yes, for all corporations
Thrust to forefront for particular controversy in order to influence the resolution of the issues involved	No	Yes
Significantly greater access to media	No	Yes.
Public Figure	No	Yes (if test applied)

Citizens United explicitly relies on the “prominence of corporations” in society as a general matter to justify providing them the right to speak. Prominence for corporations cannot turn on the size of the corporation. Just as one cannot distinguish between size and type of corporation regarding whether a corporation may speak, one cannot focus on size regarding public figure status. Justice Scalia’s broad view of corporations and the fact that *Citizens United* was a relatively small corporation suggest that many corporations, regardless of size, can “assume[] roles of especial prominence in the affairs of society.”⁴⁸ Indeed, despite *Citizens United*’s small size, the general fact of great corporate power was recognized in both the majority’s and the dissent’s opinions’ as they addressed whether the law could limit a corporation’s ability to distort a discussion. Even if one argues that *Citizens United* was not a public figure in general, the corporation in question certainly “thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Indeed, the corporation’s ability to do so and whether that ability could be restricted was the issue before the court.⁴⁹ And *Citizens United*, the corporate person, used its resources to “enjoy significantly greater access to the channels of effective communication” as it partnered with cable services to offer an expensive video-on-demand version of its communication.⁵⁰

That many corporations may behave as and qualify as public figures especially when they choose to speak seems clear. But when someone speaks about corporate public figures, the question of when a corporation is the

⁴⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

⁴⁹ *Cf. Sorrell v IMS Health*, 564 U.S. __ (2011) (striking down a Vermont statute held to discriminate against a particular marketer viewpoint that might be overly persuasive to doctors).

⁵⁰ *CU* at 887 (noting *Citizens United* was to pay \$1.2 million to make the VOD available at no extra charge to the viewer).

subject of public concern has to be sorted. The next section addresses this point.

II. POLITICAL CORPORATE CITIZENRY

A. The Politics of Products and Processes

Today the idea that purchasing choices are “purely private concerns” is less clear and perhaps inaccurate. Not all corporations qualify as public figures and not all business processes qualify as public concerns. Matters of purely private concern will remain subject to less speech protection.⁵¹ Yet, given consumer activism and the greater ability to share information about a good and whether to purchase it, corporations and consumers face increased claims about whether exercising a purchasing choice is wise or good from a political point of view. Consider questions about the way diamonds are mined, child labor issues, oil drilling methods, food production methods’ affect on health, and corporate outsourcing policies.⁵² Corporations’ role in these matters is precisely why Justice Scalia was correct in his assessment about the importance of corporations in society. Furthermore, corporations often embrace an environmental, organic, fair trade, fair labor, or other positions as part of their overall image as corporate citizens.⁵³ They also lobby on all manner of regulatory matters related to the way they conduct their respective businesses. These issues are of public concern.

The way society makes and uses goods matters, can influence the global marketplace,⁵⁴ and has political implications. What we buy, what we use, how we make, and how we use have moved beyond a pure personal cost

⁵¹ See e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (“[S]peech on matters of purely private concern is of less First Amendment concern.”); *Snyder v. Phelps*, 562 U.S. __ (2011), 131 S. Ct. 1207, 1215-16 (noting that restricting speech on purely private matters does not raise same constitutional concerns as limiting speech about matters of public interest).

⁵² Cf. NAOMI KLEIN, *NO LOGO* (2002) (arguing corporations and their brand strategies have political implications from changing the availability of open space for expression to reducing meaningful choice in the marketplace to altering labor mechanisms such that high-paying jobs are scarce and labor is exploited in developing countries).

⁵³ See e.g., Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311 (2009).

⁵⁴ See Kysar, *supra* note __, at 529, 641 (“Globalization [] has enhanced the flow of information, not merely goods, and information regarding processes increasingly is finding its way downstream” and consumers are responding accordingly: “consumer preferences may be heavily influenced by information regarding the manner in which goods are produced”); Cf. Isabelle Maignan and O.C. Ferrell, *Corporate Social Responsibility and Marketing: An Integrative Framework*, 32 *JOURNAL OF THE ACADEMY OF MARKETING SCIENCE*, 6-7 (2004)

evaluation.⁵⁵ For example, the locavore movement focuses on eating food grown within 100 miles of where one lives. It also tries to reduce fossil fuel use in growing and delivering food. The movement is connected to the sustainability movement, but some debate the movement's effectiveness for environmental goals.⁵⁶ Regardless, the shift has changed the way people and companies such as Google approach buying and consuming food. Even the paper or plastic question of fifteen years ago is not the one of today. Rather than assume paper is better than plastic, some consumers may believe that paper is better for the environment, but face evidence that one is merely choosing between two choices harmful to the environment.⁵⁷ The potential options don't stop there. What about biodegradable plastic bags?⁵⁸ Or maybe compostable bags are the best choice? Despite these options, some people believe that another option, bring-your-own-bag (BYOB), i.e., using a reusable bag, is the best environmental choice.⁵⁹ Cities, counties, and even states may pass laws banning certain materials or levying a charge for use of one material over another.⁶⁰ Companies making the bags lobby about what is the correct choice. Companies, such as Whole Foods, may choose one option before a law is passed to signal a commitment to a political ideal. News outlets report on the matter,⁶¹ as do blogs, and other online sources.⁶² Some statements challenge

⁵⁵ Cf., Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial Speech Doctrine* at 22

⁵⁶ Compare Vasile Stanescu, *Green Eggs and Ham? The Myth of Sustainable Meat and the Danger of the Local*, *Journal for Critical Animal Studies*, Volume VIII, Issue 1/2, 2010 available at <http://www.criticalanimalstudies.org/wp-content/uploads/2009/09/2-JCAS-Vol-VIII-Issue-I-and-II-2010-Essay-GREEN-EGGS-AND-HAM-pp-8-32.pdf> to Kathy Rudy, *Locavores, Feminism, and the Question of Meat*, 35 *The Journal of American Culture* Volume 26 (March 2012)

⁵⁷ See e.g., Anne Thompson, *Paper or Plastic —What's the Greener Choice?*, May 7, 2007, NBC NEWS, available at http://www.msnbc.msn.com/id/18538484/ns/nightly_news/t/paper-or-plastic-whats-greener-choice/.

⁵⁸ See e.g., *Europe Considers Plastic Bag Ban*, May 20, 2011 GUARDIAN ENVIRONMENT NETWORK, GUARDIAN.CO.UK available at:

<http://www.guardian.co.uk/environment/2011/may/20/europe-plastic-bag-ban>

⁵⁹ See e.g., Anne Thompson, *Paper or Plastic —What's the Greener Choice?*, May 7, 2007, NBC NEWS, available at http://www.msnbc.msn.com/id/18538484/ns/nightly_news/t/paper-or-plastic-whats-greener-choice/.

⁶⁰ See e.g., David Zahniser and Abby Sewell, L.A. Oks Ban on plastic bags at checkout, *Los Angeles Times*, May 24, 2012 (noting Los Angeles as the largest city to pass such a ban and San Jose, San Francisco, Long Beach, and Santa Monica have such bans in place).

<http://www.latimes.com/news/local/la-me-0524-bag-ban-20120524,0,6541830.story>

⁶¹ See e.g., Jane Black, *Plastic Bags Headed for a Meltdown*, WASHINGTON POST, F01, February 6, 2008. available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/02/05/ST2008020501480.html>; see also Graphic

<http://www.washingtonpost.com/wp-dyn/content/graphic/2007/10/03/GR2007100301385.html>

⁶² <http://blog.greenfeet.com/index.php/paper-vs-plastic-the-shopping-bag-debate/reducing-your-footprint/121>; cf. See e.g., David Zahniser and Abby Sewell, L.A. Oks Ban on plastic

bags at checkout, *Los Angeles Times*, May 24, 2012 (noting that the new law places a 10-cent fee on paper bag use to encourage BYOB behaviors).

beliefs and claims about bags.⁶³ In other realms, activists make assertions about labor or organic growth practices.

Some, perhaps many, of these claims and discussions about corporations, their products, and their services, will be false but should be protected speech given the targets of the speech. The problem is that false statements about commerce are ordinarily not entitled to speech deference. In many cases, evaluation of speech about a corporation or its practices turns to questions of defamation, the commercial nature of the speech, confusion, alleged association, and harm to the reputation of a corporation. The crux of these questions is whether the speech in question is false or confusing to the public such that it has little value and is not protected.⁶⁴ This deference to corporations shows how corporations currently have speech rights that enable them to speak freely while also having legal cudgels to prevent speech about them. *Citizens United* addresses this point as the anti-distortion question and *Sullivan* as the false statement problem. The logic of both point to increasing speech about corporations rather than limiting it.

B. The Virtue of Decentralized Authority

The Supreme Court's corporate speech doctrine favors increasing the amount of decentralized sources of information, not limiting it. Such decentralization is supposed to help society have more perspectives, especially critical ones so that reasoned debate can take place.⁶⁵ Some possible problems come with this view. Is all speech equal? Do certain types of speech drown out other speech? What can or should the law do to permit for a good debate? The literature on these questions is vast, and they will persist. This investigation, however, requires a focus on specific aspects of the general issues. Possibly over-powerful speech arises in *Citizens United* as a question of distortion—"the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁶⁶ The truth-value of speech arises in *Sullivan* as both factual error and defamation issues.⁶⁷ Taken together, these cases show that First Amendment law not only tolerates turbulence about issues and possibly confusing statements about

⁶³ Compare <http://www.reuseit.com/learn-more/myth-busting/why-paper-is-no-better-than-plastic> (recycling activist) with http://www.plasticsindustry.org/files/about/fbf/myths%2Bfacts_grocerybags.pdf (trade group claim about plastic bags and impact on environment)

⁶⁴ Weisberg on false statement of fact overstated

⁶⁵ *Whitney v. California*, 274 U. S. 357, 375-376 (1927) (Brandeis, J., concurring); *see also* *United States v. Alvarez*, at 16 ("Society has the right and civic duty to engage in open, dynamic, rational discourse.")

⁶⁶ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-660, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990); *accord* *Citizens United v. FEC*, 130 S. Ct. at 903.

⁶⁷ *See* *Sullivan*, 376 U.S. at 273 ("If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.").

public figures and/or public matters, but embraces that muddiness as a way to have a larger debate that is not subject to only one view of an issue.⁶⁸ Put differently, the Court seeks to increase the *amount* of information and puts less weight on the information's *truth-value*.⁶⁹

The possibility of distorting speech simply does not matter in the decentralized approach to corporate speech. *Citizens United* rejected the concept of antidistortion in favor of allowing more, not less speech. Antidistortion was designed to prevent corporations “from obtaining ‘an unfair advantage in the political marketplace’ by using ‘resources amassed in the economic marketplace.’”⁷⁰ That a corporation may amass great wealth and use it is not a surprise. Mitigating such a possibility might even be laudable. But individuals can also amass similar wealth, and the First Amendment does not turn on financial status.⁷¹ Furthermore, the Court noted that the anti-distortion ideal would apply to a media corporation and allow Congress to ban such a corporation's speech.⁷² According to the Court, “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”⁷³ Thus the antidistortion rule, if followed, would deny corporations the right to speak in the same way that individuals speak and be tantamount to censorship that prevents the public from receiving information.⁷⁴ Such a rule could not stand. In the face of virulent factions, banning one or the other faction “destroys liberty” of some factions and is “worse than the disease.” It is better to have more speech by all manner of speakers and let the public determine “what is true and what is false.”⁷⁵ All of these points fit into the view that the solution to possibly distorting views is to have all speak rather than have a centralized decision about what speech to allow.

The antidistortion approach to speech was doomed for another reason; the Court's high tolerance for false, inaccurate statements in the realm of political speech. The antidistortion perspective may be correct that certain

⁶⁸ As shown later, this point clashes directly with the way trademark law operates and has large implications for speech and trademark law.

⁶⁹ Cf. Deven Desai, *An Information Approach to Trademark Law*, ___ Georgetown Law Review ___ (2012).

⁷⁰ *Citizens United v. FEC*, 130 S. Ct. at 904; see also *Sorrell v IMS Health*, 564 U.S. ___ (2011) *supra* note ___

⁷¹ *Citizens United v. FEC*, 130 S. Ct. at 904-905 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*) (“The First Amendment's protections do not depend on the speaker's ‘financial ability to engage in public discussion.’”)).

⁷² *Citizens United v. FEC*, 130 S. Ct. at 905; see also Yosifon, *Pulic Choice Social Responsibility* after *Citizens United* 89 North Carolina 1198, 1221

⁷³ *Citizens United v. FEC*, 130 S. Ct. at 907 (emphasis added).

⁷⁴ *Citizens United v. FEC*, 130 S. Ct. at 907 (“The censorship we now confront is vast in its reach.” “The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” “[T]he electorate [has been] deprived of information, knowledge and opinion vital to its function.”) (emphasis added); *United States v. Alvarez*, at 16 (rejecting “enforced silence” in favor of more speech to counter false statements).

⁷⁵ *Citizens United v. FEC*, 130 S. Ct. at 907.

corporate views could overwhelm other speakers' voices and possibly eliminate precisely the wide range of speech the *Citizens United* Court vaunted. Antidistortion principles also sought to manage the way in which large corporate donations can corrupt the political process.⁷⁶ The perspective that certain corporate speech will be false and distort the factual record cannot, however, get around *Sullivan*. Recall that *Sullivan* involves a claim of libel and left the defendants with truth as a defense. The Court resoundingly rejected truth testing in favor of speech. When the First Amendment is at issue “any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker” are not recognized.⁷⁷ Such tests would force the speaker to assess and prove the truth of statements; that endeavor, even for true statements, presents great uncertainty and potential costs such that they would self-censor for fear of actions and possible judgments against them.⁷⁸ According to the Court, “erroneous statement is inevitable in free debate,”⁷⁹ and “constitutional protection [for speech] does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”⁸⁰ Furthermore, “injury to [] reputation,” even if based on “utterance[s] contain[ing] ‘half-truths’ and ‘misinformation,’” is not sufficient to trump speech about public officials.⁸¹ The *Sullivan* Court, like the *Citizens United* Court more than 45 years later, champions the ability of anyone—corporation, association, or individual—to criticize public officials (and by extension public figures) and discuss public affairs. Rules that interfere with that ability are likely unconstitutional.

In addition, both cases reflect a dedication to symmetry of allowed speech and how speech is made. *Citizens United* and the more recent decision *Sorrell v. IMS*⁸² reject rules that distinguish amongst speakers and instead favors applying the same speech rules to all. *Sullivan* recognizes that public officials have broad immunity against libel if the statement is made as part of the official's duties.⁸³ In a move to rebalance speech rights, the *Sullivan* Court held that not providing *critics* of public officials “a fair equivalent of the immunity granted to the officials themselves” “would give public servants an

⁷⁶ *Citizens United v. FEC*, 130 S. Ct. at 961-968 (Stevens, J. dissenting) (discussing how the majority “badly errs both in explaining the nature of [anticorruption, antidistortion, and shareholder protection] rationales, which overlap and complement each other, and in applying them to the case at hand.”). The Supreme Court's decision in *American Tradition Partnership, Inc. v. Bullock*, further entrenched the rule that laws seeking to prevent corporate speech to prevent corruption are unconstitutional. *American Tradition Partnership, Inc. v. Bullock* 567 U.S. __ (2012) slip op at 1.

⁷⁷ *Sullivan*, 376 U.S. at 271.

⁷⁸ *Sullivan*, 376 U.S. at 278-279.

⁷⁹ *Sullivan*, 376 U.S. at 271.

⁸⁰ *Sullivan*, 376 U.S. at 271.

⁸¹ *Sullivan*, 376 U.S. at 272-273.

⁸² *Sorrell v. IMS Health*, 564 U.S. __ (2011) supra note __

⁸³ *Sullivan*, 376 U.S. at 282. (“In *Barr v. Matteo*, 360 U. S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made ‘within the outer perimeter’ of his duties.”).

unjustified preference over the public they serve.”⁸⁴ Justice Goldberg’s concurrence in *Sullivan* adds another dimension to symmetry. The underlying logic seems to be that *if* the press was able to smear the public official, and the official had little ability to counter that speech, a distortion problem may be present. That was not the case, because public officials have sufficient means for counter speech through the media.⁸⁵ Because there was symmetry regarding speech platforms, there should be “an absolute privilege for criticism of official conduct” by citizens and the press.⁸⁶ Of course, *Citizens United* rejects the antidistortion ideal, but its adherence to the idea that all manners of speech in all mediums are equal and its discussion of the way in which any and all speakers may soon avail themselves of a range of mediums including the Internet, shows a desire to avoid carve outs for a specific type of speaker or medium and instead treat all symmetrically.⁸⁷

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

III. AGAINST SAVING CORPORATE FACE

A cluster of laws and doctrines protects corporate reputation despite the constitutional desire for more speech about public figures. Injurious falsehood claims, commercial speech doctrine, and the Lanham Act favor reduced speech about corporations and raise barriers to speech based on the idea that distortion is a harm to be prevented. Part of the problem is that the subject matter of

⁸⁴ *Sullivan*, 376 U.S. at 282.

⁸⁵ *Sullivan*, 376 U.S. at 304-305 (explaining that even in the face of “unsubstantiated opinions or deliberate misstatements” a public official should and could engage in counter-speech because she could avail herself of her “equal if not greater access than most private citizens to media of communication”).

⁸⁶ *Sullivan*, 376 U.S. at 304.

⁸⁷ *Citizens United v. FEC*, 130 S. Ct. at 905-906, 912-913 (“There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

corporate reputational laws is traditionally understood as a type of commercial speech, which receives less protection than other speech. That position misses that these laws also act as reputation protection laws. For example, trademarks have moved far beyond the commercial sphere. Trademarks have become brands, that is, they now are more about allowing corporations a way to protect reputation and persona more than to prevent unfair competition.⁸⁸ Precisely because trademarks have become reputation devices, trademark law runs into constitutional speech problems.⁸⁹ We do not question the ability of a critic to use the name and face of a natural person who was a public figure. We do, however, question and limit the ability to use corporations' names and faces to critique them. When choosing between saving corporate face and the right to speak about a corporation, the right to speak should trump.

A. Corporations Are People, II

Corporations have a being; it is their brand and all that goes with it. A corporation's word mark is its given name; its logo, its face.⁹⁰ Google, Mattel, and Rolex are the names of political figures just as Hillary Clinton, Mitt Romney, and Barak Obama are names of political figures. The bitten apple, interlocked Gs, and golden arches, are the faces of political figures just as pictures of George W. Bush, Bill Clinton, and Rick Santorum capture the faces of political figures.⁹¹ More than these familiar aspects, corporations see themselves not only as people but as having identities, personalities, and souls personified by their brands.⁹² Corporations speak of injury to their reputations

⁸⁸ Denicola at 163-164 (noting the shift to reputation protection); Dan Burk and Brett McDonnell, *Trademarks and the Boundaries of the Firm*, 51 Wm. & Mary L. Rev. 345, 361; (2009) (noting importance of trademark as a reputational asset). Lemley McKenna Associational harm, Tushnet, Lanham Act and Commercial Speech (“A reputation can be called property as easily as a trademark – indeed, they are much the same thing – and yet libel law is pervasively constrained by the First Amendment.”)Than

⁸⁹ Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158; Dreyfuss, Desai Rierson, Ramsey, Heymann

⁹⁰ *Accord* Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 198 (“Famous trademarks are the functional equivalent of famous names; indeed, if the mark consists of a distinctive graphic representation, it functions as the visual ‘likeness’ of its incorporeal owner as well.”).

⁹¹ *Id.*

⁹² *See e.g.*, TILDE HEDING, CHARLOTTE F. KNUDTZEN, MOGENS BJERRE, BRAND MANAGEMENT RESEARCH, THEORY, AND PRACTICE 49 (2009) [HEREINAFTER HEDING ET AL] (describing the identity approach to branding); CORPORATE CULTURES AND GLOBAL BRANDS 2 (Albrecht Rothacher ed., 2004) (“Simply put, a brand is the soul of a product.”); MARCEL DANESI, BRANDS 33 (2006) (explaining brands as personalities with identities) *cf.* CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 24, 33-34 (2004) (discussing brand personality as being built and reflected by the internal connection between the brand and employees who become “the soul” of the brand).

in much the same way people refer to reputational injuries in libel.⁹³ This self-perception conforms to corporations' claims to greater recognition as people in the speech context and elsewhere. Like a person, corporations seem to assert:

He hath disgraced me, and
hindered me half a million; laughed at my losses,
mocked at my gains, scorned my nation, thwarted my
bargains, cooled my friends, heated mine
enemies; and what's his reason? I am a [Corp].⁹⁴

as they wage campaigns against those who might use their marks and logos to criticize. Like Shylock, corporations seek revenge.⁹⁵ Like Sullivan, corporations seek to prevent speech about their public roles and acts. And, as people often do, corporations claim personal rights but do not wish to have the limits that go with those rights.⁹⁶

Once corporate reputation laws enter the picture, the symmetry we saw in public figure doctrine vanishes. Imagine telling Citizens United, the entity, that it could speak but not use then Senator Clinton's name or face to deliver the political message. Corporate reputation laws open this possibility all too easily. None of which is to say that such laws ignore speech entirely. Rather, they have a narrow view of speech and fail to accommodate it well.

B. Barriers to Speech About Public Figure Corporations

⁹³ Strong reasons indicate that despite corporations greater ability to claim personhood, they do not have the same dignity interests as people and thus the issues at stake for a person bringing a libel claim are not the same as for a corporation. *See* Becker at __; Sack at __. For the purposes of this Article, I argue that those reasons are being ignored and are at least eroding so that corporate reputation claims, especially dilution claims which do not require confusion and address tarnishing and blurring of image are starting to function like dignitary interests.

⁹⁴ WILLIAM SHAKESPEARE, *MERCHANT OF VENICE*, act 3, sc. 1; *see also* Milkovich Lorain Journal, Inc., 497 U.S. 1, 12 (1990) (citing and quoting William Shakespeare, *Othello*, act 3, sc. 3 (“Good name in man and woman, dear my lord, Is the immediate jewel of their souls. Who steals my purse steals trash; `Tis something, nothing; `Twas mine, `tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.”)).

⁹⁵ WILLIAM SHAKESPEARE, *MERCHANT OF VENICE*, act 3, sc. 1 (“and if you wrong us, shall we not revenge?”) Of course an irony here is that the rest of Shylock's speech asks whether he, a Jewish man, does not have eyes, hands, organs; is not subject to the elements; would not laugh if tickled, bleed if pricked; just as any other Christian and impliedly any other person. *Id.* Corporations as yet do not have such capabilities. Nonetheless there are examples of vengeful goals. *See e.g.*, Steve Silberman, *Mattel's Latest: Cease and Desist Barbie*, WIRED.COM, October 28, 1997 (reporting that a Mattel attorney allegedly claimed the company wanted a defendant's house) available at <http://www.wired.com/culture/lifestyle/news/1997/10/8037>.

⁹⁶ Mill On Liberty

The traditional lines between commercial and non-commercial speech, between corporation and person, and between private and public are gone.⁹⁷ Nonetheless, trademark law and defamation claims persist as threats to speech about public figure corporations. Trademark law was once easily separate from constitutional concerns, because trademarks were easily understood as commercial speech. As Robert Denicola once put it, “The information conveyed through the use of a trademark generally relates not to the momentous philosophical or political issues of the day, but rather to the details of prospective commercial transactions—the source or quality of specific goods or services. Restrictions on such ‘commercial speech’ were long thought exempt from constitutional scrutiny.”⁹⁸ When Denicola wrote about trademarks and speech thirty years ago, he faced unsettled “doctrine and policy” regarding the justifications for trademark protection including a growing turn to a property approach to trademarks as seen in stronger misappropriation and dilution theories of trademark.⁹⁹ In addition, the ideas of corporate personhood and speech were nowhere near as developed as today. Nonetheless he already saw that “trademark law must ultimately respond to basic constitutional interests.”¹⁰⁰ Given shifts in trademark protection, the nature of corporate personhood and speech, and the politics of products and process, the concerns motivating Denicola in 1982 are heightened. Furthermore, unlike 1982, today the information conveyed through a trademark often concerns the political issues of the day especially when considering source and quality.¹⁰¹

⁹⁷ This point has greater force today, but the Supreme Court has acknowledged the issue for First Amendment analysis since at least 1971. *See* *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 163-164 (1967) (Warren, C. J., concurring in result)

⁹⁸ Denicola at 158-159; *accord* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 265-66 (1987) (arguing that trademarks are justified promoting economic efficiency); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995) (“[T]rademark law . . . ‘reduce[s] the customer’s costs of shopping and making purchasing decisions,’ for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.” (alteration in original) (quoting 1 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.01[2], at 2-3 (3D ED. 1994))); *cf.* Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 790 (1997); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010). Lemley and McKenna further explained this proposition:

When it works well, trademark law facilitates the workings of modern markets by permitting producers to accurately communicate information about the quality of their products to buyers, thereby encouraging them to invest in making quality products, particularly in circumstances in which that quality wouldn’t otherwise be apparent. If competitors can falsely mimic that information, they will confuse consumers, who won’t know whether they are in fact getting a high quality product. Indeed, some consumers will be stuck with lemons.

⁹⁹ Denicola at 160, 172, 183; *but see* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 395 (2008) (examining shift to both commercial and noncommercial trademark speech)

¹⁰⁰ Denicola at 160.

¹⁰¹ Desai Florida and Georgetown

Corporations, and by extension questions about the source and quality of goods and services, have become political. A paradox arises here because of the idea of trademark law as consumer protection law.¹⁰² In the political realm the scale tips to more information, even inaccurate information, as the foundation for rich debate and, over time, informed decision-making. In the commercial realm, speech is limited, in part, because it is not seen as being on par with political speech and in part to limit information to accurate and true statements that enhance the marketplace and arguendo consumer welfare.¹⁰³ A presumption here is that truth in commercial contexts is easier to find and offer than in political contexts.¹⁰⁴ The irony is that we live in a world of corporate people with increased corporate speech opportunities regarding political stands and the politics of their products, not to mention aggressive and pervasive advertising across the full range of media such as television, radio, the Internet, mobile displays, billboards, infomercials, and print. A speech model that limits challenging, albeit perhaps inaccurate, speech provides a corporate person with unfettered speech while shackling the ability to question the corporate person.¹⁰⁵

Current laws about corporate criticism play right into this strategy as they hinder the ability to use speech to police corporations. For example, trademark law has problems as it tries to protect consumers from false and misleading speech. A core understanding of trademark law today is that its purpose is to “facilitate the transmission of *accurate* information to the market.”¹⁰⁶ But the source of that transmission is the mark holder.¹⁰⁷ Mark holders, not consumers, bring trademark suits.¹⁰⁸ The idea is that the mark holder will police its mark and consumers benefit as an outcome. In the rare

¹⁰² See e.g., Burk and McDonnell at 352 (“[T]rademark law contains a substantial component of consumer protection, and this has long been recognized as an important function of trademarks—deterring the deception or defrauding of consumers by “passing off” one type of goods for another.”).

¹⁰³ Alvarez; Volokh and Papandrea for cases on fraud and false speech

¹⁰⁴ Cf. Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial Speech Doctrine* at 25 “Anti-regulatory positions presume a careful and competent consumer. Arguably, when political speech is at issue we must presume a fully rational citizen, given the risks of letting the government ban any political speech. But consumer behavior in the market is so plainly inconsistent with the behavior of idealized speech-evaluators that painful compromises are required. The question is who will bear the burden of imperfection: the real consumer, or the (equally real, but perhaps not equally rights-bearing) commercial speaker?”); Richard H. Weisberg, *The First Amendment Degraded: Milkovich v Lorain and A Continuing Sense of Loss on its 20th Birthday*, at 30-32 (2010) available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=richard_weisberg

¹⁰⁵ Corporations are sensitive to imbalances when they hinder corporate ability to advance a message. One way to understand the recent Nike v. Kasky case was a claim that “it was unfair that Nike’s critics could say almost anything, subject only to the lax constraints of defamation law, while Nike’s responses were subject to strict liability for falsehood.” See Tushnet, *Fighting Freestyle* at 1465.

¹⁰⁶ Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 548 (2006) (emphasis added).

¹⁰⁷ Desai Georgetown

¹⁰⁸ See e.g., Tushnet (false advertising) 15 USC 1114(1)

cases where there truly is passing off—using a mark to deceive consumers about what they are buying—trademark law protects consumers,¹⁰⁹ and the concerns of this Article are not present. As a constitutional matter the ideal of protecting consumers by preserving the quality of information in the marketplace appears sound, but when probed falls apart. The Supreme Court’s recent decision in *United States v. Alvarez* rejects the general position “that false statements receive no First Amendment protection.”¹¹⁰ Nonetheless, untruthful speech is often not protected, and the First Amendment allows laws that “insur[e] that the stream of commercial information flows cleanly as well as freely.”¹¹¹ In words that seem to echo trademark law’s likelihood of confusion test, the Supreme Court has said, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication *more likely* to deceive the public than to inform it.”¹¹² A glaring problem, however, is that the mark holder may and does use its power to squash representations it does not like.¹¹³

We would not allow Sullivan or Hillary Clinton to dictate whether and how people could comment on them as public figures. Yet, trademark law relies on mark holders to decide when the public should be able to see or hear an opinion about the mark holder. The current system thus allows the subject of the speech to control the content of that speech. As with the defamation suit at issue in *Sullivan*, trademark law enables threatening letters and lawsuits that chill speech.¹¹⁴ Trademark enforcement practices include sending cease and desist letters and increased numbers of “strike suits” designed to force quick settlements are “standard practice in the face of virtually any use” even legal uses.¹¹⁵ If a case reaches court, the test applied, the likelihood of confusion test, asks whether the use in question is “likely to cause confusion or to cause mistake, or to deceive as to the affiliation, connection, or association” about the relationship between the plaintiff and defendant or their products.¹¹⁶ The test is, however, quite poor at accommodating speech.¹¹⁷ The multifactor test is fact extensive, requires experts, and is not often amenable to summary judgment and thus chills speech “regardless of the ultimate outcome.”¹¹⁸ In

¹⁰⁹ Tushnet __; *But see* McGevean at 68 “The test has expanded far beyond its roots in cases involving direct commercial competitors.” McGevean on rarity of direct passing off

¹¹⁰ *United States v. Alvarez*, 567 U.S. __ (2012) slip op at 7, 10 (“[This opinion] rejects the notion that false speech should be in a general category that is presumptively unprotected”).

¹¹¹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); Tushnet 58 *South Carolina L. Rev.* 737, 737

¹¹² *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (emphasis added).

¹¹³ McGevean at 63-64.

¹¹⁴ *See e.g.*, Lisa Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 *S.M.U. L. REV.* 381, 404 (2008) (discussing examples of such enforcement actions)

¹¹⁵ McGevean at 63-64.

¹¹⁶ 15 U.S.C. §§1114(1), 1125(a) (2000).

¹¹⁷ *See generally*, Lisa Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 *S.M.U. L. REV.* 381 (2008).

¹¹⁸ McGevean at 71.

addition, because trademark law claims that consumers are rational actors who process information but embraces consumers as dullards who are easily confused when purchasing,¹¹⁹ almost any hint of confusion, even in expression cases, can be found to be an infringing use.¹²⁰ As Rebecca Tushnet has said, “Courts have interpreted the Lanham Act broadly, concluding that almost any association between a trademark owner and a defendant may sow confusion. Courts are willing to enjoin uses that they conclude indicate a trademark owner’s mere approval of a defendant’s product or service.”¹²¹

In short, trademark law reaches different conclusions for the same questions the Court addresses in public figure speech cases. The following chart illustrates the divergence in treatment.

	<i>Anti-distortion/Politics</i>	<i>Confusion/Commerce</i>
Truth Test	No	Yes
Reputation Protection	No	Yes
Allows Muffling of Voices	No	Yes
Tolerance for Inaccuracy	Yes	No

The very doctrine that the Supreme Court rejects—the antidistortion doctrine—because it “muffled [] voices” and “deprived [the electorate] of information, knowledge and opinion vital to its function”,¹²² reappears in trademark law under the guise of the likelihood of confusion doctrine. Only here the roles are reversed. The corporate speaker is privileged and shielded from scrutiny as it presses its views about itself, while everyone else faces hurdles to speak. Like the world before *Sullivan*, the public figure is protected and has super powers whereas the speaker is unprotected and faces penalties

¹¹⁹ Desai Florida, Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2022–25 (2005) (identifying the law’s idealized view of the consumer as “impossibly utilitarian” and the debate around the capacities of consumers to think for themselves); Florence Mfg. Co. v. J. C. Dowd & Co., 178 F. 73, 75 (2 Cir. 1910) (defining purchasers as a “vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyse, but are governed by appearances and general impressions.”), Austin, *supra* note **Error! Bookmark not defined.**, at 887–88 (“Some strands of case law, particularly from the early decades of the twentieth century, emphasized that ‘the public must be credited with a minimum capacity for discrimination.’ More recently, however, ordinarily prudent consumers have also been characterized as ‘credulous,’ ‘inexperienced,’ and ‘gullible.’ (footnote omitted) (quoting Hiram Walker & Sons, Inc. v. Penn-Maryland Corp., 79 F.2d 836, 839 (2d Cir. 1935), J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:93 (4th ed. 1996), and Stork Rest., Inc. v. Sahati, 166 F.2d 348, 359 (9th Cir. 1948))); Beebe, *supra* note **Error! Bookmark not defined.**, at 2023–24.

¹²⁰ CITE expression cases etc.

¹²¹ Tushnet, *Running the Gamut* at 1313

¹²² *Citizens United v. FEC*, 130 S. Ct. at 907.

for speech.¹²³ Beyond the traditional speech rules under which people operate, corporations use trademark law to protect their name, face, and reputation.

In short, trademark law privileges the mark holder’s view of its mark and the information the corporation offers for processing its version of the truth over others and suppresses challenges to what the mark stands for lest those challenges confuse consumers even in cases where the “protection doesn’t protect consumers.”¹²⁴ Dissolving lines about what is commercial speech and expanding corporate power to stop speech lead to one conclusion. We need a safe harbor for speech about corporations. A corporate public figure doctrine provides the contours of such a safe harbor.

IV. THE CORPORATE PUBLIC FIGURE

Citizens United offers that all corporations are persons and important to society in general. As such, public figure jurisprudence should shape the way we allow commentary about corporations. Suits about corporations that involve speech and corporate reputation interests should first pass the actual malice test before any confusion or other analysis takes place.

A. Establishing The Corporate Public Figure

Corporations can often qualify as either general or limited purpose public figures. Under standard public figure doctrine the general public figure is the exception and the limited figure status is more likely.¹²⁵ Corporations, however, can fit into either category rather easily.¹²⁶ The broad language of *Citizens United* indicates that all corporations are closer to general public figures than living people.¹²⁷ A few hypothetical situations help sort the issue. Suppose Corporation A, “CA,” is a leading maker of tractor equipment. CA’s tractors may be used for variety of purposes. On the one hand, customers may use the tractors to gain more yield from their farm and reduce labor needs to allow for investment in costlier but more environmentally friendly farm

¹²³ Cf. Tushnet, Lanham Act Commercial Speech, at 14-15 (“[I]f it is true that commercial speech is as relevant and vital to modern citizens as political speech, then suppressing competition is analogous to silencing political opponents, and certainly merits skeptical scrutiny. Like partisan officials deciding which political speech to pursue, trademark owners may see harm where there is only competition.”).

¹²⁴ Tushnet Gamut at 1360

¹²⁵ See Gertz, *accord* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Gerald G. Ashdown, *Of Public Figures and Public Interest - The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 940 (1984).

¹²⁶ Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment Public Figure: Nailing the Jellyfish*, 68 Iowa L. Rev. 35, 84-85 (1982)

¹²⁷ CITE to Scalia and above; Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment Public Figure: Nailing the Jellyfish*, 68 Iowa L. Rev. 35, 84 (1982) (“A corporation may be more readily subject than an individual to involuntary public figure status—a classification that Gertz termed ‘exceedingly rare.’”); *but see* Bank of Oregon v. Independent News, Inc., 693 P.2d 35, 42 (1985) (citing cases finding all purpose public figure status for corporations but rejecting them as inconsistent with *Gertz*).

techniques.¹²⁸ On the other hand some customers may use the tractors to tear down forests, fill in wetlands, or remove settlements.¹²⁹ Now consider Corporation B, “CB,” a leading maker of toys for girls. CB’s doll is the most popular doll for girls. On the one hand, the doll is part of a campaign for girl power and has promoted positive careers from surgeons to fashion designer to producer to an African American female Presidential candidate.¹³⁰ On the other hand, the doll may be seen as lacking anatomical normality, promoting consumerism, and at times offering images of girls as unable to handle mathematics.¹³¹ A third corporation, Corporation C, “CC,” is a leading soda pop maker. It has promoted its products as being All-American and Classic. It has also altered its ingredients over time. At one point, the soda had a little cocaine in it.¹³² Later, the cola switched from using sugar as a sweetener to corn syrup.¹³³ CC also has issued reports on its commitment to sustainability.¹³⁴ Now, suppose that someone criticized any of the corporations by making broad claims regarding their practices, the honesty of their assertions, and so on. The critic used print, the Internet, and local radio

¹²⁸ See e.g., Caterpillar History (“For more than 85 years, Caterpillar Inc. has been making progress possible and driving positive and sustainable change on every continent”) available at <http://www.caterpillar.com/company/history>); Caterpillar Code of Conduct, Environment and Sustainability (“We strive to create stockholder value by providing customers with solutions that improve the sustainability of their operations. We leverage technology and innovation to increase our efficiency and productivity while reducing environmental impact. We develop new business opportunities that help our customers, dealers, distributors and suppliers do the same. Our products and services will meet or exceed applicable regulations and standards wherever they are initially sold. We lead industry and community initiatives that share our commitment to making sustainable progress possible.”) available at <http://www.caterpillar.com/company/strategy/code-of-conduct/commitment/environment-and-sustainability>.

¹²⁹ See e.g. *Caterpillar Pulled From Social Indexes*, Associated Press, June 27, 2012 (noting social index, MSCI, Inc., removed Caterpillar from its index and subsequent \$72 million divestment by TIIA-CREF) available at

<http://www.foxnews.com/world/2012/06/27/caterpillar-pulled-from-social-indexes/>

¹³⁰ See Simone Brummelhuis, *Career Barbie (now 50) is on a Mission and Promotes Girl Power*, THE NEXT WOMEN, March 29, 2009, available at

<http://www.thenextwomen.com/2009/03/29/career-barbie-now-50-is-on-a-mission-and-advocates-girl-power>; see also Barbie *icanbe* campaign at

http://icanbe.barbie.com/en_us/index.html (offering a range of Barbie and careers and promoting the idea that “Barbie lets you be anything you ant to be.”).

¹³¹ See COMPANY NEWS: Mattel Says It Erred; Teen Talk Barbie Turns Silent on Math, NY TIMES, October 21, 1992 available at <http://www.nytimes.com/1992/10/21/business/company-news-mattel-says-it-erred-teen-talk-barbie-turns-silent-on-math.html>

¹³² See e.g., Douglas H. Boucher, *Cocaine and the Coca Plant*, 41 *BioScience* 72, 75 (1991) (noting Coca-Cola “contained a minute amount of cocaine” in its original formula and Coca-Cola’s decision to remove the ingredient in 1903 after a report condemning cocaine as part of growing drug problem among lower classes of society), Andrew T. Weil, *Coca Leaf as Therapeutic Agent*, 5 *Am. J. Drug Abuse*, 75, 83 n.17 (1978) (noting Coca-Cola began with “coca alkaloids” but removed them in 1903).

¹³³ Desai, Florida

¹³⁴ The Coca-Cola Company Releases Sustainability Report, February 4, 2011 available at http://www.thecoca-colacompany.com/dynamic/press_center/2011/02/company-releases-sustainability-report.html

advertisements to further the campaign. The critic also used the corporation’s trademarks in the campaign—a practice sometimes called brand jacking—, because they are the name and face of the corporation.¹³⁵ And, suppose a given corporation sued the speaker. How would the issue turn out? Under current doctrine, the critic would face large costs, injunctions, and possibly need to reach an appellate court before the speech was vindicated.¹³⁶ Under the proposed approach, a defendant would argue that the corporations are public figures, and that they must meet the actual malice standard under *Sullivan*. This approach allows for earlier determination of the speech issues and should increase the amount of information available to make decisions rather than reducing it, as is the case today.

Determining whether the plaintiff is a public figure and what type of public figure, general or limited, is a question of law.¹³⁷ The Court of Appeals of the District of Columbia has explained:

A person becomes a general-purpose public figure only if he or she is a well-known celebrity, his name a household word. Such persons have knowingly relinquished their anonymity in return for fame, fortune, or influence. They are frequently so famous that they may be able to transfer their recognition and influence from one field to another. Thus, it is reasonable to attribute a public character to all aspects of their lives.¹³⁸

If CA is Caterpillar; CB, Mattel; and CC, Coca-Cola, they seem to qualify as general public figures quite well.¹³⁹ Although corporations are not giving up anonymity, they seek and, in these examples, attain “fame, fortune, and influence.”¹⁴⁰ A different way to analyze the issue is to ask whether the corporations’ marks would qualify for federal dilution protection. Dilution protects famous marks. Federal dilution law defines famous marks as marks “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”¹⁴¹ Factors indicating that a mark is famous include amounts spent and areas reached by advertising, how much and where goods and services have been sold, and the

¹³⁵ Desai from TM to Brands, Katyal, Klein

¹³⁶ McLibel case, McGeeveran, Caterpillar from Ramsey

¹³⁷ See *Tavoulareas v. Piro*, 817 F.2d 762, 772 (1987) (en banc); accord *Rosenblatt v.*

Baer, 383 U.S. 75, 88 (1966) (“Whether the plaintiff is a public figure is a question of law for the court to resolve.”) (citing *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427, 429

(D.C.Cir.1978), rev'd on other grounds, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979).

¹³⁸ *Tavoulareas*, 817 F.2d at 772 (internal quotations and citations omitted).

¹³⁹ See ROBERT D. STACK, *SACK ON DEFAMATION* § 5:3.7 (4th Ed. 2011).

¹⁴⁰ See ROBERT D. STACK, *SACK ON DEFAMATION* § 5:3.7 (4th Ed. 2011) (explaining that the nature of being a public corporation and “go[ing] public” is a voluntary action leading to mandatory public scrutiny thus treating public corporations as public figures is consistent with the First Amendment and SEC laws).

¹⁴¹ 15 U.S.C. § 1125(C)(2)(A).

extent of actual recognition.¹⁴² This language comes from a recent revision, which was designed, in part, to move away from dilution protection for “niche” marks, or locally famous marks, and only be available for national brands that have “household” recognition.¹⁴³ Marks meriting dilution protection correspond to general corporate public figures. Like human general public figures, corporate ones are household names.

Even if one chooses to avoid declaring famous corporations general public figures, or if CA, CB, and CC were not Caterpillar, Mattel, and Coca-Cola, but instead were local corporations, they would be limited public figures. Courts have applied a three-part test to determine this.¹⁴⁴ First, the controversy must be determined “because the scope of the controversy in which the plaintiff involves himself defines the scope of the public personality.”¹⁴⁵ The issue must be public such that “people are discussing it” and must affect more people than just the ones directly involved in it.¹⁴⁶ Second, “the plaintiff must have more than a trivial or tangential role in the controversy.”¹⁴⁷ Last, the claimed defamation “must be germane to the plaintiff’s participation in the controversy.”¹⁴⁸ Criticisms about CA’s approach to the environment, CB’s approach to women’s place in society, or CC’s approach to health are issues that reach more than the disputants. Whether the role was more than trivial will turn on whether the corporations asserted some influence on outcomes or made statements about the issues at hand. In our examples, Caterpillar, Mattel, and Coca-Cola have all taken public stands on the respective issues by touting their roles in sustainability,¹⁴⁹ empowering girls and women,¹⁵⁰ and health¹⁵¹

¹⁴² *Id.*

¹⁴³ See Barton Beebe, *A Defense of the New Federal Trademark Antidilution Act*, *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*, 1143, 1157-1158 (2006).

¹⁴⁴ See e.g., *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297-1298 (D.C.Cir.1980) cert. denied, 449 U.S. 898 (1980); *accord Tavoulareas*, 817 F.2d at 772-773; *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F. 2d 431, 433-434 (5th Cir. 1987) (adopting the standard).

¹⁴⁵ *Tavoulareas*, 817 F.2d at 772-773.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* In *Snead v. Redland Aggregates, Ltd.*, the Court of Appeals for the Fifth Circuit explained that determining the private or public figure status of a corporation is a case-by-case inquiry and offered three, non-exclusive factors to investigate the public aspects of the corporation’s reputation), including how well-known the corporation is in general, how well-known is its field of business, and how much media attention it normally receives. See *Snead v. Redland Aggregates, Ltd.*, 998 F.2d, 1325, 1329 (5th Cir. 1993). The *Snead* factors point to general purpose public figure inquiry—“we safely can assume that the majority of Americans has never heard of Redland or Standard Corporations”, “in these businesses do not ordinarily become household names”—and nod to limited purpose public figure analysis—“even a small corporation that does not deal with consumers might attain notoriety if it engages in frequent corporate takeovers that become widely publicized”—but do not develop as clear a set of questions as other public figure inquiries. *Id.* As such, I argue that the inquiry for people is more helpful as applied to corporations.

¹⁴⁹ Caterpillar, *Global Issues, Engaging with Government* available at <http://www.caterpillar.com/cda/components/fullArticle?m=484235&x=7&id=3449560>

matters. So even if not deemed general purpose corporate figures, they would meet this part of the evaluation. If, however, none of the corporations have made statements on an issue, would they still be limited purpose public figures? An investigation of facts about lobbying, public relation campaigns, and similar acts that demonstrate the role of the company would be required. Furthermore, a corporation's local interactions, activities, and policies such as community development projects, advocacy on city and county councils, negotiated tax breaks, employment policies, and so on would favor treating a somewhat unknown corporation as a limited public figure.¹⁵²

The germaneness question would follow a similar fact inquiry, but a corporation's greater general power to shape policy as compared to an individual, indicates that many issues could be germane more often. If the statements about the corporation were about the issues on which it spoke or where it had influence, they would, of course, be germane. A broad claim that Mattel supports war or Coca-Cola hates same-sex marriage rights or Caterpillar dislikes NASA's space program would not seem to be germane. For human defamation plaintiffs, courts will not allow a private person to be deemed a limited purpose public figure unless the statement has some connection to the controversy, and "Misstatements wholly unrelated to the controversy" are not protected.¹⁵³ Yet claims that selling goods or investing in former Apartheid South Africa supports racism helped change policy at both the corporate and state level. Today, a claim that failing to offer same-sex rights in the workplace undermines LGBT rights or choosing to offer such rights undermines family values could be germane as a general matter. Once Google, Nabisco, and JC Penny choose to support gay and lesbian rights, face some consumer backlash, and receive some consumer support, one might argue that any large company that employs many people ought support or reject gay rights.¹⁵⁴ Either way, the topics become germane as the corporation

¹⁵⁰ See Mattel, *supra* note, __; Playing Responsibly, 2009 Global citizenship Report at 40 (listing learning, health, girl empowerment, and joy as philanthropic priorities)
<http://corporate.mattel.com/about-us/2009GCRReport.pdf>

¹⁵¹ Coca-Cola Sustainability Report, Health and Well Being, available at <http://www.thecoca-colacompany.com/sustainabilityreport/in-our-company/healthy-communities/health-and-well-being.html>

¹⁵² See e.g., Chafoulias v. Peterson, 668 NW 2d 642 (Minn. S. Ct. 2003) ("By seeking public and government support for development projects that have a significant impact on Rochester, [defendant] has assumed a position that invites attention and comment about the manner in which he conducts his business affairs."); One might wish to say that the corporation did not seek the limelight; but like a person, a corporation cannot say it did not want the attention. The question turns on whether the corporation's activity could foreseeably generate public attention. See Smolla, Law of Defamation §§ 2:30, 2:32.

¹⁵³ Waldbaum 1298

¹⁵⁴ See e.g., Matt DeLong, *Google: Legalize Love Campaign Isn't About Gay Marriage*, WASHINGTON POST, July 8, 2012 available at http://www.washingtonpost.com/blogs/innovations/post/google-legalize-love-campaign-isnt-about-gay-marriage/2012/07/08/gJQAN3PQWW_blog.html, Heba Hasan, *Anti-Gay Group Slams JCPenny, Over Father's Day Ad*, June 3, 2012, available at <http://newsfeed.time.com/2012/06/03/anti-gay-group-slams-jcpenneys-over-fathers-day-ad/>; Kevin Burra and Curtis M. Wong, *Oreo Cookies' Gay Pride Backlash: 25 Companies and*

chooses its policy for such matters and participates in controversy when it makes such decisions. Just as inquiry into public officials' fitness for office makes comments about dishonesty, malfeasance, or improper motivation, germane, the way in which corporation makes its goods can be seen as germane.¹⁵⁵ The difficulty in parsing this question stems from the fact that corporations have burst the bounds of the limited commercial actor and function instead as public figures. They often wield enough power that they influence and can alter the course of human events. As corporations increase in their importance and we are asked to vote with our dollars, many issues could be deemed germane. In sum, whether a corporation is a limited purpose public figure should be a broad, lenient inquiry.

B. Questioning the Corporate Public Figure

The reason to have a corporate public figure doctrine is to ensure high information flow and public debate.¹⁵⁶ Who, however, may invoke such a privilege and how the privilege may operate in practice presents some problems. Individuals and activist groups, and the formal press may question corporate public figures, but so too may other corporations. How much information we allow into a debate involves an inherent tradeoff. First Amendment law and corporate reputation law strive to balance between judgment calls about what is good information that allows us to make better decisions and bad information that hinders our ability to understand an issue. Corporate reputation law tends to limit information. First Amendment jurisprudence favors the provision of more information by individuals, groups, and the press and relies on the ability of people to parse amongst different pieces of information, even inaccurate information, instead of restricting information flow.¹⁵⁷ The First Amendment's actual malice test reflects the choice for more information, not less. Actual malice requires that the defendant acted "with knowledge that [the publication] was false or with reckless disregard of whether it was false or not."¹⁵⁸ Given the passions involved in political and public issues, the standard requires something more than "ill will or 'malice' in the ordinary sense of the term."¹⁵⁹ It does not matter that the

Products Boycotted for Supporting LGBT Rights, HUFFINGTON POST, June 28, 2012, available at http://www.huffingtonpost.com/2012/06/28/oreo-backlash-companies-anti-gay-boycott_n_1634767.html.

¹⁵⁵ Waldbaum at 1298 n 33; Tavouleras at 774 (issues of nepotism at corporate management germane)

¹⁵⁶ See e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-504 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole.").

¹⁵⁷ *Alvarez, St. Amant v. Thompson*, 390 U.S. 727, 732 ("But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.") (1968).

¹⁵⁸ *Sullivan* at 279-280.

¹⁵⁹ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

allegedly defamatory material is published with an eye toward profit.¹⁶⁰ The core issue is whether “the defendant [] made the false publication with a ‘high degree of awareness of . . . probable falsity,’ or must have ‘entertained serious doubts as to the truth of his publication’.”¹⁶¹ It would seem that most assertions about a corporation would be privileged unless someone offered an outright lie and knew it was a lie. Indeed, the actual malice threshold has been applied to limit some corporate reputation doctrines. Trade libel and slander of title actions—sometimes collectively known as injurious falsehoods¹⁶²—have been held constitutional when limited to knowingly false statements and actual malice is shown.¹⁶³ Applying actual malice as the threshold for liability in a trade libel case involving a public figure is the approach under the Restatement of Torts and offered as the probable requirement by Judge Sack in his treatise on First Amendment law.¹⁶⁴ The Lanham Act as corporate reputation doctrine is where applying actual malice runs into problems.

The Lanham Act is the missing piece of the corporate reputation laws. The section of the Lanham Act which addresses false advertising, “creates a cause of action strikingly similar to, and that may act as a substitute for, one for injurious falsehood.”¹⁶⁵ And the section concerning trademarks uses almost the exact same language as the false advertising provisions.¹⁶⁶ Applying actual malice to trademark and false advertising law would track how the Court manages other corporate reputation doctrines. Yet, trademark and false advertising law are treated quite differently than other corporate reputation laws with injunctions being common, no intent requirement for deception, and

¹⁶⁰ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”).

¹⁶¹ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (citations omitted).

¹⁶² See Sack at §13.1.1.

¹⁶³ See e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (trade libel); *SCO Group, Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1296 (D. Utah 2010) (slander of title); accord Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae, *U.S. v. Alvarez*, No. 11-210 at 5.

¹⁶⁴ See RESTATEMENT (SECOND) OF TORTS § 623A cmt. d (1977); Sack at §13.1.4 (“A public plaintiff must probably, under the First Amendment law, prove ‘actual malice’ in a disparagement case as in a libel or slander case.”)

¹⁶⁵ Sack at §13.2.

¹⁶⁶ As Rebecca Tushnet has explained, “15 U.S.C. § 1125(a)(1) (2006) bars the use in commerce of ‘any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact’ which either (A) ‘is likely to cause confusion, or to cause mistake, or to deceive’ consumers ‘as to the affiliation, connection, or association of [the parties] . . . , or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities’ (the trademark provision) or (B) ‘in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities’ (the false advertising provision). Thus, the language barring falsity and misleading representation is the same in the statute, and courts have interpreted both provisions to require a showing of likely deception.” Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 BOSTON COLLEGE L. REV. 1457, 1475 n. 82 (2009).

no requirement for special damages related to the speech at issue.¹⁶⁷ It would seem that an actual malice test should be applied here as well. As Rebecca Tushnet has argued, the core problem that arises from a such an approach could place all corporate speech beyond the reach of not only much of trademark and false advertising law, but also “Government agencies, such as the FTC, the Securities and Exchange Commission, and the FDA, [that] engage in direct government regulation of speech using rulemaking and enforcement actions.”¹⁶⁸ Going further, Tushnet identifies precisely the problem this Article tries to address. Current Supreme Court jurisprudence goes to the heart of commercial speech and consumer protection ideals and eviscerates them.¹⁶⁹ To paraphrase Tushnet, I am not saying this turn is desirable, and I acknowledge its problems.¹⁷⁰ Rather, I believe that First Amendment jurisprudence has gone this route. This turn combined with increased corporate speech power requires that we offer proper protection for those who would speak about corporate practices. Increased speech is all that remains.

Applying actual malice would allow consumers, commenters, the press, and others to question corporations including using their trademarks as part of that speech. Under *Citizens United*, corporations are, however, people with the same speech rights as people. Thus, corporations empowered to speak will be able to assert claims not only about their goods and services but also about other corporations. Corporations will have to engage in lawsuits or even more spending for counter speech, i.e. more advertising, as they launch broad claims about each other. Consumers and activists may also hurl broad claims about a corporation into the fray. As such, other consumers will have to sort an ever-increasing stack of information and must be able to parse that information to use it.¹⁷¹

¹⁶⁷ See Sack at §13.2.

¹⁶⁸ Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 BOSTON COLLEGE L. REV. 1457, 1479 (2009)

¹⁶⁹ Accord, Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOYOLA L. REV. 101, 131 (2008) (“[T]he consequence of turning false advertising law into a subtopic of First Amendment law would be a substantial, possibly near-total, contraction of its scope.”).

¹⁷⁰ Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOYOLA L. REV. 101, 131 (2008) “Whether this is desirable or not, it needs to be acknowledged. At the least, advocates of full constitutional protection for commercial speech need to explain what they mean when they say that commercial fraud would still be actionable in their proposed constitutional regime.”).

¹⁷¹ Robert Weisberg has argued that a proper reading of *Sullivan* accepts a thinking, deliberating audience while also questioning the broad ideas of public figures and public interest that is considered speech deserving of First Amendment protection. Richard H. Weisberg, *The First Amendment Degraded: Milkovich v Lorain and A Continuing Sense of Loss on its 20th Birthday*, at 46-48 (2010) available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=richard_weisberg But see Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOYOLA L. REV. 101, 130-131 (2008) (questioning the applying the logic of relying on the marketplace of ideas as it works in political speech to commercial speech).

C. The Doctrine in Practice

TBW

SLAPP – fills some gaps but not all

Difficulty of discriminating amongst speakers

V. CONCLUSION