

Invisible Lawmaking

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INTRODUCTION

Private lawmaking is an ordinary rent-seeking activity of interest groups: the pursuit of self-interest through regulation. Familiar examples of private lawmakers include the National Rifle Association (NRA), the American Legislative Exchange Council (ALEC), and the National Motion Picture Association of America (MPAA). Motivated private lawmakers take advantage of imperfections in the marketplace of ideas and utilize such imperfections to obscure their visibility. The US Supreme Court's marketplace of ideas theory¹ denies market imperfections and presumes perfect competition in the marketplace. This presumption rests on the Court's firm premise that the pursuit of self-interest necessarily serves the public. Resting on this unqualified confidence in the pursuit of self-interest, in *Citizens United v Federal Election Commission*² the Supreme Court has empowered interest groups, strengthening their influence over public lawmakers. This Essay describes how the Supreme Court's confidence in the inherent value of the pursuit of self-interest has weakened democratic institutions, arming interest groups with effective means to draft the law of the land, while circumventing the public discourse and shortcutting open debates.

I. WHO WRITES OUR LAWS?

Our elected legislators debate and pass laws. They draft many bills but routinely also adopt "bills" that private parties write for them. Private lawmakers write many of our laws. In some instances, elected lawmakers ("public lawmakers") revise these privately drafted bills, but in many instances, they are adopted verbatim. The influ-

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¹ See, for example, *New York State Board of Elections v Lopez Torres*, 552 US 196, 208 (2008); *Hustler Magazine, Inc v Falwell*, 485 US 46, 52 (1988); *Red Lion Broadcasting Co v FCC*, 395 US 367, 390 (1969).

² 130 S Ct 876 (2010).

ence of private lawmaking on the legislative landscape, most noticeably at the state level, is profound.

Private lawmaking in America is not a new phenomenon,³ nor is it an unstudied one.⁴ Scholars, however, have described the level of study as “inattention”⁵ and have argued that “privately made laws result from an undemocratic but *potentially* market-disciplined process.”⁶

Not all private lawmakers are created equal. Some private lawmakers are apolitical organizations that are not affiliated with specific interest groups. They work to clarify, modernize, and improve the law, while maintaining some level of transparency regarding their processes. The American Law Institute (ALI), for example, is a prestigious legal organization whose members include about four thousand lawyers, judges, and academics. ALI is best known for promulgating restatements of law.⁷ Similarly, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is comprised of state commissions on uniform laws from each state and since 1892 has been providing states with model legislation designed to increase uniformity and clarity in state law.⁸ The general purpose of these organizations is to overcome imperfections in the marketplace of ideas.

Another type of private lawmakers—Interested Private Lawmakers (IPLs)—are legislative arms of interest groups. They engage in ordinary rent-seeking activity: the pursuit of self-interest through regulation.⁹ Motivated private lawmaking is rather common. For example, the Motion Picture Association of America (MPAA) persuaded Congress, forty-one states, the District of Columbia, and Puerto Rico to adopt its anticamcorder model law that criminalizes

³ See Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv L Rev 201, 202 (1937); Frederic Jesup Stimson, *Uniform State Legislation*, 5 Annals Am Academy Polit & Soc Science 1, 11 (1895).

⁴ See, for example, Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U Pa L Rev 595, 607–37 (1995); David V. Snyder, *Private Lawmaking*, 64 Ohio St L J 371, 404 (2003). See also Editorial, *The Big Money Behind State Laws*, NY Times A22 (Feb 13, 2012); Anita Kumar, *Ghostwriter at Work for Virginia's Assembly?*, Wash Post B1 (Dec 28, 2011).

⁵ Schwartz and Scott, 143 U Pa L Rev at 597 (cited in note 4).

⁶ Snyder, 64 Ohio St L J at 373–74 (cited in note 4) (emphasis added). See also Gillian Hadfield and Eric Talley, *On Public versus Private Provision of Corporate Law*, 22 J L Econ & Org 414, 436 (2006).

⁷ See Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 Geo Wash L Rev 1212, 1216 (1993).

⁸ See Walter P. Armstrong Jr, *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* 11–22 (West 1991).

⁹ For more on interest group lobbying, see Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q J Econ 371, 376–81 (1983); Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J Econ & Mgmt Sci 335, 344 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3, 13–17 (1971).

copyright violations and imposes harsh imprisonment penalties.¹⁰ The American Legislative Exchange Council (ALEC), a dominant IPL, describes itself as a “non-profit, nonpartisan association of over 2,000 state legislators that works to promote principles of free markets, limited government and federalism throughout the states.”¹¹ Founded in 1973,

ALEC’s Task Forces have considered, written and approved hundreds of model bills on a wide range of issues, model legislation that will frame the debate today and far into the future. Each year, close to 1,000 bills, based at least in part on ALEC Model Legislation, are introduced in the states. Of these, an average of 20 percent become law.¹²

ALEC’s 2010 Legislative Scorecard proudly announces that, during 2009 alone, states enacted 115 “ALEC bills,” which constituted a 14-percent “enactment rate” (a total of 826 ALEC bills were introduced in statehouses).¹³

The National Rifle Association’s Institute for Legislative Action (NRA-ILA), another IPL, is the NRA’s lobbying arm. NRA-ILA is “committed to preserving the right of all law-abiding individuals to purchase, possess and use firearms for legitimate purposes as guaranteed by the Second Amendment.”¹⁴ The organization drafts model laws, such as “stand your ground” statutes,¹⁵ and takes credit for

¹⁰ See Susan Crabtree and Paul Sweeting, *Feds Pushing Play*, Daily Variety 8 (Apr 26, 2004); Eric J. Schwartz, *In the Matter of Preregistration of Certain Unpublished Copyright Claims—Notice of Proposed Rulemaking, Comments of the Motion Picture Association of American to David Carson*, *Esq* 1–2 (Aug 22, 2005), online at <http://www.copyright.gov/prereg/comments/mpaa.pdf> (visited Dec 18, 2012). For the enacted federal version of the law, see Family Entertainment and Copyright Act of 2005 § 102, Pub L No 109-9, 119 Stat 218, 218–20, codified at 18 USC § 2319B.

¹¹ Kaitlyn Buss, *Hundreds of State Legislators Will Meet in Phoenix to Discuss Solutions for Creating Jobs, Growing the Economy and Restoring Fiscal Order* (ALEC Nov 28, 2011), online at <http://www.alec.org/2011/11/hundreds-of-state-legislators-to-meet-in-phoenix-discussing-solutions-for-creating-jobs-growing-the-economy-and-restoring-fiscal-order> (visited Dec 18, 2012).

¹² *History* (ALEC), online at <http://www.alec.org/about-alec/history> (visited Dec 18, 2012).

¹³ *2010 Legislative Scorecard* (ALEC), online at http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/9-Legislative_Scorecard%202010.pdf (visited Dec 18, 2012). For more on ALEC, see *ALEC: Ghostwriting Law for Corporate America* (American Association for Justice May 2010), online at http://www.justice.org/cps/rde/xbrl/justice/ALEC_Report.pdf (visited Dec 18, 2012); *Corporate America’s Trojan Horse in the States: The Untold Story behind the American Legislative Exchange Council* (Defenders of Wildlife and National Resources Defense Council 2002), online at <http://www.alecwatch.org/11223344.pdf> (visited Dec 18, 2012).

¹⁴ *About NRA-ILA* (NRA), online at <http://www.nra-ila.org/about-nra-ila.aspx> (visited Dec 18, 2012).

¹⁵ See Denise M. Drake, Comment, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 St Mary’s L J 573, 575 (2008); P. Luevonda Ross, *The Transmogrification of*

“help[ing] pass” laws, such as the Protection of Lawful Commerce in Arms Act, “which blocks reckless lawsuits against firearms manufacturers [and distributors].”¹⁶ NRA-ILA considers “[l]egislative action . . . a constant war, fought on multiple battlefields simultaneously.”¹⁷

A less familiar IPL is Gary Marbut of Missoula, Montana, who “takes credit for the drafting of over thirty pro-gun and pro-hunting Montana laws.”¹⁸ Mr. Marbut’s most successful legislative product, the Firearms Freedom Act, was introduced in thirty states and adopted in eight.¹⁹ To advance his goals, Mr. Marbut founded the Montana Shooting Sports Association, a political action organization affiliated with the NRA, “to get the right candidates elected.”²⁰

Indeed, the role of IPLs is so entrenched in our legislative culture that a statute’s informal name often indicates its private origins. For example, the Sonny Bono Copyright Term Extension Act of 1998²¹ was commonly referred to as the “the Mickey Mouse Protection Act” for Disney’s part in its enactment.²² The Family Smoking Prevention and Tobacco Control Act of 2009,²³ which reformed tobacco regulation in the United States while preserving some of Philip Morris’s interests, was labeled the Marlboro Act, in acknowledgment of the company’s extensive involvement in its drafting.²⁴

Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground, 35 S U L Rev 1, 23 (2007).

¹⁶ *The NRA Institute for Legislative Action: Protecting our Second Amendment Freedom and Hunting Heritage* (NRA-ILA Mar 9, 2008), online at <http://www.nra-ila.org/news-issues/articles/2008/nra-ila.aspx?s=which+blocks+reckless+lawsuits+against+firearms+manufacturers&st=&ps=> (visited Dec 18, 2012).

¹⁷ *Id.*

¹⁸ Barak Y. Orbach, Kathleen S. Callahan, and Lisa M. Lindemenn, *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 Ariz L Rev 1161, 1176 (2010).

¹⁹ See *id.* at 1178.

²⁰ Orbach, Callahan, and Lindemenn, 52 Ariz L Rev at 1176 (cited in note 19), quoting Jess Bravin, *A Lone Stance on Ad Spending: Montana is Seeking to Uphold Campaign-Funding Curbs Jeopardized by a Supreme Court Ruling* (Wall St J Oct 12, 2010), online at <http://online.wsj.com/article/SB10001424052748704127904575543920682786784.html> (visited Dec 18, 2012).

²¹ Pub L No 105-298, 112 Stat 2827, codified in various sections of Title 17.

²² See Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L Rev 1057, 1065 (2001).

²³ Pub L No 111-31, 123 Stat 1776, codified at 21 USC § 387 et seq.

²⁴ The person who coined the name is Steve Watson, a former Vice President of External Affairs of Lorillard, one of the largest four tobacco companies. John Carey, *Commentary: Philip Morris’ Latest Smoke Screen* (Bloomberg Businessweek July 15, 2001), online at <http://www.businessweek.com/stories/2001-07-15/commentary-philip-morris-latest-smoke-screen> (visited Dec 18, 2012). See also Allan M. Brandt, *FDA Regulation of Tobacco — Pitfalls and Possibilities*, 359 New Eng J Med 445, 447 (2008).

II. THE VISIBILITY OF IPLS

Of course, there is no reliable data about the scope of IPLs' activities and influence. By and large, interested private lawmaking is relatively invisible. Being opportunistic by definition,²⁵ IPLs disclose information selectively and try to manipulate publicly available information.

Benefiting from “inattention,” IPLs receive the constitutional protection available to interest groups, under the Supreme Court's premise that, in the marketplace of ideas, the pursuit of self-interest tends to serve society, namely, that when interest groups exercise political speech they are likely promote societal ends.

In *Citizens United*, the Court held that the First Amendment prohibited the government from restricting independent political expenditures by corporations.²⁶ The Court was divided about the question whether the pursuit of self-interest by pressure groups is likely to serve as a means to hold officials *accountable to the people* or as a means to discipline and reward officials for their *accountability to private interests* at the expense of the people. A majority of five justices sided with the former theory. Writing for the majority, Justice Anthony Kennedy ruled that speech necessarily serves as a “means to hold officials accountable to the people,”²⁷ and declared that “[p]remised on mistrust of governmental power, the First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others.”²⁸

In June 2012, the Supreme Court handed down three decisions that underscored the increasing aggressiveness of IPLs in our political system, including their willingness to engage in conflict with public lawmakers: *National Federation of Independent Business v Sebelius*²⁹ (“NFIB”), *Arizona v United States*³⁰ (“Arizona”), and

²⁵ Professor Oliver Williamson provided the classic definition of “opportunism” as “self-interest seeking with guile.” Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*, 26 (Free Press 1975). This definition stresses the interest of opportunist parties in control over information. Professor Henry Smith offered a more elaborate definition that stresses the significance of information: “[B]ehavior that is undesirable but that cannot be cost-effectively captured—defined, detected, and deterred—by explicit ex ante rulemaking.” Henry E. Smith, *An Economic Analysis of Law versus Equity* *9 (unpublished manuscript, 2010), online at http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf (visited Dec 18, 2012).

²⁶ See *Citizens United*, 130 S Ct at 913.

²⁷ *Id.* at 898.

²⁸ *Id.* at 898–99.

²⁹ 132 S Ct 2566 (2012).

³⁰ 132 S Ct 2492 (2012).

*American Tradition Partnership, Inc v Bullock*³¹ (“ATP”). In *NFIB*, twenty-six states, several individuals, and the National Federation of Independent Business challenged the constitutionality of two key provisions of the Patient Protection and Affordable Care Act of 2010.³² IPLs designed the intellectual framework underlying the constitutional challenges and provided state legislatures with model bills that nullified the federal statute.³³ In *Arizona*, the Court upheld several key provisions of a state immigration law that conflicted with federal immigration policies.³⁴ An IPL crafted and championed the state law.³⁵ *ATP* involved a constitutional challenge to Montana’s 1912 Corrupt Practices Act.³⁶ The petitioners were IPLs that relied on *Citizens United* to challenge the 1912 statute that imposed restrictions on their activities.³⁷ By a 5–4 vote, the Court declined to reconsider *Citizens United*, delivering a victory to IPLs that sought to influence elections.³⁸ One of the petitioners was Marbut’s Montana Shooting Sports Association.³⁹

Under *Citizens United*’s public accountability theory, the increasing trend in IPL assertiveness could only illustrate good citizenship—a critique of the government through impacting regulation. Under this premise, because the pursuit of self-interest serves society, the activities of interest groups, including IPLs, are also likely to serve society, while governmental intervention in market activities and individual choices is likely to be harmful.

But even the “tradition of economic liberalism . . . has always assumed that there were some economic results which cannot be attained at all or attained only in inappropriate amounts if left to the

³¹ 132 S Ct 2490 (2012).

³² See *NFIB*, 132 S Ct at 2580.

³³ See Beth Kutscher, ‘Model Legislation’: States, *ALEC Take Reform into Their Own Hands*, 42 *Mod Healthcare* 14, 14–15 (June 18, 2012). For an example of one of the statutes mentioned in Kutscher, see Virginia Healthcare Freedom Act, 2010 Va Acts 106, codified at Va Code § 38.2-3430.1:1. See also Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 *NYU J L & Liberty* 581, 607–08 (2010).

³⁴ See *Arizona*, 132 S Ct at 2502, 2504, 2506.

³⁵ See Fred Grimm, *Private Prisons the Force behind Immigrant Law?*, *Miami Herald* (Nov 16, 2010). For more on the Arizona immigration law, see Gabriel J. Chin and Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 *Duke L J* 251, 291–95 (2011).

³⁶ See *ATP*, 132 S Ct at 2491.

³⁷ See Marnee Banks, *Montana Politics 2010: Corporate Spending Ruling* (KXLH Dec 27, 2010), online at <http://www.kxlh.com/news/montana-politics-2010-corporate-spending-ruling> (visited Dec 18, 2012).

³⁸ See *ATP*, 132 S Ct at 2491.

³⁹ See Petition for a Writ of Certiorari, *American Tradition Partnership, Inc v Bullock*, No 11-1179, *ii (US filed Mar 26, 2012).

free market.”⁴⁰ Therefore, free market thinkers taught that “[w]e must choose those [institutions] which minimize the risks of undesirable consequences.”⁴¹ In *Citizens United*, however, the majority considered only one type of risk of undesirable consequences: “Government [that] seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear [] uses censorship to control thought.”⁴²

The simplistic focus on harm government intervention may cause is myopic and misleading;⁴³ it ignores, and thereby increases, the vulnerability of the government to be used as a tool of pressure groups. It is a focus on possible risks from one visible entity—the government—while disregarding the risks from less visible entities—the legislative arms of interest groups.

⁴⁰ Aaron Director, *The Parity of the Economic Market Place*, 7 J L & Econ 1, 2 (1964).

⁴¹ *Id.* at 10.

⁴² *Citizens United*, 130 S Ct at 908.

⁴³ For an example for this perspective, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 14–15 (1984) (arguing that if we “let some socially undesirable practices escape, the cost is bearable,” while the “costs of deterring beneficial conduct (a byproduct of any search for the undesirable examples) are high”).



The Political Problem. Harper's Weekly, Apr 15, 1876.

III. MIDDLEMEN IN THE MARKETPLACE OF IDEAS

Private lawmakers are middlemen.⁴⁴ They operate as the conveyors of ideas from the public to and through legislatures. As middlemen, private lawmakers owe their existence to imperfections in

⁴⁴ For a discussion on the economic role of middlemen, see Gary Biglaiser, *Middlemen As Experts*, 24 RAND J Econ 212, 216–22 (1993) (arguing that middlemen add value to a market because they are able, by dint of their expertise, to assure buyers that their goods are valuable); Ariel Rubinstein and Asher Wolinsky, *Middlemen*, 102 Q J Econ 581, 591–93 (1987).

the marketplace of ideas,⁴⁵ such as the costs of communicating information (transaction costs), inadequate information, and bounded rationality.⁴⁶ Put simply, if “the best test of truth [were indeed] the power of the thought to get itself accepted in the competition of the market,”⁴⁷ as Justice Oliver Wendell Holmes famously wrote, private lawmakers would be unemployed.⁴⁸

In marketplaces of ideas, some private lawmakers compensate for imperfections,⁴⁹ some exploit such imperfections to advance private interests, and others do both—compensate for and take advantage of imperfections.

Unlike apolitical private lawmakers (like the ALI or NCCUSL), IPLs are in the business of advancing narrow interests. They utilize imperfections in the marketplace of ideas to do so. This is their expertise, and their performance is measured by delivery of self-serving laws, such as ALEC’s “enactment rate.”⁵⁰ In some instances, private interest may align with broad public interests, but this coincidental alignment is not the goal of IPLs. Their mission is defined by the private interest.

Some IPLs try to present themselves in a neutral light by likening themselves to their apolitical relatives. For example, ALEC explains,

ALEC model bills serve as public policy resources. Many organizations that focus on state-level issues also offer model state legislation or codes. These organizations include the American Bar Association, National Conference of Commissioners on Uniform State Laws, and [others]. Model bills are ideas that can be taken, modified or rejected, depending on the needs of a particular legislation. State legislators often find model bills valuable for learning from each others’ experiences and expertise,

⁴⁵ See Jaffe, 51 Harv L Rev at 202 (cited in note 3); Stimson, 5 Annals Am Acad Polit & Soc Sci at 10–11 (cited in note 3).

⁴⁶ Correspondingly, regulation is a by-product of imperfections and human limitations. See generally Barak Orbach, *What Is Regulation?*, Yale J Reg Online (Oct 10, 2012), online at <http://yale-jreg.org/what-is-regulation/> (visited Dec 18, 2012).

⁴⁷ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting). See also *Whitney v California*, 274 US 357, 377 (1927) (Brandeis concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

⁴⁸ See generally Barak Y. Orbach and Frances R. Sjöberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 Conn L Rev 1 (2011); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 S Ct Rev 1; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1.

⁴⁹ See, for example, W. Brooke Graves, *Uniform Regulation and Control of Commerce*, 14 Harv Bus Rev 337, 344–45 (1936).

⁵⁰ *2010 Legislative Scorecard* (cited in note 13).

while tailoring the bills they introduce to meet the interests of their own state's constituents. Any model bill, regardless of where it is from, rises or falls in a state based on whether it provides the solutions that makes sense in that particular state.⁵¹

But private lawmaking is not all about the creation of “public policy resources.” It also includes advocacy aimed at promoting particular groups’ interests. In the case of IPLs, model bills are drafted to advance a specific interest, and public lawmakers are not left to find those bills, to exercise their best judgment, or debate the bills.

IV. THE INVISIBLE HAND IN THE MARKETPLACE OF IDEAS

IPLs make a constant effort to have their invisible hands stirring in legislative houses. They circumvent the public discourse and shortcut open debates to advance their goals. IPLs are not interested in the “free trade in ideas” and work to stifle and cripple such trade. This is their art.

The Supreme Court’s simplistic marketplace of ideas philosophy, however, sweepingly views all market participants, including all interest groups—and implicitly also IPLs—as deserving of the same constitutional protection.⁵² As framed by Justice Holmes, the basis of this entitlement is the belief that people of

fighting faiths . . . may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market.⁵³

The Supreme Court has canonized this conceptual framework⁵⁴ and pressed it further, ruling that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁵⁵

⁵¹ *Frequently Asked Questions* (ALEC 2012), online at <http://www.alec.org/about-alec/frequently-asked-questions> (visited Dec 18, 2012).

⁵² See *Citizens United*, 130 S Ct at 898.

⁵³ *Abrams*, 250 US at 630 (Holmes dissenting).

⁵⁴ See, for example, *Snyder v Phelps*, 131 S Ct 1207, 1220 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

⁵⁵ *First National Bank of Boston v Bellotti*, 435 US 765, 777 (1978). In *Citizens United*, the majority rested its reluctance to distinguish between corporations and individuals on the Court’s ruling in *Bellotti*. See *Citizens United*, 130 S Ct at 898–900.

In *Citizens United*, Justice Kennedy reframed these premises: “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”⁵⁶ Therefore, he concluded that “political speech must prevail against laws that would suppress it”⁵⁷ and “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”⁵⁸ Under present law, Congress and states cannot restrict the political speech of IPLs to limit the reach of their hands, which are invisible to the public.

The Supreme Court’s confidence in the efficacy of the marketplace of ideas rests on beliefs in “invisible hand” theories: market participants supposedly tend to be “led by an invisible hand to promote an end which was no part of [their] intention . . . [and] [b]y pursuing [their] own interest [they] frequently promote[] that of the society.”⁵⁹ Thus, the invisible hand argument posits that although market participants use speech rights to promote their own self-interest, the “ultimate good” may be reached or the “truth” may be discovered. Invisible hand beliefs are, indeed, popular in the legal and political discourse.⁶⁰ The popularity of these arguments, however, does not cure their fundamental flaws.⁶¹

The intellectual foundation of invisible hand arguments originates in a misreading of Adam Smith. Smith did not coin the phrase invisible hand, which was common during his time.⁶² Although criti-

⁵⁶ *Citizens United*, 130 S Ct at 898.

⁵⁷ *Id.*

⁵⁸ *Id.* at 913.

⁵⁹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 477–78 (Chicago 1976).

⁶⁰ See Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 Va L Rev 1417, 1419–22 (2010).

⁶¹ For discussions of market failures due to poor regulation, see National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* 52–66 (GPO Jan 2011), online at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> (visited Dec 18, 2012); Carmen M. Reinhart and Kenneth S. Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* 277–82 (Princeton 2009); Robert J. Shiller, *Irrational Exuberance 2* (Broadway 2d ed 2005). See also *The Financial Crisis and the Role of Federal Regulators, Hearing Before the Committee on Oversight and Government Reform, House of Representatives*, 110th Cong, 2d Sess 16–17 (2008) (testimony of Alan Greenspan, Former Chairman of the Federal Reserve) (“[T]hose of us who have looked to the self-interest of lending institutions to protect shareholder’s equity (myself especially) are in a state of shocked disbelief. . . . The whole intellectual edifice . . . collapsed.”).

⁶² For example, in the early seventeenth century, William Shakespeare had already used it in *Macbeth*.

cal of government regulation, Smith's invisible hand was the hand of God, not of market forces.⁶³

Further, established economic theories do not support invisible hand beliefs.⁶⁴ Rather, they emphasize market imperfections, such as externalities, transaction costs, inadequate information, and bounded rationality. Under any established economic framework, "[t]he inherent worth of the speech in terms of its capacity for informing the public"⁶⁵ depends on the efficiency of idea exchange that, in turn, is influenced by communication costs, the availability of initial information, rationality, and other factors.⁶⁶ Nonetheless, the Supreme Court has been utilizing an overly simplistic framework of perfect markets.⁶⁷

Indeed, economist Frank Knight, a prominent free market theorist, argued that "trade in ideas" does not really exist:

Genuine, purely intellectual discussion is rare in modern society, even in intellectual and academic circles, and is approximated only in very small and essentially casual groups. On the larger scale, what passes for discussion is mostly argumentation or debate. The intellectual interest is largely subordinate to entertainment, *i.e.*, entertaining and being entertained, or the immediate interest of the active parties centers chiefly in dominance, victory, instructing others, or persuading rather than convincing, and not in the impartial quest of truth.⁶⁸

Knight's observation has abundant empirical support. Studies in psychology show that people tend to interpret information in a manner

⁶³ See Andy Denis, *The Invisible Hand of God in Adam Smith*, 23 *Rsrch Hist Econ Thought & Methodology* 1 (2005); Peter Harrison, *Adam Smith and the History of the Invisible Hand*, 72 *J Hist Ideas*, 29, 45 (2011); Alec Macfie, *The Invisible Hand of Jupiter*, 32 *J Hist Ideas* 595, 597 (1971).

⁶⁴ See generally Steven G. Medema, *The Hesitant Hand: Taming Self-Interest in the History of Economic Ideas* (Princeton 2009).

⁶⁵ *Bellotti*, 435 US at 777 (reasoning used as a rationale in *Citizens United*).

⁶⁶ See R. H. Coase, *The Problem of Social Cost*, 3 *J L & Econ* 1, 15 (1960):

In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly—sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

⁶⁷ See Director, 7 *J L & Econ* at 5–6 (cited in note 40) (explaining the meaning of *laissez faire* in the tradition of liberalism and arguing that it is not applicable to speech).

⁶⁸ Frank H. Knight, *Freedom and Reform: Essays in Economics and Social Philosophy* 349 (Harper 1947). See generally Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (Wadsworth 2d ed 1982) (describing the mechanisms of error in organizations and institutions).

that is consistent with their preexisting beliefs, and use reasoning to persuade others, not for the purpose of “trade in ideas.” Strong opinions about complex issues tend to exacerbate this tendency and result in biased perceptions of reality and information.⁶⁹ Under certain circumstances, debates may reinforce existing beliefs and escalate polarization.⁷⁰ Of course, people regularly overcome disagreements through exchanges of views and negotiation, but this pattern does not necessarily establish efficiency in the marketplace of ideas. The Supreme Court’s treatment of the marketplace of ideas utilizes an outdated economic narrative to justify the Court’s traditional treatment. This narrative is not only outdated, but also lacks theoretical and empirical grounds.

V. MANIPULATIONS AND SPECULATIONS IN THE MARKETPLACE OF IDEAS

Using the marketplace narrative, the Supreme Court has developed a few additional principles for the marketplace of ideas. For example, in *New York Times Co v Sullivan*,⁷¹ the Court declared that the United States has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁷² And in *Snyder v Phelps*,⁷³ the Court announced, “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a Nation we have cho-

⁶⁹ See, for example, Charles G. Lord, Lee Ross, and Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J Personality & Soc Psych 2098, 2104 (1979).

⁷⁰ See James Andreoni and Tymofiy Mylovanov, *Diverging Opinions*, 4 Am Econ J: Microeconomics 209, 213 (Feb 2012) (“[A]rrival of public information can cause divergence of opinions.”). For scholarly discussion on the self-serving bias, the pattern of adhering to existing beliefs, and polarization, see Roland Bénabou and Jean Tirole, *Self-Confidence and Personal Motivation*, 117 Q J Econ 871, 901–02 (2002) (explaining the empirical fact that people are often unfoundedly self-confident by arguing that even unfounded self-confidence might be personally valuable); Avinash K. Dixit and Jörgen W. Weibull, *Political Polarization*, 104 Proc Natl Acad Sci 7351, 7354 (2007); Barak Orbach, *On Hubris, Civility, and Incivility*, 54 Ariz L Rev 443, 456 (2012) (arguing that the cognitive biases may form polarizing civility and incivility norms); Orbach and Sjoberg, 44 Conn L Rev at 6 (cited in note 48); Rajiv Sethi and Muhamet Yildiz, *Public Disagreement*, 4 Am Econ J: Microeconomics 57, 76 (Aug 2012); Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* 14–15 (Oxford 2009) (discussing an experiment in which the attitudes of jurors toward the proper severity of punishment were further polarized after deliberation).

⁷¹ 376 US 254 (1964).

⁷² Id at 270.

⁷³ 131 S Ct 1207 (2011).

sen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”⁷⁴

Speech is indeed powerful. Alongside its undeniable beneficial virtues, speech may also be used to stifle public debate and adversely affect society.⁷⁵

Middlemen, including private lawmakers, operate in the marketplace in many ways, and one may argue they are “led by an invisible hand to promote an end which [is] no part of [their] intention.”⁷⁶ They may indeed compensate for existing market inefficiencies by facilitating exchanges. But middlemen can also utilize their position to advance their self-interest by profitably speculating or manipulating information at the expense of others.⁷⁷ The marketplace of ideas hypothesis suggests that if profitable manipulations (or speculations) ever take place they stabilize prices, namely, by revealing the truth or preferences in the market. John Stuart Mill, Milton Friedman, and other economists presented this thesis to argue that financial speculations may cause transitory effects in the short term but stabilize prices in the long term.⁷⁸ The Supreme Court took this approach to the extreme, arguing that the pain speech may cause is temporary and local, while the inherent value of speech contributes to the public debate. In other words, the premise regarding the “inherent worth of the speech in terms of its capacity for informing the public”⁷⁹ is equivalent to an unqualified assumption about an inherent value of stock transactions, including insider trading and stock price manipulation. Applying this logic, under the rationale of *Citizens United*, the restrictions imposed on stock traders should not be greater than those imposed on the public.

The economic argument about speculations and manipulations is theoretically flawed and is inconsistent with financial realities.⁸⁰ In

⁷⁴ Id at 1220.

⁷⁵ See Orbach and Sjoberg, 44 Conn L Rev at 5 (cited in note 48).

⁷⁶ Smith, *The Wealth of Nations* at 477 (cited in note 59).

⁷⁷ See generally Jos Van Bommel, *Rumors*, 58 J Fin 1499 (2003) (explaining how rumors cause speculation through the asymmetry and uncertainty of information they create); Daniel R. Fischel and David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 Harv L Rev 503 (1991) (arguing that manipulative—or speculative—trades should not be prohibited because they may not be socially undesirable); Oliver D. Hart, *On the Profitability of Speculation*, 91 Q J Econ 579 (1977) (examining the conditions under which speculation is beneficial to society).

⁷⁸ See Lester G. Telser, *A Theory of Speculation Relating Profitability and Stability*, 41 Rev Econ & Stat 295, 297–99 (1959); Milton Friedman, *Essays in Positive Economics* 157–203 (Chicago 1953); John Stuart Mill, 2 *Principles of Political Economy with Some of Their Applications to Social Philosophy* 267–70 (Parker 3d ed 1852).

⁷⁹ *Bellotti*, 435 US at 777.

⁸⁰ See generally M.J. Farrell, *Profitable Speculation*, 33 *Economica* 183 (1966); Oliver D. Hart and David M. Kreps, *Price Destabilizing Speculation*, 94 J Polit Econ 927 (1986).

essence, the argument suggests that middlemen have no role in the facilitation of financial bubbles. Like other middlemen who can utilize their position for profitable speculations and manipulations, IPLs' position allows them to use political speech to discipline public lawmakers who do not endorse their proposals and to reward obedient public lawmakers. They can increase their enactment rate with political speech. By unleashing the political speech of interest groups, *Citizens United* effectively armed IPLs and contributed to their effectiveness.

VI. THE FALLACY OF THE BELIEF IN EFFICIENT MARKETS

Interested private lawmaking, albeit an ordinary strategy of interest groups, is relatively invisible. Occasionally, it becomes the target of media scrutiny, but overall courts and scholars pay little attention to the topic despite its significance. This inattention is only one dimension of invisibility. Interested private lawmaking is invisible also because of the presumption that public lawmakers draft or, at the very least, deliberate, every legislative proposal.⁸¹ The public does not know much about IPLs and their activities. The public cannot throw IPLs out of office, and throwing public lawmakers out of office for adopting IPLs' bills may only be a temporary setback to IPLs. For IPLs, public lawmakers are dispensable pawns.

It is often argued that "regulation is acquired by the industry and is designed and operated primarily for its benefit."⁸² Capture theories are one source of critique of regulation.⁸³ Critique and distrust of regulation and government have led the Supreme Court to impose restrictions on the government power to regulate private parties that seek to influence the government. In effect, in *Citizens United* and *ATP*, the Court strengthened the capture IPLs have over public lawmakers, relying on the theory that speech serves as a "means to hold officials accountable to the people."⁸⁴ In the marketplace of ideas, unleashed interest groups may have effective means

⁸¹ See, for example, *NFIB*, 132 S Ct at 2579 (Roberts) ("[P]olicy judgments . . . are entrusted to our . . . elected leaders, who can be thrown out of office if the people disagree with them.").

⁸² Stigler, 2 Bell J Econ & Mgmt Sci at 5 (cited in note 9). See also Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* 3 (Free Press 1963) (studying the establishment of the ICC and its early years and concluding that "regulation itself was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable"); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J L & Econ 211, 213-22 (1976).

⁸³ See, for example, Orbach, *What Is Regulation?* 5-6 (cited in note 46).

⁸⁴ *Citizens United*, 130 S Ct at 898.

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to influence public lawmakers to be accountable to *their people* at the expense of *the people*.