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Should Corporations Have First Amendment Rights?

Kent Greenfield,[†] Daniel J. H. Greenwood,[‡] Erik S. Jaffe^{}*

Dana Gold: Kent Greenfield is a professor at Boston College Law School, and a very good personal friend. He is a progressive corporate law scholar, and he has a new book coming out called *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*.¹ Kent will be moderating this session, and this will be a lively discussion between Professor Dan Greenwood of Utah at the University of Utah College of Law, who focuses also in the area of corporate law, and Erik Jaffe, who focuses his practice on First Amendment law.

Kent Greenfield: Thank you, Dana. Erik Jaffe and Dan Greenwood will each talk for about ten minutes, and then the three of us will converse for a few minutes before taking questions from the audience.

Daniel Greenwood: Thank you. Despite Professor Winkler's careful advice to us, the corporate personality isn't the core of the issue here. I'm going to make an argument that corporations are the wrong sort of thing to have speech rights; that is, I'm going to ignore the law, which, as Professor Winkler quite correctly points out, focuses on the rights of listeners rather than the rights of speakers, and instead argue that the speaker makes a difference. I'm happy to talk directly about listeners afterwards, but I'm not going to do it here. This is an issue that could be understood as part of the problem of the First Amendment and the constitutionalization of economics.²

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1. KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2007).

2. See, e.g., Daniel J. H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659–72 (1999).

I. THE FIRST AMENDMENT AND THE
CONSTITUTIONALIZATION OF ECONOMIC REGULATION

Almost a century ago in *Lochner*,³ Justice Holmes proclaimed that the Constitution did not enact Mr. Herbert Spencer's *Social Statics*.⁴ The Court, however, disagreed, finding basic principles of so-called "laissez-faire" economics in the contracts clause of the Constitution. After the Second World War, and for a brief moment defined by footnote four of *Carolene Products*,⁵ the Court changed course, concluding that the backward-looking interpretive techniques of the judiciary were unlikely to find answers to the dynamic needs of a shifting economy. Instead, the courts would restrict themselves to structural issues: on the one hand, ensuring the integrity of the democratic process through redistricting, voting rights, and democratic debate; and on the other hand, giving special attention to rectifying the historical racial injustice imbedded in the American system.

But First Amendment doctrine regularly threatens to return the Court to *Lochner*. Indeed, not merely *Lochner* in the sense of imposing strained interpretations of ambiguous texts on an unwilling citizenry, or *Lochner* in the sense of limiting democracy in the name of the rule of the dead, but the specific *Lochner*-era judicial role of tilting the scales of government in favor of our most protected minority: organized wealth.

The dominant metaphor of the First Amendment is the free market of ideas that Professor Winkler has already mentioned to you. The free market of ideas constantly tempts the Court back to the old *Lochner*-era notion of freedom of contract because, as First Amendment theorists and the Court discuss it, the market of ideas bears little resemblance to our post-realist, highly self-conscious, legally constructed market.

In the real free market, property is a manipulable creation of state law and contract, and tort and regulatory rights stem from political processes, not from a "brooding omnipresence in the sky."⁶ Legislators, consulting firms, and reserve bankers freely change the rules to create incentives that will act in a Hobbesian manner, "as hedges are set, not to stop travelers, but to keep them in the way"⁷ towards collective attractive goals: full employment, cheap televisions, and the like.

The free market of ideas is not described this way. Instead, the free market of ideas borrows from the *Lochner* understanding of economic

3. *Lochner v. New York*, 198 U.S. 45 (1905).

4. HERBERT SPENCER, *SOCIAL STATICS: THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* (1851).

5. *Carolene Products Co. v. United States*, 323 U.S. 18 (1944).

6. *S. Pac. R.R. v. Jensen*, 244 U.S. 206, 218 (1917) (Holmes, J., dissenting).

7. THOMAS HOBBES, *LEVIATHAN* 258-73 (1651).

markets. As Owen Fiss puts it, “the [F]ourteenth [A]mendment may not enact the *Social Statics* of Mr. Herbert Spencer, but maybe the [F]irst [A]mendment does.”⁸ Fiss’s efforts notwithstanding, the rhetoric of the free market of ideas remains tied to an image of pre-legal markets regulated by supposedly neutral Court-enforced rules and accompanied by Spencer’s guarantee that competition for survival will generate not merely survivors, but also truth and justice and the American way.

In this imaginary market, as in *Lochner’s* imaginary market, all is necessarily for the best in this best of all possible worlds, provided only that legislatures are barred from interfering on behalf of market losers. Those who win deserve to win. Any attempt to legislate different rules that might generate different winners is a violation of secularly-sacred rules of the game. In short, and particularly since markets operate by the ancient principle that to those who have much, much will be given, might makes right.⁹

Much as the old freedom of contract was a radical improvement over slavery or immutable status,¹⁰ freedom of speech is a lot better than its pre-modern alternative: censorship. Still, it is one of those freedoms that is strangely more useful to the powerful than the powerless, that uses the rhetoric of equality to reinforce inequality in the name of liberation. Like freedom of contract, freedom of speech is a doctrine of selective government abstention, and the absence of government always empowers those who have the power to do as they please.

Again, like the freedom of contract, the ideology of freedom of speech conceals the underlying property rights that generate the results it justifies, claiming that they are pre-political in some sense, written into the nature of the world or at least the Constitution, and thereby transforming privilege into entitlement.

II. CORPORATIONS AND SPEECH

My principal expertise is corporate law rather than speech law, and so for the rest of my limited time here I’m going to focus on one place where the rhetoric of the free market of ideas conceals an underlying power imbalance created by the law itself. My fundamental claim is that corporations should not have speech rights because they are illegitimate

8. Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413, 1415 (1986).

9. The diminishing marginal utility of money, or as it might be more colorfully put, the Jean Valjean principle, guarantees that voluntary transactions in free markets will always redistribute upwards. Those who have more need more powerful persuasion to induce them to give up what they have. For further discussion, see Daniel J. H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 825 (2001).

10. See Daniel J. H. Greenwood, *Gendered Workers/Market Equality*, 12 TEX. J. WOMEN & L. 323, 327 (2003).

participants in political debate.¹¹ I'm happy to talk later about the other First Amendment, the one that creates a space for individual autonomy and conscience free from politics or collective judgment; but here I'm concerned principally with the First Amendment as an essential part of democratic self-rule.

To simplify matters, I'm going to set aside the principle doctrinal arguments. That is, first, what the corporations do is spend money, and money isn't speech at all; and second, that most corporate advertising and lobbying should be categorically excluded from the First Amendment as commercial speech. I think I can show that even if money were speech, and even if commercial speech were pure political speech, publicly traded business corporations should have no political speech rights.

As Professor Winkler correctly stated, current doctrine emphasizes the rights of listeners rather than the identity of corporate speakers. My argument is, in effect, that this emphasis misses the key point. But I will not deal with listeners directly. I am simply going to assume, rather than argue, that if corporate advertising were ineffective in influencing voters or legislators, normal market processes would eliminate it. I'm going to take it for granted that when corporations speak, it makes a difference in the actual results.

A. Corporations Are Not Citizens

The first step in my argument is obvious, but necessary nonetheless. Corporations are neither humans nor citizens. They are not values in themselves, but tools to human ends. Thus, they are not endowed by their creators, whomever those may be, with certain inalienable rights, and there is no reason that we should respect their claims to autonomy unless we also conclude that corporate autonomy is useful to real human beings.

An important issue lurks here that I am going to fudge for the moment. If corporations are tools rather than ends in themselves, one question is whose tools are they? We give varying answers to this question in varying contexts. Usually, we think of corporations as businesses whose social usefulness lies in the products or services they produce or the jobs they create. That suggests that they are tools for consumers or employees. Sometimes, however, and especially when corporations are insisting on rights against the citizenry or against a governmental body, the rhetoric switches and corporations are portrayed as tools of their investors or shareholders rather than their consumers. Whether corporations are tools

11. See Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995-1070 (1998) (discussing the issue of corporate speakers).

for consumers, workers, or investors, however, they remain tools. The goal of government should be the happiness of people, not legal persons.

B. Corporations Do Not Speak For Their Participants

The reality of corporate law is that our corporations are largely autonomous as a formal, legal matter. That is, corporate leaders have more or less the same authority to spend corporate assets as, say, Mu'ammar Al'Qaddafi does with respect to Libya's assets. Here I agree with Professor Winkler, with this slight caveat: there are two somewhat enforceable limits on corporate decisionmakers' discretion regarding corporate assets. First, federal law creates an enforceable obligation not to lie to shareholders generally; and second, corporate decisionmakers may not give corporate assets to themselves, unless they can present some evidence that doing so is in the interest of the corporation.

As a market matter, however, corporate management is a good deal more constrained. In competitive product markets, of course, competition assures that any company that doesn't focus on keeping its private costs of production below its competitors' private costs of production will be driven out of business. In those markets, then, corporations are deeply constrained. They can press for governmental action that reduces their own costs or increases those of their competitors, but that's about it.

Moreover, with the possible exception of highly visible consumer products sold largely on image, such as Nike shoes, the actual views of the human beings who ultimately consume the service or product, often several links further down the line, are largely irrelevant. I may or may not have strong personal views on the way in which the parts suppliers to a car door manufacturer treats its local environment or employees. But the management of the company will only be interested in the cost of manufacturing its parts relative to the price at which it sells them. My views as a consumer of cars simply drop out well before they get back to management. Indeed, as the Vermont recombinant bovine growth hormone case¹² made clear, consumers generally are not even entitled to information regarding the processes by which a product is made.¹³

The upshot is that the product market constrains producer corporations, but consumers do not. Consumers have many values. Markets only seek high quality and low cost. The market has no view on externalities, pollution, working conditions, cultural transformations, bovine growth

12. *Int'l Dairy Foods Ass'n v. Amestoy*, 98 F.3d 67 (2d Cir. 1996).

13. See Doug Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525-642 (2004).

hormone or the like, except as they influence private costs or saleable product quality.

The capital market functions similarly, but even more so. Standard economic theory tells us that share prices are determined only by the market's estimate of future returns to shareholders—dividends plus the final payment on liquidation or sale. Most shareholders today are institutions, constrained by law (in the case of pensions and endowments), or markets (mutual funds, hired managers, and other Wall Street professionals), to profit maximize at the expense of whatever other values they may have. Most of the humans who actually make decisions for these institutional investors are under similar market constraints and role expectations: if they don't manage to beat the market, or at least match it, they will be fired and will be replaced by somebody who does.

These apolitical, amoral investors create massive pressure on every company to act in the way that those investors believe will maximize stock price. Simply put, the professional investors stand to make a fortune if they can find stock that is not priced according to the market's estimate of future returns to the shareholder, and in making their fortune, they drive the price back to that benchmark. The result is that any investor who chooses to invest on other grounds simply has no effect on stock price.

Simultaneously, any company that deviates from the financial market's current theory of how to maximize share value creates a different and equally profitable arbitrage opportunity. Its stock price will drop to reflect its focus on something other than profit. Accordingly, a Wall Street professional need only buy the stock at the low price, coerce or convince management to shift their policies to the profit policy preferred by the market, and then sell the stock at the new high price. This is, incidentally, a stylized version of the takeover wars of the 1980s: the financial markets forced companies to abandon job creation as a goal in favor of share value maximization.

The key for First Amendment purposes is to notice that this story makes the corporation a slave—with a more or less long leash—to the financial markets. Notice that I say "markets" and not shareholders. The mechanism of control is through the stock market price, and price is determined by sellers and by non-buyers as much as by current holders. So, it is deceptive to call this shareholder control, as if it were a form of democratic rule. Indeed, the master is not even stock investors as a group. It is the market itself, not the human beings who stand behind the investments, that determines the prices and send the messages to management. After all, human beings tend to have values other than share price maximization. But since those values are even less likely to affect the market

price of stock than consumer views on car door supplier part manufacturer's local employment practices affect the price of cars, they do not get conveyed to managers.

C. The Parable of the Cigarettes

So let's make it concrete. Imagine that a company produces a product that is dangerously unhealthy and also somewhat disgusting, but also addictive and highly profitable. Exercising some literary license here, we could call it "cigarettes." I put the term in quotes to make clear that I am talking about a general problem, not the consumer product of a similar name. Imagine also that the vast bulk of the population agrees with my polemical characterization of the product and believes that profiting from addiction and death is basically immoral. My contention is that even if it were the case that this view was widely, even universally, held by consumers, investors, employees, and managers, neither the consumer nor the financial markets would change the behavior of the firm in any way. The firm will continue to do what it does without regard to the moral, ethical, or political views of the people involved.¹⁴

Start inside the firm. An employee who concludes that she is engaged in murder has four options to choose among. When I teach this issue, the most common response of my students is to conclude that they ought to act like professionals—to set aside their personal beliefs, during the workday at least, and work for the interests of the company. That is, go ahead and murder while justifying your actions by saying you are just doing your job.¹⁵

The second option is to reduce cognitive dissonance by adapting your personal beliefs to the reality of your work place, to simply adopt the corporation's views as your own, to convince yourself that cigarettes are safe or that people who use them should be protected in the exercise of their autonomous choices to die. When Professor Winkler suggests that taking away rights from corporations would simply transfer them to the employees, who would act in their private life the way they do in their professional life, he is relying on the common sense notion that people often internalize the values of the institutions they join.

The third option is to advocate that the firm abandon its highly profitable enterprise of murder. The corporate social responsibility movement stays in business because it often turns out that on closer

14. See Daniel J. H. Greenwood, *Markets & Democracy: The Illegitimacy of Corporate Law*, 74 U. MO.-KAN. CITY L. REV. 41 (2005).

15. Compare HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963), with STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY, AN EXPERIMENTAL VIEW* (1974).

examination, bad behavior is not as profitable as it seems. Too often, faced with the difficulty of determining what the profit maximizing behavior might be, we simply rely on the false heuristics that if it hurts it must be good for you, or if it is socially detrimental it must be privately profitable.

But sometimes, surely externalizing costs onto others is profitable. And let us assume that selling sexy, addictive drugs to insecure teenagers is one of them. Then, if you argue in favor of abandoning profit in favor of other values—telling the cigarette company to switch to the addiction prevention business—you are likely to find yourself fired and replaced by somebody who will do the job properly. Alternatively, if you do succeed internally, your company will go out of business (or at least this business). That victory, however, is likely to be purely Pyrrhic. It will just be replaced by a company that will do the job properly. In either event, so long as someone somewhere is willing to take your position or some company somewhere is willing to exploit the open market niche, the job continues to get done without regard for your or anyone else's personal views.

And the last possible option is to quit and be replaced by a professional who is a little less of a *feinschmecker*.¹⁶ Quitting may cleanse your soul, but as we just saw, it has no effect on the behavior of the organization.

In short, Darwinian selection should assure that at any given time the firm will be run by people who will pursue profit. The views of those who think that profit ought to stop when murder begins just drop out of the system.

The same thing happens in the financial markets, but, as usual, even more so. If I sell my "cigarette" stock, the only effect will be that it will be bought by somebody else with fewer moral scruples or a stronger market incentive to set them aside. The price will continue to reflect the market's profit, management will continue to use corporate assets in pursuit of that goal, and my sale will have been an entirely meaningless, empty action. Actually, it is worse than that. Once I and those like me have sold our stock, the stock will be held by people who think that cigarettes are profitable and who do not care (enough) about whether they are moral. So managers who take the "shareholder supremacy" or "shareholder democracy" views of the corporation seriously may conclude that by promoting cigarettes they are furthering the views of their constituents. My protest has the effect of strengthening the position I abhor.

Allow me to tie all this back to corporate speech.

16. Yiddish for someone overly concerned with their own odor.

D. The Corporation as a Monomaniac

Corporations are monomaniacs. By that I mean that they are designed to cause management to speak for a principle—profit maximization—not as representatives of voters or other legitimate human actors with a variety of values. They speak for one value and one value alone.¹⁷ They speak by spending money that belongs to the corporation, which is to say money that has no clear human owner. They spend the money in order to make profit. They do not speak for any other value except by accident.

In the real post-*Lochner* world, we know that markets are incredibly powerful tools, but they come with no guarantee of goodness. Markets will efficiently produce heroin or prostitution or nuclear proliferation or environmental destruction just as well as they will produce cheap televisions. Real politics, post-*Lochner*, center primarily or most often on directing markets: they create the invisible hand and guide it so that it guides us in our private pursuit of profit.

If we allow markets to control their own regulation, they will do only one thing: create markets, whether the markets are useful to human flourishing or the opposite. Thus, giving corporations free speech is not a form of human freedom. It simply coerces corporate fiduciaries to campaign against limits to profit regardless of the cost to our other values. In this era of global warming, one could even say our survival.¹⁸

E. Conclusion: Towards Pluralist Democracy

Corporations are highly efficient machines for pursuing one important goal: profit. But as every child confronted with a quart of ice cream must learn, just because something is good does not mean that more of it is always better. The key to our success as a capitalist democracy is knowing how to guide and how to restrain and how to use the profit motive. Corporations, because they are slaves to that motive, are structurally incapable of reflecting intelligently on how to structure it.

Granting corporations speech rights, in short, elevates our tools above us, as a form of idolatry. We should no more allow the corporations to buy political influence than we should allow incumbent politicians to use taxpayer funds to buy votes. The problem is the same: instead of freeing ourselves to govern ourselves or freeing ourselves from government itself, this perverted First Amendment does the reverse. It frees our governance institutions from us, while limiting the spaces in

17. See, e.g., THE CORPORATION (Big Picture Media Corp. 2004) (analyzing corporate form as sociopathic).

18. JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2005).

which we, as individuals, are free to act without regard for socially mandated norms.

Thank you.

Erik Jaffe: I'll be far briefer. We've heard a lot of rhetoric about the evils of corporations, monomania of the pursuit of profit—all of which to my mind is wildly, wildly irrelevant to the First Amendment issue.

The First Amendment is not about individual rights. It's not in the part we're talking about, the political aspects of the First Amendment. There are these other sort of self-fulfillment, make-you-happy kind of aspects. And those are nice, but that's not what we're talking about here. We're talking about the political aspects of the First Amendment, how it intersects with the way we govern ourselves. And in my mind, the First Amendment is not about who has rights. It's about who doesn't have rights. And the object of that is the government. Congress, in the literal version of it, does not have rights to restrict the freedom of speech.

The freedom of speech is not something that merely protects the freedom of individuals to stand up and speak because if that were all it was, then the only freedom of speech we'd have would be to get into the public square, get on a soapbox, and yell. And I think very few people would limit the First Amendment's freedoms to the realm of the soapbox. What the First Amendment is about is taking the government out of controlling and regulating the debate about what we should do with our lives. The key areas, therefore, on which I disagree with Professor Greenwood deal first with the generalized conception of what the First Amendment does. It doesn't grant rights; it creates restrictions. It's a negative rights concept. It stops the government from doing things.

Second, we disagree about the nature of corporations. Corporations are simply associations of people. But quite frankly, even if they weren't, even if they were freestanding entities with a mono-focus purpose of acting and speaking in the pursuit of profit, I would still let them speak because the government should not be in the position of deciding what ideas are good or bad and how much of those ideas ought to make it into the marketplace. Much of the critique that we just heard, and much of the critique, quite frankly, behind most campaign finance reform which we'll hear about later, all bear this striking suspicion of speech: that speech can somehow be evil as opposed to neutral. At the end of the day, good speech, bad speech, it's just an input. It all goes into the mix.

Professor Greenwood's notion that you wouldn't speak if you didn't think it would have some effect is true as far as it goes, but it doesn't go very far. People speak all the time, thinking wrongly that they may change someone's mind. People speak volumes. For example, you

look at campaign finance and notice that the losing candidate spends a ton of money on campaign ads and ultimately gets crushed because at the end of the day the public listens to those ads, thinks the guy's a flake, and votes against him. He's hoping that they'll like his ideas, but he turns out to be wrong. Similarly, corporate lobbyists routinely lobby for things that they don't get. Surprisingly, then, in Seattle we can't smoke in public places. How could that possibly be with the vast wealth of cigarette companies speaking and influencing us? I guess it doesn't always work.

The answer is that speech is certainly part of the debate and informs people, but at the end of the day governmental bodies are not determined by the speech either they hear or their citizens hear. They are determined by the votes they get. Speech is not political in the same way that voting is political. Speech is merely a context in which politics operates. It is not the politics itself in the sense that Professor Greenwood indicated. It doesn't control our political system. Speech merely informs the political system for good or for ill.

Bad ideas get spoken. They get spoken often. But the notion that saying it often and saying it loudly and saying it with a lot of money somehow dictates the result is flawed. And even if there were some sociological evidence to suggest that such reasoning helps doesn't matter. And the reason it doesn't matter is because an assumption is built into the First Amendment, a constitutionally mandated assumption, as Justice Holmes speculated, that we leave it to the marketplace to decide these things; that more speech the better, that speech is good.¹⁹

Any speech is good. It is not that the idea contained in the speech is good, but that merely the act of expressing ideas is a public good. Whether that expression comes from corporations or from individuals or

19. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). According to Justice Holmes,

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. See also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”).

from anyone else doesn't matter. And for our courts to extend this privilege to foreigners, I actually think foreign propaganda is fine. Lots of speech is fine. It's all input. We should hear it all, make up our own minds, have our government make up its own mind, and have our senators and such make up their own minds.

The notion that speech can distort, which comes up all the time—it comes up here, it comes up in campaign finance, and it comes up in the securities context—quite frankly, is a constitutionally impermissible assumption. And therefore, whether or not the corporation is a noble speaker or ennobled, moral or immoral, is somewhat irrelevant. I wouldn't make those judgments about individuals, though, because in many instances I could more easily define moral individuals or immoral individuals than I could define moral or immoral corporations; yet, I wouldn't let the government make that a criteria for allowing their speech to go forward.

The other portion of Professor Greenwood's critique, I gather, stems from, if you read or glanced at his article, the sort of failures in corporate governance, which somehow take the shareholders, who I think of as people in association with each other and with the entity, and deprive them of the ability to have say over corporate speech. I reject that notion as well. From my perspective, a corporation's purpose of what it will do and how it will speak is dictated in large part by the articles of incorporation, which set up the corporation's purpose, tell us what the corporation is going to do, and then tell its managers to go and fulfill that purpose. For example, anyone buying shares in a corporation knows that *ex ante* if they don't want to associate with the corporation, they don't have to. But they do want to associate with it, and this is not to say that they will agree with every single thing the corporation does or that they even substantially support everything the corporation does.

What it is to say, however, is that with a limited portion of their intellect and their resources, they seek to pursue economic goals. Their other resources and their time and their intellect may be devoted to non-economic goals and, in fact, may be devoted to conflicting non-economic goals. But they have decided to delegate the economic portion of their thinking and action and speech to an economic association, which is actually a mixed economic and political association, as I think Professor Greenwood would agree, because much economic speech is, in fact, political speech, and that's okay.

The notion that a contradiction exists here means that there's a contradiction within all of us. We balance these tensions. We argue on behalf of some things that help us economically, and other things that hurt us economically, often at the same time. The fact that this balance should

just break out into specialization by having corporations do half of our arguing for us or a fifth of our arguing for us is not bothersome. To the extent that there is some kind of conflict that stops shareholders from collectively influencing the direction of their association as it relates to speech, then it is corporate law that must yield, not the First Amendment.

Perhaps there should be more shareholder control. Perhaps there should be means of having shareholder involvement in the direction or the speech that their corporation engages in. To that extent, this would be fine. The association of people comprising such a corporation could then have greater internal control in the same way the Republican party would say that the internal affairs of an organization should be left more to that organization. At the end of the day, though, it is the entry and exit decisions that count the most, and such decisions are voluntary except in the case of pension plans, which are downstream a little bit further.

This is an economic trade-off that has to be made all the time, much as the trade-off I might make if I joined the Sierra Club. I might agree with 50% of what they do and despise the other 50%, but decide that, on balance, it is worth giving them a few hundred bucks here and there.

Allowing the government to step in and regulate the speaker in this instance strikes me as a quintessential example of viewpoint discrimination. That is precisely why Professor Greenwood wants to regulate them: he does not like their viewpoint. He thinks their viewpoint is mono-focused on economics. Professor Greenwood is pro-profits; he thinks that viewpoint is somehow not as valuable as a sort of mixed or befuddled viewpoint that balances these things because we cannot make up our mind. At the end of the day, we could easily expect the viewpoint-based limitations to expand.

If we took away First Amendment rights, we would not get a flat ban on corporate speech. I would favor more what we would get: a ban on corporations insulting congressmen. No negative ads. God forbid you say to anyone that your senator is horrible, that John McCain is a fool. God forbid we let corporations say that. That is exactly what you get. I don't want to give government the power to start drawing those lines in the absence of the First Amendment. In fact, many of those lines are impossible to draw. If you look at Professor Greenwood's article, he tries to draw lines between who the author is—whether the speech is being created by a wonderful director who loves his movie, or the speech is created by a corporate entity that is just trying to get you to buy a product.

In fact, those lines are not easily drawn. Many movies consist of a little bit of both types of speech. There are a lot of mixed entities. There are a lot of mixed motives. We could draw those lines, but the inevitable

pressure on government would be to push the line in the direction of greater restriction, so that it could exercise control over more and more speech, particularly speech that would be critical of the government.

As I was listening to Professor Greenwood, it struck me that we are children of our circumstances. Professor Greenwood has a fear and loathing of corporate pursuit of profits to the extent of all other things; that's the progressive viewpoint. I have the more classically liberal—now fully conservative—viewpoint, which is a fear and loathing of government. We value restrictions on one or the other according to our deepest fears. One fear is of corporate domination of society, and the other fear is of governmental domination of society. At the end of the day, I am not seeking a utopia. I am just trying to stop the worst form of dystopia, which in my mind is government, and I think to the First Amendment framers' minds was government with the power to regulate speech regardless of who the speaker was.

Audience Participant: Mr. Jaffe, you're saying that the government shouldn't say who has the right to speak and who does not, which I generally agree with. However, your approach to this question ignores the fact that a corporation is largely a creation of the government in the first place, in the sense that it is an association of persons. But the government, in granting a corporation's charter, recognizes and gives it limited liability for the shareholders and also creates a mechanism for the easy transfer of the corporation's ownership through shares, which are a means through which corporations accumulate great wealth and profit. This allows them to have a booming voice in terms of their speech.

I question the fundamental premise that the starting place of corporations exists so the government shouldn't be allowed to say that they can or cannot speak. The government creates the corporations in the first place, and it is a function of that creation in which their rights to free speech can be limited.

Erik Jaffe: I disagree with the implication that there's a right to privilege distinction, which is the underlying point of your question—the notion that since we gave you power, we can take it back. As much as we feel like it, Bill Gates is no less a creature of government policies than Microsoft. His great and tremendous wealth is a function of dozens and dozens of government benefits, privileges, and policies that allow him personally to accumulate that wealth, whether it's the tax structure, lower rates of capital gains, or corporate law itself which allows Microsoft to do so well. Yet, the fact that he has a tremendous amount of money is not a justification to restrict his speech, although that is the argument now creeping into the campaign finance debate—that it's not merely corporations, it's rich people. In fact, it is a suspicion of aggregations of wealth

unduly influencing political debate. I rejected the premise that the notion of undue influence exists. I don't think influence mediated through speech can ever be undue, so I would take that out of the equation.

To answer the deeper question, I don't think the government is obliged to allow corporations to exist in their limited liability format. In fact, at some level I would be open to the prospect, though I haven't fully thought it through, of taking away limited liability for our corporations' expressive activities, so long as you apply full First Amendment scrutiny to any lawsuits against the expressive activities. So, if a corporation libels somebody, I'm not sure we need to give the corporation limited liability, particularly if you think about a corporation that's small or that's of limited resources and couldn't pay a big libel judgment.

I might well go to the shareholders for that. It would be an interesting discipline on corporate speech to then remove that restriction while allowing limited liability for purely economic activities, such as if I made a contract with a supplier to buy widgets and I didn't pay. So your point is well taken in the sense that they're not obliged to give those benefits. But having given them, they can't then just take back speech rights. That's more my point—you can't discriminate against speech in that fashion.

Kent Greenfield: A couple of other things that are probably worth remembering and bracketing is that it seems like our working assumption is that the theory of the First Amendment is about free market of ideas. There are a number of other theories of the First Amendment, including the self-realization theory,²⁰ which is the feel-good theory. Also, there's the town meeting approach,²¹ otherwise known as the Alexander Meiklejohn approach, that would say that it is about political discourse. Just like in a town meeting, the richest person in the room doesn't get to talk more; there's a norm of equality. Under that theory, even in the pursuit of political vision of the First Amendment, there are grounds for regulation of speakers, even individual, natural persons so that there's a notion of fair discourse, just as in a classroom taking turns is the norm. In the public discourse, one might think that would be true as well.

Audience Participant **Martin Redish:** I think there's a fallacy of the New England town meeting in that example. In the New England town meeting that Meiklejohn was talking about, you knew who was there. You knew who heard what and when. You can't assume that for

20. See generally Thomas Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PENN. L. REV. 744 (1977).

21. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22 (1948).

communication outside that kind of confined setting, so the principle of cloning doesn't really work as well.

My main question was for Professor Greenwood to follow up on something that Mr. Jaffe mentioned and to expand on it. It was a very eloquent attack, a socioeconomic, political, and moral attack on markets, free-market theory, and resolving issues on the basis of market values. What I did not hear was some sort of coherent First Amendment framework that you are using as an anchor to get to your "therefore."

I'm wondering to what extent your view is based more on hostility to the substantive positions that corporations would take than to some kind of structural process-based First Amendment analysis, and then would that just reduce your views to a kind of viewpoint discrimination?

Daniel Greenwood: On the contrary: I have nothing against markets. I'm in favor of markets. Markets are terrific. The problem for me is structural and process. There are two process problems. The first process problem is that all economic activity is speech, so there has to be some limits on the First Amendment, which in each of its various forms is a restriction of government activity, or else you end up with no government regulation of the markets. With no government regulation of markets, the markets look an awful lot like Beirut in the middle of a civil war. Those are not attractive markets, so lines have to be drawn. The complaint about corporations as participants in the political debate, whether it's a Meiklejohnian debate or a free market of ideas debate, seems to me to be that it works either way.

The complaint about corporations is that real human beings have many views on many issues, a capacity for changing their mind, and a right to self-govern, while corporations have none of these characteristics. Corporations are structurally incapable of changing their mind, or can change their mind only within limited ways; that is, you can persuade a corporation that it has made a mistake about how best to profit maximize. What you can't do under current corporate law, or any other form of corporate law that would provide us with the goods that we want, is persuade the corporation and the market system that it ought not pursue profits. That's what markets do. So, what you have is an instrument that is devoted to pursuing profit. When that instrument, the corporation, becomes a political participant, it's simply a political participant on one side of a controversial issue with no countervailing power.

I guess I plead guilty to the viewpoint discrimination claim to a limited degree; that is, my argument would be that we've created a system in which one particular viewpoint gets to spend vast amounts of money. It seems to me that unless you accept the fact that money is irrelevant, which strikes me as a bizarre concept, and unless you think

that advertising does not actually affect people, and unless you think that more speech is always good and that spam is the best thing of all, so that ultimately if the quantity doesn't make any difference and if money makes no difference, then when you create a system that says all the money is on this side of the position, and it's money that has no owner, or it's fundamentally different than Bill Gates' money because it's somebody else's money, the result is that this somebody isn't there; there is no somebody. It is actually institutional money.

Erik Jaffe: There are several flaws with that. The first flaw is the statement that all economic activity is speech. It's not, at least by definition, because the First Amendment says speech is different. That's why it's there. If speech were no different than other behavior relegated for rational behavior scrutiny under the Fifth Amendment, we would not really have a First Amendment. So, constitutionally there is a difference between speech and economic activity, and you have to draw that line. You could probably treat corporate speech differently in terms of giving more control to shareholders and things like that. Then you would necessarily treat corporate economic behavior like buying widgets.

Second, I don't think speech is ineffective. I think it's effective according to the value of the idea conveyed. Everyone is always hopeful that speech will be effective, and they always speak a lot because of that way. They want wide dissemination to expand their audience so that they get a larger percentage of people who agree with them. They get that percentage as effectively as possible, but the notion that speech per se will necessarily change minds is deeply flawed, and once again, a constitutionally impermissible notion.

No amount of advertising in the world would have made *Ishtar*²² a successful movie. That's just the way it is. The more you advertise, the less people would have gone to see it as they saw what the movie was actually about. That's also true of political candidates running for office. It is also true of corporate propositions. I think it's empirically true due to the fact that we have a lot of accounting restrictions now, and the fact that corporate managers are being subjected to greater and greater criminal liability with new laws that subject them to a lot of restrictions.

Furthermore, the fact that smoking is getting restricted all across the country suggests that corporations are not the controlling and dominant creatures that we might think, but rather are engaged in a push and pull in their idea of gain or lose traction as they will, notwithstanding the fact that they spend a lot of money.

22. ISHTAR (Columbia Pictures Corp. 1987).

Audience Participant: I apologize, first, that I am not a constitutional lawyer. I'm a trial lawyer, and I have a rather humble question which reflects on how all of us, or many of us, think as attorneys; that is, are we perhaps limiting ourselves too much by looking at a construct such as the First Amendment? By doing that, we're failing to drill down to what the deeper and more fundamental problem really is, and that is the problem we're all struggling to get at.

Let me give you just a little bit of personal context on this. As a trial lawyer, when I deliver a case and argument to a jury of non-lawyers, it's true that the two parties presenting different sides of an argument have the same amount of time, and one would assume that a jury would then be able to weigh the speech that each has given. However, the reality of the situation is that you're not dealing with a blank slate. You're dealing with an audience, with a population, with a citizenry that comes to that forum in advance with a history of arguments, propaganda, speech, volume, and noise that's been presented, which tends to shape the way that they receive the speech.

I realize that one of our speakers is talking about how we're talking about the speakers and not the listeners, but what talking is about is communication, which involves the receiving end as well. You're not dealing with a blank slate. My reason for bringing this up is that the point of making arguments in court is to communicate an idea that will be received by an independent body that can logically and honestly evaluate what's being said and then make a decision. The fact that there may be equal speech may be irrelevant if you don't have an audience which is primed to be receiving only a certain message and for thinking in only a certain way, and that way of thinking can be distorted.

My question, essentially, is can it be distorted to the point where all we're talking about is the First Amendment rights of the speaker? That question becomes unimportant, however, because over time the way you have massaged and shaped the audience, the citizenry, the people in the country, makes them unreceptive to hearing my speech. In other words, free speech almost becomes irrelevant when it's been completely overwhelmed by certain entities who have power and have money and time to carry it out.

Erik Jaffe: I think Professor Greenwood would say yes to that. My answer is that you're assuming a bounded decision-making process much like the town hall.

The First Amendment discussions are ongoing conversations. At the end of the day, I am viscerally opposed—and I think the First Amendment is by definition opposed—to letting the government decide how to massage the audience as to whether they will or won't be

protected in their particular arguments and whether they are being sufficiently open-minded or not. That's just not a decision the government gets to make.

Daniel Greenwood: This is exactly my point. In fact, the government has made that point: that what the corporate system does is massage the audience.

Erik Jaffe: The government doesn't do it. It allows it; there's a huge difference.

Audience Participant: The idea that the First Amendment exists to protect a market place of ideas is an interesting one, but what about the idea that the First Amendment exists to protect the ability to have a balanced democratic conversation? What about the fact that we're here today to look at the health of our democracy and how the First Amendment plays into that idea?

I think it's important to look at how all of this speech by the wealthy elite is drowning out the voice of people like me, who have student loans and have to go to work every day and can't write \$2,000 checks. What about my ability to participate equally in a democratic process and have my voice count? What would you say the First Amendment dialogue around that should be?

Daniel Greenwood: Let me make a small point on that. I didn't speak about the problem of wealth in the abstract, in part because it seems to me that it is too complicated to intelligently discuss within ten minutes. That one is quite complicated. The issue that I was raising is the issue of wealth controlled by fiduciaries who have a legally mandated fiduciary obligation to use wealth in a particular way. It seems to me that regardless of your view about wealth itself, you have to be disturbed by this fiduciary red light.

Let me just make one point about wealth with actual owners. A commonplace 18th century political theory, the political theory that the First Amendment comes from, was that republics could only exist with a certain minimum level of equality. In that context, equality was normally understood as meaning nobody should have enough money to be able to buy another person, at least another citizen—an ironic position given our own origins. There's an enormous amount of truth to that point, although it has anything to do with the argument made here. I'm sympathetic to the notion that at a certain points wealth functions quite differently from speech. The equation of buying speech to speak is one that puts our politics up for sale, and is, therefore, improper.

Erik Jaffe: To the extent that we have a problem with economic disparities such that some people are capable of speaking more loudly than other people, those disparities should not be solved through restrict-

ing speech, but instead should be solved by correcting the imbalances, even to the point of straight up redistribution of wealth. This is a sort of taking the non-speech path first before restricting speech. That's the critical distinction between the high standards of the First Amendment and the low standards on economic regulation. If you really think it's a problem, it's a problem not just for speech but for a lot of things; we should give you money. You should speak all you want if that's a genuine problem.

Kent Greenfield: Thank you for an excellent panel.