Note for Workshop Participants

I’m in the early stages of building out a critique of the commercial and corporate speech doctrines. In the talk and in the larger article I’m working on, I’ll draw on this short article, forthcoming in Constitutional Commentary:

http://ssrn.com/abstract=2566785

In that article, I (a) show that corporations have begun to displace individuals as the direct beneficiaries of the First Amendment, a shift from individual to business First Amendment cases is recent but accelerating, and (b) outline an argument that such cases typically reflect a form of socially wasteful rent seeking—not only bad law and bad politics, but also increasingly bad for business and society. I set out basic facts about corporations in history, regulation of commercial speech in U.S. history, and the emergence of the First Amendment in case law. The Article shows quantitatively what others have noted qualitatively: corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights, they have done so recently, but with growing speed since Virginia Pharmacy (1976), Bellotti (1978), and Central Hudson (1980). Nearly half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals. Such cases represent examples of a particular kind of corruption, defined here as a form of rent seeking: the use of legal tools by business managers in specific cases to entrench deregulation in their personal interests at the expense of shareholders, consumers, and employees, and in aggregate to degrade the rule of law by rendering law less predictable, general and clear.

In the current project, I aim to (a) develop the argument that corporate exploitation of the First Amendment is primarily a form of economically wasteful rent seeking, (b) articulate a legally implementable conception of litigation as rent seeking, including limiting principles, (c) describe what deconstitutionalization of corporations would and – importantly – would not do, and (d) advance doctrinal arguments in favor of a deconstitutionalization. In pursuing the last goal, I am uncertain (at the moment) whether I need to adopt a particular position on constitutional interpretation generally. But at least for my own working purposes, as an initial step, I’ve attempted to survey and synthesize constitutional interpretive methods and sketch a method that I might endorse were I on the Court, with the recognition that a corporate law scholar doing constitutional law is as much at sea as the constitutional jurists who make up the Supreme Court are in doing corporate law. To that end, I attach (very!) rough drafts of four pieces of the article – (1) some rough notes on what deconstitutionalization would and would not do, (2) a mapping of methods of constitutional interpretation, (3) an initial sketch of my own interpretive approach, which I call “rule consequentialism,” and (4) an initial affirmative statement of arguments consistent with rule consequentialism in favor of deconstitutionalization.
Deconstitutionalizing Corporate and Commercial Speech

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Abstract

Since 1978, corporations have begun to take over the First Amendment docket of the Supreme Court and Federal Courts of Appeal. The takeover overall is a form of economic rent seeking, with harmful effects on society. To remedy the takeover, corporate and commercial speech should be deconstitutionalized. This could be done through either a formal amendment or the same common law method that only recently created constitutional rights for corporate and commercial speech. Deconstitutionalization would not significantly reduce the rights to speech by individuals – including journalists, filmmakers, authors, or political activists, as well as those of their audiences. It would allow democratically accountable representatives to regulate how agents or subsets of corporate constituencies use other people’s money – not merely money acquired through the economy, but money held on account for others – to compel speech that do not represent their views, including large groups of rationally passive shareholders and employees. Deconstitutionalization would return US law to its valid constitutional traditions, as only an internally inconsistent formalism has been offered to support the modern corporate takeover of the First Amendment. In fact, neither the text, nor the history, nor the structure of the Constitution support corporate trumps of such regulation, nor do other potential sources of constitutional authority, such as precedent, policy, moral theory or popular will. A “rule consequentialist” approach to constitutional interpretation, here tentatively offered as a normatively valid way to combine these disparate authorities and reconcile Constitutional doctrine with plausible legal norms, reinforces this conclusion.
Outline

I. The Corporate Takeover of the First Amendment
   a. The First First Amendment – the One Courts Did Not Enforce
   b. The Individual’s First Amendment
   c. The Media’s First Amendment
   d. The Late Non-Expressive Corporate First Amendment
II. Political Activity and First Amendment Litigation as Corporate Rent-Seeking
   a. Rent-Seeking Generally
   b. Political Activity as Rent-Seeking
   c. First Amendment Litigation as Rent-Seeking
   d. The Concept of Rent-Seeking in Law
   e. Limiting Principles
III. Deconstitutionalizing Corporate and Commercial Speech
   a. Methods
      i. Formal Amendments
      ii. Common Law
   b. Results
      i. What Deconstitutionalization Would Not Do
      ii. What Deconstitutionalization Would Do
IV. Justifying Deconstitutionalization
   a. Theories of Constitutional Interpretation
      i. Text
      ii. Original Intent
      iii. Precedents
      iv. Consequences
      v. Structure
      vi. Moral Theory
      vii. Popular Will
   b. Rule Consequentialism – A Sketch of a Constitutional Method
   c. Applying Rule Consequentialism to Corporate and Commercial Speech
   d. Counterarguments and Responses
V. Conclusion
Part III. Deconstitutionalizing Corporate and Commercial Speech

A. Methods

1. Formal Amendments

In response to *Citizens United*, a number of constitutional amendment bills have been introduced in the Senate, aimed at campaign finance and corporate constitutional rights respectively. While initially there were several different specific bills in each category, elected officials and advocacy groups have converged on a pair of Senate bills, which (along with their companion-identical House bills) can be deemed representative. The full text of the bill addressing corporate constitutional rights is as follows:

**Corporate constitutional rights (“People’s Rights Amendment”)**

S.J. Res. 18 (Sen. Tester)

Proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate corporations, limited liability companies or other corporate entities established by the laws of any State, the United States, or any foreign state.

Section 1. We the people who ordain and establish this Constitution intend the rights protected by this Constitution to be the rights of natural persons.

Section 2. The words people, person, or citizen as used in this Constitution do not include corporations, limited liability companies or other corporate entities established by the laws of any State, the United States, or any foreign state, and such corporate entities are subject to such regulation as the people, through their elected State and Federal representatives, deem reasonable and are otherwise consistent with the powers of Congress and the States under this Constitution.

Section 3. Nothing contained herein shall be construed to limit the people's rights of freedom of speech, freedom of the press, free exercise of religion, freedom of association and all such other rights of the people, which rights are unalienable.

By itself, this amendment would address the issue of corporate speech, as reflected in cases such as *Bellotti* and *Citizens United*. It would not directly address commercial speech as such, although because corporations or other corporate entities carry out most commercial speech, the amendment would limit the practical import of the commercial speech doctrine articulated in *Virginia Pharmacy* and *Central Hudson*.

2. Common Law

Of course, passing any constitutional amendment is a difficult if not impossible task. Another route is for the Court to achieve the partial or complete deconstitutionalization of
corporations in the same way that it created corporate constitutional rights, via the common
law method. To do so, the Court would not need to wind the clock back very far – less far
in the past than was necessary to achieve Brown v. Board of Education.

[This will be expanded to discuss precise ways to revert to non-constitutional status for
corporate and commercial speech, which are then evaluated in Part IV. This section will also
make the argument that contrary to many claims, including by the Court, its decisions have
in fact implicitly given corporations formal constitutional standing, as distinct bearers of
constitutional rights. In addition, topics to be covered include whether
decostitutionalization should extend to the Fourteenth Amendment and/or all
constitutional provisions that can be characterized as “rights” (rather than purely structural
features, such as preemption challenges under the Supremacy Clause or interferences with
interstate commerce under the Commerce Clause).]

B. Results

1. What Deconstitutionalization Would Not Do

One common reaction to proposals that corporations no longer have constitutional rights is
that corporate constitutional rights might be necessary for protection of individual rights,
and removing constitutional protections for corporations could negatively affect individuals’
rights. Many rights “of” corporations are in fact rights of individual participants in a
corporation, e.g., shareholders, directors, officers, or employees. That does not mean,
however, that the corporation must be the bearer of the relevant constitutional rights.

For example, consider freedom of speech. A law limiting corporate communications would
not (by itself) prevent any individuals affiliated with the corporation – such as journalists –
from speaking. A constitutional amendment that permitted a law restricting corporate
communications would not expand the government’s power to restrict individuals’ speech.
Restrictions on individual speech would continue to be reviewed under the First
Amendment. Journalists and editors subject to prior restraints would still win in court.

[This section will be expanded to review landmark expressive First Amendment cases
involving corporations, with general point being that in nearly all there was actually or could
easily have been included an individual party in lieu of an expressive corporation to reach the
same basic result. In N.Y. Times v. Sullivan, several individuals (who took out the allegedly
libelous ad) were parties along with the New York Times. In N.Y. Times v. US, there were
employees of the New York Times that were seeking (in fact, in real life) to publish the
Pentagon Papers. In Miami Herald, there was an editor seeking to choose among political
candidates whom to endorse. Etc. In fact, in the mid-20th century, most of the cases
involving expressive businesses that went to the Supreme Court tended to include the
individuals as parties, rather than corporate entities with which they were affiliated.]

2. What Deconstitutionalization Would Do

Given the foregoing review of landmark First Amendment cases, one might think that the
amendment would have no effect, but that also would be incorrect. What Congress,
regulatory agencies or states could do, after such an amendment, would be to constrain
corporate use of general treasury funds to engage in activities that the Court has treated as “speech.” For corporations owned by one or a few closely allied shareholders, such as those involved in the *Hobby Lobby* case, the effect on corporate or commercial speech would be modest: it might force the shareholders to cause the corporation to dividend funds to shareholders, who could then use the funds in their individual capacities. Because owners would have to pay income tax on the dividends, this effect would not be trivial – it would put corporate owners on the same playing field as the majority of the population who do not enjoy the tax-deduction and -deferral benefits of the corporate form. However, where there are multiple owners, as with public companies, the effect would be significant, and appropriate, as it would leave to each shareholder the decision of how to spend the money so distributed, and not impose a sweeping rule that centralizes those decisions in the hands of corporate managers.2

Deconstitutionalization of the corporation could raise issues with respect to constitutional and prudential standing doctrines (whether a corporation can raise a claim on behalf of a natural person, or vice versa; First Amendment overbreadth; shareholder standing rule; etc.). For example, there may also be situations where a corporation, lacking its own constitutional rights, might be well positioned to assert the rights of individuals via third-party standing. But in such instances, the burden of establishing the need for such special standing rules would be on the litigants, and the rights being asserted should be understood to be those of individuals represented by the corporate or associational entity, with implications for how individuals so represented might want to opt out or otherwise assert individual interests implicated in the dispute.

[This section will be expanded to elaborate how corporate standing could be permitted in the same way that associational standing is permitted for unions to protect union member interests.]

Part IV. Justifying Deconstitutionalization

A. Theories of Constitutional Interpretation

How should courts interpret and apply the Constitution?3 For a stranger in a strange land, such as a corporate law scholar analyzing constitutional law, the first thing we need is a map.

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3 A preliminary note: A broad critique of judicial decision-making exists, which argues that federal judges are “political” and make decisions that are most readily explained by reference to their partisan preferences (typically as reflected in the politics of the President that appointed them). The argument applies even more obviously to elected judges, as is the case in many states. This critique (often found in political science publications) is generally implicit, as that research does not explicitly advance any theory about what judges should do, being “merely” a descriptive or predictive account of judicial behavior. Against this “attitudinal” account are various “legal” accounts that also purport to describe what judges do, generally using the “internal” self-descriptions reflected in case law as their starting point. This debate – attitudinal vs legal – is related to but distinct from the question raised here, which is how “should” a judge behave in interpreting the Constitution. The truth of the poli-sci account is relevant to the normative account because if judges in fact engage in politics...
What follows in this Section is a map of normative constitutional interpretive methods, at least eight families of which exist. The fact that there are at least eight families of interpretive methods may suggest the problems facing any one method may turn out to be serious, except those in the last family, pluralism, which embraces diversity. But before making the case for a type of pluralism at a general level, let us briefly state the main thrust of each family, note some leading advocates of each, and note some general problems for each.4

1. Textualism

Textualists want courts to focus on the words in the Constitution. (One can think of textualism as the linguist's school of interpretation.) Textualists generally would have courts read the Constitution as an average, reasonable person would read it, although some textualists would permit reference to legal meanings for legal terms of art about which ordinary individuals would not ordinarily know (e.g., “all Cases, in Law or Equity”; “appellate Jurisdiction, both as to Law and Fact”). Such a reading should be the meaning of the Constitution, and the content of Constitutional law. Originalism, discussed below, is closely related to textualism in the constitutional context, because the bulk of the constitution was adopted long ago, through a process that included indirect participation by those (white and male) citizens entitled to so participate. Textualism is, however, at least conceptually distinct, as the standard textualist position would not permit consideration of (for example) understandings of the people, the Framers, the ratifiers, or the meaning of words in 1789 or 1865, but would direct courts to consider the text as it would be read today, on its own.

Textualism has a strong intuitive appeal, particularly to non-lawyers, as it reflects the way that ordinary individuals ordinarily read ordinary texts – we typically read for meaning, and only when (we notice that) meaning is unclear do we move to other texts or sources of meaning. In context of statutory interpretation, statutory text is contrasted with legislative history as an authority for constructing a judicial understanding of legislative purpose and

or policy, and one thinks that's a good thing, one might be more inclined to adopt a normative theory of constitutional interpretation that allows such a policy-making role to be more transparent. If one thinks judicial policy-making is a bad thing, one might be inclined to adopt a theory that would do a better job of constraining judicial discretion than is currently the case, given the courts' self-articulated methods of interpreting the Constitution, if one believed any such theory could do that job. Alternatively, if one thought no normative theory could do any better, a skeptic of judicial policy-making might grudgingly accept a method permitting it as a second-best outcome. My reading of the evidence is that politics is clearly relevant but only partly capable of explaining judicial decision-making overall, even as the evidence remains uncertain on how often, how extensively or when legal values influence actual decisions. More clearly, I don’t believe there is good empirical evidence (as yet) about whether and to what extent judicial policy-making could be constrained by any particular self-articulated interpretive theory. As a result, I don’t think the current state of evidence strongly constrains the plausibility of various normative arguments about constitutional doctrine – we are left with a judgmental choice among plausible alternatives.

4 For earlier mappings of this kind, see, eg, Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1764 (1994) (identifying five theories: text, original intent, structure, precedent, and ethos or tradition); Richard H. Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1189-90 (1987) (identifying “at least five kinds of constitutional arguments,” including text, original intent, overall purpose, precedent, and policy).
statutory meaning. This is done on the grounds that the Constitution establishes “legislative supremacy” in lawmaking – something that, ironically, is not clearly spelled out in the Constitution’s text, but must be inferred from structural features of government created by the Constitution. The argument then proceeds along familiar lines: “lawmaking inevitably involves compromise; ... compromise sometimes requires splitting the difference; and ... courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose.”

In the Constitutional context, a similar textualist argument would forbid the Court from inquiring beyond text into intent or background understandings of the Founders, Framers, Ratifiers, etc. As the ongoing work of Michael Klarman, among others, shows, the Constitution was the product of a similarly complex bargain among disparate interests and “Constitutional stakeholders.” Rewriting a clear but messy Constitution to make it more congruent with some asserted background purpose risks the same upsetting of a bargain, as modified over time through constitutional amendments. This argument – for textualism against originalism on the grounds of compromise – could also be extended to critique populist readings, since “the people” are likely to disagree in complex ways about Constitutional meanings, and those disagreements might not cash out in a particular way without strong assumptions about what popular will would be on other Constitutional or legal questions, about many of which “the people” are unlikely to have anything but a hypothetical “purpose.”

This argument (preserving a compromise) would not seem to carry much independent weight in trying to resist other methods of constitutional interpretation, which do not attempt to inquire into “intent” in any specific sense, and use “purpose” (if at all) as a shorthand for a social commitment to (variably) rule of law, structural principles, policy goals, or moral principles. As against those methods, textualists instead appeal to a desire to confine judicial discretion by anchoring “law” in some authority beyond that of the court interpreting it, and a belief that such a confinement is best accomplished through a commitment to textualism. Textualism is also defended as more predictable than other interpretive modes, given that the text of the Constitution can only change through rare and difficult-to-enact amendments, can be easily accessed by all, and does not require consideration of more complex inputs, such as moral theory, policy consequences or popular

5 John F. Manning, Second-Generation Textualism, 98 Cal. L. Rev. 1287, 1290 (2010). He argues (in the context of statutory interpretation) that “judges in our system of government have a duty to enforce clearly worded statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment,” an argument that he carries over to the Constitution’s text, substituting “the people” for Congress, at least in the context of the Necessary and Proper Clause. John F Manning, Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1 (2014) at 49-50.


will. If that is so, then textualism may also be justified as more cheaply accomplishing a “coordinating function” than alternative methods of interpretation.\(^8\)

One problem for textualists – common to interpretations of texts of all kinds – is how to square the approach with the fact that interpretation of even simple texts requires consultations of non- or extra-textual statements about or relevant to interpretation. For example, should courts consult dictionaries, when they are not specifically referred to in the Constitution’s text, or draw solely on the judges’ own understandings of words, or consult linguists or take surveys, etc?\(^9\) Another is how to cope with words that change meaning over time – should original meaning win, even when the text does not say it should? An example is the use of “arms” in the Second Amendment – at the time it was written, most modern weapons had not been invented, and many (eg, nuclear weapons) were inconceivable. Does that mean that the text does not address nuclear weapons, or that it does by including it within the general noun “arms,” or by excluding it? Another example is the way some words or phrases lose (clear) meaning (at least to most people). For example, what does Article III, Section 3 mean when it states, “no Attainder of Treason shall work Corruption of Blood”? Does this antiquated phrase not force the Court to consider extra-textual materials?

No one would assert the Court could rely on text always and alone to resolve legal issues. An arguably more fundamental problem for constitutional textualism is that, as Manning observes, “No constitutional text prescribes the scope of judicial review.”\(^10\) In other words, textualism is not specified in the Constitution’s text. A related and arguably even deeper problem is that, even if textualism were specified in the text, it is at best a puzzle how a brief document – illegally produced\(^11\) and accepted even initially only with great acrimony\(^12\) – could provide an authoritative basis for binding anyone 200+ years later.\(^13\) How can any text authorize itself, much less authorize a method for interpreting it?\(^14\) Must not the consequences of acquiescence to the authority of the text, as reflected in popular will,


\(^9\) In the statutory context, Congress has only rarely and in modest ways attempted to specify how courts interpret statutes, e.g., the Dictionary Act, 1 U.S.C. §§ 1-8 (2012), which defines “person” to include “corporations,” a point noted by the Court in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

\(^10\) Manning, Forward, supra note [pin], at text accompanying note 309, citing ALEXANDER M BICKEL, THE LEAST DANGEROUS BRANCH 1 (2d ed 1986).

\(^11\) The Articles of Confederation did not contemplate amendment in the manner the Constitution was adopted.

\(^12\) [cites to ratification debates].

\(^13\) L. Michael Seidman, On Constitutional Disobedience (2012); see also David A.J. Richards, [cite].

\(^14\) One interpretation of Godel’s incompleteness theorems may be relevant here: Any machine (or method of interpretation) that generates only true statements must fail to print some true statements, or conversely, any machine that generates every possible true statement must generate some false statements too. Richard Smullyan, 5000 BC and Other Philosophical Fantasies (1984) at Ch. 3, § 65.
constitute at least part of the power of the document to bind us? If so, why should such features of our history not play an important role in interpreting it over time?

Textualism faces still more problems in particular contexts. How should courts integrate elements of text that are in tension – eg, the First Amendment’s protection of free speech versus the Fourteenth Amendment’s embrace of equal protection, or the latter versus the Sixteenth Amendment’s approval of progressive (i.e., formally unequal) income taxation? (Any advertance to the “later in time” principle requires going beyond the text.) Finally, for modern textualists, there is the problem of whether to embrace textualism’s implications when doing so would unsettle long-settled ideas about what the Constitution means, based on prior decisions that did not take a narrowly framed textualist approach. For example, as David Strauss has argued, *New York Times v U.S.*\(^{15}\) – which refused under the First Amendment to grant an injunction sought by the executive branch against publication of the Pentagon Papers – would fall under a textualist reading of the First Amendment, which only applies to “Congress,” and not to the Executive.\(^{16}\) To the extent that textualism is meant to generate predictability, then it will be at war with its own virtue if it results in modern unsettlings of long settled (if non-text based) interpretations. More generally, it is an unproven empirical conjecture that textualism is more predictable or constraining than other interpretive methods.

2. Originalism

Originalists want courts to figure out what Constitutional law would have been wanted by the Founders (or, variously, the Framers, Ratifiers, voters, people).\(^{17}\) (One can think of this as the historians’ school of Constitutional interpretation). As with textualism, originalism has an intuitive appeal, in that it reflects the way that texts as disparate as contracts and poems are commonly interpreted – by reference to historical understandings likely to have been those of the creators of the texts. Insofar as we respect the Founders as wise and farsighted, we may want to defer to their wisdom and foresight through an originalist understanding of the document they wrote. Originalism is also sometimes defended on the same basis as textualism, as constraining judicial discretion and “activism”.

As with textualism, however, originalism runs up against a number of problems. One general set of problems for originalists is who to count as a Founder (Ratifier, member of the people, etc.), what evidence to count as “original” understandings, and what to do if historical evidence shows that the Founders differed on important issues,\(^{18}\) or if new

\(^{15}\) 403 U.S. 713 (1971).

\(^{16}\) [David A. Strauss, Does Constitution Mean What It Says?, Working paper (2015).]


historical evidence emerges, as is not uncommon in historical research, that overturns (or modifies) prior understandings of what the Founders intended. Another problem – connected to the problem of linguistic change confronting textualists – is the possibility (or even likelihood) that the Founders’ intent was for the Constitution to respond to changing conditions without formal amendment.

Another problem – analogous to the lack of text specifying textualism – is that on some accounts some (most?) Founders would have rejected some (all?) versions of originalism. How could a court adhere to original intent if original intent requires de-emphasizing original intent? Some originalists are committed to original intent only if it is “clear,” while others would consider historical evidence in all cases. Some originalists argue against a free-form effort to infer Founder intent but would constrain originalist understanding to the text of the Constitution in 1787 – a form of originalist-inflected textualism. Another problem for originalists is how the many amendments to the Constitution should affect interpretation generally – some argue that the Civil War Amendments should be understood to have instituted a second original understanding that should override any initial understanding. Similar arguments could be made about the collection of Progressive-era amendments, and the strong switch in Constitutional theory that occurred during the New Deal (albeit without formal amendment). Overall, it seems unlikely that originalist theories

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19 Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1171-73 (1993) (arguing for an two-step interpretive approach that requires courts to determine an original or historical meaning and then to in good faith carry that meaning forward – to “translate” it – to new contexts); see also Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 410 (1995).


22 Barnett, supra note [pin]. As differentiated by Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707, 707-08, 725 (2011) and summarized in Joel Alicea and Donald L. Drakeman, The Limits of New Originalism, 15 U. Pa. J. Const. L. 1161 (2013), “Old Originalism ... focuses primarily on the intentions of the Framers in enacting a particular provision; New Originalism seeks instead what a ‘hypothetical reasonably well-informed Ratifier would have objectively understood the legal text to mean with all of the relevant information in hand;’ and the New New Originalists ‘claim that some provisions of the Constitution ought to be interpreted at a high level of generality, and that even originalist interpretation often requires courts to engage in creative and political acts of construction in the formulation of legal rules’” (emphases added).


25 Bruce Ackerman, We the People: Foundations (1991); cf. Michael J. Klarman, Constitutional Fact / Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments, 44 Stanford L. Rev. 759 (1992) (questioning plausibility of portraying any historical episode as “moments of suspended self-interest,” which Klarman argues is necessary for Ackerman to convincingly argue for “privileging past preferences” expressed in those moments over “present ones”); Mark Tushnet, Red, White, And Blue: A
would do much to constrain judicial discretion, given the wide variety of choices one could reasonably make in response to these problems.

3. Precedentialism

Precedentialists give primary place to existing precedents, even if they cannot (in retrospect) be supported by text, original intent, or other basis for decision. Precedentialists also want courts to adduce general principles from existing precedents to apply to novel legal questions. (One can think of this as the common law lawyers’ school of Constitutional interpretation). Precedentialism would include deference to text where that approach is consistent with precedent – the First Amendment would continue to apply to Congressional laws abridging free speech – but not where it does not, and so would subject to strict scrutiny Presidential actions abridging free speech, despite the lack of textual support noted above. Precedentialism can be defended as the most stable method of Constitutional interpretation, privileging as it does settled interpretations over other goals. It also arguably produces a more coherent overall body of interpretations, as the common law method that it reflects includes as a component the judicial task of generating new precedents in light of and (to the extent feasible) consistent with the principles reflected in other precedents. It is also a task at which US judges are arguably more skilled – by virtue of the common law and precedent-based approach to other bodies of law, which they apply all the time – than they are at (for example) evaluating historical research necessary to choose among competing historical understandings, or to evaluating the pros and cons of moral theories that could inform Constitutional meaning, or even to go beyond at least clear textual meanings and apply the often-conflicting canons used to interpret statutes and contracts.

One obvious problem for precedentialists is what to do if there is no precedent – this generally leads judges inclined to believe in precedentialism to become pluralists (see below) and mix other approaches with adherence to *stare decisis*. Another problem (common to common law approaches) is what to do if there are conflicting precedents, or precedents that were founded on now-repudiated theories of interpretation. At the most general level, judicial attitudes towards judicial review – ie, the scope of judicial power to strike down legislation as violating the Constitution, however interpreted – have varied over time, just as have the meanings of words. Another problem is how to think about the status of precedents that overturned prior precedents, as in *Citizens United*, which overturned two prior Supreme Court decisions (*Austin* and *McConnell*), or in *Virginia Pharmacy*, which overturned a law forbidding pharmacies from advertising drug prices.

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26 See, eg, Larry D. Kramer, The Supreme Court, 2000 Term--Foreword: We the Court, 115 HARV. L. REV. 4, 33-130 (2001) (describing changes in the Court's attitude toward judicial review over time).


overturned *Valentine*. Does a later-in-time precedent deserve full deference? Or does it less deference because it failed to accord with precedentialist values? Should one look to precedents overall to decide how to reconcile sequentially conflicting precedents – that is, count up the instances in which a holding that reversed a precedent was subsequently reversed, and compare that reversal rate to the overall reversal rate, and then weight the precedent accordingly?

4. Consequentialism

Consequentialists believe that courts should consider the consequences of their decisions, and decide accordingly (One can think of this as the economists’ school of Constitutional interpretation). The “legal realist” school can be seen as a version of consequentialism, in which the fact that courts can be shown to (sometimes) engage in unconstrained policy making is seen as a justification for courts to do so generally, with William O Douglas being suggested as an example of a judge openly (or nearly so) engaging in consequentialism. Consequentialism has the obvious if arguable potential to produce good consequences, or at least of allowing the Court to not generate obviously pernicious consequences. Consequentialism is also defended as inevitable. It is also defended on the ground that it will best protect the Court – were the Court to commonly reach interpretations with disastrous consequences, the Court would fall into disfavor and the rule of law more generally would lose legitimacy. Arguments from consequences are most powerful when the consequences have already happened – that is, when a past decision has proven unworkable. Consequentialism can thus be seen as a important constrain on precedent.

A problem for consequentialists is how courts should choose what types of consequences to consider, how to know what they will be, especially given their limited resources and powers of investigation, and how to balance or trade off among consequences. (These arguments lead many people with consequentialist commitments to adopt another version of Constitutional interpretation. I propose a version of this approach below.) Another problem is that is widely considered in conflict with principles of legality as reflected in the separation of powers, with judges charged with interpretation and not lawmaking. Another problem – the so-called “countermajoritarian difficulty” – is that because judges are not elected, they can represent minority viewpoints in thinking through consequences, and generate decisions that conflict with the desires of the democratically accountable representatives of the people. This objection is least powerful when the consequences in

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31 Valentine v. Chrestensen, 316 U.S. 52 (upholding a statute banning handbills on streets).


34 In my view, this difficulty has always been overstated and overemphasized in legal scholarship, once it is recognized that all political agents are agents, that none are immediately (if ever) accountable to a majority of the people, and that the Supreme Court justices are appointed by a President typically voted in office by a majority of the voters, and confirmed by more than a majority of Senators who are in turn voted into office by a majority of the voters in a majority of the states. How is the Supreme Court any more countermajoritarian than the President (see Bush v. Gore, for example) or the Congress (whose members are chosen by voting
question are of the Court’s own making – past consequences due to past precedent – and when the Court’s view on consequences are widely shared by the people.

5. Structuralism

**Structuralism** asks courts to infer general principles from (or interpret the Constitution in light of) the structure of government created by the Constitution, such as federalism or separation of powers, and to use those principles to guide interpretation of the text, sometimes even to override the “plain meaning” of the text (One can think of this as the political science school of Constitutional interpretation). One variant of structuralism is famously associated with Charles Black. Other schools of thought could be seen as structuralist, such as the “minimalist” approach of James Bradley Thayer, who argued that courts should interpret the Constitution to conflict with a statute only in instances where the conflict was clear, on grounds of institutional competence and accountability. Thayer’s views receive support from recent decision-theoretic analysis by Adrian Vermeule. Similarly, one could identify as “structuralist” the “legal process” school associated with Henry Hart and Herbert Wechsler, who emphasized the limited role that courts should play in a legal system on jurisprudential and institutional grounds. They argued that courts should make decisions only after a reasoned process of deriving rules from general principles of law, regardless of the substantive content of those principles, and following rules in actual controversies without regard to the status of the parties or any fact not explicitly made relevant by the rule itself, a set of legal constraints that would push courts towards some mix of text, precedent, and pre-committed structural principles as the primary authorities for new interpretations.

Another structural argument that can be mobilized in particular Constitutional disputes flows from the basic facts that (a) the Court is charged with interpreting law in a given case, (b) the Supremacy Clause gives the Federal government, and the Constitution, the ultimate final say over what the law is when the Constitution is implicated, (c) the institution of

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judicial review invented in *Hylton* and made famous in *Marbury*, and (d) the elaborate and difficult process required to formally amend the Constitution. Together, these facts allow courts to make Constitutional law without (much) fear of being overturned. If courts use that power to aggressively or strongly intervene in resolving a legal debate based on Constitutional interpretation, they can close down that debate more abruptly or permanently than can other parts of the government. Congress, the regulatory agencies and the states cannot override the Supreme Court’s interpretations of the Constitution, but the Court can (at least initially, and within wide limits) override Congress, the regulatory agencies, and the states. The combined effect of judicial review, precedent, the Court’s tiny docket, and rare turnover in Supreme Court membership also combined to make the Court’s constitutional decisions more influential, more durable, and more “jurispathic” than any other decisionmaker in the legal system. It follows that the Court should be – as it often has been – more cautious and deliberate in interpreting the Constitution than in interpreting other legal texts, even when the text has an apparently plain meaning.

An obvious problem for structuralists overall is that – as reflected in the foregoing summary – many candidates for structural principles exist, and can conflict, or be indeterminate – e.g., is federalism advanced or harmed if the Federal government adopts laws enforceable only in state court? Another problem is that the method’s appeal often derives from overall consequences – e.g., legitimacy and quality of court decisions overall, over time – and not from specific decisions, and that the effort to translate any given structural principle to specific decisions will leave courts with large amounts of discretion – precisely the opposite of what the method promises overall. Any given variant of structuralism also rests on arguably empirical foundations: would the legitimacy of the courts (and law generally) be enhanced if the courts embraced a Thayerite stance and declined (for example) to strike down laws restricting marriage to heterosexual couples, or to protect the right to burn the flag? Congress or agencies may be theoretically positioned to gather more information about specific laws or rules than the courts, but the shelter of life tenure may permit more reasoned and reflective decisions about consequences, and if courts can piggy-back on Congressional or agency fact-finding, perhaps (at least over some run of cases) the court can improve on the quality of decisions. Casual observation of Congress’s tendency to enact criminal laws with little sound policy analysis in the last fifty years may tend to doubt its ability to make sound decisions overall – which is not to say that

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39 *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796)


41 Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 44, 53 (1983) (“Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.”); Robert M. Cover, Violence and the Word, 95(8) Yale L.J. 1601, 1615 (1986) (“When judges interpret, they trigger agentic behavior within just such an institution or social organization. On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously.”).

42 Manning, supra note [pin], at [pin].
the courts do better when they intervene frequently, but only to underscore the empirical questions left open by abstract arguments from structure.

6. Moralism

Moralists (famously, Ronald Dworkin\textsuperscript{43}) believe courts should adduce general moral principles from the text and structure of the Constitution, and use those principles to guide their interpretations and legal decisions. (One can think of this as the moral philosopher's school of Constitutional interpretation). As with consequentialism, some moralists claim it is impossible for courts to do other than to bring their own morality on the Constitution, even if they deny it, and that candor and transparency would be increased if courts admitted they were doing so. “Morality” in this context can be broad ranging, as in Dworkin's writings, or more narrowly framed as “justice” or legal virtues such as coherence.\textsuperscript{44} Versions of moralist interpretation are defended as in fact consistent with original intent, precedent, and structure of the Constitution – an argument that has strongest bite when approaching such obviously open-ended clauses as the Equal Protection Clause and Due Process Clause. Moralism can also be defended on the ground that moral principles are a core element of law, and arguably reflect a subset of consequence-relevant but relatively-fact-free reasons for particular interpretations that are within the specialized domain and capabilities of the courts.

A problem for moralists is that moralisms vary and conflict, even if one were to limit the acceptable moral theories to just those that are compatible with the Constitution’s text or original meaning. [This section will be expanded.]

7. Populism

Populists believe that courts should be guided by their understandings of contemporaneous popular will, as it evolves over time.\textsuperscript{45} (One can think of this is as the pollsters’ school of Constitutional interpretation.) Populism is defended on both ideological grounds – the Constitution is meant to reflect the will of the people – and pragmatic grounds similar those used to defend consequentialism: it will best protect the Court – were the Court to commonly reach interpretations that strongly conflict with popular will, the Court would fall into disfavor and the rule of law more generally would lose legitimacy. The “Switch in Time” is commonly advanced as an example of populist interpretation, defensible in the context as a second-best to having the Court’s role more drastically modified through Court-packing or formal Constitutional amendment. [This section will be expanded.]

Problems for populists are numerous. Popular will is often conflicted, and often conflicts with prior popular will as reflected in the Constitution’s text, or prior court decisions. It is unstable, and hard to discern on any but the most general or salient propositions. It

\textsuperscript{43} Ronald Dworkin, Law’s Empire 318-33 (1986).

\textsuperscript{44} E.g., James McCauley Landis, Statutes and the Sources of Law, in Roscoe Pound, ed., Harvard Legal Essays 213, 214-18 (Ayer 1934) (defending purposivist interpretations as reflecting inherent judicial power to make the law more coherent and just).

\textsuperscript{45} Larry D. Kramer, The People Themselves (2004).
conflicts with the structure, text, and original intent of the U.S. Constitution in more general ways, by failing to reflect the many protections of minority rights in the Bill of Rights, or the careful limits on popular will reflected in the separation of powers and the federalist system generally. Popular opinion can fly in the face of the rule of law, as when mobs form or concentration camps are built.

8. Pluralism

Pluralists believe that courts should use a variety of approaches to decisions, drawing from the above list in some mix, which can be an open-ended balancing approach (trading off some benefit obtained by following any particular theory against the cost of ignoring another), or lexical (for example, starting with text, and moving to structure only if text does not answer the legal question). In practice, it may be hard to be other than a pluralist of some stripe, since few of the above theories will give clear answers to every legal question. This fact is likely a partial cause of there being so many different methods, and sub-methods, reflected in the above survey. Among modern academics, examples of pluralists include Richard Fallon, Robert Post, and Phillip Bobbit.46

Just as the large number of other stand-alone methods is a reason for pluralism to emerge, it is also a problem for pluralists, in that a wide variety of ways exist to mix the above theories exist, and many will conflict. Another set of problems is that the multiplicity of approaches may reduce the predictability of results over time, fail to generate consensus on the Court, respect from lawyers, or legitimacy among the population. It may also camouflage exercise of judicial discretion, with judges switching among methods not because they have an overarching, stable and consistent pluralist theory of interpretation, but because the results they favor for personal or political reasons happen to line up with different methods of interpretation in different cases.

The challenge, then, is to articulate a type of pluralism that will generate consensus and hence predictable results. To do that, there is an obvious appeal to a type of lexical ordering of methods, rather than to free-form balancing. By putting sources of authority in an order, a pluralist method would preserve the benefits of particular, higher-ranked methods while remaining open to other methods should the higher-ranked methods fail to generate results.

B. Rule Consequentialism – A Sketch of a Constitutional Method

In this section, I sketch a synthesis of the many methods of constitutional interpretation to reflect the foregoing survey and summary of their pros and cons. Given my “outsider” status (in constitution law), the reader should already know that what follows is not original – it reflects many influences, and in most respects could be traced to many prior constitutional scholars, who will (I hope) forgive me if I do not cite them at every turn. For

working purposes, let us give the synthesis an identity: “rule consequentialism.” The name is obviously drawn from rule utilitarianism – a standard way to (try to) reconcile the intuitive appeal of both utilitarianism and deontological approaches to social, moral and political decisions. 47

The basic idea is straightforward, and in accord with many pluralist approaches to constitutional interpretation set out by others. Overall, courts should interpret the Constitution so as to achieve the best overall consequences (however defined). To do otherwise would be hard to understand, even if many theorists fail to acknowledge the point. As a well-known colleague likes to put it, “the Constitution is not a death machine.” Text, original intent, precedent, structure, moral theory, popular will – all must fall in the face of known and dire consequences.

But to generate the best consequences overall, the Court should – as it always has – self-impose a series of rules (or, more precisely, a mix of rules and standards) designed to limit how often or extensively it must engage in consequence assessment in interpreting the Constitution. Full-blown or “free-form” consequentialist reasoning in each case, in other words, will produce bad consequences. In keeping with the purpose of law generally, the Court should tie its own hands in order to function most valuably.

The self-imposed restraints include but are not limited to relying on narrower methods of interpretation – particularly use of precedent, and text, in that order 49 – to the extent those methods are capable of easily resolving an issue. Unlike most textualists, originalists, or precedentialists, however, I am skeptical about how often such methods can easily resolve most issues that make it to the Supreme Court. If those methods have been tried and no consensus generated, the Court should move to the second-tier of methods, including consideration of original intent, structure, moral principles, and popular will. But – consistent with those methods being less reliable and affording courts more discretion – the

47 As now seems inevitable, it turns out that this phrase, made up for this paper, can already be found in moral and political philosophy, as a broader set in which rule utilitarianism, see note [pin] infra, is an example. Brad Hooker, Ideal Code, Real World. (2002); Samuel Scheffler, ed., Consequentialism and Its Critics (1988).

48 See Richard T. Garner and Bernard Rosen Moral Philosophy: A Systematic Introduction to Normative Ethics and Meta-ethics (1967) at 70 (defining rule utilitarianism). The standard example used to differentiate rule utilitarianism from “act utilitarianism” is that in the former one might decide to never run red lights, while in the latter, one would (in principle) always evaluate whether to run each red light. “Don’t run red lights” then becomes a rule that replaces “maximize utility” when one drives up to a red light, but the replacement can be justified on the ground that (a) not running red lights on average (or typically) maximizes utility and (b) following a rule rather than re-evaluating the rule at every light economizes on decision costs.

49 A note on the ordering within this tier of method: respect for precedent will tend to generate the most predictable and consistent results over time; text, because it is less open-ended or changing than historical evidence, will be second most reliable. Precedent beats a novel textual interpretation because it by definition has already occurred, and has generated consequences that can be observed, however imperfectly. By contrast to these legal materials, original intent is less likely to generate predictable and consistent results, both because it comes in many different plausible varieties, and because of the problems noted above relating to subsequent formal amendments of a general nature, particularly the Fourteenth Amendment, with its wildly open text, reflecting a wide-ranging potential set of intended consequences. As compared to free-form consequentialism, any of these methods will be more stable and consist of a narrow set of legal materials from which advocates can generate arguments.
Court should do so in ways that self-consciously limit the extent to which doing so requires it to invent new principles, shut down legal reasoning by other participants in the legal system, or base decisions on strong and sweeping principles that will predictably generate unpredictable consequences.

In particular, original intent as a source for independent authority should be limited to non-debatable propositions, or to propositions that overlap with widely and modernly shared moral or structural principles or popular beliefs. Those principles, in turn, should typically count only if they are widely shared – in other words, when they reflect popular will. On its own, popular will should matter only if it reflects a durable position over a time about issues that are sufficiently narrowly framed to suggest survey or poll respondents could have fairly considered the question. Finally, when these sources are unavailing or conflict, and the case cannot be resolved in any other way, the Court should consider consequences of its interpretations, but only where the consequences are narrowly framed, most easily anticipated, and/or reversible at modest cost. Decisions should be self-consciously tentative and revisable – the Court should find a new right, or decline to find a right, only in temporary terms, “for now,” “as advised.” Doing so will reduce the odds of egregious errors, even if it does reduce the force and stability of precedent as a source of stability.

To elaborate on why this pluralist but lexically ordered method of rule consequentialism may appeal: Bad consequences from free-form consequentialism are likely to arise for a variety of reasons embedded in the justifications for non-consequentialist methods sketched above. Free-form consequentialism makes coordination around legal meaning difficult – lower courts, lawyers, lawmakers would all find it hard to guess how the Court would come out on a large number of open constitutional questions. Limits on knowledge, information, and expertise will make the Court less likely to generate good consequences than other legal actors in many cases. Greater unpredictability, poor information, and the Court’s strong and jurispathic role (as stated in IV.A.5 above), would combine to discourage some kinds of legal risk-taking, inhibit legal and regulatory experimentalism, and demoralize legal actors. The Court should be cautious in letting consequentialist reasoning lead it to shut down contested interpretation by other actors in the legal system, or to refuse novel constitutional arguments altogether. The “bargain” reflected in the Constitution makes adherence to each of its components important to adherence to all of its components, and derogations of one clause may undermine its overall benefits.

Bad consequences are most likely to arise when the Court chooses or is forced by Circuit Court splits to venture into territory not yet addressed in our legal traditions, as reflected in text, original intent, or precedent, or in widely accepted moral and political principles, or as may sometimes be reflected in clear evidence of durable informed popular opinion. Conversely, where a given legal interpretation is already addressed in the text, clear evidence of original intent or traditional practice, precedent, and in widely accepted moral or political principles and/or clearly evidence popular opinion, the Court may more safely use consequential reasoning to choose among plausible alternative readings that extend or develop that tradition. Where there are conflicts among sources of traditional understandings – for example, where text seems to conflict with precedent, or widely held moral principles conflict with text or precedent – the Court should consider consequences, but cautiously.
One way to “cautiously” consider consequences for a specific case is to decide cases so as to have the fewest direct consequences. To do so, the Court should consider how complex the law and facts of the case are, and frame a decision in ways that generate the smallest number of complex and disparate effects. If the legal issue is narrow and has no strong connections to other legal issues – striking down one small component of a statute, for example, where it is not likely to have a dramatic effect on the legal system as a whole – then, all else, equal, the risks of free-form consequentialism will be lower. If a party asserting a constitutional right is an individual, then, all else equal, the consequences will be simpler to assess than if the party is an organization – including governmental entities, corporations, and unions. If the party is uniquely situated in some highly specific factual context, then the consequences will be simpler than if the party is representative of a large number of similarly situated parties. If the case is the first of its kind ever to be brought, then the consequences will likely be harder to assess than if the case is one of a repeat series of similar cases.

All of these generalities are reflected in the Court’s prudential practices. The Court tends to take cases only after multiple lower courts have aired similar cases. The Court tends to decline to decide constitutional issues if there are other ways to decide the case. The Court tends not to adjudicate “political questions” such as jurisdictional or procedural fights within another branch of the government. The Court does not issue advisory opinions on constitutional questions, as is done in other countries, and tends to decide constitutional cases “as applied,” taking into account the specific party and the specific facts in the present dispute, rather than “on their face,” an approach that strikes down a law across the board, for all parties, regardless of the facts. By doing so, it leaves open to further lower-court development the facts of other cases involving other parties. It keeps the burden of anticipating consequences narrow. It minimizes the negative consequences of open and free-form consequentialism, including mistakes, reversals, loss of legitimacy, and generation of avoidable political controversy.

C. Applying Rule Consequentialism to Corporate and Commercial Speech

In this Section, I apply the foregoing approach to constitutional interpretation to corporate and commercial speech. The bottom-line of the analysis is that the Court made a mistake when it began to extend First Amendment rights to corporations and to commercial speech. The analysis purposely mixes commercial speech cases – *Virginia Board* and *Central Hudson*, etc. – with corporate political speech cases – *Bellotti* and *Citizens United* – because both lines of cases stem from the same business litigation strategies, both lines represent examples of pernicious rent-seeking, as outlined in Part I, and both lines depend on the same mistakes of constitutional interpretation.

Neither text, nor precedent, nor original intent supported *Virginia Board* or *Bellotti*. Without *Virginia Board* and *Bellotti*, no precedents would have supported *Central Hudson* or *Citizens United*. Nor was there any widely held moral principle supporting their outcomes – to the contrary, most Americans resist the idea that corporate entities can be moral bearers of constitutional rights. Rather than approaching the disputes in these cases with a view to the structural role of courts – minimizing the burden of assessing consequences, and curtailing its jurispathic effects, as argued above – the Court went out of its way in these cases to open up channels for immense and hard-to-anticipate legal change, while shutting down the ability of other legal actors to respond to the effects of those changes.
1. Text and Precedent

As for text, the most immediate point is that the Constitution nowhere mentions corporations. The modern Court has attempted to dodge that point by appealing to the fact that the First Amendment protects “speech” in the abstract, without reference to speakers, an interpretive “move” first made in Virginia Board. A literal reading of the First Amendment, however, would protect only against laws made by Congress, not by the states, as in Virginia Board and Bellotti, or regulations adopted by Federal agencies, as in Citizens United. Moreover, this reading of the “first word of the First Amendment” is supported by intertextual inference, as David Strauss has noted: no other provision of the Bill of Rights are written this way, specifically addressing a part of the Government, but instead speak of rights of individuals or the people.50

Of course, it would now be a strong departure from precedent for the Court to apply the First Amendment to Congress alone.51 But if the privileging of precedent is the only reason for extending the subject noun in the First Amendment to Governmental bodies other than Congress, the same privileging of precedent would have limited its object noun to individuals engaged in non-commercial speech, and would have not extended it to include speech by corporations or commercial speech more generally. Virginia Board directly and explicitly overturned Valentine, and Justice Powell’s opinion in Bellotti repudiated his own valid and well-stated concerns in Pipefitters about “major participation in politics by the largest aggregations of economic power, the great unions and corporations.” Prior to Virginia Board, the nation and its economy had hummed along for nearly 200 years without non-expressive business organizations being entitled to trump regulations under the First Amendment. In Bellotti, Chief Justice Rehnquist placed appropriate emphasis in his dissent on how strange the concept of business corporations having constitutional rights to political expression, when he emphasized Justice Marshall’s statement:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.52

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50 Strauss, supra note [pin].

51 In Bellotti, however, it should be noted that Rehnquist, dissenting, continued to argue that the First Amendment has only a “limited application ... to the States,” 435 U.S. at 823, in which he cited back to his opinion in Buckley v. Valeo, 424 U.S. 1, 291–92 (1976).

52 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (Marshall, C.J.). As noted in Leo E. Strine, Jr. & Nicholas Walter, Conservative Collision Course? The Tension Between Conservative Corporate Law Theory and Citizens United, 100 Cornell L. Rev. 101, 180 (2015), “[This] holding is consistent both with contemporary practice and the descriptions of the corporation by [corporate treatise writers] Coke, Blackstone, and Kyd, [and] ... was reaffirmed scores of times before the Civil War.” Strikingly, the case is nowhere cited in the majority opinion in Citizens United, or in Justice Scalia’s concurrence. The “artificial entity” theory has been generally contrasted with two rival theories, the “aggregate” theory, which attempts to treat a corporation as “merely” the aggregate of the individuals who create it (typically, for such theorists), shareholders and the “natural entity” theory, which treats corporations as if they were individuals for legal purposes. See John C. Coates IV, State Takeover Statutes and Corporate Theory: The Revival of an Old Debate, 64 N.Y.U. L. Rev. 806 (1989), at 809–25 (reviewing theories of the corporation in law).
In the Progressive Era, this view of the constitutional status of corporations was reflected in the Tillman Act, which simply banned corporate political spending, in 1907. Shortly later, President Taft proposed a two percent federal excise tax on corporations, accompanied by a proposed constitutional amendment that led to the Sixteenth Amendment. Shortly later, Kansas passed the first of what became standard “blue sky” state laws forbidding the sale of securities by corporations. Those laws that were upheld in the Supreme Court against challenges as arbitrary (under the Due Process Clause), unequal in application (under the Equal Protection Clause), and interferences with interstate commerce. The First Amendment played no role in that case, because at that point in U.S. legal history it had never been used to strike down any law on its face, and it apparently did not occur to the legal advocates involved to argue that it should be so used.

Another textual objection exists to the extension of the First Amendment to state laws regulating corporate and commercial speech. To apply to the states, the Court must “incorporate” the language of the First Amendment through the Fourteenth Amendment, which bans states from depriving any “person of life, liberty or property, without due process of law.” To accomplish this, however, the Court had to accept that corporations are “persons” – a proposition nowhere established in the text of the Constitution. While there may be many legal conveniences that flow from counting corporations as “persons” – essentially economizing on the “transaction costs” of addressing such legal issues as jurisdiction by letting the corporate entity stand in for individual constituencies – they are not clearly required by the Constitution’s text, and similar conveniences could be accomplished by treating corporations as “citizens,” a proposition rejected by the Supreme Court as early as 1809. This refusal to grant corporations formal constitutional rights equivalent to those of individuals was extended to the Fourteenth Amendment in the Progressive era, when the Court held that the liberty protected by that amendment "is the liberty of natural, not artificial persons."

2. Original Intent


55 Santa Clara, a decision commonly said to establish that corporations are “persons” for purposes of the Fourteenth Amendment, expressly declined to resolve that question, instead holding that a tax assessment in a railroad was invalid under state law. Co. of Santa Clara v. Southern Pac. R. Co., 118 U.S. 394 (1886) at 416 (“the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the State Board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court”).

56 Bank of United States v. Deveaux, 9 U.S. (9 Cranch) 61, 86, 91 (1809) (“citizen” consists of individual shareholders even if they come into court under corporate name).

Not only does the text of the Constitution omit corporations, there is clear historical evidence that the omission was deliberate. The Founders even left out of the Constitution a Federal right even to charter corporations, for fear of triggering resistance from state bank owners and operators. Nothing in the debates of the Founding Era, or the Civil War era, or the Progressive Era, or the New Deal, suggested any original “intent” to give corporations constitutional rights on par with or distinct from rights held by individuals. Nothing in the post-Civil War cases that in dicta suggested that corporations were “persons” for purposes of the Fourteenth Amendment is there any reference back to evidence of original meaning supporting such extensions. Throughout US history, corporations have been treated as subject to full-throated and robust regulation, including in the manner that they speak and communicate. 58

3. Moral Theory, Structural Principles, and Popular Will

No widespread consensus argument based on moral reasoning or structural analysis exists to justify any of those decisions. Corporations as such rarely figure in moral theories, and when I ask my neighbors if they think anyone has a moral entitlement to operate through the corporate form they usually laugh. The structure of the Constitution, and the structural arguments outlined in Part IV.A.5 above, all line up against the Court in creating constitutional rights for corporations. Popular opinion runs wholeheartedly against *Citizens United*. The consequences of each decision were difficult if not impossible to predict when they were decided, and remain uncertain even today. One reason their effects were and are unpredictable is because they involved complex organizations rather than individual parties. Corporations are central to the economy, are commonly nodes of coordinated behavior and self-regulation for thousands of shareholders and employees. Another reason they remain uncertain in their effects is because they were decided in ways that depart from the Court’s wise normal practices in confining the effects of novel constitutional interpretations: they were decided in ways not carefully limited to their facts, but accompanied by sweeping statements that predictably generated a long series of knock-on cases involving complex organizational parties, and each of which raised still more uncertain facts.

*Virginia Board* involved no would-be speaker, leading the Court to have to demean its traditional cautious approach to standing to permit the case to proceed. *Central Hudson* articulated what has proven to be a manipulable and open-ended test for commercial speech. The test has been an invitation to business corporations to bring ever-increasing numbers of new disputes to the Federal Courts – indeed, compared to other controversial, modern constitutional innovations, such as the right to abortions and the right to have the fruits of illegal search and seizures excluded from criminal trials, the right to commercial speech has proven to generate a greater number of ongoing Court challenges to regulations and laws enacted by the democratically elected or appointed agents of the people. 59

58 Coates, supra note [pin] at [pin].

59 Coates, supra [pin] at [pin].
Citizens United represented an even starker departure from cautious constitutional interpretation, and swept vastly farther than even the plaintiff in the case requested. That plaintiff – a nonprofit corporation with an annual budget of $12 million, mostly funded by individual donations – made several arguments that would have allowed the Court to decide the case on conventional, relatively narrow grounds, with a much more modest impact, greatly reducing the Court’s need to anticipate and assess the consequences of its decision.\(^{60}\) Among other things, the plaintiff argued that the rule in question should be invalidated only as applied to (1) video-on-demand – because that medium has a lower risk of distorting the political process than ordinary television ads – or (2) to nonprofits funded primarily by individuals. This last position was acceptable to the U.S. Government and would have represented a modest relaxation of the Court’s prior holding\(^{61}\) that the ban was unconstitutional as applied to nonprofits that solely promote political ideas, are not engaged in business, and are not funded by for-profit corporations or unions.

These were the arguments considered by the D.C. District Court in January 2009 and these were the arguments joined when the appeal was first argued before the Supreme Court in March 2009. Instead of adopting any of these arguments, the Court invalidated the ban in its entirety, freeing all corporations (and unions) for the first time in 60 years to spend freely in US federal election fights. In effect, the Court not only chose to depart from precedent specific to campaign finance and First Amendment doctrine, but also chose to repudiate the kind of “judicial minimalism” championed in the past by Chief Justice Roberts, among others.\(^{62}\)

Moreover, the Court never seems to have even considered the manipulability of the corporate form, and the results a sweeping rule might have, once political entrepreneurs began to think through the advantages of creating new corporations – let’s call them Superpacs – that would benefit from the Court’s decision. Even the best experts in campaign finance, for example, utterly failed to predict the explosion in “dark money” and nominally independent spending that followed from the case. That’s in part because campaign finance specialists are not – any more than the Court – corporate specialists. They, too, had not thought about how corporations are used as tools in the business sphere, or what they are legally capable of, once they become the bearers of constitutional trumps.

D. Counterarguments and Responses

[I anticipate the following counterarguments, but would interested in others:]

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\(^{60}\) Another argument was that the distribution of a film through video-on-demand would not be a “public distribution” under Federal Election Commission regulations, and that a reasonable interpretation of the film (Hillary) was that it was documentary, not “express advocacy” covered by the ban.


\(^{62}\) E.g., Draft Article on Judicial Restraint, available at (“The reason the courts were insulated from popular pressure, however, was precisely because their function was not conceived to embrace policymaking. Responsibility for policymaking in a democratic republic must reside in those directly accountable to the electorate.”) (last visited June 11, 2010).
The Court does not really embrace corporate formalism. Corporations as such don’t have free speech rights, so my arguments against giving them such are misdirected. Response: it is true that the Court in Citizens United affects a pass-through of speech rights to the individuals who create and organize and run corporations, rather than lodging them in the corporation as such. However, because it is formally the corporation who is the plaintiff, this is formally a pretext. Likewise, because the corporation as such has a governance structure that affords a small number of individuals power to act for the corporation, the pass-through fails to respect the complexity of (at least) public corporations. The Court fails to consider that the imposition of laws about use of treasury funds in elections has a governance purpose – it shifts power from those agents to shareholders, who can use PACs for that purpose. Bans on such laws effected under the guise of the First Amendment are unwarranted by the text of the Constitution, which nowhere suggests that managers of organizations must be afforded special First Amendment rights or the power to force others (shareholders, employees) to contribute to their exercise of those rights.

Precedent is indeterminate. Given the large number of cases decided under Virginia Pharmacy (less so Bellotti), precedent now cuts against, or at best is indeterminate. That is clearly correct – there are now precedents on both sides. Is there a period of repose after which a bad legal innovation should be deemed good? I will argue that the continued increase in cases and disputes, representing an ever-larger share of the federal docket, justifies reverting to pre-1978 precedent. Courts should face up to consequences once they have revealed themselves, as argued above – this is an important limit on precedent.

The “audience” argument. Courts aren’t protecting corporations, but audiences. This argument fails to take seriously the policy motivations behind regulation of commercial and corporate speech. As a limiting example, would we defend use by stolen property to fund speech, on the ground that it helps audiences? If not, we recognize that other legal entitlements can restrict speech, even when it benefits audiences. A similar legal entitlement is for states that create corporations to condition their activities, and Likewise, commercial speech is typically motivated to protect audiences from fraud. Anti-fraud regulation requires careful deliberation and regulatory design. It cannot be effectively done by the Court under the First Amendment.

The “entrenched incumbent” argument. Similar to the audience argument, there is an argument against laws that entrench incumbents by constraining political activity, including political speech. While a solid policy argument can be made against some kinds of election laws, arguably including limits on organizational political speech, it runs afoul of the constitutional interpretative method outlined above. There is no free-standing right to have Courts strike down laws that have the effect of making it harder to un-elect them, short of a failure of the Republican form of government (which has been held non-justiciable, in any event). Even if this argument were accepted, however, it would not extend to business for-profit corporations, which are not primarily organized to engage in political advocacy and do so only as a subservient tool for either profit or private benefits of control.
Business knowledge is important corporations have important things to talk about. By blocking corporations from speaking, laws such as those in Citizens United prevent useful information from making its way into the public domain and debate. The response to this is that this, again, is a policy argument – not untenable at least for some purposes, but not Constitutional. Corporations have, in any event, separate rights to lobby and speak about issues, even if they are excluded from the election process itself. More broadly, as regards commercial speech, corporate agents have more than ample ability as demonstrated in practice to shape public debate without the need of First Amendment trumps.

Deconstitutionalizing the corporation will not fix campaign finance, because wealthy individuals can corrupt too. I agree. More than one problem, more than one fix.