Can You Hear Me Now? Corporate Censorship and its Troubling Implications for the First Amendment

Terence Lau, University of Dayton
William Wines

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By

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ABSTRACT

In the area of commercial speech, the U.S. Supreme Court has in the past two terms handed down decisions dealing with “coerced speech.” This paper addresses another problem in commercial speech, a problem that could be designated “coerced silence” in some cases or “coerced ignorance” in others. This paper takes as its starting point the Supreme Court’s doctrine that the First Amendment protects both the speaker’s right to speak and the public’s right to hear. Metaphorically, the channels of free speech in this country can be understood as a pipeline that connects “opinion makers” with the 280 million people who comprise the American public. Increasingly, the control over that pipeline resides in fewer and fewer hands. This power over what information is available to the American people when it forms its opinions has vast and profound implications.

Enormous disparities in economic power have created opportunities that have been seized upon by powerful corporations to silence opinions that they consider unfit for public dissemination; and the day when standing on a soapbox in a public park was an effective way to voice one’s dissent has passed. In effect, those economically powerful interests who have control over access to virtually the entire American publics are in a position to either “filter” or to “censor” the information that reaches the American people. This situation threatens both the efficient running of a free market and the political freedoms inherent in the American experiment in democratic republican government. We call this phenomenon “corporate censorship” and trace specific instances of corporate censorship having a material effect on what large swaths of Americans see and hear. We suggest a public good approach to the First Amendment will provide a greater diversity of voice, and we suggest further areas for research into possible solutions.
CAN YOU HEAR ME NOW?– CORPORATE CENSORSHIP AND ITS TROUBLING IMPLICATIONS FOR THE FIRST AMENDMENT

“Money doesn’t talk; it swears.”
-Bob Dylan

“The problem of power is …how to get men of power to live for the public rather than off the public.”
-Robert F. Kennedy

“A profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”
-Justice William Brennan

Introduction

The “profound national commitment” to uninhibited, robust and wide-open debate on public issues that Justice Brennan lovingly described in 1964 has recently been forced on life support. Take, for example, Bill Maher’s talk show, “Politically Incorrect,” which appeared for a few years on the ABC network. His show was cancelled by ABC in the summer of 2002 when several advertisers pulled out after Mr. Maher’s comments about Sept. 11, 2001 drew criticism from the White House. Apparently, the White House achieved by indirection a goal (the silencing of a political critic) which it was constitutionally prohibited from doing directly. For those who love free expression, such conduct invites scrutiny, whether or not one agrees with Mr. Maher’s views.

This silencing of critics appears to be widespread if one looks to corporate conduct. In a very real sense, the institution of law has become an accessory. Consider, for example, the use of S.L.A.P.P. suits by large corporations to silence critics. S.L.A.P.P. is an acronym for “strategic lawsuits against public participation.” In addition to silencing critics, a popular fashion is to restrict the flow of information to the American people or certain segments of the American people in order to modify their behavior or to conform their opinion. This “screening of information” is insidious and undermines what it means to be a free people in the democratic sense. Much of the screening and silencing, although certainly not all, is a product of the abuse of vast economic powers by wealthy interests.

Since September 11, 2001, several federal government officials have used the tragic events of that day and our increased fear of international terrorism as a shield to protect themselves from criticism and to chill open discussion of the causes for those losses. This psychological chilling of open expression was also accelerated by the Administration’s decision to invade Iraq for the stated goals of ousting the regime of Saddam Hussein and destroying weapons of mass destruction. There are some reports on cable news that Peter Arnett’s job at CBS was “collateral damage” of a head-hunting mission from the White House after he criticized the U.S. war plan on Iraqi television. Even an absolute right to communicate, such as the right of communication between an attorney and his or her client, was unilaterally suspended by the
Attorney General in the days following September 11. The result has been disheartening to those who cherish open and robust discussion of matters of public import.

Globally, there seems to be decreasing tolerance for diverse and critical opinions as evidenced, anecdotally, by the daytime murder on a public street in Amsterdam, Holland of Theo Van Gogh, the great grandson of the world-renowned Dutch artist. Van Gogh, a filmmaker, had received death threats after the August airing of the movie “Submission,” which told the fictional story of a Muslim woman forced into a violent marriage, raped by a relative and brutally punished for adultery. The movie was made by Van Gogh and a right-wing Dutch politician who had renounced the Islamic faith of her birth. Witnesses said the attacker fired six shots, stabbed Van Gogh, and then stood over him to make sure he was dead.

Such an outrageous act, if it turns out to be what it appears, namely the killing of one man by another for the opinions he expressed is reminiscent of the response to the publication of Satanic Verses by Salman Rushdie in 1988. Rushdie’s book prompted protests and book burnings. Iran’s Ayatollah Khomeini proclaimed the book a work of blasphemy and condemned Rushdie to death for insulting Islam. Eager followers of the Ayatollah put a bounty on Rushdie’s head. Perhaps, looking at just these two cases from many, it is possible that the global rise of fundamentalism among the world’s major religions has led to an alarming certainty that allows people to condemn expression they disapprove of and even to kill others simply for not agreeing with them.

Rather than a “rights” analysis, we shall attempt to analyze this problem from the perspective of a public good. Previous scholarship has examined the nature of the First Amendment and the public good, analogized speech on the Internet with public good and international trade theory, and argued the harm in extending First Amendment protections to advertising. In 1995, University of Chicago law professor Cass Sunstein argued for the creation of a Madisonian “deliberative democracy” and suggested that government should control the quality of information to ensure “greater diversity of view.” Our inquiry is narrower than Professor Sunstein’s as our focus is on corporate forms of censorship. We concur with Professor Sunstein’s argument on the importance of diversity of view; and this article confirms the effects of a permissive regulatory scheme that allows corporations to dictate what we see and hear. We will also propose initiating a national debate on potential solutions.

In our discussion, we begin in Section I by reviewing the history of the First Amendment to support our contention that it was and is intended to provide a “power-balancing” that protects unpopular political speech. Initially, the entire Bill of Rights was seen as necessary to protect essential freedoms after the creation of a new and stronger central government. In this history, we see a mandate for power balancing to protect the expression of unpopular political sentiments from being silenced by powerful forces that may or may not have popular support. In Section II, we provide illustrative cases of corporate censorship, starting with the repression of commercial messages in the 2002 Winter Olympic Games in Salt Lake City, Utah, then with the startling case of chilling academic speech in Boise, Idaho, and finally with the use of corporate power to manipulate what was heard and seen during the 2004 Presidential Election. We then turn our attention in Section III to examine the expansion of civil rights obligations from the governmental sector to the private sector, and how the rise of corporate power to determine what broad swaths of the American public can see and hear coincides with the demise of the Federal Communication Commission’s monitoring of publicly-owned spectrum for “equal access.” Finally, in Section IV we make suggestions about potential solutions such as re-installing the equal-time rule, breaking up ownership of media conglomerates under the anti-trust laws, and
allowing private attorney-general actions to be brought by citizens who have been denied access to the essential public good of open and free expression on matters of public interest.

I. A BRIEF HISTORY OF FREE EXPRESSION

A. The U.S. Constitution (1787) and the Bill of Rights (1791).

On December 15, 1791, Virginia became the eleventh state to ratify the first ten amendments to the U.S. Constitution; and thus, the Bill of Rights became law. In most states, Federalist proponents of the Constitution succeeded in securing ratification only by promising that they would seek a bill of rights when the new Congress convened after ratification. The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

After the Civil War (1861-1865), Congress passed and the states ratified the Fourteenth Amendment, which addresses civil rights for former slaves and other matters required as a result of the rebellion. In Section 1, the Fourteenth Amendment declares:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Amendment took effect during Reconstruction and spoke directly to the states. The Bill of Rights, on the other hand, addressed the new federal government, not the states.

During the struggle by the courts to come to terms with the meaning of “due process” when applied to the state governments, the federal courts gradually embraced the idea of selective incorporation. Under that doctrine, the First Amendment protections were applied on a case-by-case basis. Freedom of speech has been upheld against state encroachments since 1927; now an important issue seems to be how shall we protect freedom of speech, or the larger concept of freedom of expression, against the powers that have been applied by powerful economic forces, by the dominant culture, and – in time of war – by indirect government action through powerful “friends” rather than direct government intervention.

Our interest here is limited to non-governmental obstacles to freedom of expression; and, consequently, we will not venture into what the federal and state governments may do to limit free expression during times of national security crises other than to note that important issues lie in that realm.

B. Free Expression and the Nature of a Public Good.

The First Amendment protects both freedom of the press and freedom of speech. By 1921, some on the Supreme Court came to see this protection as including “freedom of
expression,” probably a larger concept than the combination of free speech and a free press—each considered separately. However, as the cases cited by Professor Reed clearly state, what is protected is “communication.” Communication can be understood as the transmission of information in a manner in which the information is satisfactorily received. Thus, both a sender of signals and a receiver of signals are required.

In other cases, the U.S. Supreme Court has held that the First Amendment protects the “right” to receive information as well as the right to transmit information. In examining the Federal Communications Commission’s traditional “fairness doctrine,” Justice White writing for the court declared, “It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.” Justice White explained that this right to receive ideas and experiences may not be constitutionally abridged by Congress or the F.C.C. We believe that this “crucial” right of the public to receive information should not be stymied by non-governmental interests in situations where the government itself could not block the transmission or expression of that information.

Several studies suggest that we, the general public, tend to both underestimate the value or worth of public goods and our fair share required to maintain them. Another problem with public goods is that no one, in general, takes the role of caregiver for the public good. In one sense, public goods are orphans compared to private goods that “belong” to certain people who generally take an interest in their care and feeding, so to speak. One result of this, as shown in studies done for business ethics, is that public goods tend to suffer, using a bank account analogy, from excessive withdrawals and inadequate deposits. For instance, most employers want to get full references from former employers for prospective employees but only a small fraction of them are willing themselves to provide such references out of distrust and fear of litigation.

“Free expression” is a valuable public good. The Founders protected free speech against federal intrusion because they had just finished a very distasteful experience with England and King George III. Criticism of his majesty’s government was grounds, true or not, for serious punishment under the doctrine of seditious libel. It was not private conversations that needed protection, but public discourse, such as that of the newspaper owner John Peter Zenger of New York in 1735, which was in danger. This public discourse, especially on political topics, needed and received protection under the First Amendment. Both the right to hear and the right to speak were defended. A free people need a free flow of information. This may be understood as “communitarian,” but it does not have to be. It can also be understood as part of the social contract, e.g., I will respect your right to speak, write, hear, read, publish and watch whatever you wish if you will respect my right to do the same.

II. CORPORATE CENSORSHIP – ILLUSTRATIVE EXAMPLES

In order to illustrate the problems posed by non-governmental obstacles to the First Amendment’s dream of an informed populace engaged in vigorous debate, we examine in this section three examples of corporate censorship. We begin with the case involving a locally brewed beer in Utah and the marketing campaign used to sell that beer during the 2002 Winter Olympic Games. We then examine the case involving one of this article’s authors and Boise Cascade’s chilling of academic speech. We mention briefly the allegations contained in a lawsuit by two fired reporters in Florida about Monsanto’s pressure on a local Fox News affiliate to change an investigative news story regarding the harmful effects of one of Monsanto’s growth
hormone products. Finally, we examine numerous incidents of corporate censorship surrounding the 2004 Presidential Election.

A. Polygamy Porter.

One of the big hits of the 2002 Winter Olympic Games at Salt Lake City was a locally produced beer named “Polygamy Porter.” This part of the paper discusses how that brand name came to be so popular in the context not of marketing but of business, government and society. As part of this work, we will produce a short history of the Schirf Brewing Company. We are interested in seeing how, in this narrow context, a business interacted with its larger community and how the market for a product worked (or in some people’s perspective did not work). We are also interested in raising the issue of community and corporate censorship or “filtering” of free and protected speech in American society.

Raised Roman Catholic in Milwaukee, Wisconsin, Greg Schirf went west to Park City, Utah in 1983. He decided that what Utah, a heavily Mormon state, needed was a brewery. The Mormon Church, an informal name for the Church of Jesus Christ of Latter Day Saints, frowns on caffeine and is firmly against the use of alcohol or tobacco by any of its members. Thus, it seemed to some observers, that Schirf’s entrepreneurial quest might have been quixotic, or, at least, misplaced.

By 1986, Schirf was able to get his award-winning brand of beer, Wasatch beers, launched. Wasatch adopted the motto: “We Drink Our Share and Sell The Rest.” Schirf named his beers after “the majestic mountains that provide the pure, natural water.” According to the company’s website, “[t]he Wasatch Brew Pub has housed the Schirf Brewing Company, brewers of the new Polygamy Porter, and Park City’s most popular restaurant since 1989.”

In March 2001, controversy had begun to swirl around some of Wasatch’s advertising. One of the pieces of the attention-getting campaign urged readers of a billboard to “Baptize your taste buds” with Wasatch beer. Another ad featured a radio spot in which Elders “Rulon” and “Heber” endure door after door being slammed on them before Heber blurts out “Beer!” and reveals that their mission is of a different kind. “We’re here to spread the word about good beer, . . .” Heber says. “We’re on a mission, sir.” These ads, according to the Salt Lake Tribune, have offended some prominent Utah Mormons, including some legislators and beer distributors.

Greg Schirf says it is all meant in good fun. “The campaign really isn’t intended to give offense to the prevailing culture,” he says. “We just want to sell beer and have fun doing it.” People certainly had taken notice and were talking about it. A March 2001 phone-in poll on a Mormon-owned radio station resulted in 48 percent of the callers wanting the billboards taken down, but 52 percent thought they should stay. A spokesman for the LDS Church was reported in the Tribune as having said that the Church would have no official comment on the campaign.

Paul Kirwin of Park City, Utah’s Kirwin Communications advertising agency took a rather sanguine approach to the controversy surrounding his company’s recent pitch for Wasatch Beers. Asked about the potential for offending the state’s overwhelming Mormon population, Kirwin replied, “How can you lose a customer you’ll never have?” Apparently the controversy about Wasatch Beers advertising and the choice of names for its beers was just warming up as the 2002 Winter Olympic Games got closer to opening day. Schirf Brewing Company produced a beer called “St. Provo Girl Pilsner” featuring an image of a buxom blonde. Next, Schirf came out with ‘Not 2002 Amber Ale’ with an emblem stating
Wasatch “Unofficial” NOT 2002 Amber Ale. This number caused a dustup with the Olympic organizers. The real storm came, however, when Wasatch introduced a new advertising campaign for its newest beer, Polygamy Porter.

The advertising campaign for Polygamy Porter included the slogan: “Why Have Just One?” The play on words, suggesting both beer and wives should be consumed in the plural, yielded spectacular results. The beer was flying off the shelves and so were the T-shirts. With the story getting national and international news coverage, Utah Brewers’ e-commerce sales – mainly Polygamy Porter T-shirts – increased to $50,000 a month from $2000. The campaign included a billboard featuring the slogan, “When enjoying our flavorful beverages please procreate responsibly.”

The Mormon Church outlawed polygamy in 1890. This ban on polygamy was a U.S. condition for statehood for Utah. Even so, there are still pockets of practicing polygamists in parts of Utah. There are an estimated 30,000 to 50,000 practicing polygamists in Utah, according to a survey by the Salt Lake City Tribune. In fact, one of the outspoken critics of the beer was Owen Allred, the leader of one of Utah’s largest polygamist sects, the Apostolic United Brethren. Mr. Allred was quoted as saying, “I sure don’t like it, but I don’t think there is anything I can do about it. We do not believe in alcoholic drinks of any kind, it’s definitely a slam against the polygamists.”

Schirf and Wasatch Beers ran into serious opposition when the state alcoholic beverage control commission toyed with the idea of banning advertising that made fun of religion and two local billboard companies refused to run the ad campaign for Polygamy Porter. Civic leaders who were attempting to portray Salt Lake City as having a cosmopolitan flavor in order to attract Olympic visitors were upset with the ads bringing up an embarrassing part of Utah’s history. The Reagan Outdoor Advertising Company refused, despite having done previous campaigns for Wasatch beers, to honor its contract to promote Polygamy Porter. Reagan Advertising used the “bad taste” escape clause to get out of the contract, even though Mr. Schirf protested, “We’ve exhibited much worse taste than this.”

Dewey Reagan of Reagan Outdoor Advertising said, “The entire ad is offensive.” Moreover, Mr. Reagan, whose company had contracted to erect the billboard which advised drinkers to “take some home for the wives” and “please procreate responsibly,” maintained, “We just do not want to be associated in any way with anything that associates in any way with polygamy. It’s not something that is accepted by the majority of society.”

Apparently, Reagan Outdoor Advertising had discovered a new sensitivity to advertising content that it lacked in years past. The Salt Lake Tribune reported that two years before, Reagan ran a Brighton Ski Resort billboard with the slogan “Why be wedded to one resort?” – a not too subtle nod to Utah’s polygamous era. Bright marketing director Dan Maelstrom said, “We have run boards at Reagan every year. Now it’s getting a little weird.” Reagan had also nixed a Brighton advertisement featuring free skiing for children 10 years and younger. That slogan was “Bring’em Young” – a word play on the name of the LDS Church’s second president and prophet, Brigham Young, who had numerous wives. Schirf tried to get other companies to run the billboards for Polygamy Porter without success. Young Electric Sign Company, based in SLC, rejected the advertisement.

Mitt Romney and others did a masterful job of selling Salt Lake City as a cosmopolitan city just waiting to be discovered by a world bamboozled by wrong-headed stereotypes. In fact, Mr. Romney, son of former Michigan governor George W. Romney, did such a good job that it seemed to have jump-started his political career in his home state Massachusetts.
nearby towns such as Boise, Idaho, the media “spin” was so positive as to be almost saccharine. No mention was made of any logistics problems, and virtually everywhere the major media outlets praised the Salt Lake City Olympics as possibly the best ever.

One example from many should provide the flavor. Delta Airlines operates a major hub in Salt Lake City. In its February 2002 issue of Sky magazine, Delta featured a cover article that ran ten-pages long with photos and quotation that praised SLC. The author opened with this confession:

“. . . . Salt Lake, I once thought, was just a big city with a small-town mind-set, strange liquor laws and a heavy-handed religion. As I met more locals over the years, I realized that I had mistaken the stereotype for the reality. On the eve of the 2002 Olympic Winter Games, I returned for a closer look and discovered warm people, civic dynamism, a unique history, an active cultural life and an enviable proximity to nature.”

In the next paragraph, the author introduced Mitt Romney (elected GOP Governor of Massachusetts in 2002?) and his views on Divine Providence’s hand in the 2002 Olympic site:

“. . . . ‘God did a good job here geographically,’” Salt Lake Organizing Committee of 2002 President and CEO Mitt Romney told me. ‘I was riding up to Park City the other day with Jean-Claude Killy,” Romney said of their trip to the nearby ski-resort town, ‘and he [Killy] started shaking his head. ‘What’s the matter?’ I asked. He said ‘he’d never before seen an eight-lane expressway going to a ski village.”

On the facing page in LARGE type, the author quoted former Salt Lake City Mayor Ted Wilson, “‘The Mormon Church [emphasis in the original] has given this community a strong spine: strong families, dedication to clean values, hard work.”

The conversion experience for the author was completed at the very end of the article where the author’s credentials were given followed by this final sentiment, “always thought Salt Lake City was a nice place to visit. Now, he’s tempted to move there.”

One might think it would be newsworthy that a company like Schirf Brewing produced a product legally for sale and could not buy economically feasible advertising space to promote it in the entire state of Utah in the first years of the twenty first century. That was apparently not what happened. The story that was not newsworthy in the U.S.A. “broke” in The Economist with some help from the British Broadcasting Company (BBC) and then was imported into the U.S.

Other subjects, including an examination of whether Mormon baptism is recognized by the Roman Catholic Church (it’s not), were all grist for mainline journalism’s examination in the buildup to the 2002 Winter Olympics. One Newsweek article, for example, touched on Mormon church doctrine, history, beliefs about afterlife, Joseph Smith’s revelations and murder, the rise of Brigham Young, the controversial 1857 “Mountain Meadows’ massacre, and the strict culture in Utah. However, the tone of the articles was almost jocular; and a reader could come away from the issue thinking that the Olympics were going to cause a mild reformation in the Mormon-dominated culture of Utah.

Even the launching of Polygamy Porter by Wasatch Beer was touched on by Newsweek as an example of Utahans having a sense of humor. However, the subsequent struggle by Schirf Brewing Company to find any outdoor advertising company that would run its ad campaign failed to get similar coverage. In fact, some Utahans did not have a sense of humor about polygamy at all. Mainstream media, controlled by a handful of corporations, did not find this revelation all worthy of coverage or discussion.
The First Amendment to the U.S. Constitution passed in 1791 and, in relevant part, declares that Congress shall “make no law … abridging the freedom of speech, or of the press; ….”105 For almost 190 years, the courts held that commercial speech enjoyed no protection under the First Amendment whatsoever. Then, in a watershed case, the court in a majority opinion written by Mr. Justice Powell held that “a lesser protection” was afforded to commercial speech “than to other constitutionally guaranteed expression.”106

Of course, no one can deny that the Winter Olympics were very big business.107 Consequently, the sponsors and other businesses that stood to rake in millions of dollars would not only be sensitive to the image of Salt Lake City but would also push hard to ensure that the media spin was extraordinarily positive.108 Anheuser Busch paid more than $50 million to the Salt Lake City Organizing Committee and the U.S. Olympic Committee in exchange for the exclusive beer-promotion rights during the Winter 2002 Games for its signature brand, Budweiser.109 In this atmosphere, Wasatch Beer was a small fish swimming against a big current. This kind of full-court media push can be likened to what the media and Hollywood do when it is time to turn American opinion in favor of a war.110 Although through good fortune and a huge amount of free media publicity, Wasatch beer did make an unexpected windfall.111

Since the Olympics, the State of Utah has moved to increase its tax on beer.112 One member of the Utah legislature said, on the floor of the house, that he was especially offended by Wasatch Brewery’s advertisements and thought that beer was a good place to find money for the state budget shortfall.113 In response, Greg Schirf, dressed as Benjamin Franklin, protested in a fashion reminiscent of the Boston Tea Party by pouring the first few barrels of his First Amendment Amber into the Great Salt Lake.114 Schirf called the beer tax “brilliant” and compared it to the “Amish raising the tax on gasoline.”115

In a seemingly unrelated incident, a Utah couple took out billboard space to promote a book that proselytizes for polygamy.116 As an AP writer commented, “The billboards along Interstate 15 are a glaring reminder that polygamy isn’t dead yet.”117 The author of a new book, Shane Whelan, calls polygamy “A Promise for Tomorrow.”118 The billboards show somber faces of polygamous Mormon pioneers surrounding the book’s title, More than One: Plural Marriage – A Sacred Pioneer Heritage.119

Our interest in this is not one of censorship. One can, after all, under the First Amendment advocate some pretty far-out, even ridiculous ideas. But rather, we note for the record that the bill board space was unavailable to Wasatch brewery when it wished to advertise a lawful product with the word “Polygamy” in the product label. Yet, that ad was determined to be “offensive;” but other billboards advocating an illegal practice that has been officially renounced by Mormon leaders were not determined to give offense. This situation is ironic, aggravating and a sad commentary on corporate America’s lack of commitment to good citizenship, fair play or free expression.

B. Boise Cascade Company120 Chills Free Expression

This part of our article will focus on Boise Cascade Company (“BCC”) in the 15 years from approximately 1988 to 2003 because it then typified transnational corporations in the extractions industry121 and that industry’s alleged general disregard for the environmental welfare of the planet.122 This section details how BCC became the subject of academic research into BCC’s expansion into Mexico, and how that research was subsequently treated by University administrators under pressure from BCC.
We note that one of this article’s co-authors, [name redacted], is a party to a settlement agreement resulting from litigation between him and his co-authors and the University of [name redacted] arising out of an article he wrote about BCC. This section of the paper was written by co-author [name redacted] and is based on publicly available sources.

In the late nineties, BCC was faced with “thinning inventories, toughening environmental regulations, and dogged demonstrators.” After the North American Free Trade Agreement was ratified in 1994, BCC became one of 15 U.S. wood-products companies to relocate operations to Mexico. BCC closed mills in Joseph, Oregon in 1994 and Council, Idaho in 1995. At the same time, BCC opened a new mill in Papanoa, in the Mexican state of Guerrero. A farmer-led protest of BCC’s operations led to a massacre on June 28, 1995, when 17 unarmed farmers were killed by police. An attempted cover-up to place weapons in the hands of those killed failed when an unedited video version of the massacre was aired on television in Mexico. A special prosecutor jailed 28 police officers, and the governor of the state was forced to resign.

In April 1998, BCC ceased operations in Mexico. Company officials claimed the shutdown was the result of the rainy season and problems with infrastructure. The Chicago Tribune report, to the contrary, that local peasant activists, led by Rodolfo Montiel and Teodoro Cabrera, organized trucking blockades that led to BCC’s withdrawal. Montiel and Cabrera were arrested in 1999 by Mexican Army officials. They were held incommunicado for five days in an army barracks where they were tortured and eventually signed statements confessing to gun running and illegally cultivating marijuana. The men were convicted of those charges and sentenced to prison terms of seven to ten years. During their time in prison Amnesty International called them prisoners of conscience and Montiel was awarded the prestigious Goldman Prize for environmental activism.

Activist group American Lands Alliance tried to link BCC with the torture and jailing of Montiel in Mexico at the BCC shareholder’s meeting in 2000. Company chairman George Harad replied, “You may want to think very carefully about connecting Boise Cascade in any way with the imprisonment of Mr. Montiel.” When activists at the shareholder meeting credited Montiel with BCC’s withdrawal from Mexico, Mr. Harad replied, “We had absolutely no knowledge of Mr. Montiel until we read about him in the newspapers.”

In 2001, after spending more than two years in prison, Montiel and Cabrera were released from prison by Mexican president Vicente Fox. In a statement described as “terse,” President Fox said, “With this, we show by our actions, my government’s commitment to the promotion and observance of human rights in our country.” The U.S. State Department responded with a statement that it “applauded this important gesture and the strong reaffirmation of Mexico’s commitment to an improved human rights record it signals.” Their release came shortly after their lawyer, a prominent human rights lawyer and former nun, Digna Ochoa, was found murdered. Ms. Ochoa’s body was found with two bullet wounds shot at point blank range along with an anonymous note threatening further attacks against human rights activists. Incredibly, in spite of the existence of two point-blank bullet holes, the Mexican authorities investigating the case concluded that Ms. Ochoa’s death was a suicide. The State Department, in its 2004 Annual Human Rights Report on Mexico, took exception to this conclusion, noting that the Mexico City human rights commission had reported that irregularities in the case did not “generate certainty.” Prosecutors in Mexico City recently reopened the investigation into Ms. Ochoa’s death.
In September 1998, the [name redacted] Journal of International Law and Policy published a scholarly article called “The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico’s Costa Grande and Elsewhere.” The article was written by [name redacted] and Mark Buchanan, both professors from Boise State University, and Donald Smith, an environmental activist. As the article’s title suggests, the authors accused BCC of irresponsible corporate behavior in its Mexican operations. In July 1999, and without contacting the authors first, the University of [name redacted] “retracted” the article by publishing an “errata” in the summer 1999 issue of the [name redacted] Journal of International Law and Policy. The journal also instructed the Westlaw and Lexis-Nexis legal databases to remove the articles from their electronic collections. A search on Lexis now yields neither the article nor the errata, but other scholarly articles that cite to the original article are still available.

According to the errata, the article had been retracted because of its “lack of scholarship and false content.” The errata also claimed that the article was “not consistent with the editorial standards of the Journal or of the University of [name redacted], and that portions of the article relating to Boise Cascade were clearly inappropriate and require elimination, revision or correction.” The errata also apologized to any individuals who were impacted [sic], and claimed that the withdrawal from Lexis and Westlaw was taken “pending re-editing.”

While University of [name redacted] claims that it did not act under pressure from BCC in withdrawing the article, University officials admit that upset BCC officials contacted the University in October 1999. In a startling admission of acquiescing to corporate censorship, University lawyer Paul Chan responded to a journalist’s question about whether the University was threatened with a lawsuit by Boise by answering, “Well, ‘threaten’ is an interesting word. Let’s just say they pointed out that the objections they raised did rise to the level of being actionable.”

The authors of the paper filed a lawsuit against University of [name redacted] for defamation and breach of contract. In late 2001, the parties reached a settlement under which University of [name redacted] apologized to the authors, returned the copyright to them, and paid an undisclosed sum. As part of its apology, the University stated that it wished to “reiterate its respect for the First Amendment and its legacy of a robust, wide-open, and healthy public discussion of important social issues.” Nonetheless, the article on Boise Cascade remains inaccessible to researchers into corporate social responsibility who rely on Lexis or Westlaw, in spite of being cited repeatedly by other scholarly articles.

Interestingly enough, a draft of the article is reported as published in Volume 26 of the [name redacted] Journal of International Law and Policy, and is available for download on its website.

Academic freedom has been described as “that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community.” The academic freedom of university professors and researchers is generally understood to be freedom from political, ecclesiastical, or administrative interference with investigation, discussion, or publication in their field of study. Apparently, no one gave much thought to corporations chilling academic freedom before the 1990’s.

In 1940, the American Association of University Professors produced the classic statement on Academic Freedom, the 1940 Statement of Principles on Academic Freedom and Tenure. In relevant part, it reads as follows:
(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment.

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.\textsuperscript{169}

In 1967, the U.S. Supreme Court had the opportunity to address the issue of academic freedom. That case involved a declaratory judgment action seeking injunctive relief brought by faculty members of Buffalo State University who were notified that they were going to be fired for refusing to sign the so-called “Feinberg Certificate.” This certificate declared that the signer was not a Communist and that if he had ever been a Communist he had communicated that fact to the President of the State University of New York.\textsuperscript{170} In a 5-4 decision, the Court in an opinion by Mr. Justice Brennan held that the New York statutes were unconstitutionally overbroad because the objectives of the state, namely preventing seditious speech in classrooms, could be achieved by less sweeping prohibitions.\textsuperscript{171} In his decision, Brennan wrote, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”\textsuperscript{172}

The pall of “orthodoxy” in the 1990’s and in the early years of the twenty first century seems to be self-imposed in many colleges and universities that are now dependent upon financial contributors for money to keep the operations going. In the 1990’s, some state universities changed their names to “State-Assisted” Universities in order to indicate more accurately their financial relations with their states. Problems with loyalty oaths and seditious speech are gone. Now the issue is whether a Professor’s research will offend a major donor\textsuperscript{173} or even a minor donor such as Boise Cascade Corporation,\textsuperscript{174} if that minor donor has annual revenues of over $6 billion and the ability to “beggar” a university by S.L.A.P.P. suit.

One sad conclusion is that the First Amendment doesn’t mean much when university administrators, university professors, and the public press engage in \textit{self-censorship} in order to appease corporate interests.\textsuperscript{175} As another author has noted, “because the loss of employment is so damaging, the expectation that they will be fired for expressing their opinions could have a serious chilling effect on individual’s political speech.”\textsuperscript{176} In the recent episode involving Ward Churchill, the President of Colorado University felt compelled to resign after she had defended Mr. Churchill’s academic right of free speech against critics who wanted him fired.\textsuperscript{177}
C. Bovine hormone treatment

“And you don’t get rewarded for telling the hard truths about America in a profit seeking environment.”

-- Bill Moyers

In 1993, the Food and Drug Administration approved the use of synthetic bovine growth hormone, an artificial form of growth hormone designed to stimulate milk production in cows. The hormone is injected into cows every two weeks, and can increase milk production by 15 percent per cow. Approximately 22 percent of cows in the United States receive the growth hormone. In the United States, the hormone is marketed solely by Monsanto under the brand name \textit{Posilac}. It is estimated that \textit{Posilac} generates approximately $250 to $300 million in revenue for Monsanto annually. The use of synthetic bovine growth hormone is controversial. Canada bans the hormone, as does the European Union. Concerns regarding the use of bovine growth hormone treatment range from the onset of early puberty in girls to the contribution of resistance to antibiotics in humans. The FDA continues to insist that the hormone is safe to use and that pasteurization kills the growth hormone in milk that Americans consume.

In April 1998, news reporter Steve Wilson and his wife Jane Akre filed an unusual lawsuit in Florida state court against their former employer, WTVT Fox 13. In the lawsuit, the plaintiffs alleged that they had prepared a special report on Monsanto and synthetic bovine growth treatment. The story was supposed to air in 1997, but station executives pulled the story after complaints from Monsanto. After 10 months and 73 rewrites, the reporters were no closer to a story that would pass station management. The plaintiffs claim that station management then offered the couple $200,000 to walk away and keep the story quiet, but they refused. The couple were fired, and they filed a claim for wrongful termination and violation of Florida’s whistleblower statute.

According to the plaintiffs, Monsanto attorneys sent a letter to the President of Fox News Corporation on the eve of the planned broadcast, which had already been publicized on television and radio. The letter stated that Monsanto was concerned over statements over its integrity, and made reference to a recent jury verdict in which ABC news had been ordered to pay a grocery chain $5.5 million for reporting that contained some elements of truth. In Steve Wilson’s own words, the evidence the reporters gathered against Monsanto was damning. Their report asserted that virtually all cows in Florida were injected with synthetic bovine growth hormones. Florida grocery stores admitted in the report that they had broken pledges made in the public to label milk that had been injected with the hormone. The report confirmed charges from two Canadian regulators that Monsanto had tried to bribe them with $1-$2 million bribes in exchange for approval of the drug without further testing. The reporters documented millions in research grants from Monsanto to the University of Florida, which conducted some of the testing that eventually led to FDA approval. They interviewed farmers who told them that Monsanto had not properly documented the adverse effects the hormone had on cows. When the reporters challenged David Boylan, the new News Manager moved into the station from Fox News Network, he told them, “We’ll decide what the news is. The news is what we say it is.”

At trial, a unanimous jury found that Fox News had pressured the reporters to broadcast a “false, distorted or slanted news report.” The plaintiffs were awarded $425,000, and a short
time later they were awarded the Goldman Environmental Prize. In 2003, a state appeals court overturned the jury verdict. The couple are considering further appeals, and in the meantime have petitioned the Federal Communications Commission to deny renewal of the station’s license for “intentionally airing false and distorted news reports.”

D. Corporate Censorship during War, National Pastime, and the 2004 Presidential Election

“A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or both.”

-- James Madison

After the fall of Baghdad, a NPR reporter talked with Iraqis in that nation’s capitol. Some said they hated Saddam; others said they hated the United States. But the reporter noted they were not as tightlipped as they had been. They talked freely, were openly disagreeing, and felt free to have opinions. “This free expression,” the NPR reporter commented, “is truly a sign that they have been liberated.”

ABC News Tonight reported that three Cubans who had hijacked a Havana ferry in an attempt to reach the United States were tried, appealed their convictions, and executed by a firing squad all in the same week. The ferry was overtaken when it ran out of fuel and had been towed back to Cuba. The same report noted that the harshest “crackdown” on dissent in Cuba since 1959 was underway. Approximately 80 well-known dissenters, including poets, writers and intellectuals, were arrested in the prior week. Some had already been sentenced to as much as twenty years in prison for criticizing Fidel Castro’s administration of the island nation. Cuba’s spokesman said these measures were necessary because of unrest stirred up in Cuba by the Bush administration.

While reports of censorship and brutal repression of speech are not surprising coming from totalitarian regimes, they are surprising when they come from the United States. When the “censor” is not the government, but private corporations, most Americans may shrug their shoulders and see no harm in the private market responding to market forces. When the speech being suppressed, however, is suppressed because of political content, the First Amendment’s goals are thwarted. The following is a brief recitation of incidents of corporate citizenship that have occurred during times of war, national pastime, and the 2004 Presidential election.

We begin by looking at how corporate citizenship can affect a seemingly innocuous pastime such as baseball. National Public Radio reported that a Fifteenth Anniversary showing of the baseball movie “Bull Durham” scheduled for the Baseball Hall of Fame had been cancelled by the Hall of Fame because of the anti-war politics of two of the film’s stars, Susan Sarandon and Tim Robbins. Meanwhile on the war front, Peter Arnett, the media-darling on CNN in 1991 during the first Gulf War, was fired on Monday, March 31, 2003 by NBC because the network held he had been “wrong” to grant an interview on state-run Iraqi TV in which he said the American war plan had failed because of underestimated Iraqi resistance. Arnett, a New Zealand native and naturalized American, won a Pulitzer Prize for his reporting for the AP during the Vietnam War. NBC initially defended Arnett’s interview as a “professional courtesy” and said on Sunday, March 30 that Arnett’s remarks were analytical (i.e. opinion) in character. But on Monday, NBC President Neal Shapiro, after Arnett had apologized, fired him. It is this sequence of events that has fueled reports by cable news outlets of White House pressure on NBC.
Not to be outdone by Arnett’s blunder, U.S. Senator Jim Bunning (R. Ky) said on the floor of the Senate that “I think he [Arnett] should be brought back and tried as a traitor to the United States of America for his aiding and abetting the Iraqi government…” Arnett, who was hired by London’s Daily Mirror on the same day he was fired, was back on the air and retracted his apology. Apparently, Senator Bunning, whose main qualification for the U.S. Senate seems to be a major league baseball career, would have him targeted by the U.S. Special Forces or brought back forcibly in irons to stand trial for treason and presumably be shot for an act of unpopular speech.

Baseball has recently had other problems with freedom of speech than canceling a classic movie. In February 2000, John Rocker, the Atlanta Brave relief pitcher, drew a $20,000 fine and a three-month suspension from Bud Selig, baseball commissioner, for racial and ethnic remarks that “offended practically every element in society.” On appeal, the arbitrator for major league baseball reduced the regular-season part of the suspension from one month to 2 weeks and cut the fine to $500, but upheld the requirement that Mr. Rocker attend “sensitivity training.” As a yardstick, one might note that the original suspension was the longest one not related to drug use since Lenny Randle received 30 days for punching his manager, Frank Lucchesi. Here a speech violation, for which Rocker had already apologized, merited three times the suspension for assault and battery.

David Wells, a pitcher with the New York Yankees, wrote a book entitled Perfect I’m Not: Boomer on Beer, Brawls Backaches and Baseball. In the book, among other things, Wells said that he was “half-drunk” when he pitched a perfect game against the Minnesota Twins in 1998. After reading the book, Yankees manager Joe Torre said that Wells “went over the line with what he wrote and needed to make amends. At a February 28, 2003 meeting with Torre and General Manager Brian Cashman, Wells became upset and offered to quit. Ultimately, Wells accepted a $100,000 fine from the Yankees and apologized to the team and individual players. No one said what Wells wrote (or had ghost written for him) was untrue or defamatory, just that it “caused problems” and “bothered the team’s principal owner, George Steinbrenner.”

Meanwhile, baseball commissioner Bud Selig was reported to be considering revoking Pete Rose’s lifetime suspension from major league baseball. Apparently, Rose, who has even recently denied betting on baseball games as a player and manager despite gambling slips in his handwriting and overwhelming evidence to the contrary, was still a big celebrity in Cincinnati. Selig’s decision seemed more motivated by whether the revocation would help the owners at the gate than by any consideration of repentance, remorse, or morality. For better or worse, however, the war in Iraq generated enough attention in the Cincinnati area to take issues about Pete Rose’s future off the front pages.

A Westwood, Ohio man, James Watters, 49, became a local celebrity in the Cincinnati area in April 2003 for driving his semi-trailer onto a sidewalk where people were protesting the war in Iraq. Mr. Watters pleaded not guilty to three charges of aggravated menacing, inducing panic and reckless operation in Hamilton County Municipal Court on April 2, 2003. He said, “I’m the hero of my son’s battalion. They’re all behind me [sic] fighting this.” Watters was arrested on March 24 when he drove his semi on the sidewalk toward about 40 war protesters, one in a wheelchair, who had gathered on an overpass over Interstate 75. Mr. Watters says he never intended to injure any protestors, only to get them off the bridge. Co-workers had raised $1100 for his defense fund in the first 48 hours after the accident.
Although Marines in combat may not be expected to be free-speech sensitive, Miami University, not in any combat zone, had its own little free expression tempest in the spring of 2003. Aaron Sanders, a student, wrote a column for the Miami Student in the January 17 edition that criticized some French Department faculty and was especially harsh on a class session in which a French movie, “Ridicule,” was shown. The film, which was shown in a course on French language and culture, is graphic; the opening scene has a close-up of a man urinating on another man’s head. To quote a local newspaper columnist, “le merde hit le fan.” The head of the French Department wrote a lengthy rebuttal, including some personal criticism of Sanders. The faculty advisor for the Miami Student sent an e-mail to the student editor calling for Aaron Sanders to be “drop[ped]” as a columnist. In turn, Sanders lost his unpaid position as a columnist on the student paper. At around the same time, Columbia University suffered its own free speech crisis when untenured faculty member Nicholas De Genova said the only true heroes of the war in Iraq were those who helped defeat the U.S. military and that he hoped U.S. troops suffered a “million Mogadishus.” Columbia President Lee Bollinger issued a statement expressing shock and opined that Dr. De Genova had “crossed the line.” So much for open and robust discussion on campus.

An attempt to honor fallen troops in the Iraq war met with corporate citizenship in the Spring of 2004 when ABC’s Nightline documentary produced an episode showing the names and photos of servicemen and women killed in Iraq. Sinclair Broadcasting, which owns seven ABC affiliates as part of its network of 62 stations, refused to permit those ABC affiliates to air the episode. Sinclair’s chief executive, David Smith, is a “strong supporter of the war in Iraq and President Bush’s reelection.” Sinclair spokesperson Mark Hyman characterized the Nightline episode as an “attempt to disguise political speech as news content” – proof positive that political speech is in the crosshairs of powerful media corporations. ABC affiliates made the news again in November 2004, when stations in Dallas, Atlanta, and dozens of other markets refused to air an unedited version of the Oscar-winning movie “Saving Private Ryan,” for fear of offending viewers. Under its licensing agreement with the movie studio, ABC was not permitted to edit the movie prior to broadcast.

The use of corporate power to influence what millions of Americans see and hear was especially evident during the Presidential election of 2004. In May 2004, Miramax Films, owned by the Walt Disney Company, announced that it would not be distributing Michael Moore’s documentary “Fahrenheit 9/11,” which connected President George W. Bush to the family of Osama bin-Laden and other oil-rich Saudis. Miramax funded the film, but as the release of the film neared the company was pressured by its parent Disney not to distribute the film. According to Ari Emanuel, Michael Moore’s agent, Disney chief Michael Eisner had expressed concern that distribution of the film would endanger tax breaks Disney received for its operations in Florida, where President Bush’s brother, Jeb Bush, was governor. Disney executives were quick to deny the allegation, insisting instead that the company’s decision not to permit Miramax to distribute the film stemmed from its desire to cater to “families of all political stripes.” On July Fourth that summer, Disney released “America’s Heart & Soul,” a “flag-draped” look at the United States featuring an Olympic boxer, a blind mountain climber, a dairy farmer and an aerobatic pilot.

The Weinstein brothers were not the only Hollywood celebrities who discovered the ability of corporations to silence certain speech. Singer Linda Ronstadt, who dedicated a closing song to Michael Moore at a performance in the Alladin Theater in Las Vegas in July 2004, found herself hustled off stage and out of the building, and told she was not welcome back, now or ever
again. She was not even allowed back to her hotel room to pack – hotel employees finished her checkout process instead. A week prior to that incident, comedian Whoopi Goldberg was fired by Florida-based Slimfast as its representative in an advertising campaign when she made jokes about President Bush at a Democratic fundraiser. When radio personality Howard Stern started to publicly make fun of President Bush, media giant Clear Channel (whose founder Lowry Mays and a director, Thomas Hicks, have long financial associations with George Bush) dropped his show. Clear Channel, the nation’s largest broadcaster with over 1200 stations, also dropped the popular country band Dixie Chicks from station play lists after singer Natalie Maines told a crowd in London that she was “ashamed” that George Bush was from Texas. The second largest broadcaster in the country (with more than 250 stations) Cumulus, followed suit. One Cumulus station ran a promotion wherein Dixie Chicks compact discs were smashed by a 33,000 pound tractor. At a Senate Commerce Committee hearing, Senator John McCain admonished the media companies involved: “If someone else offends you, and you decide to censor those people, my friend, the erosion of our First Amendment is in progress.”

Finally, consider the controversy surrounding Sinclair Broadcasting (the same company that refused to air an episode of “Nightline” that featured the names and photos of fallen soldiers) and its open support for President Bush during the election. Sinclair, which is the nation’s largest owner of television stations, planned to air a documentary, “Stolen Honor: Wounds That Never Heal,” wherein former prisoners of war in Vietnam called John Kerry’s 1971 Senate testimony a “betrayal that prolonged their captivity.” The Kerry campaign called the film “politically motivated” and pointed out that Mr. Kerry’s Senate testimony was in fact a recitation of other Americans talking about American atrocities. Protests quickly followed, and in a three-day period, a group called stopsinclair.org raised enough money through its website to run full page newspaper ads in four swing states. Burger King announced it was dropping advertising from Sinclair stations, and the company lost $90 million in market capitalization. Under this intense pressure, Sinclair modified the broadcast into a “news special” and called it “A POW Story,” and used only portions of the original film.

Even attempts to document historical events were thwarted during the “runup” to the Presidential election. In late 2003, CBS was putting the finishing touches on a $10 million miniseries, promoted as one of the network’s “most anticipated projects,” about the Ronald Reagan presidency. In the early part of October, a copy of the script was leaked. By late October, media outlets reported that the documentary attributed statements to Reagan that he, in fact, never made, such as “[T]hey who live in sin shall die in sin,” when referring to AIDS victims.
Showtime for a $2 million loss. This remarkable turn of events occurred before the miniseries saw the first light of broadcast air.

Religious messages are not exempt from corporate sponsorship. In 2003, Reuters refused to run a commercial on its electronic billboard in Times Square by the United Methodist Church. Rolling Stone magazine refused to accept an advertisement for a new version of the Bible. Both decisions were reversed after public scrutiny. In December 2004, the United Church of Christ attempted to launch an advertising campaign featuring two nightclub-style bouncers outside a church, excluding certain individuals such as racial minorities, the elderly, and two men holding hands from entering the church. Following a visual change to the emblem and name of the U.C.C., the voice-over concluded: “The United Church of Christ. No Matter Who You Are or Where You Are on Life’s Journey, You’re Welcome Here.” CBS refused to air the commercial, stating that “… the fact that the Executive Branch has recently proposed a Constitutional Amendment to define marriage as a union between a man and a woman, this spot is unacceptable for broadcast.” NBC also refused to run the advertisement, citing a long-standing policy against advertisements that deal with issues of “public controversy.” In a related attack on gay-themed television, PBS pulled an episode of “Postcards with Buster,” a children’s program, that featured the star of the show, Buster, an 8-year-old bunny rabbit, learning how to make maple syrup from a family with two mothers in Vermont. PBS dropped the show after objections from Education Secretary Margaret Spellings, who wrote a letter to PBS claiming that “many parents would not want their young children exposed to the lifestyles portrayed in this episode.”

III. CORPORATE CENSORSHIP AND THE RIGHT TO HEAR

“I am increasingly alarmed by the culture of censorship that is developing in this country. This censorship is being conducted by corporations that own our increasingly consolidated, less diverse media. … The result is an insidious chill on free expression on our airwaves.

-- Rep. Bernie Sanders (I-VT)

A. Protecting the Public Good of the First Amendment

When regarded as a public good, rather than an individual’s right to free expression, the First Amendment begins to display a new dimension. Take, for example, the oft-believed notion that academe is a bastion of free expression. There are in fact very few cases supporting academics or their freedom before the acceptance of this concept into the pantheon of First Amendment rights in 1957. The Supreme Court re-iterated that position a decade later when it declared, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment…” As noted by Professor Byrne in his 1989 article, the court decisions do not match the fine rhetoric, thus failing to protect the public good in a robust academy.

In the area of prior restraint, however, the courts have been vigilant about protecting free expression. Even in the area of alleged pornography, a type of speech that has no First Amendment protection, the courts have been sensitive to prior restraint.
The First Amendment prohibits Congress from making any law that would abridge freedom of speech or of the press. Initially, this Amendment was understood as a limitation only upon the power of the federal government. However, by 1964, the Supreme Court seemed to reach almost all aspects of state action that would “chill” speech directed at state or other public officials by holding that state libel actions had to meet Constitutional standards. This appeared to be the last step in “selective incorporation” of the First Amendment into the Fourteenth.

There is some authority for the proposition that the First Amendment includes the “right to hear” just as it does the right to speak or express. As Justice Brennan famously stated, “It would be a barren marketplace of ideas that had only sellers and no buyers.” It is thus even more vexing that in spite of this recognition, the courts and legislature seem reluctant to recognize the effects of media concentration on the right to hear ideas unpopular with corporate interests.

B. The “Equal Time Doctrine”:

One source provides the following data with citations: in 1983, 50 corporations controlled most of American media; by 1997, only ten (10) corporations controlled almost everything we see, hear, and read! Current sources say that the number of corporations that dominate virtually all broadcast and print media in the United States is down to five (5). Yet, a significant number of Americans (25%) still get their news and views from broadcast television.

Despite this unprecedented corporate chokehold on the airwaves and over the print media, the F.C.C., under very ideological appointees who almost profess a religious-like devotion to the so-called “free market,” has marched steadfastly toward deregulation of the media. The initial call to battle was sounded in 1982 by then F.C.C. Chairman Mark Fowler, who published an article in the Texas Law Review calling for total deregulation of the broadcast media. In 1985, the F.C.C. officially repudiated the fairness doctrine (informally known as the “equal-time rule). The reason given was that scarcity was no longer a problem given the number of new cable channels and other new technology for disseminating information.

The Federal Court’s contribution to the market-driven ideology embraced by the F.C.C. was to overrule its earlier (1967) decision in Red Lion that mandated free response time to personal attacks and political editorials. On June 2, 2003, the FCC voted to relax several of its media ownership regulations. One U.S. Senator declared that “the FCC’s action was one of the most complete cave-ins to corporate interests I’ve ever seen by what is supposed to be a federal regulatory agency.” Even as the FCC embraces a market-driven approach to spectrum allocation, however, it (bolstered by Congress through legislation such as the Broadcast Decency Enforcement Act of 2005) is moving towards stiff penalties for violations of broadcast decency, which forces smaller, independent broadcasters into a cycle of self-censorship.

C. Size of Corporate America and Power Equations

“Ill fares the land, to hastening ills a prey,
Where wealth accumulates, and men decay;”
--Oliver Goldsmith (1730-1774)
Business is the dominant social institution in U.S. society today and soon will be the dominant institution on the planet. The number of corporations in the U.S. has increased from about one-half million in 1940 to over 4.47 million in 1995, an increase of almost 900 percent. Assets controlled by U.S. corporations have increased from about $300-billion dollars in 1935 to $26-trillion in 1995, an increase of 8,600 percent. The salaries paid by fewer than the 20,000 largest corporations account for approximately 97% of the total private sector payroll in the United States, leaving the remaining 5.54 million firms to pay the remaining 3% of salaries.

Institutions that control significant social assets and wield awesome financial power have a corresponding responsibility to use those assets and that power in ways that make good sense for the society generally. In other words, responsibility or duties accompany any grant of power. This is true in the legal world; it is also true in society generally. A grant of a power of attorney carries with it certain fiduciary obligations. Similarly when one takes a commission as an officer in the armed forces, the authority granted carries with it serious responsibilities. In a representative society, the irresponsible use of power, over time, results in the loss of that power or the reduction of it by regulation and law. Financial power carries social responsibility. It is unavoidable. It might even be profitable.

Ethics requires perspective. Thus, we would be remiss not to acknowledge that we have one of the strongest economies, if not the strongest, in the history of Western Civilization. Our vast natural resources coupled with American labor and know-how has generated unparalleled wealth. No one is suggesting that profits are dirty or that business needs to give up on making money. What we are arguing is that a healthier society might well result from trade-offs at the margin between maximum profits and decisions designed to promote community health by improving the access to information of the average American. Profits are, as Kenneth Mason, the former CEO of Quaker Oats argued, a necessary condition of corporate existence in the same way that getting enough to eat is a necessity of life. Life’s purpose, once existence is assured, is higher, grander and nobler that simply eating; likewise, we would argue with corporate profits. The pursuit of profits with no concern for the flourishing of either the polity or the free market is shortsighted and, ultimately counter-productive.

**IV. A Public Good Approach to Corporate First Amendment Obligations: Suggestions for Further Research**

The initial concern of the Founders in adding the Bill of Rights to the new U.S. Constitution was to guarantee certain fundamental liberties against abuses by the newly established federal government. They had just had a bad experience with a monarchy under George III and were intent on not seeing the new government abuse its powers. Some, like Patrick Henry of Virginia, worked bitterly against the ratification of the new Constitution and died unrepentant. It was no small matter that ratification of the Constitution was held up until assurances were made by its promoters that a Bill of Rights would be added.

After the Civil War, the federal government passed Constitutional Amendments and statutes attempting to guarantee the end of slavery and that the freed slaves would not be second-class citizens in the former Confederacy. This history illustrates a willingness to address expected as well as historical abuses of state powers by providing federally established civil rights to oppressed individuals. Historical attitudes towards the First Amendment aside, however, today’s generation appears to possess a far more relaxed attitude towards the role of the
press in safeguarding the First Amendment. A recent poll revealed that more 35% of high school students thought the First Amendment “goes too far” in the rights it guarantees. Almost a third of high school students think the press has “too much freedom.” And, most depressingly, only 51% of high school students said newspapers should be permitted to publish stories “without government approval.”

In the 1960’s, passage of the Civil Rights Act of 1964 moved into the arena of protecting civil rights from abuses by individuals or corporations or others in the private sector who were significant enough in their operations to burden or “affect” interstate commerce. The passage of these laws seems to mark an expansion of civil rights for individuals against abuses of economic power by businesses.

The history of the Bill of Rights illustrates that this country has moved to protect the individual or groups of disenfranchised individuals against the tyranny of power in the hands of either a strong federal government or state governments. In the 1960’s, this protection was extended to oppressed individuals and members of historically oppressed groups under the civil rights laws. The labor law itself states in its preamble that one of its purposes was to balance the economic power between labor and large employers so as to assure both labor peace and fair bargaining.

Much of the history of the United States can be understood as an experiment in majority rule with very strong safeguards for unpopular religions, speeches, or books. Book burning itself is an epithet in this country with no other modifiers attached to it. How, then, can we tolerate deregulation of the media when power over it is in the hands of only five corporations?

Up until less than 30 years ago, no one in this country reasonably conversant with the First Amendment believed that it protected commercial speech. Yet, now it does. A Hohfeldian power analysis indicates that the creation of a right gives rise to a corresponding duty to use that right in a manner that does not injure the public; similarly, Hohfeld would argue that creation of power anywhere in a society creates an equivalent vulnerability.

Thus, we argue that the vast power allowed to be created over the public airwaves and the print media demands that the vulnerability of the U.S. public in its lack of a free access to unfettered political and economic information be guarded by appropriate laws and regulation. This would be a particularly inappropriate time for the federal government to abandon a precious public common good to the essential amorality of the market place. Moreover, the creation of a free speech right in favor of large commercial interests also argues for the imposition of a wide-ranging duty to use it responsibly. We do not argue that journalism should not exist in a free market. The free market has made possible many new and creative ways of creating, distributing and processing information possible. The free market, for example, has allowed the Internet to flourish; and websites and “blogs” that monitor and maintain a level of accountability on the traditional media make a significant contribution to robust debates. Free markets, however, have limits. While journalism is a profession that should remain free of commercial pressure, we believe the corporations that control the spectrum that allows most Americans to access information have demonstrated an unwillingness or inability to adhere to those standards of journalism, and therefore should be regulated by an obligations and public-good approach to the First Amendment.

**Suggestions for Future Scholarship.**

Our thoughts in this area are somewhat preliminary and are intended to start a much needed public discussion rather than to be considered either polished or the “final word.” We
think that one area that deserves exploration is to apply the First Amendment to activities of large businesses in the same manner that it applies to the states and municipalities. However, we believe that such speech protection would not be self-enforcing. Consequently, we would urge consideration of the imposition of actual lawyer fees such is done now under some civil rights statutes and an automatic “nominal damages” for each violation of the federal jurisdictional minimum in diversity jurisdiction cases plus actual compensatory damages as are proven.

Moreover, any extension of speech protection for individuals against business or corporate interests will inevitably connect to the problem of campaign financing in the United States. This last election for President cost over $4 billion by some estimates; and the candidates spent over $600 million – an amount three times that spent in the November 2000 Presidential election. The attempt by McCain-Feingold to limit campaign spending was easily circumvented. It may be appropriate to consider limiting the time of the campaigns rather than or in addition to regulating the funding. The public interest is ill served by having a two-year marathon that keeps many qualified candidates from seeking the White House. One suggestion that we advance would be to limit the primary campaigning so as to start no earlier than the Fourth of July before the first Tuesday in November of the election year and to have a one-night national direct primary to pick the candidates for each political party on the 61st day before the actual election. The pressure to buy “time” and space for campaign ads would be enormous. Consequently, a price cap would have to be established and equal time mandated once-again – but this time for BOTH commercial and journalistic speech.

Some regulation of commercial speech to assure that it does not abuse its dominant cultural position in the United States would go a long way to reestablishing the credibility of the advertising profession and to eliminating the repetitious and insulting Pavlovian programming that now passes for commercial speech. How this might be accomplished goes well beyond the scope of this, a first and conceptual paper. In the election just past, approximately forty percent of eligible voters did not cast a ballot. We need to sponsor research and to commence a dialogue with these non-voters to determine the causes. If we have mandatory public education for the purpose of having an informed electorate and to balance universal suffrage, we have an important job ahead of us to explore where this linkage breaks down. What Abraham Lincoln called “the last best hope of mankind” deserves no less.

Other possible areas for addressing the corporate censorship problem that might yield fertile research include permitting the courts to declare the right to hear to be a fundamental right, therefore subjecting FCC’s abandonment of equal time rule (in spite of 1934 Communication Act) to strict scrutiny and thereby bringing back the equal time rule. A recognition that the market-approach to allocating a media spectrum has failed and a return to antitrust enforcement of media consolidation might also be fruitful. Another area for research may be a professional code of ethics of journalism, if it could be made as enforceable against journalists as rules of professional conduct are for attorneys. Legislative responses might include creating a private right of action against corporations that engage in corporate censorship and requiring disclosures on the news as to the source of the news. Finally, researching the effects of nationalizing television news, as done in Canada and the United Kingdom, on improving the relative freedom of journalists might yield beneficial information.

**Conclusion**

Vast disparities in economic power have created opportunities that have been seized upon by the powerful to silence opinions that the powerful find unfit for public dissemination; and the
day when standing on a soapbox in a public park was an effective way to voice one’s dissent has passed. In effect, those economically powerful interests who have control over access to virtually the entire American public has either “filtered” or “censored” the information that reaches the American people. Worse, the use of S.L.A.P.P. suits has led scholars, universities, and public figures to self-censor their work and opinions. This situation threatens both the efficient running of a free market and the political freedoms inherent in the American experiment in democratic republican government. Such “corporate censorship” is having a significant impact on what vast numbers of Americans see and hear. We suggest that further research into judicial and legislative responses to ensure the citizens’ right to hear is a critical component to ensuring the ultimate goal of an informed populace and enlightened citizenry. Finally, we call for an urgently need national debate on the current obstacles to the flow of information on topics of national public interest.

Endnotes

1 Bob Dylan, It’s Alright, Ma (I’m Only Bleeding) on BRINGING IT ALL BACK HOME (Sony Records 1965). The entire stanza in which this quote appears follows:
   Old lady judges watch people in pairs
   Limited in sex, they dare
   To push fake morals, insult and stare
   While money doesn’t talk, it swears
   Obscenity, who really cares
   Propaganda, all is phony. Id. (emphasis added.)
5 Id.
6 Mr. Maher was not permanently silenced. He returned to television, albeit not network television, with a new show on HBO entitled “Real Time With Bill Maher” on Friday, July 30, 2004 at an 11 p.m. time slot. David Bianculli, TV Preview: ‘Real Time’ Lets Maher ‘Fight Back,’ THE CINCINNATI ENQUIRER, July 30, 2004, at E7.
7 The nature of Mr. Maher’s views may be suggested by the title of his recent book, “When You Ride Alone You Ride With Bin Laden,” a collection of his thoughts about the war on terrorism. See Battaglio, supra note 4.
8 See, e.g., Section IE, infra.
Consider, for example, White House press spokesman Ari Fleischer’s exhortation to Americans to “watch what they say, watch what they do…” See Celestine Bohlen, In New War on Terrorism, Words are Weapons Too, N.Y. TIMES, Sept. 29, 2001, at A11.


Rather than stopping at discouraging open dissent, the government has even gone so far as to produce fictitious news reports about how well the government is doing in areas such as airport security and bringing democracy to Iraq that were broadcast on regular news segments without identification as a government-produced video. See David Barstow & Robin Stein, Under Bush, a New Age of Prepackaged News, N.Y. TIMES, March 13, 2005, at 1.


Glenn Frankel, Controversial Dutch Filmmaker is Slain; Van Gogh Angered Muslims with Criticism, WASHINGTON POST, Nov. 3, 2004, at A4.


For an interesting parallel discussion on power-balancing in the context of labor relations, see generally James B. Zimarowski, A Primer on Power Balancing Under the National Labor Relations Act, 23 U. MICH. J.L. REFORM 47 (1989).


U.S. CONST. amend. I.

U.S. CONST. amend. XIV, § 1.

In 1892, the first Justice John M. Harlan insisted that the Fourteenth Amendment prohibited the states from abridging any of the fundamental rights guaranteed by the Constitution. O’Neil v. Vermont, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting). In other words, the Fourteen Amendment “incorporates” the provisions of the Bill of Rights.

The modern law of free speech is usually said to trace to Justice Oliver W. Holmes’ famous dissent in Abrams v. United States, 250 U.S. 616 at 624 (1919). This history should be expanded to include the much less heralded opinion of Judge Learned Hand in Masses Publishing Co. v. Patten 244 F. 353 (S.D.N.Y.), rev’d, 246 F. 24 (2d Cir. 1917). For an excellent and detailed explanation of why that is better history, see Gerald Gunther. Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STANFORD L. REV. 719-772 (1975).


Justice Black (joined by Justice Harlan) in dissent wrote, “The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated.” Brown v. Louisiana, 383 U.S. 131, 166 (1966). (Brown involved the culmination of sit-in cases from Louisiana in which the Supreme Court overruled convictions of defendants for civil-rights sit-ins at public places to protest dejure segregation laws on the ground that their conduct was protected by the First Amendment).

See definition of “communicate” in MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 232-233 (10th ed. 1995).


Id.

See, e.g., ROBERT MITCHELL & RICHARD CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 46 (1989).

Id.

Theoretical research in social psychology confirms the presence of bias in estimating the value of public goods. Insensitivity to quantity, for instance, in valuation of public goods arises “in three ways: the embedding effect (in which willingness to pay (WTP) for a good is smaller if assessed after a superordinate good), the quantity effect (relative insensitivity to numerical quantity), and the adding-up effect (WTP for two goods less than inferred from WTP for each good alone).” Jonathan Baron & Joshua Greene, Determinants of Insensitivity to Quantity in Valuation of Public Goods: Moral Satisfaction, Budget Constraints, Availability, and Prominence, 2 J. OF EXPERIMENTAL PSYCHOLOGY: APPLIED 107 (1996). Professor Baron, Psychology Department, University of Pennsylvania, also argues that the “solution [to valuation biases for public decisions] should be a high priority for research.”

Jonathan Baron, Biases in the Quantitative Measurements of Values for Public Decisions, 122 PSYCHOLOGICAL BULLETIN 72 (1997). All the biases identified have a tendency to undervalue the public good. From an economic perspective, public goods historically have had no value; hence, the externalities effect of polluting air, water, and land do not show as costs either to the producer or to the consumer of goods and services. As one textbook stated succinctly, “[t]raditionally, business has considered the environment to be a free, virtually limitless good. In other words, air, water, land, and other natural resources from coal to beavers … were seen as available for business to use as it saw fit.” WILLIAM H. SHAW & VINCENT BARRY, MORAL ISSUES IN BUSINESS 443 (1989). See also FREDERICK STURDIVANT, BUSINESS AND SOCIETY: A MANAGERIAL APPROACH 313-336 (1981) (discussion of the difficulties involved in valuing and determining who pays for environmental public goods, both maintaining them and cleaning them up).

A 1998 survey conducted for the Society of Human Resource Management found that between 80 and 90% of the respondents regularly conducted reference checks but that less than half of them (42%) even provided an answer to the question of whether the former employee was eligible for rehire. Survey Reveals Applicants Stray From Truth, at http://www.ppsspublishers.com/articles/survey.htm (last visited Mar. 26, 2005). The same survey found that employers were even more tight-lipped about job qualifications (18%); work habits (13%); people skills (11%) or violent/bizarre behavior (8%). Id. This refusal of former employers has been such a contentious issue that some states have passed specific statutes dealing with the issue. For instance, North Dakota passed a statute granting immunity from civil liability for employers who provide truthful information regarding dates of employment, pay level, job duties, and job performance. N.D. CENT. CODE § 34-02-18 (2004). In neighboring Minnesota, the Supreme Court granted relief to former employees who were fired on the pretext of “gross insubordination” because they were “compelled to publish defamatory information” when asked by prospective employers about the reasons for leaving their prior jobs. See Carole Lewis v. Equitable Life Assurance 389 N.W.2d 876 (Minn. 1986).

For a recount of trial of John Peter Zenger for seditious libel and jury nullification, see Peter Irons, A People’s History of the Supreme Court 5 (1999).

For further discussion on the “right to hear,” see Section II.E.4, infra.

Commercial speech, although low on the priority list of protected speech, has enjoyed First Amendment protection since the United States Supreme Court decision in First National Bank v. Bellotti, 435 U.S. 765 (1978). In a recent case, the U.S. Supreme Court held that State of Massachusetts regulations of outdoor advertising of smokeless tobacco were overbroad and violated the First and Fourteenth Amendments. See Lorillard Tobacco v. Reilly, 553 U.S. 121 (2001).


Id.

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Id.
George Wilchen Romney (1907 - 1995) was Secretary of Housing and Urban Development from 1969 to 1973 under President Richard M. Nixon. He was governor of Michigan from 1963 to 1969. Prior to his political career, he was a businessman and president of American Motors Corporation. He also held numerous high posts in the Mormon Church. David Rosenbaum, George Romney Dies at 88; A Leading G.O.P. Leader, N.Y. TIMES, Jul. 27, 1995, at D1.

In November, 2002, when Romney was elected Governor of Massachusetts (where less than 0.5% of the residents are Mormons), his Mormon religion received less than half as many mentions as it did in 1994. Michael Paulson, Romney Win Seen as Sign of Acceptance of Mormons, THE BOSTON GLOBE, Nov. 9, 2002, at B1.


See Kenneth L. Woodward, A Mormon Moment: America’s Biggest Homegrown Religion is Looking More Christian, NEWSWEEK, Sept. 10, 2001, at 44, 49. Ironically, the introduction of Polygamy Porter was raised in the following passage in a companion article in the same issue:

In July, the 10th Circuit Court of Appeals struck down a Utah provision that banned most alcohol advertisements... Salt Lake Mayor Rocky Anderson, looking to shake his hometown’s provincial image, has led the effort to make the rules ‘more hospitable.’ Anderson, a divorcé and a Democrat, has been something of a lone voice in the wilderness. He won a battle against the city council to allow beer drinking in the park surrounding city hall, and he’s now hoping to loosen a law that prohibits dancing till dawn.... Heck, Utahns [sic] even have a sense of humor. Wasatch Brewery just introduced a new product in time for the Games: Polygamy Porter. It’s being promoted with the slogans ‘Why have just one?’ and ‘Take some home for the wives.’ Ann Figueroa, Salt Lake’s Big Jump: This Sober City is Getting Ready to Party, NEWSWEEK, Sept. 10, 2001, at 52.

The Juab County Attorney David Leavitt, the governor’s brother, is a descendent of a polygamist marriage. Attorney Leavitt recently successfully prosecuted a prominent polygamist for child rape of his 13-year-old bride. Tim Korte, High-profile Polygamist Convicted of Child Rape, THE IDAHO STATESMAN, June 25, 2002, at 3. The convicted man, Tom Green, caught Leavitt’s attention when he emerged from obscurity to appear on TV talk shows where he argued that his polygamist lifestyle was a constitutional right. As Korte reports, Leavitt took the extraordinary step of prosecuting the polygamist for bigamy, spotlighting Utah’s historical peculiarity, even as state leaders sought to deflect such attention in anticipation of the 2002 Winter Olympic Games. Members of the Church of Jesus Christ of Latter-day Saints practiced polygamy widely until the 1890’s when church leaders renounced it as a condition of statehood. Pockets of polygamy still exist throughout the West, though Mormons are excommunicated if caught. Polygamy was based on church founder Joseph Smith’s declaration that men with more than one wife were given special standing in the afterlife. Id.
editor said the article “should not have been published” and represented a “breakdown” in the editing system. Glenn Guzzo, *Paige Column Should Not Have Run*, T _HE DENVER POST_, Feb. 17, 2002, at C2.


By the end of 2001, Greg Schirf, 49 and an admitted former hippie, said, “...because of the Winter Olympics, they [his opponents] don’t seem to realize they are drawing more attention to themselves. I couldn’t pay for this kind of publicity.” Thomson, *supra* note 71. Finally, Schirf, the so-called “life of the party,” could not resist one more zinger: “the church has been so helpful, I should tithe 10 percent. It’s the only right thing to do.”’ *Id.*

112 The beer tax in Utah will rise from $11 per barrel to $12.80 per barrel, as a result of a bill passed in the 2002-2003 legislative session. *States’ Budget Woes Mean Higher Beer Taxes*, _L.A. TIMES_, Apr. 6, 2003, at 34.


115 *Id.*


117 *Id.*

118 *Id.*

119 *Id.*

120 In an attempt at “re-branding” its image, Boise Cascade changed its name to simply “Boise” as of 2002. However, many people who had known the company by its old name continued to use that name. Boise Cascade is no longer in the extraction industries. Boise Cascade bought Office Max, a large office supply chain, for $1.06 billion in December 2003. Jeff St. John, *Boise Cascade Sells Paper, Timber Assets*, TRI-CITY HERALD, Jul. 28, 2004. Then in July 2004, Boise Cascade Corporation agreed to sell its paper and timberland assets to a Chicago-based buyout firm for $3.7 billion and change its name to OfficeMax, Inc. thereby completing the transition to the number three office-products retailer. *Id.* George Harad remained the Chief Executive. *Id.*

122 The battle between Boise Cascade and the environmental rights group Rainforest Action Network (“RAN”) over BCC’s environmental policies was especially public in 2004. The company accused the group of using “harassment and intimidation” to advance a “lawless, radical agenda.” Marc Gunther, *The Mosquito in the Tent; A Pesky Environmental Group Called the Rainforest Action Network is Getting Under the Skin of Corporate America,* _FORTUNE_, May 31, 2004, at 158. After RAN persuaded many of BCC’s customers (including Kinko’s, L.L.Bean, Patagonia, and the University of Texas, to stop buying from BCC, BCC relented and agreed to stop buying wood from endangered forests. *Id.*


124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*


131 *Id.*

According to Montiel at a speech to students at the University of South Florida in 2003, he was choked and jumped on, shocked with electricity, and had soda injected up his nostrils. Aya Batrawy, *Mexican Activist Shares Stories of Torture at U. South Florida*, UNIVERSITY WIRE, Apr. 15, 2003. He and Cabrera were forced to sign confessions to three charges and then made to pose with illegal weapons, leading to his conviction on weapons charges. *Id.* They were not permitted to communicate with their families to let them know they were alive until fifteen days after being arrested. *Id*

*Goering, supra* note 132.

*Id.*

*Id.*

Tucker, *supra* note 130.

*Id.* (emphasis added).

*Id.*

Ginger Thompson, *Fighters for the Forest are Released From Mexican Jail*, N.Y. TIMES, Nov. 9, 2001, at A12.

*Id.*


*Id.*

*Id.*


*James McKinley, Jr., Prosecutors in Mexico Reopen Inquiry in Rights Lawyer’s Death*, N.Y. TIMES, Feb. 27, 2005, at A8.


*Id.*

*Id.*

*Id.*

*Id.*


*Monaghan, supra* note 149.

*Id.*

*Id.*

*Id.*

*Id.*


*Id.*

*See note 149, supra.*

presence in Idaho can be found in note 35 and accompanying text, education (including Boise State University in Idaho). A fuller description of Mr. Simplot and his immense fear that his study might offend the political sensitivities of J.R. Simplot, a donor of substantial amounts to higher grant proposal he had submitted had been turned down for full funding by the College of Business in large part for Freedom,

Company’s annual sales [6 billion in 1998] or approximately six months salary and benefits for an American matter of speculation. The amount, however, represented approximately eight ten-thousandths of one percent of the out of their manner of doing business in Mexico. What BCC obtained in exchange for this token donation is a millwright at the Papanoa Mill in Guerrero. See Edwin R. A. Seligman, editor-in-chief, 1 Encyclopedia of the Social Sciences 384 (1930). At the end of n.15, Pacholski adds this comment: “This notion of freedom is bounded by the limits of professional competence and ethical behavior.”


BCC, for instance, donated $50,000 for environmental scholarships at Boise State University after the news came out of their manner of doing business in Mexico. What BCC obtained in exchange for this token donation is a matter of speculation. The amount, however, represented approximately eight ten-thousandths of one percent of the company’s annual sales [$6 billion in 1998] or approximately six months salary and benefits for an American millwright at the Papanoa Mill in Guerrero. See The Critical Need for Law Reform, supra note 165.


Dale E. Miller, Terminating Employees for Their Political Speech, 109 Bus. & Soc. Rev. 225-243 at 229 (no. 2, 2004). See also Lee Bollinger, Columbia University President, National Press Club Luncheon (Apr. 2, 2003) (explaining that an untenured faculty member who had called for the United States to lose the Iraq war and proclaiming hope for the deaths of U.S. soldiers could not be fired because the speech did not occur in the classroom, but rather, at an open “teach-in”).

See Paul Fain, “Under Fire on 2 Fronts, U. of Colorado Chief Resigns” The Chronicle of H. Education, Mar. 18, 2005, at A1. “The continuing controversy over Mr. Churchill has received as much if not more attention as the football scandal.” Id. at A27. The football scandal heated up in March, 2005 when someone leaked details of a sealed grand-jury report indicating that the grand jury had found an assistant football coach “had sexually assaulted two female athletic trainers.” Id.
Id.


Steve Wilson, *Fox in the Cow Barn; Controversial Dairy Hormone News Story Buried by Fox-TV Station WTVT Tampa, Florida*, THE NATION, June 8, 1998, at 20.

Id.


Id.


Id.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

ABC News Tonight with Peter Jennings* (ABC television broadcast, Apr. 11, 2003).

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

BULL DURHAM (Orion Pictures 1988).


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Jim Bunning was much better than an average ball player. He was the second pitcher in history, after Cy Young, to win 100 games in both the National and American Leagues. He played 17 seasons and was elected to the Baseball Hall of Fame in 1996. See Jim Bunning, at http://www.pubdim.net/baseballlibrary/ballplayers/B/Bunning_Jim.stm? (last visited Apr. 16, 2003).


Ronald Blum, *supra* note 229.


Id.

Id.

Id.
George Steinbrenner, of course, was convicted of multiple felonies for his role in covering up illegal campaign contributions to CREEP in the days leading up to President Nixon’s Watergate crisis and impeachment. See Redeeming Pete Rose, CHICAGO TRIBUNE, Dec. 16, 2002, at 24. See Gregory Korte, Luken Takes His Licks on Support of Pete Rose, CINCINNATI ENQUIRER, Jan. 1, 2003, at C2. See id.


Id.
Id.
Id.
Id.


Id.
Id. at B2.
Id.
Id.


Id.
Id.
Id.
Id.


Id.

Ruthe Stein, Fahrenheit 9/11 Too Hot for Disney; Firm Bars Film Unit from Distributing Michael Moore Film, THE SAN FRANCISCO CHRONICLE, May 6, 2004, at A2.

Richard Goldstein, Mauling Moore, VILLAGE VOICE, July 6, 2004, at 27.


Id. Michael Moore’s film was eventually distributed by the principals of Miramax, Harvey and Rob Weinstein, who purchased the film from Miramax for about $6 million. See Elaine Dutka, Box Office Bash for 9/11, Los Angeles Times, June 28, 2004, at 1. The movie went on to become the highest-grossing feature length documentary on its opening weekend. See id. The dispute between the Weinsteins and Disney led to much public speculation about the Weinsteins’ future with Miramax, as their contracts with Miramax expire in September 2005. See Laura M. Holson, Weinsteins and Disney Talk Terms; But Who Gets Quentin After the Divorce?, THE INTERNATIONAL HERALD TRIBUNE, Jan. 13, 2005, at 13.

Peter Thal Larsen & Holly Yeager, Disney Unleashes a Star Spangled Riposte to Moore, FINANCIAL TIMES, July 2, 2004, at 14.


Id.


Edmund Sanders, Senators Scold Radio Chain for Tuning Out Dixie Chicks, LOS ANGELES TIMES, Jul. 9, 2003, at 1.

Id.
Id.


Id.
Id.


311 See, e.g., *Roth v. United States 354 U.S. 476 (1957)* wherein Mr. Justice Brennan, writing for the majority, declared “We hold that obscenity is not within the area of constitutionally protected speech or press.” *Id.* at 481.

312 See *Board of Education v. Pico,* 457 U.S. 853, 867 (1982) (Brennan, J. for the plurality, wrote, “We have held in a variety of different contexts ‘the Constitution protects the right to receive information and ideas.’” [citations omitted.])
313 See Radio Television News Dirs. Ass’n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (directing the FCC to immediately repeal the personal attack and political editorial rules).

314 Damn the Torpedoes, supra note 309 at 891-895.

315 Id. at 892-893 quoting LONDON FIN. TIMES (Sept. 12, 2003) at 2 quoting Senator Byron Dorgan (D-ND).


317 See Sanders, supra note 296.


320 Data from the U.S. Bureau of the Census.

321 Id.


323 “In the long run, those who do not use power in a manner that society considers responsible will tend to lose it.” This is the “Iron Law of Responsibility” according to KEITH DAVIS and ROBERT L. BLOMSTROM, BUSINESS AND SOCIETY: ENVIRONMENT AND RESPONSIBILITY (1975) at 50 as quoted in DONNA J. WOOD, BUSINESS AND SOCIETY (1990) AT 123.

324 For an argument on how using corporate power for socially responsible ends can be profitable, see LYNN SHARPE PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE (2003).

325 “In Aristotle’s terms, ethics may be defined as the quest for, and the understanding of, the good life, living well, a life worth living, or, from the Greek, eudaimonia. The pursuit of eudaimonia is largely a matter of attempting to gain and maintain a balanced perspective on life; …” W. A. WINES, READINGS IN BUSINESS ETHICS AND SOCIAL RESPONSIBILITY (Rev. Ed. 1999) at 9.

326 Some divisions exist relative to America’s prosperity:

   “Consider two Asian views of America – perspectives an American in Asia learns to recognize as commonplace. One sees a land vast, rich, hard-driving, and innovative, fired by strange but intriguing democratic ideals, diversity and individual drive. …

   Another view is less rosy and today is exploding in acceptance. It sees America as a nation of sloppy, loud-mouthed, poorly schooled people, quick to gripe and slow to work, a people grown unworthy of their national wealth and international position. …” Tom Ashbrook, “Has U.S. Gotten Lazy?” THE BOSTON GLOBE (September 3, 1989).


328 Kathleen Parker, What They Don’t Know Can Hurt Them, USA TODAY, Mar. 15, 2005, at 13A.

329 Id.

330 Id.

331 See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter Wheeler Cook, Ed. 1923)

332 See, e.g. Omer Lee Reed, Jr., The Psychological Impact of TV Advertising and the Need for FTC Regulation, 13 AMER. BUS. L. J., June 1974, 172-178.

333 MARK E. NEELY, JR., THE LAST BEST HOPE OF EARTH; ABRAHAM LINCOLN AND THE PROMISE OF AMERICA (1993). The title of Neely’s book is taken from President Lincoln’s address to the Congress in December 1862. Lincoln closed his remarks with this line: “We shall nobly save, or meanly lose, the last best hope of Earth.” Id. at v.