

CAPITALISM VS. FREEDOM

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[†] Assistant Professor, Law School, the Hebrew University of Jerusalem. This article is dedicated to the memory of C. Edwin Baker, who has inspired this project and encouraged me to undertake it. I would like to thank Elizabeth Anderson, Ilan Benshalom, Margit Cohn, Richard Delgado, Jan Deutsch, Yoav Dotan, David Enoch, Moshe S. Goldberg, Lisa Herzog, Andrew Levine, Daphna Lewinsohn-Zamir, Joseph Raz, Mark Sagoff, Reem Segev, Michal Shur-Ofry, Zeev Sternhell, Mark Tushnet, Rebecca Tushnet and Eyal Zamir for their helpful comments, insights and suggestions. dedicated to the memory of C. Edwin Baker, who has inspired this project and encouraged me to undertake it. I would like to thank Elizabeth Anderson, Ilan Benshalom, Margit Cohn, Richard Delgado, Jan Deutsch, Yoav Dotan, David Enoch, Moshe S. Goldberg, Lisa Herzog, Andrew Levine, Daphna Lewinsohn-Zamir, Joseph Raz, Mark Sagoff, Reem Segev, Michal Shur-Ofry, Zeev Sternhell, Mark Tushnet, Rebecca Tushnet and Eyal Zamir for their helpful comments, insights and suggestions. dedicated to the memory of C. Edwin Baker, who has inspired this project and encouraged me to undertake it. I would like to thank Elizabeth Anderson, Ilan Benshalom, Margit Cohn, Richard Delgado, Jan Deutsch, Yoav Dotan, David Enoch, Moshe S. Goldberg, Lisa Herzog, Andrew Levine, Daphna Lewinsohn-Zamir, Joseph Raz, Mark Sagoff, Reem Segev, Michal Shur-Ofry, Zeev Sternhell, Mark Tushnet, Rebecca Tushnet and Eyal Zamir for their helpful comments, insights and suggestions.

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I.
INTRODUCTION

This article touches upon one of the most disputed concepts in philosophy and legal theory: the concept of freedom. While there is a broad consensus that freedom is one of the most important ideals that every society must seek to achieve, there is much disagreement on the question of what freedom is. This article aims to point out that the understanding of freedom in the U.S. legal system is too narrow. While the legal system very extensively protects the aspects of freedom that fall into the narrow perception of this concept, it often disregards other significant aspects of freedom.

Many scholars have observed that U.S. legal thought is profoundly influenced by capitalist ideology.¹ Much less has been written about the nature of that influence, and this article attempts to fill the gap. The essence of capitalist ideology lies in the idea that the state should provide individuals with the best possible means to pursue their own financial gain. Capitalism is thus based on two major values: individualism and materialism. This article will demonstrate that the U.S. legal system displays a significant tendency toward these two values. Individual and pecuniary interests are often favored over nonpecuniary and collective ones. To give one example, courts consistently undermine legislative attempts to restrict advertising of alcohol,² tobacco,³ and gambling games.⁴ In so doing, they prefer to protect the private commercial interest in selling those products over the public noncommercial interest in reducing their consumption.

This article aims to offer a contextual perspective on the U.S. legal system, combining phenomena from various fields of law into one picture. I will demonstrate that such diverse legal practices as denying standing to environmental groups, striking down bans on racist speech, granting broad

1. See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at xv (1977); Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601, 608-09 (1977); Mark Tushnet, *A Marxist Analysis of American Law*, in *MARXIST PERSPECTIVES* 1, 96-97 (Spring 1978).

2. *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 314 (5th Cir. 1983); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 476 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 484 (1996).

3. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 526 (2001).

4. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 173 (1999).

protection to trademarks, and invalidating affirmative action programs, can all be explained in terms of capitalist ideology.

Capitalism is traditionally perceived as an economic system promoting freedom. This article will reveal the erroneousness of this common wisdom by showing how capitalist ideology reduces freedom to one aspect: the freedom to act as a private market player. Inspired by this vision, the U.S. legal system puts great emphasis on securing one's freedom to pursue one's own pecuniary gain. The freedom to pursue one's non-pecuniary and collective interests—such as a clean environment, the humane treatment of animals, or social equality—often has deficient legal recognition.⁵

While capitalist ideology perceives people as exclusively self-interested and economically motivated actors,⁶ human personality has various aspects. Philosophers have long recognized the significance of non-egoistic motives for human actions.⁷ Empirical psychological research has similarly demonstrated that people are sensitive to fairness over and above its consequences for material gain.⁸ A legal system wishing to provide its citizens with meaningful freedom must take into account the diverse aspects of human nature. To be free means something broader than the capitalist conception; it means having the freedom to develop a harmonious and flourishing personality. It means being free as a real person, not as a fictional legal character motivated solely by selfish pecuniary interest.

This article will adopt a broader concept of freedom, as reflected in the writings of Hannah Arendt and Joseph Raz. These philosophers attribute crucial importance to aspects of freedom that lie outside the private economic sphere, such as the ability to lead one's life according to morally sound goals, or the ability to participate in public life and realize social interests such as equality, justice, and solidarity. I will use these insights to show how specific legal rules disregard important aspects of freedom.

This article proceeds as follows: Part II outlines the ideological dimension of capitalism. Part III explains how capitalist ideology envisions freedom and offers alternative understandings of the concept. Part IV illustrates the influence of capitalist thought in various fields of law. It shows how this influence results in restricting significant aspects of freedom. Part V concludes the discussion, observing that the legal focus on capitalist values may impede the development

5. See *infra* Part IV.

6. Roger E. Backhouse, *The Rise of Free Market Economics: Economists and the Role of the State Since 1970*, 37 HISTORY POLITICAL ECON. 355, 364 (2005).

7. See, e.g., JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 90 (G. D. H. Cole, trans. 1762) (“As long as several men in assembly regard themselves as a single body, they have only a single will which is concerned with their common preservation and general well-being.”). See also *Id.* at 13 (“In fact, each individual, as a man, may have a particular will contrary or dissimilar to the general will which he has as a citizen.”).

8. See, e.g., Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 Q. J. OF ECON. 817, 817–18 (2002); Golnaz Tabibnia, Ajay B. Satpute & Matthew D. Lieberman, *The Sunny Side of Fairness: Preference for Fairness Activates Reward Circuitry*, 19 PSYCHOLOGICAL SCIENCE 339 (2008).

of social morality, which is one of the most important goals of our society.

II.

THE IDEOLOGICAL DIMENSION OF CAPITALISM

According to Merriam-Webster dictionary, capitalism is “an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market.”⁹ Yet, the economic structure of a society and its ideological beliefs are naturally intertwined. Thus, although capitalism is first and foremost an economic structure, it requires a belief in certain philosophical ideals. The ideological dimension of capitalism has been famously indicated by the sociologist Max Weber. In his book, *The Protestant Ethic and the Spirit of Capitalism*, he attempts to determine what psychological conditions made possible the development of capitalist civilization.¹⁰ Weber notes that while the motive of economic self-interest was commonplace in all ages, capitalism’s great innovation is in perceiving this motive as a virtue rather than a vice.¹¹ He argues that this psychological switch was enabled by the wide acceptance of Calvinism, a Protestant tradition that regards material success as a sign of God’s favor.¹² Weber maintains that Calvinism triumphed over all other traditions because it managed to provide an ideological basis for the then emerging economic system of capitalism.¹³ He explains that the spirit of capitalism sees profit as an end in itself, and shows how this spirit is served by Calvinism, which similarly regards the pursuit of wealth as a duty—even a “calling.”¹⁴ Calvinism enabled the emergence of capitalism, but religious support later became unnecessary, as the capitalist spirit took on a life of its own.¹⁵

In a similar vein, Karl Marx maintained that the economic structure of society is its real foundation, with the political and legal superstructure that leads people to accept the status quo built on top of it.¹⁶ As a result, the economic structure of society largely defines the ideological views of people living in it.¹⁷ Developing this idea further, Antonio Gramsci argued that capitalist ideological values have acquired the status of “cultural hegemony” and have come to be

9. CAPITALISM, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/capitalism> (last visited Jan. 13, 2014).

10. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1950).

11. *Id.* at 2, 53–4, 73–78.

12. *Id.* at 163–64.

13. *Id.* at 42–46.

14. *Id.* at 98–128.

15. *Id.* at 72–73.

16. KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 11–12 (N. I. Stone trans., 1904).

17. *Id.*

perceived as rules of common sense.¹⁸ This hegemony is constantly being reproduced in cultural life through the media, universities, and religious institutions.¹⁹ While this view may be somewhat overstated, in the sense that ideology is probably not a pure product of the economic structure, there is certainly a deep connection between the two.

Contemporary Western legal and economic thought is heavily influenced by one specific philosophic tradition: neoliberalism.²⁰ Neoliberalism is tellingly described by David Harvey as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”²¹ Neoliberalism regards people as exclusively self-interested and economically motivated actors.²² It holds that most economic and social problems have a market solution and that governmental intervention should be reduced to the minimum.²³ It is easy to see that neoliberal philosophy favors capitalism in its strongest form, and in fact, there is virtual parity between this philosophy and capitalist ideology.

Neoliberalism started in 1947 as a movement opposing the economic thought of socialism and fascism.²⁴ Enjoying the powerful support of large corporations and the media, neoliberalism gradually took hold in universities and other research institutions, found its way into politics, and ultimately established itself in the common consciousness of the Western world.²⁵ The 1970s marked a

18. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12 (Quentin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (Gramsci characterizes cultural hegemony as “the ‘spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is ‘historically’ caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production”).

19. *Id.*

20. See, e.g., MICHAEL CHARLES HOWARD & JOHN EDWARD KING, THE RISE OF NEOLIBERALISM IN ADVANCED CAPITALIST ECONOMIES: A MATERIALIST ANALYSIS 9 (2008) (arguing that “Neoliberalism is also significant in intellectual history because it constitutes a refutation of much social and economic thought in the twentieth century”); Roger E. Backhouse, *Economists and the Rise of Neo-Liberalism*, 17 RENEWAL 17 (2009) (arguing that “over the past three or four decades, economists have developed theories that have supported this move from government action towards market solutions to economic problems”).

21. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2007).

22. Backhouse, *supra* note 6, at 364.

23. HOWARD & KING, *supra* note 20, at 1 (“The ideology is that all, or virtually all, economic and social problems have a market solution, or a solution in which market processes will figure prominently.”).

24. HARVEY, *supra* note 21, at 19–21.

25. *Id.* at 40. See also HOWARD & KING, *supra* note 20, at 4 (explaining the rise of neoliberalism with the increasing sophistication of the productive forces and the economic requirements for their continued development); Backhouse, *supra* note 6, at 365 (arguing that neoliberalism was purposefully promoted by groups of influential economists opposing socialism); Susan George, A Short History of Neo-Liberalism, Conference on Economic Sovereignty in a Globalising World (Mar. 24–26, 1999), available at <http://www.globalexchange.org/resources/econ101/neoliberalismhist> (“One explanation for this triumph of neo-liberalism . . . is

high point in this process, with ideas of deregulation and privatization becoming accepted worldwide.²⁶

The acceptance of neoliberalism throughout the western world has, however, been uneven.²⁷ While the U.S. has been most receptive to this philosophy, its influence has been somewhat milder in the U.K., and much weaker in Continental Europe.²⁸ Scholars explain this discrepancy by the different forms that capitalism assumed in the various states of that time. The strong welfare structure found in the countries of Continental Europe were partly responsible for forming the “common sense” of citizens and their political representatives that made American ideas about deregulation and privatization less appealing.²⁹ Accordingly, while U.S. public institutions provide a relatively weak safety net, most countries of Continental Europe can still be described as welfare states.³⁰ The everyday economic reality, in turn, shapes the social common sense. Living under conditions of intense capitalism makes the neoliberal social order appear to be natural and inevitable.³¹ Thus, although it is hard to say whether the economic structure determines the social consciousness or vice versa,³² there is a clear correlation between the relatively far-reaching form capitalism takes in the U.S., as opposed to Western Europe, and the extent to which these countries adhere to the neoliberal philosophy.

Although neoliberalism largely dominates today’s Western legal and economic thought and is arguably “the most successful ideology in world history,”³³ counter-hegemonic voices do exist. They take the form of environmental movements and other movements seeking to reestablish collective values.³⁴ Those movements relentlessly, and sometimes successfully, try to challenge the logic of neoliberalism and to change our political, legal and economic landscape.

that neo-liberals have bought and paid for their own vicious and regressive ‘Great Transformation.’ They have understood . . . that ideas have consequences. Starting from a tiny embryo at the University of Chicago with the philosopher-economist Friedrich von Hayek and his students like Milton Friedman at its nucleus, the neo-liberals and their funders have created a huge international network of foundations, institutes, research centers, publications, scholars, writers and public relations hacks to develop, package and push their ideas and doctrine relentlessly.”)

26. HARVEY, *supra* note 21, at 41.

27. *Id.* at 87–119 (describing the “uneven geographical developments” of capitalism).

28. *Id.* at 88–89.

29. *Id.* at 116–7.

30. *See, e.g.*, Elise Gould & Hilary Wething, *U.S. Poverty Rates Higher, Safety Net Weaker Than in Other Countries* (Jul. 24, 2012), <http://www.epi.org/publication/ib339-us-poverty-higher-safety-net-weaker/>.

31. HARVEY, *supra* note 21, at 41 (“And it is at that level—through the experience of daily life under capitalism in the 1970s—that we begin to see how neoliberalism penetrated ‘common-sense’ understandings. The effect in many parts of the world has increasingly been to see it as a necessary, even wholly ‘natural’, way for the social order to be regulated.”).

32. *Id.*

33. HOWARD & KING, *supra* note 20, at 1 (citing Perry Anderson).

34. HARVEY, *supra* note 21, at 185–6.

III. CAPITALISM AND FREEDOM

Classical liberal philosophical tradition places the highest value on personal freedom, while focusing on the negative aspect of this concept.³⁵ Freedom, according to this view, consists of the liberty to pursue “our own good in our own way, so long as we do not attempt to deprive others of theirs.”³⁶ This position has been criticized as being too narrow and not guaranteeing that individuals are provided with sufficient tools for pursuing their life goals.³⁷

Taking its roots in liberal philosophy and being strongly focused on market activity, neoliberalism regards voluntary economic transactions, or “economic freedom,” as the most crucial component of personal freedom.³⁸ Consistent with the liberal tradition, neoliberals view only governmental intervention as a potential threat to this freedom and believe that limitations imposed by other private market players present no significant problem.³⁹ This perception of freedom is most widespread where the strongest forms of capitalism prevail. For instance, one has to be educated to a rather particular concept of freedom to accept that not clinically underweight women are unable to work as models,⁴⁰ and at the same time to doubt whether Congress has the power to require all citizens to acquire health insurance.⁴¹

To depart from the narrow concept of freedom offered by capitalist ideology, one has to abandon the view of people as rational wealth-maximizers and recognize other dimensions of human personality. Philosophers have long

35. Frank Lovett, *Republicanism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2013), <http://plato.stanford.edu/archives/spr2013/entries/republicanism/> (“In Mill’s well-known words, ‘the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs.’”).

36. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 17 (John Gray ed. 1991) (1859).

37. *Id.* JOSEPH RAZ, THE MORALITY OF FREEDOM 409–10 (1986) (critiquing the conflation of positive freedom and the capacity for autonomy).

38. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12 (1962) (developing a general idea of freedom based on the liberty to act as a market player). *See also* HARVEY, *supra* note 21, at 7 (“The assumption that individual freedoms are guaranteed by freedom of the market and of trade is a cardinal feature of neoliberal thinking.”).

39. *See* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J., 783, 816–17 (2003).

40. *See, e.g.*, Amy Brown & Helga Dittmar, Think “Thin” and Feel Bad: The Role of Appearance Schema Activation, Attention Level, and Thin-Ideal Internalization for Young Women’s Responses to Ultra-Thin Media Ideals, 24 J. OF SOC. AND CLINICAL PSYCHOL. 1088, 1088–89 (2005) (“The body size of glamorous models is often more than 20% underweight, exceeding a diagnostic criterion for anorexia nervosa of 15% underweight.”). It is noteworthy that in Italy and in Israel employing underweight models is illegal. Israel Passes Law Banning Use of Underweight Models, BBC NEWS (Mar. 20, 2012, 12:35 PM), <http://www.bbc.com/news/world-middle-east-17450275>; Italian Fashion Designers Ban Size Zero Models from the Catwalks, MAIL ONLINE, <http://www.dailymail.co.uk/news/Italian-fashion-designers-ban-size-zero-models-catwalks.html>.

41. *See infra*, Part IV.E.

acknowledged the significance of non-egoistic motives for human actions.⁴² For instance, Jean-Jacques Rousseau coined the term “general will”—the interest of people not as individuals who pursue their own welfare, but as members of the public who seek to discover and advance the public good.⁴³ Modern literature similarly speaks of a distinction between consumer preferences and citizen preferences.⁴⁴

These philosophical insights have a solid empirical support. A large body of experiments, in which participants are asked to divide sums of money between themselves and another person—the so-called “Dictator” and “Ultimatum” Games—consistently show that in real life, people do not act as rational wealth-maximizers. The player in control shares money with anonymous strangers (who have no control over wealth distribution). The recipients prefer to forgo a monetary gain rather than accept an offensively low offer.⁴⁵ These results cannot be explained without recognizing that people have an apparent tendency to altruism and a yearning for fairness.⁴⁶ In addition, so-called “happiness research” shows that people’s individual welfare may be negatively affected by unequal income distribution in their society.⁴⁷ Regardless of their own income levels, people have an aversion to wealth allocations that they perceive as unjust.⁴⁸

Goal-frame theory offers a convincing account for the complexity of human motivation.⁴⁹ Contrary to the neoliberal vision of *homo economicus*, people do

42. See, e.g., Andrew Youpa, *Leibniz’s Ethics* pt. 3, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2012), <http://plato.stanford.edu/entries/leibniz-ethics/>; Brian Leiter, *Nietzsche’s Moral and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1.3, 4, available at <http://plato.stanford.edu/entries/nietzsche-moral-political/>; Neera K. Badhwar & Roderick T. Long, *Ayn Rand*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3.6, available at <http://plato.stanford.edu/entries/ayn-rand/>.

43. Christopher Bertram, *Jean Jacques Rousseau*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3.1, available at <http://plato.stanford.edu/entries/rousseau/#IdeGenWil>.

44. See, e.g., JAMES MEADE, THE THEORY OF ECONOMIC EXTERNALITIES 51–52 (1973); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1411 (1980); Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 383, nn. 14–15 (2006). See also Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 81 (1990) (“Individuals are not wealth maximizers when competing interests must be traded away, although most probably prefer more wealth to less if all other things are equal. Individual voters frequently support legislation even though the legislation will reduce their wealth. For example, political liberals with good incomes support minimum wage laws even though they are likely to feel the laws’ effect only in price increases in the goods and services they purchase.”).

45. Charness & Rabin, *supra* note 8, at 817–18; Tabibnia, Satpute & Lieberman, *supra* note 8; Ernst Fehr & Klaus M. Schmidt, *Theories of Fairness and Reciprocity—Evidence and Economic Applications*, CEPR Discussion Paper No. 2703, at 5 (2001), available at <http://ssrn.com/abstract=264344>.

46. *Id.* at 5.

47. Lester C. Thurow, *The Income Distribution as a Pure Public Good*, 85 Q. J. OF ECON. 327 (1971); Alberto Alesina, Rafael Di Tella & Robert MacCulloch, *Inequality and Happiness: Are Europeans and Americans Different?*, 88 J. OF PUB. ECON. 2009 (2004).

48. *Id.* at 2009.

49. Siegwart M. Lindenberg, *Social Rationality and Well-Being*, in HANDBOOK OF RATIONAL

not have one fixed set of preferences. Rather, they have a number of different, sometimes contradicting goals. The theory indicates three general goal frames: the hedonic goal frame that motivates actions that make one feel better right now; the gain goal frame that motivates one to guard and improve one's resources; and the normative goal frame that motivates one to act appropriately.⁵⁰ When a certain goal frame is focal, it dominates our motivation.⁵¹

The activation of goals is strongly influenced by external circumstances. For instance, labeling a resource allocation game a "Community Game," and thereby activating the normative goal frame, greatly increases the frequency of cooperative responses, as compared to labeling the same game a "Wall Street Game," and thereby activating the gain goal.⁵² To cite another example, sometimes a salient hedonic goal frame makes one consume products that, in a gain goal frame, one generally wishes to avoid.⁵³ Goal-frame theory provides a persuasive psychological explanation for the philosophic observation that people have both egoistic "consumer" preferences and altruistic "citizen" preferences.

This demonstrates that perceiving people as pure wealth-maximizers disregards some important aspects of the human personality. Consequently, an excessive focus on individual economic freedom may fail to provide people with true freedom that takes a meaningful account of the multi-dimensionality of their personality. At this point I will briefly present broader concepts of freedom as reflected in the writings of two modern philosophers—Joseph Raz and Hannah Arendt.

Joseph Raz offers a plausible alternative to the individualistic perception of freedom so deeply rooted in our legal thought. He maintains that freedom is not intrinsically valuable.⁵⁴ It is valuable only to the extent it allows a person to lead an autonomous life.⁵⁵ Autonomy is not the ability to pursue one's own self-interest. Rather, it is an individual's ability to choose morally sound goals and to lead her life according to those goals.⁵⁶ The existence of valuable goals is a social rather than individual matter.⁵⁷ To secure its citizens' freedom, the government has a positive duty to promote various morally sound ideals, so that

CHOICE SOCIAL RESEARCH 211, 215–25 (R. Wittek, T.A. B. Snijders & V. Nee eds., 2007), available at http://www.ics-graduateschool.nl/uploads/tineke/link%20in%20project%20proposal%20nr%206%20_Wittek%2003%20Lindenberg%20V2-1.pdf.

50. *Id.* at 217.

51. *Id.* at 213–14.

52. *Id.* at 218.

53. *Id.* at 221.

54. RAZ, *supra* note 37, at 16–17.

55. *Id.* at 203–7.

56. *Id.* at 318, 424–25. Similarly, Thomas Hill Green holds that "the state should foster and protect the social, political and economic environments in which individuals will have the best chance of acting according to their consciences." See also Colin Tyler, *Thomas Hill Green*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 6 (Edward N. Zalta ed., Summer 2011), <http://plato.stanford.edu/archives/sum2011/entries/green/>.

57. RAZ, *supra* note 37, at 424–25.

individuals can choose how to build their lives according to a variety of socially recognized goals.⁵⁸

Hannah Arendt's theory represents the very antithesis of the individualistic and materialistic concept of freedom. According to her view, genuine freedom can never be realized individually.⁵⁹ By its very essence, freedom is a public phenomenon.⁶⁰ True freedom means the freedom to act: to take the initiative, to introduce something genuinely new, unexpected and unpredictable into the world.⁶¹ This freedom can be realized to its full extent only in the political sphere, where people debate, test, and form their opinions on public matters through ongoing discourse.⁶² By engaging in politics, we go beyond our private self-interest to realize the interests of the public world that we all share as citizens—such as equality, justice, and solidarity.⁶³ This is the very quintessence of freedom.⁶⁴

By contrast, Arendt views the market as a place where one's freedom cannot be meaningfully realized.⁶⁵ Being products of necessity, both consumption and production equate people, that is, blur the distinctiveness of their personalities.⁶⁶ The possibility of doing something unpredictable and unexpected, or expressing one's unique personality, hardly exists in this sphere.⁶⁷ Arendt is deeply opposed to consumerism as the ideal of modern society.⁶⁸ As our society becomes preoccupied with consumption and production, and private economic interests triumph over the public sphere, genuine freedom disappears, causing deep unhappiness.⁶⁹ Arendt calls for the reactivation of our capacities as citizens by recovering a common political world where individuals can express their identities, establish relations of reciprocity and solidarity, and engage in an ever-continuing process of constructing their collective identity.⁷⁰

Both Raz and Arendt attribute crucial importance to aspects of freedom that lie outside the private economic sphere. Even if one does not fully accept their views, a brief look at their theories demonstrates the shortsightedness of the capitalist vision of freedom. In the next Part, I will demonstrate how the legal system tends toward this narrow vision of freedom thereby leaving crucial aspects of freedom without adequate protection.

58. *Id.* at 424–25.

59. HANNAH ARENDT, *THE HUMAN CONDITION* 30–31 (1958).

60. *Id.*

61. *Id.* at 177–78.

62. *Id.* at 244–45.

63. *Id.* at 36.

64. Maurizio Passerin d'Entreves, *Hannah Arendt*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 6 (Edward N. Zalta ed., Fall 2008), <http://plato.stanford.edu/entries/arendt/#ActFrePlu>.

65. ARENDT, *supra* note 59, at 85.

66. *Id.* at 213–15.

67. *Id.* at 85.

68. *Id.* at 107.

69. *Id.*

70. *Id.* at xii.

IV.
CAPITALISM AND THE LEGAL SYSTEM

Numerous scholars have described and critiqued capitalist ideology's influence on the legal system. The general argument posited by Marx—that a legal system inevitably reflects the economic structure of society⁷¹—was developed and nuanced by the Critical Legal Studies movement. For instance, Morton Horowitz claims that since the early nineteenth-century American judges have consciously promoted rules that favor the interests of capital owners.⁷² Describing the transformation of the U.S. legal system since that time, he observes that shifting concepts of private law played a crucial role in enabling rapid economic growth in this country.⁷³ Similarly, many other scholars have pointed out the contribution of specific legal rules and doctrines to the development and persistence of capitalism.⁷⁴

Much less effort has been devoted to discovering the ethical values that capitalist ideology introduces into the legal system.⁷⁵ As already mentioned, capitalist ideology envisions the pursuit of pecuniary gain by private market players as the quintessence of freedom. This aspiration is characterized by two values: materialism and individualism. The following discussion will demonstrate the tendency of the US legal system toward these values. Four examples from diverse fields of law will illustrate the tendency to favor individual and economic interests over collective and non-economic ones. I will show how this tendency results in an overly narrow scope of legally protected freedom.

Two caveats are in order here. First, I do not intend to argue that the U.S.

71. MARX, *supra* note 16, at 11–12.

72. HORWITZ, *supra* note 1, at 63. *See also* Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 676 (1933) (arguing that at the beginning of the twentieth century emerged “a general assumption among the students of the Court that the decisions of the justices could be explained by their economic interests and sympathies”).

73. HORWITZ, *supra* note 1.

74. *See, e.g.*, Richard Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 186 (D. Kairys ed., 1982) (“[C]ontemporary tort law is intimately related to the rise of capitalism, as both cause and effect.”); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57–93–94 (1984) (“Private property, free contract, (complex and expensive) due process, (well-heeled-and-organized-interest-group-responsive) democratic procedures, and even (expensive-and-technology-dependent) free speech operate de facto to reinforce the advantages of wealth and power.”); David Abraham, *Liberty and Property: Lord Bramwell and the Political Economy of Liberal Jurisprudence, Individualism, Freedom, and Utility*, 38 AM. J. LEGAL HIST. 288, 292 (1994) (“There is no denying that the erosion of European medieval conceptions of full or strict liability only weakly hinged to fault was closely connected to the rise of capitalist entrepreneurship and bourgeois conceptions of individual human agency”).

75. For an example of a notable project, *see* Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253 (David Kairys ed., 1982) (showing how case law in the field of corporate speech can be explained in terms of capitalist ideology, particularly the tendency to regard everything, including speech, as a commodity). *See also* Jan G. Deutsch, *Corporate Law as the Ideology of Capitalism*, 93 YALE L.J. 395 (1983) (revealing influences of capitalist ideology on corporate law in a review of *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982)).

legal system always disregards non-materialistic and non-individualistic values. In fact, the U.S. legal system grants remarkably extensive protection to political speech,⁷⁶ secures freedom of religion to all citizens,⁷⁷ and recognizes the cultural rights of Native American tribes.⁷⁸ The legal landscape is complex—the law never follows one coherent logic. Rather, the law is an outcome of endless conflicts between contradictory ideals, none of which can ever fully shape the legal system.⁷⁹ Thus, the tendency toward capitalist values is naturally not manifest in all legal rules, and its intensity varies as well. Even so, since the legal tendency toward materialism and individualism is salient and widespread, it does deserve special attention.

The second caveat is actually a clarification. The reference to individual, as opposed to collective, interests begs an explanation, since literature offers several perceptions of the concept “collective interests.” Collectivism in its strong form suggests that some group interests are distinct from the interests of individual group members: that is, the whole is sometimes greater than the sum of its parts.⁸⁰ This position is highly contested.⁸¹ The following discussion will adopt the weaker version of collectivism, which is rather broadly accepted.⁸² The term “collective interests” will refer to group-regarding interests of individuals, that is, interests that people have by virtue of belonging to a group—either to a sub-group in a society, or to society as a whole.⁸³ The term

76. See RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:6 (2012) (“While these various theories, in combination, provide strong protection for freedom of speech in America across a wide range of topics, speech on issues of ‘public concern’ occupies a ‘first among equals’ status, and has been described by the Supreme court as occupying the ‘highest rung of the hierarchy of First Amendment values.’”); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4 1969, 660 U.N.T.S. 195, 318; International Convention on the Elimination of All Forms of Racial Discrimination, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-2&chapter=4&lang=en#EndDec (with the United States declaring at ratification that “the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association”).

77. U.S. CONST. amend. I.

78. See, e.g., *United States v. Lara*, 541 U.S. 193 (2004) (Kennedy, J., concurring) (referring to Indian tribes as “extraconstitutional sovereign[s]”).

79. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STANFORD LAW REVIEW 199, 226 (1984) (“[N]onrevisionists such as Kennedy and Unger do not seek to explain law in terms of stages of capitalist development. Instead, they depict the evolution of legal doctrine as an endless conflict between opposing and unassimilable world views”).

80. See, e.g., Cees Flinterman, *Three Generations of Human Rights*, in HUMAN RIGHTS IN A PLURALIST WORLD 75, 78 (Jan Berting, Peter R. Baehr, J. Herman Burgers, Cees Flinterman, Barbara De Klerk, Rob Kroes, Cornelis A. Van Minnen & Koo Vanderwal eds., 1990) [hereinafter HUMAN RIGHTS]; Koo VanderWal, *Collective Human Rights: A Western View*, in HUMAN RIGHTS at 92–97.

81. See, e.g., Jack Donnelly, *Human Rights, Individual Rights and Collective Rights*, in HUMAN RIGHTS at 46–49; J. Herman Burgers, *The Function of Human Rights as Individual and Collective Rights*, in HUMAN RIGHTS at 72–73; Michael Hartney, *Some Confusions Concerning Collective Rights*, 4 CAN. J. L. & JURIS. 293, 297 (1991).

82. This statement is based on the author’s perception of the current literature.

83. Leslie Green, *Two Views of Collective Rights*, 4 CAN. J. L. & JURIS. 315, 321 (1991);

“individual interests,” on the other hand, will refer to self-regarding interests, that is, interests that people have as private individuals and do not share with any specific group in society, apart from their family or friends. Consequently, the term “individualism” will refer to the tendency to perceive people as isolated, atomistic beings, whose interests are mainly self-regarding.

A. The Doctrine of Standing

The doctrine of standing has been developed by courts as they interpret Article III of the Constitution.⁸⁴ This doctrine requires all plaintiffs to establish a personal stake in the case.⁸⁵ The purpose of this doctrine is to ensure the basic democratic principle of separation of powers between the legislative and the judicial branches.⁸⁶ While Congress should regulate affairs of general policy, courts may only intervene to protect distinct individual interests.⁸⁷ To prove standing, the plaintiff has to argue that the alleged violation causes her an injury in fact, which is different from the injury suffered by the public at large.⁸⁸

When interpreting the doctrine of standing, courts show a significant tendency toward the values of individualism and materialism. One of the most prominent examples of this tendency is found in the field of environmental law where the requirement of “injury in fact” constitutes a serious obstacle to plaintiffs. Environmental organizations are not regarded as entities having a specific and legally recognized interest in protecting the environment.⁸⁹ Rather,

Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80 (1999).

84. James Keenley, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 CAL. L. REV. 849, 849–50 (2007).

85. *Id.* at 875. *See, e.g.*, *Ass'n of Data Proc. Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *Flast v. Cohen*, 392 U.S. 83, 100–01 (1968); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974).

86. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

87. Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2315 (1998) (“The judicial role is limited to the resolution of cases and controversies governed by standing and injury requirements; judicial discretion is cabined by interpretations of existing law and precedent. In contrast, legislative bodies enjoy wide latitude in choosing which issues to address and which policy choices to pursue. According to this analysis, legislatures, rather than courts, should make the factual determinations underlying policymaking.”). *See also* *Marbury v. Madison*, 5 U.S. 137 (1803); *Nixon v. United States*, 506 U.S. 224, 228–29, 237–38 (1993); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997).

88. Isil Yildiz, *Standing First: Addressing the Article III Standing Defects of Rule 23(B)(3) Class Actions Composed Wholly of Future Claimants*, 26 REV. LITIG. 773, 784 (2007). *See, e.g.*, *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982); *Friends of the Earth v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167 (2000); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536 (6th Cir. 2004).

89. *See, e.g.*, *U.S. Pub. Interest Grp. v. Heritage Salmon Inc.*, No. Civ. 00-150-B-C, 2001 WL 987441 (D. Me., Aug. 28, 2001) (finding that a citizens' watchdog group had standing to sue under the Clean Water Act because its individual members may have suffered an injury from the alleged pollution into of waterways); *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) (holding that to have standing, the organization has to show that least one of its members would be harmed by the challenged order); *Grassroots Recycling Network Inc. v. EPA*, No. 04-1196, 2005 WL 3078187

to bring a suit, such a group must identify members who individually have standing to sue.⁹⁰ To do this the organization must argue that its members' usage of a natural resource has suffered as a result of the alleged illegal activity.⁹¹ Showing economic harm is the safest root towards securing standing,⁹² though it may sometimes be established by showing potential damage to health.⁹³ Although noneconomic, aesthetic interest in a clean and beautiful environment is sometimes recognized as actionable,⁹⁴ standing has hardly ever been found based on this interest alone.⁹⁵

Additionally, courts have considered geographical proximity to be an important factor when making standing determinations in environmental suits.⁹⁶ Therefore, violations that affect large areas, such as forests, seas, or the whole ecological system, are generally non-actionable. Thus, ironically, the more pervasive the ecological damage, the more difficult it is to stop the violation. Consider, for example, that under current law, individuals and organizations cannot use lawsuits to stop the following law violations: the opening up of public lands for mining,⁹⁷ harming national forests,⁹⁸ and actions liable to result in the extinction of endangered species.⁹⁹ Being unable to enforce environmental laws,

(D.C. Cir. Nov. 18, 2005) (holding that an environmental group lacks standing to challenge an Environmental Protection Agency regulation because the group could not show actual harm to any individual member).

90. *Id.*

91. *Id.*

92. *E.g.*, *U.S. Public Interest Group*, 2001 WL 987441. In an action against water pollution, the court held that each of the plaintiffs has to show some concrete or particular injury resulting from the alleged violation, specifically emphasizing economic harm. *Id.*

93. *E.g.*, *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355 (1988); *Sierra Club v. Chemical Handling Corp.*, 824 F. Supp. 195 (1993).

94. *Friends of the Earth v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 169 (2000) (finding standing based on an alleged recreational, aesthetic, and economic harm); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 541-42 (6th Cir. 2004) (recognizing that health, economic, recreational, aesthetic and environmental interests establish standing).

95. *But see Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir., 2000) (standing found based solely on aesthetic injury).

96. *Id.* (describing geographical proximity as a relevant element of standing); *Sierra Club v. Chemical Handling Corp.*, 824 F. Supp. 195 (1993) (people living in the neighborhood affected by the alleged pollution have standing to sue); *Simsbury-Avon Preservation Society v. Metacon Gun Club*, No. Civ. 3:04CV803JBA, 2005 WL 1413183 (2005) (homeowners who live near a gun club have standing to sue the club for dumping ammunition-related pollutants).

97. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

98. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

99. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allard v. Frizzell*, 536 F.2d 1332 (1976). For discussion and critique of this legal situation see Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Robert D. Bullard, *Environmental Racism and "Invisible" Communities*, 96 W. VA. L. REV. 1037 (1994); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L. Q. 1 (1995); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).

citizens lack practical means of taking control of these issues.

Aware of this difficulty, Congress and state legislators sometimes enact “citizen suit provisions” in environmental laws, granting “any person” standing to sue.¹⁰⁰ Yet courts have largely undermined this legislative intent, holding that such provisions cannot replace the requirement of injury in fact.¹⁰¹ At the core of these holdings has been the position that Congress does not have constitutional power to grant standing to members of the public who have not suffered a specific injury.¹⁰² This interpretation of the separation of powers principle is not the only possible option. For instance, in European countries, the legislative intent to renounce standing requirements is usually accepted.¹⁰³

What kind of injury constitutes an “injury in fact” is a matter of point of view. We should question why a loss of thirty cents incontrovertibly satisfies the “injury in fact” requirement,¹⁰⁴ while a loss that leaves “scars on the landscape” does not.¹⁰⁵ A court’s choice to perceive injury in terms of one’s strictly individual (preferably economic) interests underscores the circle of interests that are legally recognized as matters of one’s concern. By undermining people’s ability to shape their physical environment according to their visions, courts restrict our freedom in one of its crucial aspects: the freedom to choose morally sound goals and to lead one’s life according to these goals, to use Raz’s terminology; or to take initiative and lead changes in the public sphere, to borrow Arendt’s terms.

Since their real motivation enjoys no legal recognition, environmental organizations sometimes raise artificial claims, such as a decline in the market value of their members’ homes,¹⁰⁶ expenses on organizational activities,¹⁰⁷ increased taxes,¹⁰⁸ or the need to invest money and resources in educating the

100. *E.g.*, The Clean Water Act § 505, 33 U.S.C. § 1365 (2006); The Clean Air Act § 304, 42 U.S.C. § 7604 (2006); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (2012).

101. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

102. *Lujan*, 497 U.S. at 577.

103. For example, in Europe, patent law does not impose any standing requirements for filing an opposition to a patent, and the European Patent Office never denies standing to groups filing oppositions. *See, e.g.*, Press Release, Court of Justice of the European Union, A Process Which Involves Removal of a Stem Cell from a Human Embryo at the Blastocyst Stage, Entailing the Destruction of That Embryo, Cannot Be Patented (Oct. 18, 2011), *available at* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/cp110112en.pdf>. Environmental and animal rights organizations occasionally challenge patents on inventions that allegedly cause animal suffering or environmental damage: *see, e.g.*, Harvard/Onco-mouse [1992] O.J. E.P.O. 588 (E.U.); Greenpeace Ltd. v. Plant Genetic Systems [1995] O.J. E.P.O. 545 (E.U.).

104. *Sarafin v. Sears, Roebuck & Co.* 73 F.R.D. 585 (N.D. Ill. 1977).

105. *Nat’l. Comm. for the New River, Inc. v. Fed. Energy Regulatory Comm’n*, 433 F.3d 830 (D.C. Cir. 2005).

106. *Grassroots Recycling Network Inc. v. EPA*, 429 F.3d 1109 (D.C. Cir. 2005).

107. *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920. (Fed. Cir. 1991).

108. *In Defense of Animals v. Cleveland Metroparks Zoo*, 785 F.Supp. 100 (N.D. Ohio 1991).

general public about the violation.¹⁰⁹ In one case, the plaintiff even attempted to claim that the interest in Indian artifacts made of eagle feathers justifies the protection of living eagles.¹¹⁰

These (usually vain) attempts illustrate the inadequacy of the current legal framework. As Mark Sagoff compellingly argues, environmental legislation cannot be understood in terms of economic self-interest.¹¹¹ This legislation reflects our moral values, and our sense of responsibility regarding the land we inhabit, but has nothing to do with our self-regarding interests.¹¹²

The current interpretation of the standing doctrine excludes environmentalist concerns from legal discourse and forces advocates to speak the language of private economic interest. Pierre Bourdieu describes the restriction of freedom associated with silencing one's discourse as "symbolic violence."¹¹³ Symbolic violence is a powerful suppression tool because it relates to the very modes of human cognition.¹¹⁴ Educated into culturally dominant modes of thought, the subjects of such violence usually accept it as legitimate.¹¹⁵ We see this happening when environmentalists seek to redress economic injuries in courts.

This phenomenon is not unique to environmental law. In fact, nonprofit organizations seeking to advance the public interest regularly fail the injury requirement.¹¹⁶ For example, such organizations were found to have no standing to file a suit against racial discrimination in private schools,¹¹⁷ against sporting events that allegedly violated a state's gambling code,¹¹⁸ and against the demolition of buildings that should have served as low-income housing.¹¹⁹ By

109. *American Farm Bureau Fed'n v. EPA*, 121 F. Supp. 2d 84, 96 (D.D.C. 2000).

110. *Allard v. Frizzell*, 536 F.2d 1332 (10th Cir. 1976).

111. Sagoff, *supra* note 44, at 1397–98. This is not to say that environmental regulation cannot be justified in terms of economic efficiency: *see, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008). Yet, such analysis requires thinking in terms of collective rather than individual interests, which is dissonant with the logic of the standing doctrine.

112. REVESZ & LIVERMORE, *supra* note 111. *See also* Thomas C. Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Homes Development*, 1976 WIS. L. REV. 385, 405 (1976) ("An important element of the demand for preservation, nowhere manifested in market prices, may derive less from its instrumental utility than from its symbolic meaning. For some, a serious loss of well-being at stake in the development of second homes results from a broadly held commitment to the normative position that nature is a source of value not because it is used but because it continues to exist.").

113. PIERRE BOURDIEU, *MASCULINE DOMINATION* 1–2 (Richard Nice trans., 2001) ("[A] gentle violence, imperceptible and invisible even to its victims, exerted for the most part through the purely symbolic channels of communication and cognition.").

114. *Id.*

115. *Id.*

116. *E.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975); *Concerned Citizens for the Preservation of Watertown, Inc. v. Planning and Zoning Comm'n*, 984 A.2d 72 (Conn. App. Ct. 2009). Both cases dealt with zoning policies.

117. *Allen v. Wright*, 468 U.S. 737 (1984).

118. *Nebraskans Against Expanded Gambling v. Nebraska Horsemen's Protective Assoc.*, 605 N.W.2d 803 (Neb. 2000).

119. *Comm'y Stabilization Project v. Martinez*, 31 Fed. Appx. 340 (8th Cir. 2002).

contrast, social justice advocates who choose to resort to claims of financial loss do sometimes succeed. In one case an organization of Spanish-speaking employees claimed that the defendant's employment policy was discriminatory.¹²⁰ The organization was found to have standing on the basis of the potentially increased revenue from membership fees it might obtain, if the discriminatory barriers to selection were eliminated.¹²¹ In another case, a District Court held that a nonprofit group arguing that the common areas in a city did not allow access to people with disabilities was injured by the need to invest resources to determine if the public property complied with applicable statutes.¹²²

The legal discourse of individualism is further illustrated by cases dealing with cruelty to animals. It has been repeatedly held that individuals and organizations that have a general interest in insuring that animals live under humane conditions do not have standing to sue.¹²³ By contrast, people who have developed a personal contact with a particular animal do have standing when such an animal is mistreated.¹²⁴ Consequently, animal rights organizations try to find appropriate plaintiffs who have a connection to the animals they seek to protect.¹²⁵ Such plaintiffs may enable the organization to require lawful treatment of several specific animals, while their real commitment to protecting the entire species remains unrealized.¹²⁶

All this illustrates how the narrow legal concept of freedom disempowers a wide range of human aspirations. The doctrine of standing serves to close the doors of the courtroom in front of people not motivated by personal financial gain. This unjustifiably restricts their freedom to pursue most legitimate goals.

The current legal situation restricts freedom in an additional way. It is well known that the legal system promotes social norms.¹²⁷ The fact that one's aspirations are legally protected certainly adds to their social recognition. And social recognition is most crucial for the ability to choose one's goals: rather than inventing their goals themselves, people choose them from the existing range of socially accepted aspirations. This is why, in Raz's view, freedom can

120. *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975).

121. *Id.* at 440–41.

122. *Metropolitan St. Louis Equal Housing Opportunity Council v. Lighthouse Lodge*, No. 2:09-cv-04019-NKL, 2009 WL 1576735 (W.D. Mo. 2009).

123. *Farm Sanctuary, Inc. v. Veneman*, 212 F. Supp.2d 280 (S.D.N.Y. 2002); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

124. *Id.*; *Alternatives Research and Developments Found. v. Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000).

125. *Glickman*, 101 F. Supp. 2d 7.

126. Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation after Animal Legal Defense Fund, Inc. v. Glickman*, 29 ENVTL. L. 989 (1999) (“[I]njury to a particular animal, rather than an animal species, became a well-established interest sufficient to establish injury in fact.”).

127. See Alfred L. Brophy, *Norms, Law, and Reparations: The Case of Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, n. 15 (2004).

only be achieved by providing a great variety of socially approved goals.¹²⁸ By denying non-egoistic goals legal recognition, the legal system weakens their social status. This has the effect of narrowing the range of socially acceptable goals and restricting the freedom of all citizens.

This is, of course, not to suggest that the standing doctrine should be dismissed altogether; such a move would burden courts with endless suits. Yet, it seems that liberating the doctrine so as to allow nonprofit organizations standing in cases that fall into their primary field of activity would not make the burden unbearable. For instance, in Europe, environmental organizations do have standing to sue in case of a law violation damaging the environment.¹²⁹ Moreover, the Aarhus Convention, ratified by 45 European countries, specifically aims to ensure access to justice in cases of a failure to adhere to environmental law.¹³⁰ Despite these generous standing rules, courts in these countries do not face significantly higher caseloads than their American analogues.

B. Harmful Speech

Speech sometimes causes harm and is occasionally legally restricted for this reason. Yet, since free speech is one of the most dearly cherished ideals of the US legal system, it is very selective in allowing for such restrictions. Observing which types of harmful speech are permissible and which are restricted allows a glimpse into the value system underlying the legal thought. Naturally, the more importance the legal system attaches to a certain interest, the stronger its tendency to allow restrictions on speech in the name of that interest. The following discussion will show that when dealing with harmful speech, the U.S. legal system tends to favor individual interests over collective interests, and economic interests over non-economic ones.

1. Individual and Collective Interests

An important tool for restricting harmful speech is the defamation tort. This tort is applicable to individuals and corporations.¹³¹ However, a defamatory statement concerning a group of people only gives rise to liability if one can infer a reference to an individual member: this happens when the group is sufficiently small or when such personal reference may be understood from the

128. RAZ, *supra* note 37, at 398.

129. See EUROPEAN NETWORK OF ENVIRONMENTAL LAW ORGANIZATIONS, REPORT ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS 6 (2010) (“The NGOs in most countries do not have problems with standing to sue the decisions [concerning environmental issues]”), available at http://aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/J_E_Aarhus_ATJ_Report.pdf.

130. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, Art. 9, available at <http://www.unec.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

131. RESTATEMENT (SECOND) OF TORTS § 577.

circumstances.¹³² By contrast, harmful speech targeting a group as a whole does not constitute defamation.¹³³

Scholars have repeatedly pointed out the deficient regulation of two types of harmful speech: racist speech and pornography.¹³⁴ These scholars argue that both these types of speech cause negative stereotypes, discrimination, and violence.¹³⁵ Yet, only the most radical forms of these types of speech, incitement to immediate violence and obscenity, are forbidden.¹³⁶

In the course of the past century, several state legislators attempted to restrict racist speech, enacting laws and ordinances against “group libel.” On numerous occasions, the Supreme Court invalidated such regulations on free speech grounds.¹³⁷ Similarly, in the famous *American Booksellers v. Hudnut* case, the Anti-Pornography Civil Rights Ordinance of Indianapolis was struck down as unconstitutional.¹³⁸ The Court in this case entirely accepted the arguments of feminist activists regarding the effects of pornography.¹³⁹ It contended that pornography tends to perpetuate subordination of women, which in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.¹⁴⁰ Interestingly, for this very reason, pornography was held to be in the core of constitutionally protected speech because it is speech that presents a controversial viewpoint and affects how people see the world, their fellows, and social relations.¹⁴¹

Being collective in its nature, the interest in shielding one’s group against denigration finds little sympathy in courts. By contrast, racially or sexually

132. *Id.* at § 564A.

133. *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 684–87 (1988).

134. See, e.g., Catharine A. MacKinnon, *Francis Biddle’s Sister: Pornography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 163 (1987); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994); Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865 (1998); Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71 (2000).

135. MacKinnon, *supra* note 134, at 179; Matsuda, *supra* note 134, at 2336–38; Shiffrin, *supra* note 134, at 86. See also JEREMY WALDRON, *THE HARM IN HATE SPEECH* 83 (2012) (suggesting that hate speech targets the social sense of assurance on which the respective minority group members rely).

136. For racist speech, see *Brandenburg v. Ohio*, 395 U.S. 444, 446–49 (1969) (racist speech must be tolerated unless it constitutes an imminent incitement to violence); for pornography see the discussion in *American Booksellers v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

137. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Garrison v. Louisiana* 379 U.S. 64 (1964); *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973).

138. *Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

139. *Id.* at 1336–37 (“[D]efendants argue that there is more than enough ‘empirical’ evidence in the case at bar to support the City-County Council’s conclusion that ‘pornography’ harms women in the same way obscenity harms people, and, therefore, this Court should not question the legislative finding.”).

140. *Id.* at 1320.

141. *Id.* at 1336.

denigrating speech targeting specific individuals *is* actionable under the defamation tort.¹⁴² The crucial issue here is similar to that in environmental cases as courts readily accept the need to remedy an individual economic injury, but are hostile to the idea of redressing a collective non-monetary injury of the same kind. Undoubtedly, more caution is needed when regulating harmful speech targeting a group than when restricting speech targeting individuals, since the former probably bears political and social messages more often than the latter. Moreover, our group dignity is usually less vulnerable than our individual dignity.¹⁴³ Yet, the categorical refusal to protect groups against even the most harmful forms of denigration is unjustified.

The harms caused by racist speech and pornography can hardly be cured by “more speech.” As psychological research demonstrates, once prejudice and stereotypes are created in our minds, we are incapable of escaping their influence.¹⁴⁴ Because of the severe consequences of such attitudes on psychological well-being, economic prosperity and even physical safety of large portions of the society, I believe that legal restrictions on racist speech and pornography should reach much further than they currently do. For the sake of comparison, European legislators generally hold the view that the harm caused by pornography and radical racist statements is severe enough to justify banning these forms of speech.¹⁴⁵

Creating a society uncontaminated with prejudices, stereotypes, discrimination, and denigration is an important public good.¹⁴⁶ Preventing citizens from enacting laws that advance this ideal restricts their freedom to

142. For cases awarding damages for racial insult *see, e.g.*, *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Alcorn v. Ambro Eng'g.*, 2 Cal. 3d 493 (Cal. 1970); *Agarwal v. Johnson*, 25 Cal. 3d 932 (1979). For cases awarding damages for sexual denigration, *see, e.g.*, *Diamond v. Witherspoon*, 696 N.W. 2d 770 (2005); *Sanford v. Comm'r of Internal Revenue*, T.C.M. 158 (2008). For discussion of racial insults in the context of tort law *see* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

143. *See* WALDRON, *supra* note 135, at 55–57 (arguing that when the libel is associated ascriptively with group membership as such, it reflects seriously on all members of the group); *Id.* at 59–61 (discussing the importance of group dignity).

144. *See* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. R. 1161, 1210 (1995).

145. *See id.* at 39–40 (listing European countries that prohibit “group defamation”); Petal Nevella Modeste, *Race and Hate Speech: The Pervasive Badge of Slavery that Mocks the Thirteenth Amendment*, 44 HOW. L.J. 311 328 (2001) (“Civil law nations such as Sweden, Germany, Switzerland . . . have also adopted anti-hate speech legislation”); Heather MacRae, *Morality, Censorship, and Discrimination: Reframing the Pornography Debate in Germany and Europe*, 10 SOC. POL. 314 (2003).

146. Jeremy Waldron has also made the analogy between protection against hate speech and protection against environmental pollution: WALDRON, *supra* note 135, at 96–97. *See also id.* at 4 (“[T]here is a sort of public good of inclusiveness that our society sponsors and is committed to.”) and 92–96 (developing this idea further); RAZ, *supra* note 36, at 199 (“It is a public good, and inherently so, that this society is a tolerant society, that it is an educated society, that it is infused with a sense of respect for human beings, etc.”).

realize the interests they have as citizens in equality, justice, and solidarity—the very quintessence of freedom in Arendt’s view.¹⁴⁷ Advancing a morally better society is an important aspect of freedom. This is a significant interest that justifies restrictions on speech.

2. Economic and Non-Economic Interests

The defamation tort theoretically allows relief for both economic and non-economic harms.¹⁴⁸ A closer analysis reveals, however, that the former set of interests is strongly favored over the latter.

First, consider that a corporation may allege defamation only if (1) the corporation is for-profit, and the matter is likely to prejudice it in the conduct of its business, or (2) although not-for-profit, the corporation depends on financial support from the public, and the matter is likely to interfere with its activities by prejudicing it in the public estimation.¹⁴⁹ That is, if a corporation’s only financial support derives from membership fees, it cannot suffer any pecuniary loss and, therefore, cannot sue for defamation at all.¹⁵⁰

This rule is another example of imposing capitalist discourse on nonprofit corporations. Although their declared purpose is other than making profit, they may claim injury from defamatory speech only in pecuniary terms. Thus, in one case, an anti-obscenity organization claimed it had been defamed when a newspaper accused it of “engineering” crimes in order to receive “some of the fines the organization was entitled to under the law.”¹⁵¹ To prove defamation, the organization alleged that it was “dependent upon voluntary contributions for its support and to enable it to carry out the purposes of its incorporation.” The newspaper, it argued, would destroy the public support the organization enjoyed, which would ultimately result in pecuniary loss.¹⁵² This is an interesting case, since the alleged injury consisted of impairing the organization’s “unsullied reputation for disinterested public service uninfluenced by selfish motives or the expectation of pecuniary benefit or reward.”¹⁵³ This somewhat inconsistent line of argumentation illustrates the difficulty of public benefit organizations to state their case in legally acceptable terms.

Further, as a rule, emotional damage does not, by itself, suffice to raise a defamation claim,¹⁵⁴ while pecuniary damage, of course, does.¹⁵⁵ This rule

147. ARENDT, *supra* note 59, at 36.

148. RODNEY A. SMOLLA, *LAW OF DEFAMATION* Ch. 9 (2012) (discussing the remedies available for defamation).

149. RESTATEMENT (SECOND) OF TORTS § 561.

150. *Electrical Board of Trade v. Sheehan*, 210 N.Y.S. 127 (App. Div. 1925).

151. *New York Society for the Suppression of Vice v. MacFadden Publications, Inc.*, 221 N.Y.S. 563 (Sup. Ct. 1927).

152. *Id.* at 566–67.

153. *Id.*

154. *Eg.*, *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 29–30 (Minn. 1996) (holding that a “defamation claim cannot succeed based only on humiliation or other types of emotional harm”). *See also* *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983)

makes one's personal reputation much more vulnerable to injury than one's business reputation. For example, consider the failure of a defamation action brought by godparents of a child who had been mistakenly shown on a television broadcast, which suggested that the child's biological parents had subjected her to sexual abuse.¹⁵⁶ The alleged damage to reputation among community, friends and family was found insufficient, since the plaintiffs showed no lost income as a result of the broadcast.¹⁵⁷ By contrast, in another case, a woman appeared in a commentary broadcast and complained about her car's poor performance.¹⁵⁸ She mistakenly named the person who was the owner of the car dealership at the time of the broadcast as the one who sold her a "deathtrap," although, in fact, she had bought the car from the previous owner of the dealership. In this case, defamation was found.¹⁵⁹ These factually similar cases with opposite outcomes illustrate the very different treatment of emotional and economic harm in courts.

Similarly, while a false statement of a person's disease¹⁶⁰ or death¹⁶¹ is generally non-actionable, a false statement of deficient professional capacities¹⁶² or insolvency¹⁶³ is defamatory *per se*, that is, even without proof of damage. As one court has noted, "[t]he management and credit of a corporation and its solvency are all most carefully guarded by the law."¹⁶⁴ By contrast, in one case, a concurring opinion observed that the law "trivializes and denigrates the interest in [personal] reputation."¹⁶⁵

Trademark law is a legal tool that widens the gap between the legal protection of business reputation and personal reputation. Traditionally, trademark law is designed to preserve business goodwill by preventing consumer confusion as to the source of goods and services.¹⁶⁶ Over time, however, trademarks ceased to be mere indications of origin. They have evolved into symbols embedded with values, styles, identities and souls.¹⁶⁷ The legal

(ruling that, in the intentional infliction of emotional distress context, employer's verbal criticism was not extreme and outrageous, and thus insufficient to create liability).

155. *E.g.*, *De Mankowski v. Ship Channel Development Co.*, 300 S.W. 118 (Tex. Civ. App. 1927); *Maytag Co. v. Meadows Mfg. Co.*, 45 F. 2d 299 (7th Cir. 1930).

156. *See Richie*, 544 N.W.2d at 21 (Minn. 1996).

157. *Id.* at 29–30.

158. *Hearst Corp. v. Hughes*, 466 A.2d 486 (Md. 1983).

159. *Id.* at 488.

160. *See Bitsie v Walston*, 515 P.2d 659 (N.M. Ct. App. 1973).

161. *O'Neill v. Edmonds*, 157 F. Supp. 649 (E.D. Va. 1958); *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551 (Ga. App. 1989); *Cohen v. New York Times Co.*, 138 N.Y.S. 206 (App. Div. 1912).

162. *Moriarty v. Greene*, 732 N.E.2d 730 (Ill. App. Ct. 2000); *Interstate Optical Co. v. Illinois State Society of Optometrists*, 244 Ill. App. 158 (1927).

163. *Lion Oil Co. v. Sinclair Ref. Co.*, 252 Ill. App. 92 (1929); *Downey v. United Weatherproofing, Inc.*, 248 S.W.2d 841 (Mo. 1953).

164. *Maytag Co. v. Meadows Mfg. Co.*, 45 F. 2d 299, 302 (7th Cir. 1930).

165. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 262 (1974).

166. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:5 (4th ed. 2012).

167. Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 92–98 (2010).

protection of trademarks has expanded accordingly, further encouraging corporations to invest enormous sums in building up their trademark images.¹⁶⁸

The turning point in legal thought regarding trademarks came with the introduction of the “doctrine of dilution.”¹⁶⁹ This doctrine expanded trademark protection beyond consumer confusion.¹⁷⁰ One of the branches of this doctrine is known as “tarnishment.” Tarnishment occurs when a famous trademark is used in a manner that clashes with its wholesome image. Typically, this type of infringement is found when famous trademarks are placed in the context of sexual activity¹⁷¹ or illegal drugs.¹⁷² Examples of trademark uses enjoined as tarnishing include posters displaying “Enjoy Coca-Cola” logo with the second word altered so as to read “Enjoy Cocaine,”¹⁷³ t-shirts bearing an imprint resembling the General Electric trademark reading “Genital Electric,”¹⁷⁴ a satirical pictorial essay entitled “Monkeying Around with Tarzan and Jane” depicting Tarzan and his wife Jane engaged in sexual activities,¹⁷⁵ and a pornographic film entitled “Debbie Does Dallas” with the leading actress dressed similarly to the trademarked uniform of the Dallas Cowboys Cheerleaders.¹⁷⁶

This case law stands in sharp contradiction to the defamation context, where only provably false statements are actionable.¹⁷⁷ The First Amendment mandates this rule, as it assures that public debate will not suffer for lack of “imaginative expression” or “rhetorical hyperbole.”¹⁷⁸

Satire, caricature, parody, and other offending publications do not fall within the scope of defamation since they do not constitute statements of fact.¹⁷⁹ For instance, when *Hustler Magazine* depicted the first sexual encounter of Televangelist, Jerry Falwell, as “a drunken incestuous rendezvous with his mother in an outhouse,” the Court found the magazine’s speech to be shielded from liability by the First Amendment. It reasoned that the parody was only

168. *Id.* at 103–106.

169. See MCCARTHY, *supra* note 166, at § 27:37 (describing the doctrine); see also Robert N. Klieger, *Trademark Dilution: the Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789 (1997) (describing the historical development of the doctrine).

170. MCCARTHY, *supra* note 166, at § 27:37.

171. See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd.*, 467 F. Supp. 366 (S.D.N.Y. 1979); *Toys “R” Us, Inc. v. Akkaoui*, 40 U.S.P.Q.2d 1836 (N.D. Cal. 1996); *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942 (N.D. Ill. 2002).

172. See, e.g., *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972); *NBA Properties v. Entertainment Records LLC*, No. 99 CIV. 2933(HB), 1999 WL 335147 (S.D.N.Y. 1999).

173. *Gemini Rising*, 346 F. Supp. at 1183.

174. See *Gen. Elec. Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. 1036 (D. Mass. 1979).

175. See *Edgar Rice Burroughs, Inc. v. High Soc. Magazine, Inc.*, 7 Media L. Rep.1862 (S.D.N.Y. 1981).

176. *Dallas Cowboys Cheerleaders*, 467 F. Supp. at 369.

177. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–20 (1990).

178. *Milkovich*, 497 U.S. at 20.

179. Margaret E. O’Neill, *Libel and Slander* § 156 (2012).

rhetorical hyperbole and could not reasonably be understood as a statement of fact.¹⁸⁰ Similarly, when Andrea Dworkin, a radical feminist strongly opposed to pornography, appeared in a series of sexually explicit cartoons and was given the epithet “asshole of the month,” the court found no defamation, since no statements of fact were made.¹⁸¹ In another case, a humorous publication implying that a lawyer served his customers illegal drugs was found non-actionable.¹⁸² Taken together, these cases show that caricatures involving sex or illegal drugs are permitted when their subject is a real person, but are forbidden when their subject is a trademark. Moreover, in order to protect “open and robust debate,” courts do not allow public figures to recover for defamation made without actual malice.¹⁸³ There is no similar limitation on trademark infringement claims. And finally, when dealing with defamation cases, courts consider preliminary injunctions as unconstitutional prior restraints on free speech and do not grant them. By contrast, in trademark cases such injunctions are granted as a matter of routine.¹⁸⁴

One of the reasons why business goodwill enjoys such strong protection when embodied in a trademark is that trademarks are defined as intellectual *property*. As Felix Cohen has noted, the word “property” has a kind of magical power in our capitalist legal system:¹⁸⁵ it automatically strengthens the protection of the right in question. Thus, a business’s good name enjoys much broader legal protection than does a personal reputation. This discrepancy cannot be explained in terms of the First Amendment. Speech relating to personal affairs may be just as deserving of protection as speech relating to business issues, especially in our economics-oriented society.¹⁸⁶ Information about one’s deficient professional capacities or insolvency may be no less important to communicate than information about one’s disease or death. And, because trademarks play significant cultural roles,¹⁸⁷ it may be as important to allow free discourse in relation to them as in relation to living persons.¹⁸⁸ Mocking the all-important aura of trademarks is no less important for the free discourse than making fun of famous public figures.¹⁸⁹ In addition, trademarks often protect organizations with certain political, social, or cultural influence.¹⁹⁰ In such cases,

180. *Falwell*, 485 U.S. at 57.

181. *Ault v. Hustler Magazine*, 860 F.2d 877, 878 (9th Cir. 1988).

182. *Catalfo v. Jensen*, 657 F. Supp. 463, 464 (D.N.H. 1987).

183. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

184. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 150 (1998) (describing and criticizing this distinction).

185. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820–21 (1935).

186. To my mind, “matters of public concern” are increasingly focused on the views of commercial interests rather than a wider range of matters of human concern.

187. Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 70 (2008).

188. *Id.*

189. *Id.* at 78–81.

190. *Id.* at 19–21.

protecting trademarks against tarnishment is equivalent to shielding the respective organizations from satire and parody. Consider that while placing Andrea Dworkin in a pornographic context is allowed, doing the same to Dallas Cowboy Cheerleaders is forbidden.

The asymmetrical legal treatment of personal and business reputation can hardly be explained in terms of the severity of harm either. Psychologists have long recognized that one's image in the eyes of others has a powerful influence on the construction of one's identity.¹⁹¹ Potential harm stemming from reputational damage must not be underestimated. For instance, one study has found that physicians who have been sued or who have had formal complaints made against them describe the process as extremely stressful, reporting depression, physical illness, alcohol abuse, and even suicidal ideation.¹⁹² Such harms can be at least as severe as pure economic losses.

Personal reputation should enjoy at least as much protection as business reputation and trademark image. The proper solution probably lies in significantly lower trademark protection for the sake of the First Amendment interests and considerably greater protection of an individual's good name for the sake of personal well-being.

The discussion on harmful speech reveals the following value hierarchy: an unorganized group of people (such as a gender or a race) enjoys no protection; an organized group (corporation or organization) enjoys protection inasmuch as its goals are related to pecuniary income; business reputation, especially if embodied in a trademark, is far more protected than personal reputation; and individual people are more strongly protected against pecuniary loss than against injury to their personal reputation. Thus, for instance, our legal system is ready to tolerate pornography and racist speech at the expense of bearing the risk of increased violence against women and minority groups. At the same time, it is not willing to tolerate trademark tarnishment—such as “Genital Electric” or “Enjoy Cocaine”—due to the risk of decreased sales.¹⁹³ This value hierarchy is questionable.

Furthermore, as already mentioned, the legal system has the effect of enhancing social norms.¹⁹⁴ In its current state, it signals that the humiliation of one's race or gender should not be perceived as a social misconduct;¹⁹⁵ that

191. See CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902). See also S. Frank Miyamoto & Sanford Dornbusch, *A Test of the Symbolic Interactionist Hypothesis of Self-Conception*, 61 *AM. J. SOC.* 399 (1956); E.L. Quarantelli & Joseph Cooper, *Self-Conceptions and Others: A Further Test of the Meadian Hypotheses*, 7 *SOC. Q.* 281 (1966).

192. Louise Nash, Christopher Tennant & Marilyn Walton, *The Psychological Impact of Complaints and Negligence Suits on Doctors*, 12 *AUSTRALASIAN PSYCHIATRY* 278 (2004).

193. See also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) 28–29 (“[H]ate speech . . . receives legal protection, while speech that offends the interests of empowered groups finds a ready exception in First Amendment law.”).

194. See *Animal Legal Def. Fund v. Glickman*, 130 F.3d 464, 468 (D.C. Cir. 1997) (reinforcing that individuals or organizations with a general interest in animal welfare do not have the right to sue). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

195. A related claim has been made by Matsuda, *supra* note 134 at 2338 (“The aloneness

public benefit organizations should not care much about anything besides their revenues; that bad reputation among friends and family should not matter as much as income loss. The legal system thus effectively promotes a social perception of acceptability, and maybe even desirability, of an excessive preoccupation with one's material welfare. This legal situation may be one of the factors reinforcing the modern consumer culture. Numerous scholars hold the view that the excessive materialism of our society causes dissatisfaction, frustration, and unhappiness.¹⁹⁶ As Hannah Arendt convincingly explains, this happens because of the loss of freedom engendered by materialism, as consumer culture diverts people from engaging in the social and political activity that embodies the very quintessence of genuine freedom.¹⁹⁷ Therefore, legally supporting cultural materialism is another way of restricting freedom.

I will conclude this discussion with the following example: PETA is a worldwide animal rights organization, whose initials stand for "People for the Ethical Treatment of Animals." In 2001, PETA won a trademark infringement case against a person who called his website PETA: People Eating Tasty Animals, parodying the original trademark.¹⁹⁸ There is a good deal of irony in this victory if one considers the numerous defeats the organization has suffered in the pursuit of its main goal: animal protection.¹⁹⁹

C. Affirmative Action

1. Affirmative Action under Judicial Review

Equality is recognized as one of the most important social goals by many philosophical theories,²⁰⁰ including neoliberalism.²⁰¹ It is also one of the most basic values of the U.S. legal system, embodied in the Equal Protection Clause.²⁰² Yet, equality is a highly contested concept.²⁰³ Thus, the neoliberal

comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person.").

196. See, e.g., ERICH FROMM, *THE SANE SOCIETY* (1955); HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (1964); ROBERT E. LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* (2000); BRUNO S. FREY & ALOIS STUTZER, *HAPPINESS AND WELL-BEING: HOW THE ECONOMY AND INSTITUTIONS AFFECT HAPPINESS* (2002).

197. Arendt, *supra* note 59, at 107.

198. *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001).

199. E.g., *People for Ethical Treatment of Animals, Inc. v. Barshefsky*, 925 F. Supp. 844 (D.D.C. 1996); *People for Ethical Treatment of Animals v. Dep't of Health*, 917 F.2d 15 (9th Cir. 1990); *People for Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd.*, 22 Cal. Rptr. 3d 900 (Cal. Ct. App. 2005).

200. See Stefan Gosepath, *Equality*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2011), <http://plato.stanford.edu/entries/equality/>.

201. ROBERT SUGDEN, *THE POLITICAL ECONOMY OF PUBLIC CHOICE* 11 (1981).

202. U.S. CONST. amend. XIV, § 1 ("[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

203. See Gosepath, *supra* note 200 (describing the various philosophical visions of equality);

philosophy regards policies attempting to promote equality as a potential threat to freedom.²⁰⁴ It opposes state intervention designed to redistribute wealth more equally among society's members.²⁰⁵ All redistribution policies essentially take property from one group of people and give it to another. The restriction of freedom imposed by such compulsory giving is unacceptable, according to the neoliberal view.²⁰⁶ Redistribution of resources between society's members should occur solely through voluntary market transactions.²⁰⁷

This approach exerts considerable influence on the way that American legal thought copes with social inequality. Although federal law prohibits racial and sexual discrimination in the public sector,²⁰⁸ it provides no mechanism for guaranteeing racial and sexual equality as a matter of end-result. That is, no federal law requires employers or educational institutions to take steps for increasing the representation of minority groups. While some federal statutes permit affirmative action programs, no statute prescribes them.²⁰⁹ The Fair Employment Act of Wisconsin even specifically states that it does not require affirmative action programs to correct imbalances in the workforce.²¹⁰ Moreover, the state constitution of California outlaws any preferential treatment on the basis of race, sex, color, ethnicity or natural origin.²¹¹ This provision effectively bans all outreach and affirmative action programs in California.²¹²

It is a well-known fact that certain minority groups, most notably Afro-Americans and women, have suffered severe legal and social discrimination over history. These groups have acquired legal equality only relatively recently,²¹³

Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1729–30 (1989) (“Although both proponents and opponents of the constitutionality of affirmative action profess to be committed to the ideal of equality, no compromise on the proper method to achieve that ideal looms on the horizon.”).

204. Gosepath, *supra* note 200, at 3.2; FRIEDMAN, *supra* note 38, at 168, 195–200.

205. SUGDEN, *supra* note 201, at 168, 195–200; LUDWIG VON MISES, HUMAN ACTION 281–82 (1963); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM WITH THE INTELLECTUALS AND SOCIALISM 65–66 (2005).

206. HAYEK, *supra* note 205; FRIEDRICH A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS 175 (1969) (“[C]onsiderations of justice provide no justification for ‘correcting’ the results of the market.”).

207. *Id.*

208. 42 U.S.C.A. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

209. For example, both the Civil Rights Act and the Transportation Equity Act may allow race-based affirmative action, but neither requires it. See JAMES ACRET & ANNETTE DAVIS PERROCHET, CONSTRUCTION LITIGATION HANDBOOK § 16:41 (2d ed. 2011) (“Federal law, Executive Order No. 10925, § 301 and 42 U.S.C.A. § 2000d, prohibits racial discrimination but does not require any employer to grant preferential treatment on the basis of race or gender.”).

210. WIS. STAT. ANN. § 111.31(3) (West 2010).

211. CAL. CONST. ART. I, § 31.

212. *E.g.*, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (2000); *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5 (2001); *C & C Construction, Inc. v. Sacramento Mun. Utility Dist.*, 18 Cal. Rptr. 3d 715 (2004).

213. For instance, until the 1910s, women did not have the right to vote in most states. Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63

and this equality of legal rights has proven insufficient to achieve racial and gender equality as a matter of social fact.²¹⁴ Both Afro-Americans and women are still significantly underrepresented in many important sectors of education, employment, and public life.²¹⁵

In spite of the absence of a legal mandate, various state and federal institutions occasionally attempt to alleviate racial and gender inequalities by means of affirmative action. The first attempts to introduce affirmative action targeting Afro-Americans were made during the early 1960s, in tune with the more general understanding of the evils of segregation that began to emerge during that period.²¹⁶ These attempts were largely circumvented by courts during the late 1970s and the 1980s, as neoliberal philosophy started dominating U.S. legal thought.²¹⁷

In the landmark 1978 decision, *Regents of the University of California v. Bakke*, the Supreme Court found an affirmative action program practiced by UC Davis Medical School unconstitutional.²¹⁸ While the court held that race may be one of a number of factors considered by the school in examining applications, it concluded that setting aside seats for a certain race unjustifiably excludes applicants of other races.²¹⁹

The Court further developed its affirmative action jurisprudence in *City of Richmond v. J. A. Croson*, decided in 1989,²²⁰ where, for the first time, it

WASH. & LEE L. REV. 1407, 1413 (2006) (“White women did not have the right to vote in any part of the country until the territory of Wyoming extended them suffrage in 1869. Colorado was the first state to grant women suffrage in 1893. And it was not until the Nineteenth Amendment’s ratification in 1920 that women had a constitutional right to vote”). The Civil Rights Act of 1964 prohibiting racial discrimination was enacted as recently as 1964.

214. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1208 (2002) (“In 1964, when the Civil Rights Act was passed, it was easy for many—including the framers of the Act—to imagine that ending intentional employment discrimination . . . would be sufficient to achieve the Act’s integrative goal. But it quickly became evident that these means were grossly insufficient to meet this goal. Centuries of legal discrimination and social subordination had left stubborn legacies, including de facto segregation, that continued to pose barriers to black opportunity. To remedy these problems, it was and still is not enough simply to stop discriminating . . .”).

215. See, e.g., United States Department of Labor, *The African-American Labor Force in the Recovery*, <http://www.dol.gov/sec/media/reports/blacklaborforce/> (“Blacks are under-represented in the sectors that have experienced the greatest job growth during the recovery, including manufacturing and professional and business services. . . . Blacks are under-represented in Science, Technology, Engineering, and Mathematical (STEM) occupations accounting for about 8 percent or less of jobs in computer and mathematical occupations (6.9 percent), life, physical, and social science occupations (7.4 percent), and architecture and engineering occupations (5.2 percent) in 2011.”).

216. The Civil Rights Act of 1968 ensured equal housing opportunities for all races; in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court declared state laws establishing separate public schools for black and white students unconstitutional.

217. Emily E. Barker, *The Changing Face of Liberalism in Workplace Democracy: The Shift from Collective to Individual Rights*, 36 VT. L. REV. 303, 305 (2011).

218. 438 U.S. 265 (1978).

219. *Id.* at 307–10.

220. 488 U.S. 469 (1989).

subjected an affirmative action program favoring Afro-Americans to the same scrutiny applied to policies discriminating against that group.²²¹ Since this decision, courts have consistently treated affirmative action the same way they treat practices discriminating against minority groups.²²² According to this view, affirmative action infringes on the legal rights of whites and males in a way that is constitutionally equivalent to mistreatment historically experienced by Afro-Americans and women.²²³ As a result, the general rule today is that all gender classifications are examined with intermediate scrutiny, while all racial classifications are subject to strict judicial scrutiny.²²⁴ As one court noted, “racial classification, regardless of purported motivation, is presumptively invalid under the Equal Protection Clause and can be upheld only on extraordinary justification.”²²⁵

To survive judicial review, the institution undertaking an affirmative action program must show that its action serves a compelling state interest,²²⁶ which it is narrowly tailored²²⁷ to achieve. Both of these requirements are interpreted very restrictively.

a. The “Compelling Interest” Requirement

In order to prove a compelling state interest, it is usually not enough to show that the target minority group is severely underrepresented in a particular industry or a specific institution.²²⁸ While one Supreme Court case recognized racial diversity as a compelling state interest,²²⁹ race may not constitute a

221. Rosenfeld, *supra* note 203, at 1731–32.

222. Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a “Color-Conscious” Theory*, 13 HARV. BLACKLETTER L. J. 183, 192–93 (1997).

223. *Id.* at 193–94; William Bradford Reynolds, *Individualism Versus Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1003–04 (1984) (“[I]n no instance should an individual’s rights rise any higher or fall any lower than the rights of others because of race, gender, or ethnic origin . . . Any compromise of this principle is discrimination . . . and such behavior is no more tolerable when employed remedially, in the name of “affirmative action” or “racial balance. . .”).

224. *E.g.*, Clark v. Jeter, 486 U.S. 456 (1910); Coral Const. Co. v. King County, 941 F.2d 910 (9th Cir. 1991); Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994); Florida A.G.C. Council, Inc. v. Florida, 303 F. Supp. 2d 1307 (N.D. Fla. 2004).

225. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 131 (4th Cir. 1999).

226. See *infra* notes 228–239 and accompanying text.

227. See *infra* notes 251–259 and accompanying text.

228. Dallas Fire Fighters Ass’n. v. City of Dallas, Texas, 150 F.3d 438 (5th Cir. 1998) (invalidating Dallas’s affirmative action plan for the city’s fire department and holding that statistical analysis showing that minorities had been underrepresented in higher ranks did not suffice to justify the plan); Maryland Troopers Ass’n, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993) (affirmative action for state police found unconstitutional despite underrepresentation of Afro-Americans at ranks above trooper); Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating an undergraduate affirmative action program despite finding that Afro-Americans were underrepresented in the student body).

229. See Grutter v. Bollinger, 539 U.S. 306 (2003). See generally Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005) (discussing the nature of the compelling interest).

deciding factor in any particular admissions decision.²³⁰ That is, race must not award an automatic advantage in the admissions process.²³¹

A compelling interest is recognized when the affirmative action program aims to remedy specific past discrimination.²³² However, showing that an industry has a general history of past discrimination is not enough to justify an affirmative action,²³³ as redressing historic discrimination and societal imbalances is not regarded as a compelling state interest.²³⁴ Rather, it is necessary to show that the specific institution undertaking the affirmative action has applied discriminatory policies against the target minority group.²³⁵ In fact, some courts have gone so far as stating that each beneficiary of an affirmative action must personally be a past victim of discrimination.²³⁶ Additionally, past discrimination must be proven with specific evidence of illegal race-conscious decision-making.²³⁷ Statistical evidence showing severe underrepresentation of the minority group in the past,²³⁸ or evidence of particular instances of discrimination,²³⁹ is insufficient.

Many affirmative action programs have failed to satisfy this strict interpretation of the compelling state interest requirement.²⁴⁰ For example, in

230. *Gratz v. Bollinger*, 539 U.S. at 247.

231. *Id.*

232. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529–30 (1989); *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (District of Columbia Minority Contracting Act invalidated because the state failed to show past discrimination); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) (“The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination.”).

233. *City of Richmond*, 488 U.S. at 529–30; *Main Line Paving Co., Inc. v. Bd. of Educ.*, 725 F. Supp. 1349, 1359–60 (E.D. Pa. 1989).

234. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 268 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); *J.A. Croson Co. v. Richmond*, 822 F.2d 1355, 1357–58 (4th Cir. 1987) (“To show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination[.] . . . Findings of societal discrimination will not suffice; the findings must concern ‘prior discrimination by the government unit involved.’”).

235. *Id.* at 500 (“But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”).

236. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 515 (1989) (invalidating an affirmative action plan, the court reasoned: “[t]he class of persons benefited by the ordinance is not, however, limited to victims of such discrimination—it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups”).

237. *Id.* at 500 (“But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”).

238. *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000). *See, e.g.*, *Dallas Fire Fighters Ass’n v. City of Dallas, Texas*, 150 F.3d 438, 441 (5th Cir. 1998).

239. *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1048 (Fed. Cir. 2008); *Jackson v. Cerpa*, 696 F. Supp. 2d 962, 964 (N.D. Ill. 2010).

240. *E.g.*, *State v. Dep’t of Industry, Labor and Human Relations*, 77 Wis. 2d 126 (1977); *Krajco v. State Bureau of Personnel*, 1977 WL 3770 (Wis. Cir. Ct. 1977); *L.D. Mattson, Inc. v. Multnomah County*, 703 F. Supp. 66 (D. Or. 1988); *Main Line Paving Co., Inc. v. Bd. of Educ.*,

two cases, courts held that the poor reputation of universities in the Afro-American community and a hostile campus climate did not constitute present effects of past discrimination sufficient to justify an affirmative action program.²⁴¹ In one of those cases, the court noted that the unfriendly campus environment was probably the result of general social hostility and could not be specifically attributed to the university's past policies of discrimination.²⁴²

In the *City of Richmond* case, which concerned governmental construction contracts, the Court expressed the view that it is completely unrealistic to assume that in the absence of discrimination, minorities would choose to participate in the construction industry in lockstep proportion to their percentage in the population.²⁴³ The disparity between whites and Afro-Americans in this industry might result from phenomena other than discrimination such that Afro-Americans might be disproportionately attracted to another market.²⁴⁴ For example, Afro-American owned businesses "are more than proportionately represented in the transportation industry, but considerably less than proportionately represented in the wholesale trade, manufacturing, and finance industries," the court noted.²⁴⁵

This jurisprudence has been criticized by numerous scholars.²⁴⁶ Indeed, the view that the enormously disproportionate representation of Afro-Americans in prestigious businesses²⁴⁷ may be unrelated to their historical discrimination seems to severely distort the reality.²⁴⁸ Applying economic analysis, Martin J. Katz has demonstrated that racial disparities in a lucrative market like construction contracting cannot be adequately explained without reference to

725 F. Supp. 1349 (E.D. Pa. 1989); *F. Buddie Contracting Co. v. City of Elyria, Ohio*, 773 F. Supp. 1018 (N.D. Ohio 1991); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991); *Malabed v. North Slope Borough*, 335 F.3d 864 (9th Cir. 2003).

241. *Podberesky v. Kirwan*, 38 F.3d 147, 154–55 (4th Cir. 1994); *Hopwood v. Texas*, 78 F.3d 932, 952–53 (5th Cir. 1996), *abrogated on other grounds by Grutter v. Bollinger*, 539 U.S. 306 (2003).

242. *Podberesky*, 38 F.3d 147.

243. 488 U.S. at 507.

244. *Id.* at 503.

245. *Id.*

246. *E.g.*, Anderson, *supra* note 214; Cummings, *supra* note 222; Rosenfeld, *supra* note 203; Lindsay C. Patterson, *Individual Rights and Group Wrongs: An Alternative Approach to Affirmative Action*, 56 MISS. L.J. 781 (1986); Martin J. Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 YALE L.J. 1033 (1991); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305 (2004); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

247. *See supra* note 210.

248. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 106 (1991) ("I cannot but marvel at how, against a backdrop of richly textured facts and proof on both local and national scales, in a city where more than half the population is black and in which fewer than 1 percent of contracts are awarded to minorities or minority-owned businesses, interpretative artifice alone allowed this narrow vision that . . . there was no proof of discrimination.").

discrimination.²⁴⁹ Indeed, we have no reason to assume that there are systematic differences in productivity between racial groups, or that workers from different racial groups are not equally rational. If so, it is impossible to explain why Afro-Americans should be disproportionately attracted to lower-paying industries like transportation over lucrative ones like construction.²⁵⁰

b. The "Narrow Tailoring" Requirement

The "narrow tailoring" requirement imposes another heavy burden on institutions wishing to undertake affirmative actions. Even after past discrimination has been proven, the defendant must demonstrate a "strong basis in evidence for its conclusion that remedial action is necessary."²⁵¹ Because in every minority group there are members that are not disadvantaged in the way that the affirmative action in question seeks to remedy, race or gender-based affirmative action will often be over-inclusive.²⁵² Therefore, courts strongly favor the use of race- and gender-neutral means of promoting diversity, such as giving preferential treatment to small businesses or socially disadvantaged individuals.²⁵³ While Courts consider such means legitimate, race- and gender-based preference is regarded as a "drastic" step, which is best avoided²⁵⁴ given the judiciary's belief that racial integration can be achieved through race-neutral means.²⁵⁵ In *Hopwood v. Texas*, the court noted: "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."²⁵⁶ Accordingly, affirmative action policies requiring that a certain percentage of employees or subcontractors belong to a minority group, that a good faith effort is made to reach out to these groups,²⁵⁷ or that other steps are taken to assist minority groups in obtaining certain positions²⁵⁸ are routinely held to be

249. Katz, *supra* note 246.

250. *Id.* at 1044-45.

251. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

252. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 540-41 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 258-261(1995); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000). *See* RICHARD A. POSNER, *THE DEFUNIS CASE AND REVERSE DISCRIMINATION, IN THE ECONOMICS OF JUSTICE* 372 (1981).

253. *City of Richmond*, 488 U.S. at 520 (holding that Richmond's affirmative action program was not narrowly tailored partly because it did not consider "the use of race-neutral means to increase minority business participation in city contracting"); *Associated Gen. Contractors of Ohio*, 214 F.3d at 783; *Podberesky v. Kirwan*, 38 F.3d 147, 160-61 (4th Cir. 1994) (making similar statements).

254. *Wisconsin Dep't of Admin. v. Dep't of Industry, Labor and Human Relations*, 252 N.W.2d 353, 359 (Wis. 1977).

255. *See supra* note 248.

256. 78 F.3d 932, 966 (5th Cir. 1996).

257. *M.G.M. Const. Co. v. Alameda County*, 615 F. Supp. 149 (N.D. Cal. 1985); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997).

258. *Alexander v. Estep*, 95 F.3d 312 (4th Cir. 1996) (each recruiting season fire department

unconstitutional.²⁵⁹

The problem with the race-neutral approach, however, is that it is likely to be ineffective in remedying discrimination.²⁶⁰ Such policies will always aid top aspirants from their target pool. For instance, a policy that provides preferential treatment to small businesses will help the most effective small businesses to enter the relevant industry.²⁶¹ Yet because of past discrimination, Afro-Americans are likely to be significantly underrepresented at the top of such an aspirant pool, just as they are underrepresented in the relevant industry itself.²⁶² Race-based policy is therefore unquestionably the most effective remedy against discrimination.²⁶³

The current legal situation must change. The suspicion appropriate for discriminatory policies is entirely out of place in the context of affirmative action. Given the current underrepresentation of women and racial minorities in many important educational and professional fields, affirmative action programs seem necessary to achieve genuine equality.²⁶⁴

2. *Affirmative Action and the Doctrine of Standing*

The doctrine of standing greatly disadvantages potential beneficiaries of affirmative action, even as it does nothing to bar white plaintiffs. Plaintiffs challenging affirmative action usually have no trouble showing standing. Thus, white applicants rejected by state universities are routinely allowed to challenge affirmative action programs favoring Afro-American candidates.²⁶⁵ Similarly, white students have been permitted to challenge the constitutionality of a scholarship programs designed for Afro-American students.²⁶⁶ Plaintiffs challenging governmental employment plans do not even have to claim that they have lost a specific contract because of the unequal treatment, as it is enough to show that the plaintiff is a potential candidate for contracts regulated by the affirmative action program.²⁶⁷ As a result, corporations claiming that they were

officials set informal caps on the number of whites and the number of males who would be offered employment); *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987) (racial quotas in hiring provisions); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984) (creating two separate lists to rank minority and non-minority applicants and letting a three-member panel recommend a number of applicants to be hired from each list).

259. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

260. *Katz*, *supra* note 246, 1045–48.

261. *Id.*

262. *Id.*

263. *Id.* at 1052.

264. This was the criterion applied by the Court of Appeals. *Fisher v. Univ. of Texas*, 631 F.3d 213, 231–36 (5th Cir. 2011). Yet, the Supreme Court explicitly denied its relevance: *Fisher v. Univ. of Texas* 133 S. Ct. at 2420–21 (2013).

265. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

266. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

267. *Id.*

ready and able to bid on governmental contracts, but were prevented from doing so on an equal basis, are routinely granted standing.²⁶⁸ Such corporations are awarded lost profit damages upon a finding that the affirmative action programs in question are unconstitutional.²⁶⁹ Moreover, discrimination alone has been held to constitute irreparable harm.²⁷⁰

Things are quite different when the plaintiff is a potential beneficiary of affirmative action. For example, in *Indianapolis Minority Contractors Association v. Wiley*, a group of Afro-American owners of contracting businesses in Indiana brought an action against Indiana transportation officials, challenging the manner in which Indiana administered minority-owned business participation requirements in federal highway funding.²⁷¹ The statutory scheme in question required that each recipient of federal funds expend at least 10% of these funds with small businesses owned and controlled by socially and economically disadvantaged individuals (DBE), where Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and women are rebuttably presumed to be "socially and economically disadvantaged."²⁷² The plaintiffs claimed that Indiana did not satisfy this requirement by giving business to companies that are not truly disadvantaged, thereby diverting business from legitimate DBEs.²⁷³ The Seventh Circuit Court of Appeals held that the plaintiffs did not have standing to sue, since the statutory scheme did not provide specific goals or quotas for participation by any particular disadvantaged group.²⁷⁴ It did not guarantee any specific benefit to any identifiable individual, and thus did not create any enforceable rights.²⁷⁵

Note that had the statutory scheme provided specific goals or quotas for participation by a particular disadvantaged group, it would most probably have been found unconstitutional. This is because courts have consistently found that programs establishing quotas or goals for specific minority groups are not "narrowly tailored" to remedy past discrimination.²⁷⁶ Under this legal situation, no individual may ever have standing to claim a right for preferential treatment.²⁷⁷

268. *E.g.*, *Northeastern Florida v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994); *W.H. Scott Const. Co., Inc. v. City of Jackson*, 199 F.3d 206, 215 (Miss. 1999).

269. *E.g.*, *W.H. Scott Const. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206 (5th Cir. 1999).

270. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

271. *Indianapolis Minority Contractors Association v. Wiley*, 187 F.3d 743 (7th Cir. 1999).

272. *Id.* at 746-47.

273. *Id.* at 747.

274. *Id.* at 751-52.

275. *Id.*

276. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-500 (1989).

277. For discussion and critique see MacKinnon, *supra* note 246, at 8 (discussing the problematic intent requirement in discrimination cases); Katz, *supra* note 246, at 1034; Villanueva, *supra* note 277 (discussing the importance of non-party minority intervention in cases with a wide impact).

3. *Capitalism, Equality, and Freedom in Affirmative Action Doctrine*

The legal situation in the field of affirmative action reflects the individualistic approach of the American legal system. The view that equal treatment in the present is enough to ensure equality implicitly assumes that, as soon as discrimination ceases, members of the minority group stop being different in any relevant aspect. This view is based on an atomistic vision of individuals, which is part of neoliberal philosophy.²⁷⁸ Unfortunately, this view does not correspond to reality, as the effects of racial discrimination spread among group members and persist over time.²⁷⁹ The facts speak for themselves: job markets are today highly racially segregated, although Afro-Americans long ago acquired equal legal rights.²⁸⁰

There are numerous factors that make racial discrimination a collective rather than individual matter. First, racial discrimination results in financial disadvantage, which usually persists across generations.²⁸¹

Second, in many markets, personal relations and name recognition are important. This, in turn, further undermines the chances that a member of a historically disadvantaged racial group will be employed in such markets.²⁸² As Elizabeth S. Anderson describes,

[i]f a firm denies one's neighbor a job due to discrimination, one loses a potential role model, a source of information about job openings at the firm, and a connection who could provide a credible job reference to the firm's owner. . . . Once these disadvantages become shared, one's community becomes a site of concentrated and self-reinforcing disadvantage, perpetuating the effects of discrimination over time.²⁸³

Third, a history of discrimination may result in conditioning members of minority groups to not strive to achieve high professional positions. Thus, a boy from an average white family is more motivated to pursue prestigious higher education than a girl from an average Afro-American family. A related point is that social stereotypes and prejudices are not easy to dismantle.²⁸⁴ Many people still believe that prestigious jobs are most suitable for white males, and such perceptions unconsciously influence members of the dominant group as well as victims of discrimination themselves.²⁸⁵ Long-term social devaluation results in

278. Cummings, *supra* note 222, at 187–88.

279. Anderson, *supra* note 214, at 1206–07.

280. *See supra* note 215.

281. Katz, *supra* note 246, at 1039–45.

282. *Id.* at 1041–43; Anderson, *supra* note 214 at 1202.

283. Anderson, *supra* note 214, at 1206–07. *See also* DELGADO & STEFANCIC, *supra* note 193, at 120–24.

284. *See* Patricia St. Hill, *Race, Race Relations, and the Emergence of Professional Nursing 1870–2004*, in *A HISTORY OF NURSING IDEAS* 57, 65 (Linda C. Andrist et al. eds., 2006) (noting that “racial stereotypes are hard to kill”).

285. Anderson, *supra* note 214, at 1202–03.

continuous stigmatization of the minority group, accompanied by a corresponding sense of low self-esteem among minority group members.²⁸⁶

This narrative of group interests is largely dissonant with the current U.S. legal climate of individualism. The neoliberal philosophy holds that only individuals may be entitled to rights and subjected to responsibilities.²⁸⁷ Accordingly, U.S. courts display a general aversion to the narrative of collective rights and collective wrongs.²⁸⁸ Thus, while courts are ready to uphold affirmative action programs based on individual socioeconomic factors,²⁸⁹ and to allow individual institutions to correct their own wrongs of past discrimination,²⁹⁰ they are not ready to recognize that *society* as a whole is responsible for discrimination and that the minority *group*, rather than individual victims of discrimination, should bear the right to a remedy.²⁹¹

Viewing affirmative action through the lens of individualism misses its main point. No doubt there are socially and economically disadvantaged individuals among whites and Afro-Americans, alike. The problem that affirmative action seeks to solve is that the percentage of such individuals in the Afro-American group is sufficiently higher because of historical discrimination. Its goal is making the proportion of disadvantaged individuals in the minority group similar to their proportion in the majority group. This is an idea of group equality rather than individual equality. Of course, this goal cannot be achieved by equal treatment of individuals from the two groups.²⁹²

The legal tendency toward materialism is also manifested in the context of affirmative action. Neoliberalism prefers that public institutions function, as much as possible, like private market players, and thus do everything they can to maximize profit.²⁹³ Following this view, courts regard "the fittest" candidate as someone having a right to be chosen for a governmental contract. This right is taken for granted, as opposed to the right of a minority group member for preferential treatment.²⁹⁴ Note that this view is not the only possible one: were our legal thought not so laden with materialistic values, it would be imaginable

286. Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144 (1996).

287. Cummings, *supra* note 222, at 188 ("Individuals, not groups, possess rights in a liberal democratic society. The individual is the only "self-originating source of valid claims."").

288. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (noting that the concept of "creditor or debtor race" [is] "alien to the Constitution's focus upon the individual"). *See also* Katz, *supra* note 246, at 1051-52; Patterson, *supra* note 246, at 782-83.

289. *See supra* note 296.

290. *See supra* note 232.

291. Iglesias, *supra* note 246, at 428-29; Patterson, *supra* note 246, at 784-85, 794-95. Nevertheless, some scholars believe that group rights generally, and affirmative action in particular, are not antithetical to liberal theory. *See* RONALD DWORIN, TAKING RIGHTS SERIOUSLY 91-92 (1978); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989).

292. Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 27 (1984).

293. HOWARD & KING, *supra* note 20, at 3.

294. *See supra*, Part C.2.

to regard the government as an institution that should be primarily concerned with social justice. It would then make sense that the government might favor equality ideals over economic considerations. European countries, routinely mandating affirmative actions,²⁹⁵ may once again provide a useful comparative perspective here.

Furthermore, affirmative action programs that do withstand judicial scrutiny are usually based on economic factors.²⁹⁶ The logic of materialism may make sense of preferential treatment when it is granted to economically disadvantaged individuals and entities. The idea that less money results in poorer opportunities, which in turn result in less money, is entirely consistent with materialistic thought. In contrast, the idea of granting preferential treatment to historically disadvantaged groups is hardly explicable in materialistic terms.

The capitalist narrative of individualism and materialism strips the position of minority group members of its historical and social context.²⁹⁷ This decontextualization enables the counter-intuitive position that there is no difference between discriminating policies and affirmative actions.²⁹⁸ The difference between the two cannot be recognized without looking at the historical background that associates harsh feelings of devaluation and humiliation with the latter form of discrimination, but not with the former.²⁹⁹

Contrary to this atomistic vision, humans are not isolated beings.³⁰⁰ Group affiliation is one of the central tools for constructing personal identity and one of the major sources from which people derive meaning in their lives.³⁰¹ Discrimination against the group one belongs to distorts one's ability to feel pride in group identification, thereby obstructing one's ability to build a

295. Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, 44 HARV. INT'L L.J. 331 (2003).

296. See *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003) (upholding an affirmative action based on socioeconomic factors). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (holding that Richmond's affirmative action program was not narrowly tailored because it did not consider "the use of race-neutral means to increase minority business participation in city contracting"); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 ("[T]he historical record contains no evidence that the Ohio General Assembly gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas.") (6th Cir. 2000); *Podberesky v. Kirwan*, 38 F.3d 147, 160-61 (4th Cir. 1994) (making a similar statement).

297. Rosenfeld, *supra* note 203, at 1767-68; Patterson, *supra* note 246, at 783-84, 790-91.

298. Reynolds, *supra* note 223, at 1003; Cummings, *supra* note 222, at 193-94; Oh, *supra* note 241, at 1331-32.

299. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 49 (1991). See also WALDRON, *supra* note 135 at 102-03 (explaining, in the context of group defamation, the historical background in Europe and the United States against which racial denigration is perceived in these countries).

300. Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW AND PHIL. 13, 25 (1999) (arguing that humans are not isolated beings affected by only those factors to which they consent; to the contrary, they are social persons who are continually nurtured and influenced by their familial, filial, cultural, and political allegiances). See also CHARLES TAYLOR, *MULTICULTURALISM AND "THE POLITICS OF RECOGNITION"* 32 (Amy Gutmann ed., 1992).

301. Cummings, *supra* note 222, at 203-04, 220-21.

harmonious personality.³⁰² Afro-Americans belong to a disadvantaged *group*, a fact that is in itself associated with feelings of shame, denigration, and injustice.³⁰³ This is exactly what affirmative actions seek to change.

Equality of racial *groups* would allow Afro-Americans to take pride in their group association, in their cultural and historical heritage. This point marks the difference between disadvantaged Afro-Americans and similarly placed whites. Yet because of the non-materialistic and non-individualistic character of this aspiration, it fails to gain validity in the current legal climate. Affirmative action programs aim at improving the social status of the targeted minority group as a group. If this goal is achieved, group members are likely to be more satisfied with their social identity. This, in turn, will provide group members with better tools for building harmonious personalities and finding meaning in their lives. This will further open up a wider range of life-options for them.³⁰⁴ Thus judicial hostility toward affirmative action programs ultimately results in hindering the freedom of minority group members in one of its most crucial aspects.

Note that advocating affirmative action does not require accepting collectivism in its strong form; that is, recognizing group interests that are distinct from the interests of group members. It only requires recognizing that individuals may have group-regarding interests, that an individual's well-being may depend to a certain extent on the well-being of the group to which she belongs.

The current legal situation negatively affects freedom in an additional way. Affirmative action programs are actually attempts to create a more equal and tolerant society.³⁰⁵ Thus, when a medical school decides to increase the percentage of Afro-American students by an affirmative action program,³⁰⁶ it expresses its own perception as to what equality and tolerance means. The school thus positions itself in a certain way, allowing students from all races to take part in its political message. People who believe in the ideal of racial integration may thus consider affirmative action programs as a positive factor when deciding whether to join various institutions. By invalidating affirmative action programs, courts deprive such people of a tool for realizing their freedom—the freedom to act in tune with their moral values, in Raz's terms, and the freedom to join efforts to create a better society, in Arendt's terms.³⁰⁷ This

302. *Id.* at 233; Jurgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM* 107, 129 (Amy Gutmann ed., 1994).

303. Landrine & Klonoff, *supra* note 286.

304. Cummings, *supra* note 222, at 233 (“[R]ecognizing racial groups as critical sites of individual self-determination and political participation advances liberalism by allowing identity-formation among people of color to proceed in contexts that provide tangible and attainable images of different life paths while simultaneously affirming their humanity and sense of self-worth.”).

305. Patterson, *supra* note 246, at 799 (“As a matter of social utility, preferential treatment is often the only means of interrupting a cycle of disadvantage. It is on this intangible level that benefits, such as a greater social harmony, are viewed as the advantages resulting from a more equal society”).

306. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

307. *RAZ*, *supra* note 37, at 318, 424–25; *ARENDT*, *supra* note 59, at 36.

restriction of freedom is not a negligible one: as psychological research shows, believing that the organization one belongs to is acting fairly toward its members significantly contributes to one's happiness.³⁰⁸

It should be noted that affirmative action programs undertaken by private entities are subject to a rather lenient judicial review.³⁰⁹ Thus, the task of remedying the evils of racial and gender inequality is largely left to the private market. This situation is consistent with the neoliberal philosophy that regards the market, rather than state regulation, as the best solution to all social problems. This topic will be discussed in the next part.

D. Market vs. Politics

This part will discuss two decision-making tools found in our society: the market and the political process. Neoliberalism strongly prefers the market to politics. The first two sections will point out the weaknesses of this view. The third section will outline and discuss the current position of the legal system on this issue.

1. Objections to the Neoliberal Position

One of the central characteristics of neoliberalism is the conviction that society should make its choices, to the extent possible, through the free market rather than through the political process.³¹⁰ Milton Friedman explains this position in terms of the neoliberal vision of freedom. The political process, he argues, requires conformity—the decisions made represent only the view of the majority, while the laws enacted thereby apply to everyone. As a result, the minority is coerced to conform.³¹¹ By contrast, in the market, conformity is largely unnecessary, as a very wide range of people's choices can be represented simultaneously.³¹² Therefore, to ensure the freedom of citizens, as many issues as possible should be left in the hands of the market.³¹³ Governmental action inevitably involves coercion, and hence should be undertaken only when absolutely necessary, such as in the case of national defense.³¹⁴

Friedman's position is quite appealing. Indeed, under many circumstances the market provides a better framework for decision-making than the political process. Apart from the problem of minority coercion, the political process

308. Steve Williams, *The Effects of Distributive and Procedural Justice on Performance*, 133 JOURNAL OF PSYCHOLOGY: INTERDISCIPLINARY AND APPLIED 183 (1999).

309. See, e.g., LA. PRAC. EMP. LAW § 7:85 (Westlaw 2012–2013) (“Race conscious affirmative action plans of private employees must withstand a two-part test under Title VII. First, the consideration of race must be justified by the existence of manifest unbalance in traditionally segregated job categories. Second, the plan may not trammel on the rights of non-black employees as bar their employment.”).

310. HOWARD & KING, *supra* note 20, at 1.

311. FRIEDMAN, *supra* note 38, at 23–24.

312. *Id.* at 22–24.

313. *Id.*

314. See *id.* See also VON MISES, *supra* note 205, at 271.

suffers from numerous imperfections: logrolling,³¹⁵ principal-agent problems,³¹⁶ and lobbying³¹⁷ are but a few examples. However, despite these imperfections, the political process has some important advantages over the market. Thus, neoliberalism's absolute preference for the market is unjustified.

The traditional neoliberal position has been criticized from several points of view. One line of critique is that while market processes evoke our consumer preferences (self-regarding interests), political processes encourage people to express their citizen preferences to think about the good of their community as a whole.³¹⁸ Mark Sagoff maintains that these two types of preferences belong to different logical categories.³¹⁹ While consumer preferences involve individual desires, citizen preferences involve beliefs about what is best for the community. The market is the proper framework for regulating private interests according to individual willingness to pay, but this framework is completely out of place when the issue in question is public.³²⁰ Our willingness to pay for our convictions is irrelevant. In a democracy, the only thing that matters in this context is whether our arguments are sound and able to convince the public to adopt the policy we advocate.³²¹

In this context, scholars note that people often behave in a way that seemingly contradicts their political convictions when making consumer choices.³²² There are at least three different reasons for this phenomenon. First, in our consumer role we act as individuals. Collective actions, such as boycotts, are difficult to organize.³²³ A consumer may wish to channel the market in a certain direction but refrain from expressing this wish through her buying behavior, as she does not expect other consumers to cooperate and bring about the desired change.³²⁴ For instance, a French consumer may oppose the

315. See, e.g., James B. Kau & Paul H. Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365, 365 (1979).

316. See, e.g., Stefan Oeter, *Toward a Richer Institutionalism for International Law and Policy*, 2008 U. ILL. L. REV. 61, 69 (2008) ("We know from Public Choice scholarship that politics at national and international levels is caught in immense 'Principal-Agent' problems."); Barry R. Weingast, Matthew D. McCubbins & Roger G. Noll, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433-35 (1989).

317. See, e.g., C.M.A. McCauliff, *Didn't Your Mother Teach You to Share? Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383 (2010) (pointing to lobbying as a problem in the political process).

318. James M. Buchanan, *Individual Choice in Voting and the Market*, 62 THE J. OF POL. ECON. 334, 336 (1954); Lewinsohn-Zamir, *supra* note 44, at 382-83 (summarizing this argument).

319. Sagoff, *supra* note 44, at 1411-13.

320. *Id.*

321. *Id.*

322. *Id.*

323. Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 674-75 (1992).

324. Lewinsohn-Zamir, *supra* note 44, at 391-99. A related argument was made by Herbert Hovenkamp. Hovenkamp, *supra* note 44, at 83 ("[M]ost liberal voters do not individually possess enough wealth to materially raise the standard of living of more than a handful of others. Further, each voter may feel that organized charities cannot make up for great inequality in income

proliferation of American songs on the radio, but still listen to them. The political process enables consumers to take an organized collective action. Indeed, in France there is a law providing that at least 40% of songs on the radio during primetime hours must be French.³²⁵ In addition, a consumer can never be sure how the producer will understand her behavior.³²⁶ For instance, if the consumer refrains from buying a snack, the manufacturer may wonder if the reason lies in its high price, the fact that it contains artificial colors, or the discriminatory employment policy of the corporation.

Second, people are not always aware of the consequences of their consumptive choices. This factor is known as the “tyranny of small decisions.” When the consumers choose a certain market option or refrain from choosing it, they often do not realize that their choice shapes the supply.³²⁷ For instance, if the residents of a certain location refrain from travelling by train, this may lead to cancelling railroad services to this location, although this result may be undesirable for them.³²⁸

Third, people usually think of consumption only in the narrow context of their own wants and needs. Most of them do not realize the consequences of their consumptive choices for other people, animals, and the environment.³²⁹ This happens because in the discourse about products, the voices of corporations are almost entirely dominant: they decide which issues to bring to the fore. Because of the shared interest of corporations, this discourse is highly limited. It concentrates around the personal benefits products bring, and obscures all other product dimensions.³³⁰ For example, we are encouraged to consider the aesthetic value of clothes and jewelry rather than the labor conditions under which they were manufactured.³³¹ This is in contrast to political discourse, in which issues are usually discussed from diverse perspectives.³³²

Buying behavior may not always reflect our values. Buying a t-shirt produced by child labor in China does not amount to voting for the legitimacy of such practice. When product dimensions other than the direct benefit to the

distribution. As a result the voter prefers legislatively-enforced wealth transfers.”).

325. Daniel Tilles, *French Radio Quota Hasn't Alienated Fans: Listeners Stick with 'Le Rock'*, N.Y. TIMES, Apr. 20, 1996, available at http://www.nytimes.com/1996/04/20/business/worldbusiness/20iht-radio.t_1.html.

326. Kuklin, *supra* note 323, at 673.

327. Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limit of Economics*, 19 KYKLOS 23 (1966).

328. *Id.* at 25–29.

329. ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 421–22 (1953); MATTHEW P. MCALLISTER, *THE COMMERCIALIZATION OF THE AMERICAN CULTURE: NEW ADVERTISING, CONTROL AND DEMOCRACY* 60–61 (1996).

330. *Id.* at 60–61.

331. *Id.*

332. See Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 920 (1998) (“Thus, the Nineteenth Amendment reinforces its historical and textual predecessor, the Fifteenth, in that both Amendments recognize that distinct groups have distinct political perspectives and voices and that these voices are instrumentally essential components of the national political discourse.”).

consumer are at stake, a legislative action may be the appropriate route. For example, several years ago, the European Union passed an act banning animals testing in the cosmetics industry.³³³ This act indicates the aversion of the EU's citizens to this practice—an aversion that they were apparently incapable of expressing through their buying behavior in a way that would have driven cosmetic producers that use animal testing out of the market.

Another point of criticism relates to the distinction between “first order” and “second order” preferences. First-order preferences are our immediate wishes. Second-order preferences are our preferences about preferences; for example, an addict's preference not to prefer smoking.³³⁴ Several philosophers argue that a person is free only when acting according to her second-order preferences.³³⁵ For instance, according to Rousseau, “moral liberty . . . alone makes [a person] truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty.”³³⁶

Yet human behavior is not fully controlled. We often regret the choices we make and sometimes do not have the willpower to refrain from certain modes of behavior, such as eating fattening food. In terms of goal-frame theory, this happens because of contradictions between our various frames—while being in a hedonic goal-frame (hunger), we may be unable to function according to our gain goal-frame (not to gain weight).³³⁷

The market, by its very nature, is much more designed to satisfy our immediate desires and impulses than our higher-ranking goals.³³⁸ This becomes obvious if one considers the vast proliferation of food most consumers would like to avoid,³³⁹ the excessive consumption of prescription drugs in the U.S.,³⁴⁰ and the number of TV programs and movies most viewers regard as superficial and dull.³⁴¹ Accordingly, scholars suggest that we engage in “self-paternalism”

333. The 7th Amendment to the EU Cosmetics Directive 2003/15 2003 O.J. (L 66/26) 1 (EC). Israel adopted a similar law in 2007.

334. Sven Ove Hansson, & Till Grüne-Yanoff, *Preferences*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 5 (Edward N. Zalta ed., Fall 2011), <http://plato.stanford.edu/entries/preferences/>.

335. E.g., Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

336. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 28 (2008), originally published in 1762.

337. Lindenberg, *supra* note 49, at 221.

338. DAHL & LINDBLOM, *supra* note 329, at 391.

339. Tamara Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 221–22 (2007).

340. For discussion see Elizabeth C. Melby, *The Psychological Manipulation of the Consumer–Patient Population Through Direct-to-Consumer Prescription Drug Advertising*, 5 SCHOLAR 325 (2003). See, e.g., Ralph Gonzales, Daniel C. Malone, Judith H. Maselli & Merle A. Sande, *Excessive Antibiotic Use for Acute Respiratory Infections in the United States*, 33 CLINICAL INFECTIOUS DISEASES 757, 757 (2001), available at <http://cid.oxfordjournals.org/content/33/6/757.short-aff-3#aff-3> (“In 1998, an estimated 76 million primary care office visits for acute respiratory infections resulted in 41 million antibiotic prescriptions. Antibiotic prescriptions in excess of the number expected to treat bacterial infections amounted to 55% (22.6 million) of all antibiotics prescribed for acute respiratory infections, at a cost of \$726 million.”).

341. See, e.g., *Is Television a Bad Influence*, DEBATE.ORG, <http://www.debate.org/opinions/>

and use the political process as a tool for channeling the market so as to reflect our high-ranking preferences.³⁴²

Another line of argumentation concentrates on the fact that, while in the market, the strength of one's voice depends on one's economic power, in the political process, at least ideally, all perspectives are valued equally.³⁴³ Of course, economic power significantly influences the political process as well. Commercial corporations engage in lobbying, donations, and other means of influence to assert their interests through legislation.³⁴⁴ The vast corporate influence on politics is unfortunate and should be curtailed. Nevertheless, in spite of this influence, the political process does not obey the logic of capital to the same extent as the market does. While the presence of economic power is a by-product of the political process, this power is the very engine of the market mechanism. Notwithstanding the corporate influence, extensive legislation restricts economic freedom and imposes various burdens on commercial businesses. Thus, while economic power does influence politics, in this arena it is but one factor among many.

By contrast, in the market, one's economic power is decisive. Producers in most cases have more economic power than consumers, and they exploit this power to manipulate the demand according to their interests.³⁴⁵ The most obvious examples are dangerous or addictive goods such as cigarettes, alcohol, prescription drugs, weapons, and gambling games. While producers of these goods are interested in increasing their consumption as much as possible, this may contradict the interest of the consumers and sometimes of society as a whole. Another example is food. Fast-food chains add chemicals that enhance its smell, stimulate the appetite, and render the food addictive.³⁴⁶ They use artificial colors even in vegetables and fruits to make them look fresher, riper, and juicier.³⁴⁷ As well as manipulating our behavior, these chemicals have adverse effects on our health.³⁴⁸ The neoliberal myth of the market as an efficient mechanism adequately satisfying consumer choices is thus far from true.

A further weakness in neoliberal theory results from identifying the market with freedom, and politics with control. People are not free to act as they please in the market given that their ability to perform certain transactions depends on

is-television-a-bad-influence; Michael Musto, *TV Sucks! 43 Reasons Why I Can't Watch Anymore!*, VILLAGE VOICE (Apr. 11, 2012), <http://www.villagevoice.com/2012-04-11/columns/why-i-hate-television-Michael-Musto/full/>.

342. Kuklin, *supra* note 323; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140-41 (1986).

343. Buchanan, *supra* note 318, at 340.

344. *See, e.g., supra* notes 315-317.

345. DAHL & LINDBLOM, *supra* note 329, at 414-15.

346. Linda Melos, *Why You Can't Eat Just One*, <http://lindamelosnd.com/articles/why-you-can%E2%80%99t-eat-just-one> (last visited Mar. 24, 2014).

347. Mike Adam, *How Food Companies Fool Consumers with Food Coloring Ingredients Made From Petrochemicals*, <http://www.naturalnews.com/022870.html#ixzz226CmZ6tc> (last visited Mar. 24, 2014).

348. *Id.*; Melos, *supra* note 346.

the willingness of other market players to cooperate.³⁴⁹ This “spontaneous control” has been indicated as the most basic control technique in all societies.³⁵⁰ Arguably, this control technique is often the most tyrannical one a person is ever subjected to in her life, yet it is usually not perceived as a form of control at all.³⁵¹ This is the case because, as a rule, spontaneous control does not involve direct orders or bans. Rather, it gives the feeling of free choice.³⁵²

Control in the market does not always wear the form of stronger players dominating weaker ones.³⁵³ Consumers themselves control each other by making certain choices and refraining from others. Contrary to the neoliberal vision, the market is not a framework for independent individual choices. No single person has the power to direct the market as she desires. She may regret that a certain product is no longer distributed, that a product she would like to purchase has never been produced, that the high prices of certain products make them unavailable for her, and so on.³⁵⁴

The market is a human network. Human networks, like all other networks, are characterized by movement of almost all members of the system toward similar behavior.³⁵⁵ Out of a large variety of products, consumers concentrate around a very small number, driving all others out of the market.³⁵⁶ In this way, other peoples’ buying decisions severely restrict any individual’s consumer choice. Furthermore, the purchasing decisions of people around us determine to a large extent what we should own. This phenomenon is not limited to the “Veblen effect” of conspicuous consumption and status-seeking.³⁵⁷ The consumption choices of the majority sometimes create new physical necessities for everyone: for instance, if many people own cars and washing machines, public transportation and public laundries may become less accessible and convenient. Similarly, when new technologies become widespread, the old ones grow obsolete and can no longer be used. In addition, the buying decisions of others establish consumption customs that are perceived as normal behavior. Today most people in the U.S. drink coffee in the morning, own a microwave, a television, a pair of sneakers, a cell phone, and so on. This has led several

349. Buchanan, *supra* note 318, at 339–40 (arguing that because a consumer’s dollar vote is not accompanied by other votes to maintain the production of a good or service, that it may be lost).

350. DAHL & LINDBLOM, *supra* note 329, at 99.

351. *Id.* at 99–103.

352. *Id.*

353. Buchanan, *supra* note 318, at 339–40 (arguing that individuals’ expressed choices are never overruled).

354. *Id.*; DAHL & LINDBLOM, *supra* note 329, at 424–25.

355. Michal Shur-Ofry, *Copyright, Complexity and Cultural Diversity—A Skeptic’s View*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE* 7–8 (Adam Candebub & Sean Pager eds., 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829449.

356. *Id.*

357. THORSTEIN B. VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* 76–77 (1899) (discussing the creation of class hierarchies as a result of conspicuous consumption).

scholars to conclude that market freedom is illusory.³⁵⁸ In most cases, we are really free only to choose the brand, the model, the color of a certain product, which creates an illusion of freedom. However, we are not really free to refrain from its consumption altogether.³⁵⁹

Of course, it is not impossible to deviate from social norms, including consumption norms. But such deviations require special efforts. For instance, being a vegetarian, eating only organic products, eschewing fast food, buying only U.S.-made products, avoiding cosmetics that have been tested on animals or products of child labor all require, not only significant physical efforts, but also mental efforts associated with deviating from social norms and one's own cognitive habits.³⁶⁰ Naturally, the larger the deviating group, the easier it is for a single person to join it. This is because the market may fail to supply the products or the information required to maintain certain consumption choices, if the group wishing to make these choices is not large enough. Being a vegetarian is therefore much easier than buying only U.S.-made products or avoiding the products of child labor because there are a significant number of vegetarians. In addition, a deviation by a large group is more likely to become a legitimate alternative to the general norm, thus making the deviation mentally easier for the individual.³⁶¹

In response, one could argue that the political process is not less effortful. The size of the group holding a certain preference is equally important in the public sphere, as are all kinds of cognitive habits. Coercion, in subtle and less subtle forms, is prevalent in the political discourse too. I accept these claims. Indeed, *both* the political and the market process involve collective choices. But here lies the most crucial weakness of free-market ideology: contrary to the neoliberal vision, the choice between market and politics is not a choice between an individual and a collective mode of decision-making. Rather, it is a choice between two modes of *collective* decision-making, both of which involve coercion and require conformity.

There is, however, an important difference between these two modes of collective decision-making. While the political process is usually accompanied by intensive discussions and opinion exchange, this is much less true for the

358. See, e.g., DAHL & LINDBLOM, *supra* note 329, at 99–103; Buchanan, *supra* note 318, at 339–40.

359. M. Venkatesan, *Experimental Study of Consumer Behavior Conformity and Independence*, 3 J. OF MARKETING RESEARCH 384, 385 (1966) (describing the way consumers conform to group norms in making purchasing decisions).

360. See generally Wander Jager, *Breaking 'Bad Habits': a Dynamical Perspective on Habit Formation and Change*, in HUMAN DECISION MAKING AND ENVIRONMENTAL PERCEPTION: UNDERSTANDING AND ASSISTING HUMAN DECISION MAKING IN REAL-LIFE SETTINGS (Laurie Hendrick, Wander Jager & Linda Steg eds., 2003) (discussing the difficulty of breaking habits consumption habits).

361. See David C. Matz & Wendy Wood, *Cognitive Dissonance in Groups: The Consequences of Disagreement*, 88 J. OF PERSONALITY AND SOC. PSYCHOL. 22, 27 (2005) (noting that "being grouped with others who hold opinions opposed to one's own induces feelings of dissonance discomfort").

market. As mentioned above, the discourse around products is very much limited and almost entirely focused on physical product qualities and prices.³⁶² Although consumers do sometimes exchange opinions about products, most influence in the market setting comes from simply observing other people's buying behavior.³⁶³ The market process is therefore roughly analogous to group decisions whereby individuals observe each other's behavior, but do not have an opportunity for discussion. On the other hand, the political process is analogous to group decisions after a discussion. Because when we vote, we do so (typically) after a public discussion. When we buy, most of the time we do so without having carefully considered and meaningfully discussed the choice (with all its implications). In the next section, I will employ insights from social psychology to argue that the political process has additional advantages over the market process under certain circumstances.

2. *Some Insights from Social Psychology*

Group decision-making processes have been studied in a wide range of cognitive, judgmental, and creative tasks.³⁶⁴ Research has found that group decisions made after discussion are significantly superior to individual decisions, to decisions made without discussion, and even to decisions made by the most highly-skilled members of the group.³⁶⁵ The mere necessity to justify their opinions frequently encourages individuals to think more logically and

362. See MCALLISTER, *supra* note 329 (discussing how consumers see a product only in terms of individual consumption, e.g., how good a diamond will look on one's finger).

363. See Venkatesan, *supra* note 359, at 386 (finding that individuals tended to conform to group norms in their buying behavior).

364. See, e.g., Robert L. Thorndike, *The Effect of Discussion upon the Correctness of Group Decisions, When the Factor of Majority is Allowed For*, 9 J. SOC. PSYCHOL. 343, 358 (1938) (noting that "under the conditions of our experiment we find that the majority vote of a group is right slightly more often than the vote of the average member of the group"); Ernest J. Hall, Jane S. Mouton & R.R. Blake, *Group Problem Solving Effectiveness Under Conditions of Pooling vs. Interaction*, 59 J. SOC. PSYCHOL. 147, 155 (1963) (discussing the differences between "group decisions based on interactions of members and those produced through statistical pooling of individual judgments"); Charles R. Holloman & Hal W. Hendrick, *Adequacy of Group Decisions as a Function of the Decision-Making Process*, 15 ACAD. MGMT. J. 175, 184 (1972) (noting that "the data suggests that to the extent it reflects a pattern of interaction among group members, the kind of decision-making technique used by a group exerts a significant influence on the quality of the group's final decision"); Peter Chalos & Sue Pickard, *Information Choice and Cue Use: An Experiment in Group Information Processing*, 70 J. APPLIED PSYCHOL. 634, 640 (1985) (discussing how groups eliminate individual error and inconsistencies in financial tasks and information processing); Randy Y. Hirokawa, *The Role of Communication in Group Decision-Making Efficacy: A Task-Contingency Perspective*, 21 SMALL GROUP RES. 190, 200 (1990) (finding "the importance of communication for decision-making efficacy tends to increase as the 'unfavorableness' of the task situation increases").

365. Chalos & Pickard, *supra* note 364, at 640; Hirokawa, *supra* note 364, at 200-01; Dean C. Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. ABNORMAL & SOC. PSYCHOL. 55, 59 (1959); Janet A. Sniezek & Rebecca A. Henry, *Accuracy and Confidence in Group Judgment*, 43 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 1, 20 (1989); Gayle W. Hill, *Group Versus Individual Performance: Are N + 1 Heads Better Than One?*, 91 PSYCHOL. BULL. 517, 520-21 (1982).

analytically, and to use more complex decision strategies requiring greater investment of time and effort.³⁶⁶ This frequently results in disproving one's own conclusions and correcting one's own errors.³⁶⁷ Discussion produces a higher level of interest, personal involvement, and a sense of responsibility, thus causing individuals to put more effort into the task, to think more carefully, and be more self-critical.³⁶⁸

Further, discussion reveals a greater number of viewpoints, causing the group to examine a problem more thoroughly and to consider a wider number of solutions, thus increasing the chance of selecting a sound answer.³⁶⁹ Individuals bring different sets of values into the discussion. The competition between these values results in a more objective view of the problem, a factor that was found especially significant in increasing chances of drawing valid conclusions.³⁷⁰ On the other hand, a group discussion may have an adverse effect on the number of creative and original ideas that its members produce. In this respect, the market naturally outperforms the political process, offering a plethora of choice.

During discussions, individuals change their views when presented with persuasive counterarguments, especially if they were previously unaware of these arguments.³⁷¹ In addition, individuals tend to shift their judgments so that they are more in tune with the current trend of evolving social norms. For instance, studies have shown that people express less racist and more feminist views after a group discussion.³⁷² However, if social norms develop in problematic directions, this positive effect of discussion may turn into a negative one. For example, discussions can accelerate negative social stereotypes.³⁷³ This phenomenon may occur during the political process and result in legislation infringing upon the rights of minority groups. Unlike in the case of affirmative action, the strict judicial scrutiny applied to such legislation³⁷⁴ is appropriate because it keeps this potential danger of the political process in check.

In groups that make decisions without a discussion, the decisions of the majority are not better than those of the average group member, and are

366. See, e.g., Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 80 (1983) (finding that subjects will think in more complex terms when they have to justify their opinions on controversial issues to others).

367. Barnlund, *supra* note 365; Hall, Mouton & Blake, *supra* note 364.

368. Barnlund, *supra* note 365, at 58–59.

369. *Id.*

370. *Id.* at 58.

371. Eugene Burnstein & Amiram Vinokur, *Testing Two Classes of Theories about Group Induced Shifts in Individual Choice*, 9 J. EXPERIMENTAL SOC. PSYCHOL. 123, 133 (1973).

372. David G. Myers & George D. Bishop, *Discussion Effects on Racial Attitudes*, 169 SCIENCE 778 (1970); Genevieve Paicheler, *Norms and Attitude Change II: The Phenomenon of Bipolarization*, 7 EUR. J. SOC. PSYCHOL. 5, 10–11 (1977).

373. Micah S. Thompson, Charles M. Judd & Bernadette Park, *The Consequences of Communicating Social Stereotypes*, 36 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 567, 595 (2000).

374. As explained above in Part C, the strict judicial scrutiny test applies to both laws discriminating minority groups and to affirmative action programs.

significantly worse than those of the most competent members.³⁷⁵ Even more troubling is the fact that exposure to decisions made by others exerts considerable influence on individuals.³⁷⁶ People who learn that others do not share their view lose confidence in their opinion and tend to change it.³⁷⁷ This realization frequently produces errors in individual judgment.³⁷⁸ For example, in a classic experiment, Solomon Asch demonstrated that people tend to disregard their own judgments and yield to the majority opinion even when the task is as simple as comparing the length of lines.³⁷⁹ The ability of an individual to resist group pressures that run counter to her judgment was found to be quite small.³⁸⁰ Meanwhile, people are usually unaware of the degree to which they are influenced.³⁸¹ In fact, nearly all individuals state that independence is preferable to conformity.³⁸²

These observations have led social psychology scholars to conclude that group consensus attained without discussion is "likely to be an empty achievement."³⁸³ To be productive, consensus requires that each individual contribute independently out of her experience and insight.³⁸⁴ Consensus that is created under the dominance of conformity tends to distort individual experience and undermine the individual potential for creativity and productivity.³⁸⁵ Solomon Asch notes: "That we have found the tendency to conformity in our society so strong that reasonably intelligent and well-meaning young people are willing to call white black is a matter of concern."³⁸⁶

Applying these findings to the market versus politics debate, we can speculate that individuals often yield to social pressures without realizing it when making decisions about what to buy. Because the market lacks a meaningful discussion mechanism, it is more likely to distort individual opinion and personal judgment than the political process. It tends to influence one's behavior by mere pressure to conform, rather than by logical argument that might change one's views. Consequently, one's buying decisions are less likely

375. Barnlund, *supra* note 365, at 58.

376. Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Influences Upon Individual Judgment*, 51 THE J. OF ABNORMAL AND SOC. PSYCHOL. 629, 635 (1955).

377. Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUMAN RELATIONS 117, 122 (1954).

378. Deutsch & Gerard, *supra* note 376, at 635.

379. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCIENTIFIC AMERICAN 31, 32-33 (1955).

380. Deutsch & Gerard, *supra* note 376, at 635; Thorndike, *supra* note 364, at 344.

381. Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOL. 306, 312 (1987).

382. Asch, *supra* note 379, at 35.

383. Deutsch & Gerard, *supra* note 376, at 635.

384. Asch, *supra* note 379, at 35.

385. *Id.*; Deutsch & Gerard, *supra* note 374, at 635.

386. Asch, *supra* note 379, at 35.

to reflect one's genuine convictions than one's political choices. The market is therefore more likely than the political process to produce consensus that is an "empty achievement."

Indeed, research shows that market choices can be very easily distorted. Experiments have found that people are highly susceptible to group pressure in their consumptive choices.³⁸⁷ For example, in an experiment where subjects were presented with a choice between three identical suits, they overwhelmingly tended to prefer the suit chosen by other persons around them.³⁸⁸ When people are presented with information on the popularity of a product, their preferences tend to have the pattern of a "self-fulfilling prophecy." To name just a few examples from a vast literature: books mistakenly omitted from a bestseller list had fewer subsequent sales;³⁸⁹ software that received artificial downloads earned substantially more real ones;³⁹⁰ music presented as being popular was evaluated more favorably;³⁹¹ and coffee that had already been evaluated positively was more likely to be perceived as tasty.³⁹²

The tendency to yield to social pressure in the market setting frequently results in so-called "herd behavior:" doing what others are doing, even when one's private judgment suggests otherwise.³⁹³ This type of behavior sometimes leads to "informational cascades," or uniform patterns of mass behavior based on very little information.³⁹⁴ A theoretical model of an informational cascade describes the choice between restaurants A and B. The first person gets a signal according to which A is slightly better than B, and chooses A. The next person gets a signal that B is slightly better than A, but chooses A because of the tendency to disregard one's own information in favor of imitating the others' behavior. Further, everyone in the group gets a signal that B is better, but chooses A, because the others before her have done so. Finally, the whole group ends up choosing A although it is practically certain that B is better.³⁹⁵ Empirical data confirms that people tend to act according to this model.³⁹⁶

387. Venkatesan, *supra* note 359, at 384.

388. *Id.* at 386.

389. Matthew J. Salganik & Duncan J. Watts, *Leading the Herd Astray: An Experimental Study of Self-Fulfilling Prophecies in an Artificial Cultural Market*, 71 *SOC. PSYCHOL. Q.* 338, 339 (2008).

390. *Id.*

391. *Id.* at 351. This effect has its limits, though: when too many bands employ this strategy, it decreases all sales. *Id.*

392. Robert E. Burnkrant & Alain Cousineau, *Informational and Normative Social Influence in Buyer Behavior*, 2 *J. CONSUMER RES.* 206, 212 (1975).

393. Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 *Q. J. ECON.* 797, 798 (1992).

394. Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 *J. POL. ECON.* 992, 994 (1992).

395. Banerjee, *supra* note 393 at 798-99.

396. See, e.g., Utpal M. Dholakia & Kerry Soltysinski, *Coveted or Overlooked? The Psychology of Bidding for Comparable Listings in Digital Auctions*, 12 *MARKETING LETTERS* 223 (2001); Jen-Hung Huang & Yi-Fen Chen, *Herding in Online Product Choice*, 23 *PSYCHOL. & MARKETING*, 413 (2006).

When people ignore their own information and imitate the others' behavior, their decision becomes uninformative to others.³⁹⁷ Cascades thus undermine the benefit of diverse information sources.³⁹⁸ Because of the widespread presence of informational cascades, mass social behavior is often based on very little information.³⁹⁹ Indeed, an individual in the midst of an informational cascade might be making a decision about a product or service with no information beyond the fact that others are acting in a certain way in relation to that product or service.

These insights can provide a further explanation of consumer behavior seemingly contradicting consumer convictions. People may consume fast food or watch certain TV programs not because they are convinced that these choices are beneficial for them, but simply because of the human tendency to follow trends. Similarly, even though people are aware of the consequences created by consuming items produced by child labor, cosmetics tested on animals, or environmentally detrimental goods, they may continue to consume such products simply because the natural tendency to behave like others might sometimes be stronger than these concerns.

It is reasonable to think that people may exhibit the same behavior patterns in their voting choices, imitating others instead of making thoughtful decisions. Yet because public discussions of political issues take place more often than discussions of the various dimensions of consumption, the chances of making a choice that reflects one's values and convictions are greater at the ballot box than on the market.⁴⁰⁰ The neoliberal presumption in favor of the market is thus overstated. On the contrary, the market may invisibly direct human behavior, divorcing action from belief. The political process, on the other hand, may sometimes give individuals a better opportunity to make choices that express their real convictions. Hence, the default posture should not be suspicion of economic regulation, although suspicion may be warranted if there are special reasons for that.⁴⁰¹

3. *Market, Politics and the Legal System*

In this section, I will demonstrate that the legal system strongly prefers the market over the political process as a decision-making tool.

U.S. legal practice has a long tradition of aversion towards laws attempting to regulate the market, especially when the rationale behind the regulation is other than economic efficiency. Such laws have often been struck down by

397. Bikhchandani, Hirshleifer & Welch, *supra* note 394, at 994.

398. *Id.* at 1009.

399. *Id.* at 994.

400. See MCALLISTER, *supra* note 329, at 60–61 (discussing how consumers see a product only in terms of individual consumption, e.g., how good a diamond will look on one's finger).

401. For a related discussion see Hovenkamp, *supra* note 44, at 100 ("There is no obvious reason for thinking that political markets work more poorly than economic markets; in fact, there are many reasons for thinking that they should work better.").

courts. Historical examples include *Dred Scott v. Sandford* (1856) finding an act prohibiting slavery to be an unconstitutional restriction on private property;⁴⁰² *Lochner v. New York* (1905) invalidating a ten-hour workday limit for bakers, on the ground that it interfered with the freedom of contract between employers and employees;⁴⁰³ *Coppage v. Kansas* (1915) overturning a statute forbidding employers to exact a promise not to join a labor organization as a condition of retaining employment, on the ground that it infringed on the rights of personal liberty and property;⁴⁰⁴ *Hammer v. Dagenhart* (1918) holding that an act of Congress banning child labor violated the Commerce Clause;⁴⁰⁵ *Adkins v. Children's Hospital* (1923) finding that a minimal wage law for women arbitrarily interfered with freedom of contract, imposed on the employer the burden of supporting a partially indigent person and attempts a classification, as a means of safeguarding morals, without reasonable basis.⁴⁰⁶

Famously, the judicial tendency to strike down laws aiming to regulate the market is especially characteristic of the *Lochner* era. Yet this tendency has continued after this period. For example, in *Mikell v. Henderson* (1953), a cruelty-to-animals statute was held invalid because it resulted in outlawing the business of raising fighting-cocks.⁴⁰⁷ Modern instances of judicial aversion toward legislative attempts to regulate the market are found in a great variety of fields. I will now discuss two examples to illustrate this tendency: (1) the media, and (2) advertising and compelled disclosure.

a. The Media

In the context of the media, judicial hostility to any kind of content regulation emerged in the 1970s, as neoliberal ideas became dominant. In a number of cases, courts invalidated laws requiring television and radio stations to provide noncommercial programming of educational and informative nature or to provide channels for public, governmental, and educational access.⁴⁰⁸ All these laws were found to be inconsistent with the First Amendment.⁴⁰⁹ In addition, the U.S. Court of Appeals upheld the FCC's invalidation of the "fairness doctrine," which required broadcasters to cover important controversial issues and to provide reasonable opportunities for the presentation of contrasting viewpoints.⁴¹⁰ In the same vein, the Supreme Court overturned a Florida statute requiring newspapers to provide reply space to political candidates who they had

402. 60 U.S. 393 (1856).

403. 198 U.S. 45 (1905).

404. 236 U.S. 1 (1915).

405. 247 U.S. 251 (1918).

406. 261 U.S. 525 (1923).

407. 63 So. 2d 508 (Fla. 1953).

408. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 695–96 (1979); *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292, 304–05 (D.C. Cir. 1987).

409. *Id.*

410. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1987).

criticized.⁴¹¹ Even a self-regulatory code limiting the amount and length of TV commercials was found to violate the Sherman Antitrust Act.⁴¹²

Today it is well established that restrictions on media content may only be made in order to protect minors and should be narrowly tailored for this purpose.⁴¹³ Thus, for instance, attempts to ban pornographic, indecent, or “patently offensive” programming are routinely struck down as unconstitutional.⁴¹⁴ Even statutes forbidding depictions of such objectionable activities as cruelty to animals,⁴¹⁵ and child pornography,⁴¹⁶ have been invalidated.

This lax approach to media is based on the neoliberal view, according to which the market—viewers, readers, and listeners—but not the government, ought to determine what best serves the public interest.⁴¹⁷ According to this view, the audience itself would kill off any program it is not interested in.⁴¹⁸ Any governmental regulation restricting the freedom of the broadcasters dictates to the audience what kind of media content it should consume, and thus constitutes unacceptable paternalism.⁴¹⁹

This view is consistent with the neoliberal vision of the market as the site where freedom can be most fully realized. As discussed above, this position has several weaknesses. As far as the media is concerned, the most serious flaw of the neoliberal idealization of the market lies in disregarding the disparity between the producers’ and the consumers’ interests. In the field of media, this disparity is especially severe because of its particular financial structure. Because broadcasters gain most or all of their revenues from advertising rather than from the audience, they are much more interested in broadcasting advertising than anything else.⁴²⁰ Since the repeal of time and length limits on advertising, advertisement’s time and length have grown, although consumers apply every possible technique to avoid them.⁴²¹ According to surveys, people feel that “the amount of advertising is out of control,” that they are “constantly bombarded” by commercials, and that TV advertising disrupts and hinders

411. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

412. *United States v. Nat’l Ass’n. of Broadcasters*, 536 F. Supp. 149 (D.C. Cir. 1982).

413. *E.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 845–46 (1997); *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251–52 (2003); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 187–207 (3d Cir. 2008).

414. *E.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000).

415. *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008).

416. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

417. Les Brown, *Self-Regulation in American Television in Areas Aside from Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705, 708–09 (1995).

418. *Id.*

419. *Id.*

420. C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 333–337 (1997).

421. *Id.*

speech.⁴²² Thus, the market mechanism clearly does not allow the audience to shape at least this aspect of media content according to its interests.⁴²³

What is more, broadcasters shape the non-advertising content of media according to the sponsors', rather than the audience's, interest.⁴²⁴ Media sponsors are interested in programs that promote a good and non-skeptical mood.⁴²⁵ They prefer light and entertaining programs that do not raise controversial social or political issues.⁴²⁶ Harsh criticism of the government and more generally, any radical political views, are undesirable.⁴²⁷ Several big media sponsors have even formulated these principles in explicit rules.⁴²⁸

This state of affairs was made possible by the abandonment of the "fairness doctrine."⁴²⁹ Several scholars argue that since that time, the media has lost its ability to develop meaningful social and political discourse and has turned into no more than a purveyor of light entertainment.⁴³⁰ Hence, advertising-sponsored media is considered to be a potential obstacle to free democratic discourse.⁴³¹

A related line of critique argues that by focusing on entertainment and avoiding deep discussions of controversial issues, today's media turns citizens into consumers.⁴³² As mentioned above, the very quintessence of freedom, according to Hannah Arendt, is engaging in a public world that we all share as citizens, in which we can shape our opinions and act to promote equality, solidarity, and justice.⁴³³ Her view forcefully reveals how commercial media undermines the freedom of its audience.

In the same vein, it may be said that the media is currently focused on satisfying our first-order preferences, given its focus on instant gratification. The second-order preferences of most people include at least occasional exposure to thought-provoking discussions of important social issues. In addition, people sometimes find it difficult to resist the constant consumption of media content they would ideally prefer to avoid. This may be illustrated by an experiment conducted for marketing purposes.⁴³⁴ Participants were asked to evaluate a TV show, while their brain's responses to the program were recorded using brain-scan technology. The show was evaluated negatively by most participants,

422. Matt Getz, "Drowned in Advertising Chatter": *The Case for Regulating the Ad Time on Television*, 94 GEO. L.J. 1229, 1233 (2006).

423. *Id.*

424. MCALLISTER, *supra* note 329, at 37–40.

425. *Id.* at 47–48. Edwin C. Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2153–56 (1992).

426. *Id.* at 2157–64; MCALLISTER, *supra* note 329, at 41–43; BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 206-07 (5th ed. 1997).

427. MCALLISTER, *supra* note 329, at 48–50.

428. *Id.* at 49; Baker, *supra* note 425, at 2151–52.

429. *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987).

430. Baker, *supra* note 425 at 2175–76.

431. *Id.* at 2099, 2153, 2221–24. BAGDIKIAN, *supra* note 426, at 209.

432. Baker, *supra* note 425, at 2176–77.

433. ARENDT, *supra* note 59, at 36.

434. MARTIN LINDSTROM, *BUY-OLGY: TRUTH AND LIES ABOUT WHY WE BUY* 173–74 (2008).

although their brains showed emotional engagement and pleasure.⁴³⁵ The brain responses matched the actual market success of the show.⁴³⁶ Studies like these have led the market expert Martin Lindstrom to conclude that people's conscious responses cannot be trusted, as people often claim to hate what they actually like.⁴³⁷ Yet another conclusion is no less plausible: people prefer not to watch certain television programs, but sometimes find it difficult to resist them.

As discussed above, people are genuinely free only when they act according to their second-order preferences rather than yielding to their instant desires.⁴³⁸ Hence, by playing upon the inability to resist these desires, the media market ultimately restricts the freedom of its audience. Nonetheless, educated into the capitalist vision of freedom, we construe our options for making consumer choices in the field of media as being genuine freedom.

The media itself is one of the most powerful factors that act to promote and preserve this perception. The media inundates us with advertising. Advertising encourages us to think of ourselves as consumers rather than citizens, to value consumption above everything else.⁴³⁹ Advertising reduces our most cherished ideals—such as love, self-fulfillment, and success—to the banal act of purchasing commodities.⁴⁴⁰ In addition, media sponsors explicitly instruct broadcasters to avoid any kind of criticism of advertising, the consumer culture, or the capitalist world order generally.⁴⁴¹

The media thus restricts the freedom of individuals in yet another way—it ingrains the narrow capitalist vision of freedom and does not allow alternative visions to rise to the fore. By constantly reinforcing economic and individualistic notions of freedom, it limits our critical and imaginative faculties.

The media is one of the most important sources of information about the world around us. It shapes our perception of reality, powerfully influencing our views and beliefs.⁴⁴² It is hard to overestimate the media's impact on our lives and on the spirit of our society. And yet, most of our decisions as to what to watch and what to listen to are made in the moment. We do not realize the

435. *Id.*

436. *Id.*

437. *Id.* at 173–76.

438. *See supra* notes 334–42 and accompanying text.

439. *Getz, supra* note 422, at 1246.

440. *Id.* (“Consumption, not freedom or companionship or democratic participation, is touted (and too often believed) as the road to happiness and fulfillment.”); ROBERT W. MCCHESENEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY 166 (2004) (“[A]ll our most treasured values—democracy, freedom, individuality, equality, education, community, love, and health—are reduced in one way or another to commodities provided by the market.”); McALLISTER, *supra* note 329, at 60; JUDITH WILLIAMSON, DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING 140–51 (1981) (describing how advertisements induce magical thinking in which consumption leads to happiness); Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 432 (2003) (“Advertising may be tainting democracy itself, for its effects are hidden and indirect.”).

441. Baker, *supra* note 425, at 2149–52. *See also* Assaf, *supra* note 187, at 27–28.

442. *See generally* MICHAEL PARENTI, INVENTING REALITY: THE POLITICS OF THE MASS MEDIA (1986).

impact of these everyday decisions on our cultural and social landscape. The dissatisfaction so many people feel about today's media may thus be a result of the "tyranny of small decisions" phenomenon: while we may prefer programs with deeper content, deciding on a merely entertaining program just for the moment, we eventually shape our cultural landscape.

Acting as individuals, we are unable to shape the media according to our interests. It is important to remember in this context that our consumptive choices are always collective. This is especially true in the media context because popularity is so important in this market.⁴⁴³ To survive, a media product must be extremely popular.⁴⁴⁴ In our choices of the media products, we are strongly influenced by the choice of others.⁴⁴⁵ Trends in the field of media products are susceptible to small changes and easily manipulated.⁴⁴⁶ This is why it seems safe to state that the media market resembles group decisions made without discussion. As mentioned above, consensus attained under such circumstances is likely to be an "empty achievement," not representing the real convictions of individuals. We might speculate that after a thoughtful discussion, members of our society would not have voted for many of the most popular of today's shows, the celebrity culture, the unshakable dominance of the "happy end" genre, or other trends.

A cautious legislative action could allow some space for speech that the unregulated media fails to provide. In spite of the flaws the political process suffers from,⁴⁴⁷ it does provide the possibility for coordinated collective action, an action resembling a collective decision made after a discussion. It provides an opportunity to discuss the different viewpoints, to examine the questions thoroughly, and to make decisions reflecting one's genuine convictions. The media content should be more than the result of a random interplay between market forces. It should include at least some elements that reflect our conscious and thoughtful choice. This may be done in any number of ways, for example, investing more resources in public media, creating sponsored programs dedicated to important social issues, or requiring commercial media to allow time or space to nonmainstream voices of dissent.

b. Advertising and Compelled Disclosure

In the past, commercial speech did not enjoy the protection of the First Amendment.⁴⁴⁸ This position was probably based on the intuition that

443. Shur-Ofry, *supra* note 355, at 4 ("winner-takes-all" phenomenon . . . is consistently observed across cultural markets: despite the large supply of works in the fields of culture and art—the vast majority of consumers prefer to concentrate on a small number of 'star' works.").

444. *Id.*

445. Salganik & Watts, *supra* note 389, at 339.

446. *Id.*

447. For example, it may fail to reflect certain liberty values. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152, n. 4 (1938) (recognizing that judicial review should correct failures of the political process). *See also supra* notes 315–17.

448. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (declaring "that the Constitution

commercial speech does not reflect one's real convictions and does not provide any significant contribution to the public discourse.⁴⁴⁹ However, as neoliberal ideas became dominant in the 1970s, that perception has changed. Advertising was recognized as constitutionally protected speech on the basis that it provides consumers with product information, which is at least as important as providing them with information about the most urgent political debate.⁴⁵⁰ It is noteworthy how this change in the law reflects the values of capitalism with its emphasis on the importance of consumption. The significance that the legal system ascribes to consumption is well illustrated by the following passage:

The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.⁴⁵¹

i. Restrictions on Advertising of Certain Products and Services

Since the 1970s, courts have consistently struck down restrictions on

imposes no such restraint on government as respects purely commercial advertising"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 584 (1980) ("Prior to this Court's recent decision *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever."). See also Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 845-46 (1985) ("Until the mid-1970's, commercial speech was considered beyond the purview of the first amendment.").

449. See, e.g., *Mutual Film Corp. v. Industrial Comm. of Ohio*, 35 S.Ct. 387, 391 (1915) ("It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion."); *People v. La Rollo*, 24 N.Y.S.2d 350, 354 (City Mag. Ct. 1940) ("The considerations which justify and require that the public interest in the cleanliness of its streets be made subordinate to the more important rights of its citizens freely to proclaim their ideas and principles are not equally applicable where the handbill distributor seeks merely to advertise and solicit patronage for his purely commercial enterprise. Nor is there any deprivation of equal protection of the laws in so distinguishing between a citizen exercising his fundamental democratic rights of freedom of speech and freedom of the press, and another who seeks to pervert those principles merely for his own commercial or monetary gain.").

450. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-65 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) ("The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.").

451. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

advertising that are not “narrowly tailored” to promote a compelling public interest.⁴⁵² Applying this test, courts have invalidated statutes restricting advertising of alcohol,⁴⁵³ tobacco,⁴⁵⁴ gambling games,⁴⁵⁵ attorney services,⁴⁵⁶ prescription drugs,⁴⁵⁷ advertising directed at physicians,⁴⁵⁸ as well as a ban on in-person solicitation by public accountants and a ban on direct-mail solicitations by lawyers to people charged with traffic or criminal offenses.⁴⁵⁹

This line of jurisprudence is questionable. Rather than just providing information, advertising uses sophisticated psychological techniques that are difficult, and sometimes even impossible, to resist.⁴⁶⁰ Consider, for example, that marketing experts openly recommend companies to invest their resources in advertising rather than in production.⁴⁶¹ That is, influencing consumers through advertising is more profitable than supplying them with quality goods. This fact demonstrates the power of advertising over the consumer. This power goes beyond what could be achieved by providing the consumer with mere product information.⁴⁶² To be induced to purchase a product or a service by psychological techniques obviously contradicts the consumer’s interest, especially when the purchasing decision is an important one—such as in the case of prescription drugs or legal services—or when the product or the service can damage the consumer in some way—as in the case of tobacco, alcohol, or gambling games.

The consumer’s interest not to be exposed to advertising and not to be influenced by it is recognized as legitimate. For example, legislation creating the “do not call” registry—a tool that helps individuals to avoid advertising—has successfully withstood judicial review.⁴⁶³ Yet, in the eyes of the legal system, each individual must find her own way to escape unwanted advertising.

452. See *infra* notes 463–69.

453. *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm’n*, 701 F.2d 314, 322–23 (5th Cir. 1983); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995).

454. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001).

455. *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 188–189 (1999).

456. *Alexander v. Cahill*, 598 F.3d 79, 95–96 (2d Cir. 2010).

457. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370–71 (2002).

458. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 73–74 (D.D.C. 1998).

459. *Ficker v. Curran*, 950 F. Supp. 123, 126 (D. Md. 1996).

460. See, e.g., Assaf, *supra* note 167, at 14 (discussing the “classical conditioning” technique).

461. Assaf, *supra* note 167, at 96–98.

462. In an experiment, the subjects were presented with advertisements of Ford cars, employing the slogan “Quality is Job 1” and then saw extracts from “Consumer Reports” for sixteen models of cars. Subjects who saw this data without having been exposed to the ads tended to attribute rather low reliability to Ford’s cars. Yet, the very same data strengthened the beliefs about Ford’s reliability among subjects who had been exposed to the ads. See, e.g., John Deighton, *The Interaction of Advertising and Evidence*, 11 J. CONSUMER RES. 763, 766–69 (1984).

463. *Mainstream Marketing Servs., Inc. v. FTC*, 358 F.3d 1228, 1246 (10th Cir. 2004) (upholding the “Do Not Call” registry). See also Parma, Ohio, Codified Ordinances §§ 757.01–757.06 (2009) (a state law providing residents with an option to prevent solicitation).

Collective actions through legislation are precluded. At the same time, the consumer's ability to escape the exposure to advertising or its influence is very much limited.⁴⁶⁴ Under these circumstances, lack of legal restrictions on advertising practically equals a license to influence the consumer against her will.

Several further features of the capitalist philosophy are noticeable in the judiciary's approach to advertising. While striking down restrictions on advertising, courts usually juxtapose the public interest—such as promoting public health by reducing tobacco and alcohol consumption or gambling—with the interest of individuals willing to obtain information about respective products and services, and the manufacturers' interest in conveying such information.⁴⁶⁵ Courts usually conclude that governmental interest in manipulating the demand may not justify preventing individuals from conveying and receiving information.⁴⁶⁶

Here, we can once again observe the tendency of the legal system to favor individual interests over collective ones. In addition, it is interesting to see that courts usually take account of only one side of the individual interest, that of the consumer who wants to receive information that allows making the consuming decision. Courts seem to disregard the fact that individuals themselves may be willing to avoid (excessive) consumption of certain products and services, such as tobacco, alcohol, gambling, and prescription drugs. Laws restricting advertising for such products may express individual second-order preferences. For instance, a person may be interested not to allow advertising to create or support her smoking or drinking habit.

The current judicial view of advertising echoes the spirit of capitalism that ascribes great importance to consumption. The freedom to consume has much more weight in the eyes of the legal system than the freedom to refrain from consumption. Moreover, the economic damage that may be caused by a consumption decision based on insufficient product information is ultimately given more weight than the damage that the consumption itself may bring about. This is consistent with the general tendency of the legal system to favor economic rights over other rights.

464. VICTOR J. TREMBLAY & CAROL HORTON TREMBLAY, *ADVERTISING AND WELFARE: NEW PERSPECTIVES ON INDUSTRIAL ORGANIZATION* 467 (2012).

465. *E.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 487 (1996) (“The fit here is not reasonable, since the State has other methods at its disposal . . . that would more directly accomplish its stated goal without intruding on sellers’ ability to provide truthful, nonmisleading information to customers.”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“The State’s interest in preventing underage tobacco use is substantial . . . but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.”).

466. *See supra* note 465.

ii. Misleading Advertising

Although courts do recognize that there is a substantial public interest in protecting consumers against confusion,⁴⁶⁷ laws designed for this purpose are often overturned because of deficient empirical evidence proving that a particular type of advertising is confusing.⁴⁶⁸ Courts explicitly mention that the legislation has to meet a heavy burden to justify regulations of misleading advertising,⁴⁶⁹ and such regulations are frequently found to be more extensive than necessary. For example, in a number of cases, courts overturned regulations banning the use of medical claims that are not supported by substantial scientific evidence, reasoning that the potential confusion may be negated by appropriate disclaimers.⁴⁷⁰

Courts follow the same line when interpreting existing statutes protecting consumers against confusion, as the general unwillingness to intervene in the market process results in a very restrictive interpretation of these statutes. For instance, false advertising claims assuring that a cigarette “filters best,”⁴⁷¹ that a hair pomade would restore the user’s natural shade or color,⁴⁷² that a toothpaste would brighten consumers’ teeth,⁴⁷³ or that candy would help with weight loss⁴⁷⁴ were all held to be mere “puffing,” or exaggerated seller’s talk that no reasonable consumer would take seriously. This line of jurisprudence markedly contradicts empirical research showing that exaggerated advertising claims do mislead consumers.⁴⁷⁵

467. See, e.g., *Calamari Fisheries, Inc. v. The Village Catch, Inc.*, 698 F.Supp. 994, 1015 (D. Mass. 1988) (“Preventing consumer confusion is clearly in the public interest.”).

468. R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues under the First Amendment Commercial Speech Doctrine*, 24 *CARDOZO ARTS & ENT. L.J.* 953 (2007) (“[T]he Supreme Court has made it clear that states cannot constitutionally ban claims in professional services advertising merely because they are potentially misleading to consumers. . . . Such claims can be constitutionally regulated as long as the regulation “serve[s] as an appropriately tailored check against deception or confusion.” (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation Bd.*, 512 U.S. 136, 147 (1994)).

469. *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91, 109 (1990) (“[E]ven if we assume that petitioner’s letterhead may be potentially misleading to some consumers, that potential does not satisfy the State’s heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.”).

470. *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999); *Alliance for Natural Health U.S. v. Sebelius*, 714 F. Supp. 2d 48, 65 (D.D.C. 2010).

471. *Quinby & Co. v. Funston*, 177 N.Y.S.2d 736, 739 (Sup. Ct. 1958).

472. *Herbold Lab., Inc. v. United States*, 413 F.2d 342, 344 (9th Cir. 1969).

473. *In re Bristol-Myers Co.*, 46 F.T.C. 162, 175 (1949) (“Concerning the representation that Ipana tooth paste will beautify the smile and brighten and whiten the teeth, the Commission is of the opinion that the reference to beautification of the smile was mere puffery, unlikely, because of its generality and widely variant meanings, to deceive anyone factually.”).

474. *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946).

475. Terence A. Shimp & Ivan Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 *J. MARKETING* 22, 27 (1981); see also Janet Hoek & Philip Gendall, *An Examination of Puffery’s Effects on Consumers*, ANZMAC 2007 Conference Papers 1031, 1036, available at http://conferences.anzmac.org/ANZMAC2007/papers/JHoek_2.pdf (finding that consumers may be more vulnerable to puffs than previously assumed).

Moreover, even when faced with evidence of actual consumer confusion, courts frequently refuse to conclude that the advertisement in question is misleading. For example, *Mead Johnson & Co. v. Abbott Laboratories* dealt with an advertisement claiming that the Similac baby formula was the “1st Choice of Doctors.”⁴⁷⁶ The court was presented with survey evidence demonstrating that most consumers understood this claim to mean that a substantial majority of doctors recommended Similac and that they did so because of its medical superiority over other brands. None of these implications was true. Yet the court concluded that the claim was non-actionable and noted generally that surveys cannot be employed to determine the meaning of words.⁴⁷⁷ Similarly, in *American Italian Pasta v. New World Pasta*, survey evidence was brought to demonstrate that a substantial number of consumers understood the slogan “Americans’ Favorite Pasta” as implying that the advertised brand was number-one, or at least national brand.⁴⁷⁸ Again, this was not true. Relying on *Mead Johnson*, the court stated that the dictionary meaning of the word “favorite” was subjective and vague, and hence the statement could not be regarded as a factual claim even if misunderstood.⁴⁷⁹

The spirit of capitalism exerts a substantial influence on legal thought in the field of misleading advertising. Judicial practice in this field focuses on the individual interests of advertisers and the consumers. In doing so, courts pay inadequate attention to the public interest in advertising as a trustworthy channel of communication. As a general communication tool, advertising is a public good. The lax legal approach to misrepresentation results in undermining the informative value of advertising at large. Indeed, surveys constantly show that people do not trust advertising and are very suspicious towards its claims.⁴⁸⁰ Had courts examined misleading advertising more strictly, ads could provide consumers with more reliable information, thereby benefiting both consumers and producers. Yet the legal system’s focus on individual interests results in disregarding the public dimension of advertising.

The materialistic aspect of capitalist ideology is also noticeable in this context. The corporate interest in increasing the volume of trade is perceived as so important that consumers’ interest in acquiring accurate product information has to step aside. This is probably because the consumer’s interest is not purely economic, as opposed to the interest of corporations. In other words, the damage caused by the disappointment of teeth not becoming white or hair not recovering its color is legally regarded as less severe than the damage from not being able to

476. *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883 (7th Cir. 2000).

477. *Id.* at 885–86.

478. *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004).

479. *Id.* at 393–94.

480. Carl Obermiller & Eric Spangenberg, *Ad Skepticism: The Consequences of Disbelief*, 34 J. ADVERTISING 7, 7 (2005) (“roughly two-thirds of consumers claim they doubt the truthfulness of ads”); Stephen J. Hoch & Young-Won Ha, *Consumer Learning: Advertising and the Ambiguity of Product Experience*, 13 J. CONSUMER RES. 221, 221 (1986) (“A recent national survey found that 60 percent of consumers agreed that ‘advertising insults my intelligence.’”).

sell a product.

iii. What Kind of Information Should Matter?

The informative value of commercial information is further undermined by some of the jurisprudence surrounding mandatory labeling. Laws requiring manufacturers to disclose certain information implicate the First Amendment because they compel speech.⁴⁸¹ Courts frequently overturn such requirements, finding them overly burdensome or not narrowly enough tailored to serve their purpose.⁴⁸² The state bears a particularly heavy burden of proof in this context, as it must provide significant empirical data—rather than a common sense conclusion—to demonstrate the existence of real, material harm and to convince the court that its regulation will alleviate it.⁴⁸³

Courts consistently hold that a consumer's concern or desire to receive the information in question is not sufficient to justify a mandatory labeling requirement.⁴⁸⁴ Thus, in two decisions, courts found that the state may not require milk manufacturers to state that their milk is obtained from cows treated with rbST hormone. The use of this hormone was subject to intense public criticism.⁴⁸⁵ Yet the courts decided that consumer concern alone was insufficient to justify restriction on the constitutionally protected right to free speech.⁴⁸⁶ This is because no significant differences existed between milk obtained from rbST-treated cows and non-treated cows.⁴⁸⁷ Similarly, in another case, the court found that the FDA had no basis upon which it could legally mandate labeling of food as genetically modified, since GM-foods do not “present any different or greater safety concern than foods developed by traditional plant breeding.”⁴⁸⁸ The court reasoned that “if . . . the product does not differ in any significant way from what it purports to be, then it would be misbranding to label the product as different, even if consumers misperceived the product as different.”⁴⁸⁹

Remarkably, this line of jurisprudence practically denies consumers the freedom of choice that is so dear to the neoliberal philosophy. These decisions

481. *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, Bd. of Acct.*, 512 U.S. 136, 142 (1994); *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000); *Tillman v. Miller*, 133 F.3d 1402, 1403 (11th Cir. 1998).

482. *Ibanez*, 512 U.S. at 148–49; *In re R.M.J.*, 455 U.S. at 205–06; *Mason*, 208 F.3d at 957; *Tillman*, 133 F.3d at 1403.

483. *Ibanez*, 512 U.S. at 148–49; *In re R.M.J.*, 455 U.S. at 205–06; *Mason*, 208 F.3d at 957; *Tillman*, 133 F.3d at 1403.

484. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000); *Stauber v. Shalala*, 895 F. Supp. 1178, 1193 (W.D. Wis. 1995).

485. *Stauber*, 895 F. Supp. at 1183.

486. *Int'l Dairy Foods Ass'n*, 92 F.3d at 73.

487. *Int'l Dairy Foods Ass'n*, 92 F.3d at 79–80; *Shalala*, 895 F. Supp. at 1193. For discussion and critique see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 18 HARV. L. REV. 525, 569–574 (2004).

488. *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 179 (D.D.C. 2000).

489. *Id.* For discussion and critique see Kysar, *supra* note 487, at 553–69.

make it difficult for an over-cautious consumer who does not want to buy genetically modified or hormone treated food to satisfy her preferences.⁴⁹⁰ The same is true for a consumer who has a moral objection to genetic engineering or hormone treatment.⁴⁹¹ By contrast, in the European Union, labeling genetically modified food as such is mandatory.⁴⁹² Note that in all the mentioned cases there was a clear consumer demand for the information in question. This demand did not result in the market providing this information, because its disclosure obviously contradicted the distributor's interest. Yet the demand for this information created sufficient public pressure for the legislator to enact laws requiring its disclosure. By invalidating such laws, courts implicitly state that the only information that is important enough so as to justify mandatory disclosure is information that results in physical differences between products. This position echoes the neoliberal vision of the individual as a rational wealth-maximizer who only cares for his or her own pecuniary gain: if the process of production does not make a difference in the end-product, this process should not matter much.

Looking at the legal rules regulating misleading advertising helps complete this picture. The laws and their enforcement make information on products other than their physical properties virtually unavailable. Historically, courts have always been reluctant to recognize misrepresentation claims not referring to the physical properties of products or to their prices.⁴⁹³ Today, courts and federal regulators recognize that the modern consumer may be interested in truthful information about the labor conditions under which a product is manufactured,⁴⁹⁴ the impact of the production process on the environment, and other similar issues.⁴⁹⁵ Unfortunately, this general recognition has little practical

490. Nicole B. Cásarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 974 (1998) ("In effect, the court [in *Int'l Dairy Foods Ass'n v. Amestoy*] said that because the government says rBST is safe, consumers do not need to know about it. However, as Judge Leval noted in his dissenting opinion many consumer products once believed to be safe—including tobacco—were later found to be dangerous."). See also Mario F. Teisl, Luke Garner, Brian Roe & Michael E. Vayda, *Labeling Genetically Modified Foods: How Do US Consumers Want to See It Done?*, 6 J. AGROBIOTECHNOLOGY MANAGEMENT & ECON. 48 (2003), available at <http://www.agbioforum.org/v6n12/v6n12a11-teisl.htm>.

491. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 76 (2d Cir. 1996) (Leval, J., dissenting) ("Nowhere does the majority opinion discuss or even mention the evidence or findings regarding the people of Vermont's concerns about human health, cow health, biotechnology, and the survival of small dairy farms."); Jonathan Adler, *Regulating Genetically Modified Foods: Is Mandatory Labeling the Right Answer?*, 10 RICH. J.L. & TECH. 1, 13 (2004) ("[T]he GM debate is mostly about values and about ethical concerns. . . . Anti-GMO proposals are not about health risks, but about how we feel about GM technology and how our foods should be produced.").

492. Regulation (EC) 1830/2003 of the European Parliament and of the Council of 22 September 2003, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2003:268:0024:0028:EN:PDF>.

493. *Samson Crane Corp. v. Union National Sales, Inc.*, 87 F. Supp. 218, 222 (D. Mass. 1949).

494. *Nike v. Kasky*, 539 U.S. 654 (2003). Yet, the court did not give a substantial decision in this case because the plaintiff was found not to have standing.

495. Robert B. White, *Preemption in Green Marketing: The Case for Uniform Federal*

effect. Thus, most “environment friendly” and “cruelty free” claims found on the market today are demonstrably false.⁴⁹⁶ The FTC is apparently not troubled much by misrepresentations of this kind and does not take the necessary steps to prevent it.⁴⁹⁷ Meanwhile, surveys show that the majority of consumers are willing to avoid products whose manufacturing process damaged the environment or involved cruel treatment of animals.⁴⁹⁸

Individual consumers usually lack the resources and motivation to undertake the investigation needed to discover deception of this kind. A tool that could be helpful here is a class action, a legal tool especially designed to encourage filing law suits in cases which would otherwise not be brought because litigation costs of each individual outweigh the suffered damage.⁴⁹⁹ In California, a class action based on consumer fraud may be filed under the California Unfair Competition Law that requires the plaintiffs to demonstrate “loss of money or property.”⁵⁰⁰ Courts tend to interpret this requirement to mean that the plaintiffs must demonstrate a misrepresentation as to the *physical* characteristics of the product. Thus, in one case, consumers claimed that they had bought milk based on the belief that the cows were treated according to criminal animal cruelty statutes.⁵⁰¹ They alleged that they had bought milk they otherwise would not have bought if they had known that some of the producing herd may have been raised under cruel conditions. The court held that the plaintiffs only suffered a “moral injury.” They did not claim that the cruel treatment had a negative effect on the milk. The milk they bought was not physically inferior to other milk and thus, they “had the benefit of their bargain” and suffered no “loss of money or property.”⁵⁰² A similar conclusion has been reached in a case dealing with milk misleadingly labeled “Happy Cows.”⁵⁰³

Marketing Definitions, 85 IND. L.J. 325, 327 (2010) (discussing laws that regulate “green” marketing claims).

496. *Id.* at 326 (“In a 2007 study of 1018 products claiming environmental benefits in North American consumer markets, all but one made claims that were demonstrably false or that risked misleading intended audiences.”) (internal quotations omitted); Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 459 (2006) (referencing Consumer’s Union assertion that “cruelty-free” labeling is “potentially misleading” and “not meaningful”).

497. White, *supra* note 495, at 343 (“[S]ince May 2000, the FTC has not prosecuted a single green-marketing claim or issued any Green Guides revisions.”); Winders, *supra* note 496, at 463 (“[T]he FDA and FTC have declined to regulate “cruelty-free” claims. Despite citizen requests that they do so, no agency has proposed guidelines or rules on this issue.”).

498. White, *supra* note 495, at 325 (“Surveys over the past fifteen years have consistently found that most consumers are more likely to choose products that claim to be environmentally friendly over products that do not make such a claim. A majority of these consumers are willing to pay up to five percent more for those products.”).

499. *Current Decisions Survey: Decisions*, 16 CLASS ACTION REPORTS ART 3 (1993) (“[C]lass action encourages the pursuit of claims which would otherwise not be brought through individual litigation because the costs of bringing suit outweigh possible recovery.”).

500. CAL. BUS. & PROF. CODE § 17204 (West 2014).

501. *Animal Legal Defense Fund v. Mendes*, 72 Cal. Rptr. 3d 553, 560 (Ct. App. 2008).

502. *Id.* at 146–47.

503. *People for Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory*

This interpretation is not the only possible way to understand the phrase “loss of money or property.” Nothing in the language of the statute suggests that a physically inferior product brings about a “loss of money or property,” while a product inferior in another dimension does not. The chosen interpretation is consistent with the general tendency of the legal practice to perceive injury in terms of individual economic interest. Recall that an injury to the environment is not thought to constitute an “injury in fact” sufficient to establish standing.⁵⁰⁴ The same logic is apparent here: while courts readily acknowledge one’s concern with the physical state of a product, they are skeptical toward one’s concern regarding its social desirability.⁵⁰⁵

This skepticism is unjustified. There is no basis to assume that a person would be more injured by a false claim of an exceptional quality of milk than by a false claim of humane treatment of cows.⁵⁰⁶ For the sake of comparison, consider that if the plaintiff-consumers had been misled to think that a reliable authority certified the quality of the milk, this would most probably amount to “loss of money or property” without showing any effect on the physical properties of the milk.⁵⁰⁷ To put this in economic terms, while people who care about the quality of milk clearly overpay in this hypothetical case, people who care about the humane treatment of cows have clearly overpaid in the discussed lawsuits.

The neoliberal view, largely shared by legal practice, regards the market as the best mechanism for regulating all types of social issues.⁵⁰⁸ According to this view, people should be able to express most of their wishes through individual voluntary market behavior.⁵⁰⁹ By confining the notion of injury to economic loss, courts limit consumption to a mere tool of satisfying one’s own material goals and sufficiently narrow the scope of public life that can be regulated through market behavior. The FDA’s lax policy regarding misleading

Bd., 22 Cal. Rptr. 3d 900 (Ct. App. 2005).

504. See *supra*, Part III.A.

505. See Kysar, *supra* note 487 (criticizing this legal situation). Notably, in California, the law prohibits labeling products “made in USA” unless the overall product and its parts are substantially made in the U.S. Courts tend to allow suits based on misleading “made in USA” labels, even when the plaintiffs do not allege that the purchased products are physically inferior. See *Colgan v. Leatherman Tool Group, Inc.*, 38 Cal. Rptr. 3d 36 (Ct. App. 2006); *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011). For discussion see Rebecca Tushnet, *It Depends on What the Meaning of “False” is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 238 (2007).

506. See Kysar, *supra* note 487, at 529 (“[A]t least with regard to some areas of choice, consumer preferences may be heavily influenced by information regarding the manner in which goods are produced. . . . Although such factors generally do not bear on the functioning, performance, or safety of the product, they nevertheless can, and often do, influence the willingness of consumers to purchase the product.”).

507. See *Animal Legal Defense Fund*, 72 Cal. Rptr. 3d at 560 (noting that the plaintiffs “had the benefit of their bargain—that is, they received dairy products that were not of inferior quality”).

508. HOWARD & KING, *supra* note 20, at 1.

509. FRIEDMAN, *supra* note 38, at 22–24.

advertising as to the social desirability of products complements this picture. Lacking trustworthy information, people are unable to express their views on social issues related to manufacture processes through consumption.

This situation constitutes a serious threat to liberty. Because of the aversion of the U.S. legal system toward market regulation through legislation, people are largely unable to use legislation to express values and ideals related to consumption. It is noteworthy that the situation is different in the European Union where such laws are not uncommon. For instance, as already mentioned, animal testing in the cosmetics industry is forbidden in Europe.⁵¹⁰ Under the American legal climate, the legitimacy of such legislation is questionable, although I dare to speculate that U.S. citizens object to this practice no less than their European counterparts do.⁵¹¹

As the current discussion of the U.S. legal practice reveals, mandatory labeling of cosmetic products tested on animals would probably not withstand judicial review, since this information has no effect on the end-product. For the same reason, misleadingly advertising a product as not being tested on animals is unlikely to attract the FDA's attention and may well be deemed unsuitable for a class action by courts. As a result, American citizens might have virtually no effective legal means of stopping the practice of animal experiments in the cosmetics industry. As the examples above demonstrate, the same is true for genetic engineering, treating animals with hormones, and cruelty to animals.

Focusing solely on the physical characteristics of products, the legal system confines the person to a rational wealth-maximizer, as envisioned by the capitalist ideology. This position is undesirable. As Raz convincingly argues, freedom is not intrinsically valuable, but is valuable only to the extent it allows a person to lead an autonomous life—that is, a life guided by one's moral goals.⁵¹² The current position of the legal system compromises citizens' freedom to realize their ethical and political values in the name of manufacturers' economic interests. In practice, it favors the interest of corporations to use socially objectionable practices in production, to conceal and even to misrepresent information related to non-physical product dimensions over the consumers' interest to legally restrict certain production practices, or to discourage them by their consumption behavior. Applying Raz's vision of autonomous life as one's ability to choose morally sound goals and to lead her life according to those goals makes it obvious that the current legal situation sacrifices meaningful and valuable freedom for the sake of a trivial one.

E. A Broader Outlook

Previous parts of this chapter have discussed four examples illustrating the

510. Council Directive 93/35, 1993 O.J. (L 151) (EEC), P 2.

511. See Joshua Ulibarri, Bob Meadow & Cornelia Treptow, ENDING COSMETICS TESTING ON ANIMALS IN THE UNITED STATES, LAKE RESEARCH, available at http://www.humanesociety.org/assets/pdfs/animals_laboratories/cosmetic_product_testing/cosmetic_testing_poll_results.pdf.

512. RAZ, *supra* note 37, at 16–17, 203–07, 318, 424–25.

legal tendency toward the values of individualism and materialism. These examples were intentionally taken from diverse fields of law, in order to demonstrate the broad range of this tendency. This article has a broader aspiration. It aims to provide an analytical prism through which to observe various legal phenomena. The excessive tendency toward materialism and individualism can be revealed in a plethora of legal phenomena and in virtually any field of law. Placing these issues in the context of capitalist ideology sheds some light on their roots, allowing a deeper understanding of their inner logic.

For instance, the consideration doctrine in contract law doctrine, holding that a promise is legally enforceable only when made in exchange for something of economic value,⁵¹³ is easily explicable in terms of the legal tendency toward materialism and individualism. Another example is campaign spending. Since the rise of neoliberalism in the 1970s, the Supreme Court has been rather hostile towards limitations on private donations for political campaigns.⁵¹⁴ The famous *Citizens United* decision of 2010 has further declared all governmental regulation of independent expenditures in political campaigns unconstitutional.⁵¹⁵ The legal preference for regulation through the market rather than through the political process is readily apparent here.

Having said all that, this article obviously does not intend to claim that the US legal system never takes non-economic and collective interests into account. Laws providing for freedom of religious association, proscribing minimum wages, preserving the environment, forbidding cruelty to animals etc. are all based on such values. Thus, the predisposition toward capitalist values may be strong, but those values certainly do not *always* prevail in the legal scene.

V.

CONCLUSION: THE PHANTOM OF LIBERTY

Capitalism is usually associated with freedom. In this article, I have attempted to challenge this common wisdom. In fact, capitalism strongly favors one specific dimension of freedom—the liberty to pursue one’s personal

513. David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299, 1299–1300 (2006). For critique, see *Id.*; James D. Gordon, *A Dialogue about the Doctrine of Consideration*, 75 CORNELL L. REV. 987 (1990); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 53 (1992) (critiquing the view that evidentiary concerns require economic exchange as part of consideration); Daniel Markovits, *Contract and Collaboration*, 113 YALE L. J. 1417, 1477–81 (2004).

514. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating limitations on individual campaign spending). For more examples and historical description see James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673, 676-81. (2011). For critique see, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994).

515. *Citizens United v. FEC*, 558 U.S. 310 (2010). For discussion see Gardner, *supra* note 514, at 680.

economic gain. Living in the environment of flourishing consumer culture fueled by media and advertising, we have learned to take this particular aspect of freedom as the quintessence of human liberty. The main argument of this article has been that we should understand freedom in much broader terms. Personal economic liberty, important as it may be, often constitutes a rather trivial aspect of freedom as compared to other aspects.

Different aspects of freedom often come into conflict. Whenever one of these conflicts reaches the legal system, a decision must be made in favor of one of the aspects of freedom. The option not to decide does not exist, because deciding not to intervene always favors one side over the other.⁵¹⁶ To be able to seek a just solution, it is important to realize that such conflicts exist in the first place. By perceiving people as mere wealth-maximizers, the legal system often obscures the fact that their freedom has been compromised by a certain decision.

When courts deny nonprofit organizations standing to sue to stop violations that negatively affect the environment, an animal species, a racial group, or society at large, the judiciary seems to underestimate the importance of these issues for one's ability to enjoy meaningful freedom. This is exactly what finding lack of standing means: none of the plaintiff's personal rights have been affected, there is no real conflict between the plaintiff and the defendant and, therefore, the plaintiff is excluded from legally opposing the defendant's behavior. Regardless of whether the denial of standing is justified in a specific case, it is important to see that a real conflict does exist and that denying standing means preferring the defendant's interests over those of the plaintiff.

A decision denying the plaintiff standing never affects the plaintiff's personal economic interests. In our capitalist-oriented cultural environment, this seems enough to ensure that the person's freedom has not been restricted in any way. This article has attempted to dissolve this illusion. Philosophers and psychologists alike recognize the importance of the "citizen" dimension of the human personality; that is, of the human capacity to exercise altruism, to be concerned with social affairs, and to act to promote public welfare. Moreover, many philosophers, including Joseph Raz and Hannah Arendt, believe that exercising one's "citizen" capacities is a far more important aspect of freedom than pursuing one's own self-interest.

Following these insights, this article pointed out instances in which this important aspect of freedom is compromised by seemingly neutral legal doctrines. Preventing people from enacting or enforcing laws that restrict racist speech and pornography, grant preferential treatment to historically disadvantaged groups, require the media to promote discourse on important social issues, mandate the disclosure of information related to the manufacturing processes, etc. touches on the very heart of their freedom as citizens.

To conclude this discussion, I would like to make one further point. It is one of our most important goals as a society to develop our moral norms, to move

516. For an interesting discussion see RAZ, *supra* note 37, at 120–21.

ever forward in our search for truth. The legal focus on capitalist values may hamper this process. As noted above, laws prohibiting slavery, establishing limits to working hours, prescribing minimum wages, etc. were struck down in the past in the name of private economic rights, such as freedom of contract and protection of property. Of course, when social perceptions change, courts, being part of society, ultimately adapt to these changes.⁵¹⁷ Nevertheless, by striking down laws that reflect new attitudes, courts are slowing down social change.

As Joseph Raz suggests, "it is the function of governments to promote morality."⁵¹⁸ The culmination of a social change is when it becomes part of the law. Then it starts the process of becoming fully accepted and internalized. Just as today we can no longer imagine slavery, it may well be that had the courts upheld the laws banning racist speech, that kind of speech would have been much more socially objectionable today. And, if a law banning the distribution of products of child labor or cosmetic products that were tested on animals is enacted today, perhaps in a few decades we will be unable to imagine the possibility of using such products. Therefore, the hegemony of the capitalist values in our legal discourse creates an obstacle to one of the most important social goals.

517. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 9 SUFFOLK U. L. REV. 27, 32 (2005) ("[O]ver time, the [Supreme] Court's decisions tend to reflect the center of national public opinion.").

518. RAZ, *supra* note 37, at 415.