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## ARTICLES



## COMMENT

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The UCLA Undergraduate Business Law Review (UBLR) is dedicated to fostering thoughtful, accessible dialogue at the intersection of business, law, and policy. We provide students with a platform to explore pressing legal and economic issues, share underrepresented perspectives and contribute to the broader conversation on how our institutions shape our business landscape and general society. UBLR is published semiannually (in the fall and the spring) entirely by students with hopes to empower the next generation of legal and business thinkers through research and collaboration. Inquiries into UBLR can be sent to uclaublr@gmail.com and copies of the editions are available on the Undergraduate Business Law Association (UBLA) website: uclaubla.com.

## Foreword

On behalf of the Editorial Board, I am pleased to present the Spring 2026 edition of the *Undergraduate Business Law Review* at UCLA. This issue continues the *Review's* commitment to publishing thoughtful undergraduate legal scholarship at the intersection of business, law, regulation, and public policy. The pieces selected for this edition examine how legal institutions respond to market power, political influence, technological change, and regulatory failure.

This second volume reflects the continued growth of the *Review* since its inaugural publication. Over the past year, our editors and contributors have worked to build a publication that is both analytically rigorous and accessible. The *Review* remains committed to providing undergraduate students with an opportunity to engage seriously with legal scholarship and to examine questions at the intersection of business, law, and policy.

The articles featured in this issue address pressing questions across several areas of law and policy. In *Aristotle's Golden Mean and the Diesel Defect: A Moral View of the Clean Air Act and the Failure of Federal Vehicle Emissions Enforcement in California, 2009–2025*, Ella Vincent evaluates environmental enforcement through the lens of Aristotelian ethics. In *Gilded Age Laws in the Digital Era: Judicial Narrowing and the Limits of Antitrust Enforcement Against Digital Platforms*, Carter Hanson examines whether existing antitrust doctrine can meaningfully address platform self-preferencing in modern digital markets. Finally, in *The Transformation of American Political Markets Ex Post Citizens United*, Gary Voigt and Noah Reisenauer analyze the doctrinal and empirical consequences of modern campaign finance jurisprudence, tracing how Supreme Court decisions have reshaped the relationship between political spending, market access, and democratic participation.

I want to thank the authors for their careful research, the editors for their close work throughout the revision process, and the Undergraduate Business Law Association for its continued support of the *Review*. We hope that this edition contributes to conversations about the role of law in shaping economic and political institutions, and we thank you for your continued readership of the *Review*.

Sincerely,
Matthew Cherfane
Editor-in-Chief

# Aristotle's Golden Mean and the Diesel Defect: A Moral View of the Clean Air Act and the Failure of Federal Vehicle Emissions Enforcement in California, 2009–2025

Written by Ella Vincent
*Article*
Edited by Andrew Ma, Sophie Lenart, and Hong-An Nguyen

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## I. INTRODUCTION

Aristotle's concept of the Golden Mean[1] holds that virtue resides in the balance between excess and deficiency, and it supplies a framework for evaluating regulatory policy. The existing federal penalty structure, as applied to large automotive corporations, is insufficient to counteract the profit incentives that drive noncompliance. Vehicles emit nitrogen-oxide pollutants and fine particles that react in sunlight to form ground-level ozone, and strong regulation is therefore vital to the health of the people who breathe air polluted by vehicle emissions. The dismantling of California's independent enforcement authority, a regulatory mechanism with demonstrated deterrent force, pushes the system further from equilibrium.

California is the appropriate focus for this analysis because its air-quality crisis is severe and well documented. The California Air Resources Board (CARB) is among the most active regulatory bodies in the nation, and it has used its authority under Section 209 of the CAA[2] to set standards stricter than federal minimums—making California the prime example for watershed vehicle-emissions litigation over the past two decades. This paper examines that litigation from 2009, the earliest model year of Volkswagen's defeat-device fraud, to the 2025 landmark case addressing California's waiver authority, capturing a complete arc of enforcement failure and regulatory response.

In September 2015, the U.S. Environmental Protection Agency (EPA) issued a Notice of Violation to Volkswagen AG,[3] revealing that the German automaker had installed a "defeat device"—software designed to cheat vehicle-emissions testing. The device was embedded in more than 590,000 diesel vehicles sold in the United States.[4] The software enabled a vehicle to detect that it was undergoing emissions testing and temporarily reduce engine output to remain within legal limits. Under normal driving conditions, the affected vehicles emitted nitrogen oxides (NOx) between nine and thirty-eight times the federal maximum.[5] These emissions posed a serious public-health concern, because nitrogen oxides react in the atmosphere to

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[1] Aristotle, *Nicomachean Ethics* bk. II, ch. 6 (W.D. Ross trans., Oxford Univ. Press 1998) [hereinafter Aristotle, *NE*].
[2] Clean Air Act § 209(b), 42 U.S.C. § 7543(b) (2018).
[3] Notice of Violation from U.S. Envtl. Prot. Agency to Volkswagen AG (Sept. 18, 2015) [hereinafter EPA Notice of Violation].
[4] U.S. Envtl. Prot. Agency, *Volkswagen Clean Air Act Civil Settlement* (last visited May 15, 2026), https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement.
[5] EPA Notice of Violation, *supra* note 3.

form smog and particulates that worsen air quality and damage lungs. The fraud went undetected by the EPA for at least six years before independent researchers at West Virginia University uncovered it.[6]

This paper asks whether the federal agencies charged with enforcement effectively investigated the fraud and, upon discovery, imposed sufficient legal consequences. It argues that they did not, and that the solution lies in meaningful reform of regulatory penalties. The 1970 revisions to the Clean Air Act require the EPA to regulate vehicle emissions and to enforce civil penalties and compliance orders against violators.[7] Yet the penalty structure in Title II of the CAA has not been meaningfully reformed to reflect the scale of present-day corporations that may violate it. The CAA authorizes per-vehicle civil fines, with additional fines for tampering, defeat-device use, and repeat violations. When a company generating hundreds of billions of dollars in annual revenue faces a civil penalty calculated in per-vehicle terms, the penalty amounts to little more than a marginal operating expense. In the Aristotelian sense, such a structure represents a deficiency: a failure to apply force proportionate to the excess it is meant to correct.

## II. BACKGROUND

### A. California's Air Quality Crisis and the Stakes of Enforcement

California presents one of the most severe cases of air pollution in any region of the developed world. The San Joaquin Valley and the South Coast Air Basin, which encompasses greater Los Angeles, contain some of the highest concentrations of ground-level ozone and fine particulate matter (PM2.5) in the United States. The American Lung Association has consistently ranked cities such as Bakersfield, Fresno, and Los Angeles among the most ozone-polluted in the country.[8] Elevated NOx emissions (the pollutant at the center of the Volkswagen defeat-device fraud) react with sunlight to form ozone, a leading contributor to respiratory disease, cardiovascular illness, and premature death, with disproportionate impacts on low-income communities and those near high-traffic corridors.

Because of these conditions, Congress granted California a unique legal privilege within the CAA in 1970. Congress allowed California to maintain its

[6] Hemanth Kappanna et al., *Light-Duty Diesel Vehicle In-Use Emissions Testing*, Ctr. for Alternative Fuels, Engines & Emissions, W. Va. Univ. (2014).
[7] Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q).
[8] Am. Lung Ass'n, *State of the Air 2024* (2024).

pre-existing vehicle-emissions program and to set stricter standards independently, provided the EPA grants a "preemption waiver" under CAA Section 209(b). Over the decades, the EPA has granted California more than seventy-five such waivers.[9] Other states may adopt California's standards but may not set their own.[10] This arrangement has made California a de facto second national regulator for vehicle emissions and the principal counterweight to federal enforcement. That counterweight matters because emissions enforcement varies sharply with federal administrations: when federal regulators relax standards or decline to pursue violators, California's independent authority is often the only mechanism that preserves a continuous deterrent and prevents a nationwide regression in air-quality protection.

B. The Clean Air Act: Enforcement and Penalty Structure

Title II of the CAA governs emissions from new motor vehicles and their engines. Section 202(a) requires the EPA to establish emissions standards for pollutants that endanger public health.[11] Section 203 prohibits manufacturers from selling nonconforming vehicles and bars the use of defeat devices—any system that bypasses required emissions controls.[12] Section 205 authorizes civil penalties of up to $37,500 per vehicle per violation (adjusted for inflation), enforceable in federal district court or through an administrative process.[13]

Two features of this structure shape every enforcement action that follows. First, the penalty is denominated per vehicle and capped by statute, adjusted only periodically for inflation rather than indexed to the offender's size or gain. Second, the civil penalty is conceptually distinct from the remedial measures—buybacks, mitigation funds, and zero-emission-vehicle investments—that typically accompany a large settlement: remediation compensates for past harm, while the penalty is the instrument meant to deter future violations by making noncompliance economically irrational. As the Volkswagen proceeding examined in Part IV.A demonstrates, the gap between the headline value of a settlement and the disciplinary force of its

[9] Cal. Air Res. Bd., *History of California Waiver Requests Under Section 209 of the Clean Air Act* (2023).
[10] Clean Air Act § 177, 42 U.S.C. § 7507 (2018).
[11] Clean Air Act § 202(a), 42 U.S.C. § 7521(a) (2018).
[12] Clean Air Act § 203, 42 U.S.C. § 7522 (2018).
[13] Clean Air Act § 205, 42 U.S.C. § 7524 (2018); 40 C.F.R. § 19.4 (2023) (penalty inflation adjustments).

penalty component is where the deficiency in the current framework becomes visible.

### C. The Regulatory Landscape: California, 2009–Present

The 2009–2025 window is justified on both empirical and philosophical grounds. The year 2009 marks the earliest model year in which Volkswagen vehicles were equipped with defeat devices, meaning the fraud was already under way when President Obama signed the American Recovery and Reinvestment Act and directed federal investment toward “clean” automotive technology. Federal policy subsidized the “clean car” while a major manufacturer exploited the regulatory tests that defined it.

The arc closes in 2025 with the Trump administration’s use of the Congressional Review Act to revoke California’s Clean Air Act waivers and California’s subsequent challenge to that revocation. Across these sixteen years, the three proceedings examined here trace an enforcement record that was slow to detect systemic fraud and, upon discovery, declined to impose penalties commensurate with the harm disclosed. In Aristotelian terms, the failure lies not in excess but in deficiency: a penalty structure that has become a predictable cost of doing business, one that large corporations can absorb without changing their conduct.

## III. METHODOLOGY

This paper draws on federal court opinions, consent decrees, EPA enforcement records, and CARB regulatory filings, alongside secondary scholarship in environmental law, deterrence theory, and regulatory economics. Its analytical framework brings two traditions that rarely meet into dialogue: Aristotelian virtue ethics and the economic theory of regulatory deterrence.

Each of the three cases had to originate in or be substantially litigated in California, reflecting the paper’s jurisdictional focus; each had to bear directly on the relationship between penalty structures and corporate-compliance incentives; and together they had to span 2009 to 2025, allowing the paper to trace an arc rather than isolate a single incident. The Volkswagen MDL, a consolidation of hundreds of suits filed by consumers, dealerships, and others into one proceeding in the Northern District of California under Judge Charles Breyer, satisfies the first two criteria most completely. *Diamond Alternative Energy* extends the analysis into the systemic and political dimensions of enforcement, and *California v. United States* marks the end of the arc in 2025, addressing the political erosion of the distributive protections owed to the communities that suffer most from vehicle emissions.

Aristotle's Golden Mean is not a fixed midpoint but a proportionate response calibrated to the situation and the stakes. A penalty adequate for a small manufacturer is not adequate for a multinational generating hundreds of billions in annual revenue, and regulation that ignores that distinction is deficient. For each case, the analysis asks whether the regulatory response was adequate in the Aristotelian sense—sufficient to the task without overreaching—and, where it fell short, what kind of deficiency it represented. Each case is paired with a proposed reform grounded in both Aristotelian ethics and existing legal precedent, to show that the path to the mean is neither radical nor unprecedented.

The paper acknowledges the limits of this approach. A literature review cannot establish causal claims about which specific penalty levels would have prevented the Volkswagen fraud, nor can it fully account for non-economic compliance motivations such as reputational risk. These limitations are noted where relevant and do not diminish the core finding: that the existing penalty structure is structurally inadequate relative to the profit incentives it confronts.

## IV. RESULTS

### A. In re: Volkswagen "Clean Diesel" Litigation (N.D. Cal. 2016): Chrematistics, Corrective Justice, and the Failure of Nomos

Formally captioned *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, No. 2672 (N.D. Cal. 2016), the litigation was consolidated in the Northern District of California under Judge Charles M. Breyer. Commonly known as "Dieselgate," it remains the largest vehicle-emissions enforcement action in U.S. history. Its magnitude, however, is precisely what makes it a study in the inadequacy of the current framework rather than a success.

Beginning with model year 2009, Volkswagen equipped its TDI diesel vehicles with software that recognized the specific conditions of an EPA emissions test and activated full emissions controls only under those conditions. During normal road operation the controls were disabled, allowing the vehicles to emit NOx at concentrations between nine and thirty-eight times the permitted maximum. The fraud was not detected by regulatory testing but by West Virginia University researchers conducting independent on-road measurements in 2014.[14]

Aristotle's concept of chrematistics–the pursuit of monetary gain as an end in itself, without regard for genuine use or social benefit–is clearly illustrated by the scandal. Volkswagen's conduct between 2009 and 2015 was blatantly chrematistic: the company chose to manufacture the appearance of environmental compliance rather than its reality, not for lack of cleaner technology but because compliance was costly. Each defeat device represented a calculated decision to externalize the cost of compliance as a public harm in the form of excess NOx emissions.

After the settlement was finalized in October 2016, the numbers were historic: a $14.7 billion global settlement,[15] of which California received approximately $1.18 billion for consumer restitution, environmental mitigation, and zero-emission-vehicle investment.[16] On its face, this appears to represent meaningful accountability. Examined through corrective justice, however, the settlement reveals its limits. On paper, the $37,500 per-vehicle ceiling implied a theoretical penalty exceeding $20 billion for the roughly 590,000 affected vehicles; in reality, only $1.5 billion of the $14.7 billion settlement constituted a civil penalty[17]—less than eight percent of the statutory ceiling. The remaining $13.2 billion consisted of consumer buybacks, mitigation trust funds, and zero-emission-vehicle investments, all of which served important remedial purposes but are categorically distinct from disciplinary deterrence. Volkswagen's fiscal-year 2015 sales revenue alone reached €213.3 billion,[18] and the $1.5 billion civil-penalty component represented less than two months of a single year's net profit. The exchange was "unequal" in the corrective-justice sense not because $1.5 billion is a small sum in absolute terms, but because the penalty was calibrated to a per-vehicle statutory cap rather than to the profit Volkswagen extracted through fraud; it was "modest" relative to that revenue, and "unjust" in that it left the wrongdoer in possession of the bulk of the gain its wrongdoing produced. For Aristotle, corrective justice (*diorthotikon dikaion*) demands restoration proportionate to the unjust profit.[19] A penalty that leaves the wrongdoer with the

[14] Kappanna et al., *supra* note 6.
[15] Consent Decree, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 (N.D. Cal. Oct. 25, 2016) [hereinafter VW Consent Decree].
[16] VW Consent Decree, *supra* note 15.
[17] *Id.*
[18] Volkswagen AG, *Annual Report 2015* 8 (2016) (reporting annual sales revenue of €213.3 billion for fiscal year 2015).
[19] Aristotle, *NE*, *supra* note 1, at bk. V, ch. 4.

overwhelming bulk of the proceeds does not restore equality; it ratifies an unequal exchange at a modest discount. That Volkswagen halted defeat-device use and ceased selling diesel vehicles in the United States following the settlement—and has not, on the public record, resumed installing such devices—does not resolve the underlying problem: compliance achieved under reputational pressure is not the same as compliance produced by a penalty system that makes fraud economically unviable.

A skeptic might answer that the market itself supplied the missing discipline: the scandal triggered roughly a forty-six-percent drop in Volkswagen's share price and about $56 billion in lost market value,[20] and regulators legitimately weigh whether a penalty so severe that it forces a manufacturer to exit markets, halt innovation, and lay off workers would leave the public better off. But share price is a market reaction, not a regulatory mechanism: it is unpredictable, temporary, and cannot be deliberately calibrated as a deterrent. The market-exit concern, moreover, assumes that the purpose of penalty moderation is to insulate bad actors from the full consequences of wrongdoing—a premise Aristotle's corrective-justice framework rejects. Volkswagen's exposure to severe penalty was not arbitrary but the preventable consequence of deliberate, sustained fraud. A penalty insufficient to claw back the competitive advantage Volkswagen secured through fraud fails the corrective standard,[21] and the automotive market, with domestic and foreign competitors alike, is not so fragile that disciplining one bad actor creates a vacuum; rivals such as Toyota, Honda, and Ford had already invested heavily in cleaner engine technology by 2015.[22]

This gap between the settlement's nominal scale and its actual corrective force is not accidental but structural, and it is ultimately a function of scale. The $1.5 billion civil-penalty component represented less than one percent of Volkswagen's 2015 revenue of roughly $236.9 billion.[23] Economic deterrence theory, most associated with Gary Becker's work on the economics of crime,[24] holds that rational actors will violate a rule when the expected gain exceeds the expected penalty discounted by the probability of detection. Where penalties are capped on a

[20] Danny Hakim, Aaron M. Kessler & Jack Ewing, *As Volkswagen Pushed to Be No. 1, Ambitions Fueled a Scandal*, N.Y. Times, Sept. 26, 2015, at A1.
[21] Aristotle, *NE*, *supra* note 1, at bk. V, ch. 4.
[22] Int'l Energy Agency, *Global EV Outlook 2016* 18–22 (2016).
[23] Volkswagen AG, *Annual Report 2015*, *supra* note 18, at 8.
[24] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 176–78 (1968).

per-vehicle basis by outdated statutes and detection relies on underfunded agencies rather than systematic monitoring, this calculation consistently favors noncompliance for large-scale firms. The CAA's per-vehicle penalty cap, set by statute and adjusted only periodically for inflation, does not scale with corporate revenue. A penalty architecture calibrated for a mid-twentieth-century automotive industry cannot serve as a proportionate corrective for a twenty-first-century multinational generating hundreds of billions in annual revenue. In Aristotelian terms, the law's *nomos*—the written, positive law that a community enacts to govern conduct, as distinct from unwritten natural or customary norms—has not kept pace with the economic reality it was designed to govern.[25]

Problem and Proposed Reform: Scaling Penalties to Corporate Revenue

The core problem Dieselgate illustrates is that flat per-vehicle penalties allow corporate actors to treat fines as an added cost of doing business. When noncompliance is cheaper than compliance, the actor operating under purely chrematistic logic will choose noncompliance. The law's *nomos* existed—Section 203 prohibited defeat devices and Section 205 authorized penalties—so what failed was the architecture, not the aspiration.

This paper proposes indexing CAA civil penalties to corporate revenue rather than a flat per-vehicle amount. Penalties for knowing defeat-device violations should be calculated as a percentage of the manufacturer's global annual revenue, analogous to the European Commission's practice of imposing antitrust fines of up to ten percent of a company's global annual turnover.[26] A penalty set as a meaningful fraction of revenue would retain corrective and deterrent force regardless of corporate scale: for a manufacturer generating €200 billion annually, a two-percent penalty would represent €4 billion, a figure that materially changes the underlying economic calculus. Because the precise size of any fine would still depend on prosecutorial discretion, settlement negotiation, and judicial judgment—penalties are rarely fully predictable in advance—a revenue-indexed floor is best understood not as a fixed price but as a guarantee that the corrective will scale with the offender. The reform requires not new legislation from scratch but an amendment to Section 205 adding a revenue-based floor alongside the

[25] Aristotle, *Politics* bk. III, ch. 11 (Benjamin Jowett trans., Oxford Univ. Press 1998) [hereinafter Aristotle, *Politics*].
[26] Commission Regulation 1/2003, art. 23(2), 2003 O.J. (L 1) 1, 14 (EC).

existing per-vehicle cap. The corrective-justice logic is simple: if the unjust gain scales with size, the corrective loss must as well.

B. Diamond Alternative Energy, LLC v. EPA (U.S. 2025): Koinon Sympheron, Epieikeia, and the Limits of Nomos

*Diamond Alternative Energy, LLC v. EPA*, 606 U.S. ___, 145 S. Ct. 2121 (2025), began as a challenge by fuel producers and seventeen Republican-led states to the EPA's reinstatement of California's 2013 Clean Air Act waiver, which authorized the state's Advanced Clean Cars program and required increasing percentages of zero-emission-vehicle sales through model year 2025. The challengers argued that the EPA had exceeded its statutory authority and that the CAA's special treatment of California violated the Constitution's equal-sovereignty principle. The D.C. Circuit dismissed the fuel producers' challenge for lack of standing, reasoning that their claimed injuries depended on uncertain behavior by automakers.[27] On June 20, 2025, however, the Supreme Court reversed in a 7–2 decision, holding that the fuel producers do have Article III standing because courts may draw "predictable, commonsense inferences" about how regulated parties will respond to a rule, and the record showed that invalidating the California standards would likely increase demand for the producers' liquid fuels. The Court remanded without reaching the merits of the waiver itself.[28]

Viewed through Aristotle's political philosophy, the dispute concerns *koinon sympheron*—the common advantage. For Aristotle, legitimate political authority is always oriented toward the *koinon sympheron*;[29] a regime that governs in the interest of the rulers alone is a deviation from just governance. The California waiver system creates space for the state most burdened by vehicle emissions to set standards that protect its population. The fuel producers are not members of the regulated community: they are not automakers, and California's vehicle standards do not govern them directly. Their theory of harm is that cleaner cars reduce fuel consumption and therefore revenue—in Aristotelian terms, a chrematistic objection, a claim that private monetary interest should constrain the political community's capacity to protect the common good. That the Supreme Court found this economic injury sufficient for standing does not make the underlying objection any less chrematistic in character; it simply means the courthouse doors are now open to it.

[27] *Diamond Alternative Energy, LLC v. EPA*, 606 U.S. ___, 145 S. Ct. 2121 (2025).
[28] *Id.* (reversing *Diamond Alternative Energy, LLC v. EPA*, 90 F.4th 1 (D.C. Cir. 2024)).
[29] Aristotle, *Politics*, *supra* note 25, at bk. III, ch. 6.

The case also illuminates *epieikeia*, Aristotle's term for equity—the capacity to correct a general rule when its application in a particular case produces an unjust result.[30] The California waiver provision is itself a codified expression of *epieikeia*: Congress recognized that a uniform national emissions standard would produce an unjust result for California specifically, a state whose geography, population density, and air quality make the federal standard affirmatively inadequate. The waiver is the law's built-in correction for its own generality. When the challengers argue that this equitable correction is itself unconstitutional, they argue, in effect, against the principle that justice sometimes requires differential treatment proportionate to differential need.

### Problem and Proposed Reform: Calibrating Standing and Protecting Waiver Authority

After *Diamond Alternative Energy*, the vulnerability of equitable regulatory corrections to chrematistic litigation is no longer hypothetical: the Supreme Court has confirmed that collateral actors whose commercial interests are only indirectly affected by stronger environmental standards may have standing to challenge them. That holding makes the reform question more urgent, not less. Congress could respond by amending the CAA's judicial-review provisions to specify the showing required of parties who are not directly subject to a Section 209(b) waiver before they may challenge it.[31] Any such limit, however, should be drawn carefully. The benefit of permitting broader standing is that it also opens the courthouse to plaintiffs whose interests align with the common good: residents of the San Joaquin Valley and South Coast Basin, whose respiratory systems suffer quantifiable damage from excess emissions, have an interest in waiver proceedings that differs in kind from the producers' purely monetary one. A standing rule that distinguishes tangible bodily harm from speculative revenue loss—rather than one that simply narrows access for everyone—would better serve both equity and the common good. Congress could further codify California's waiver authority in a form that limits the Congressional Review Act's reach to rules of general applicability, making clear that case-specific adjudicatory orders, including EPA waiver decisions, are not subject to CRA disapproval. These reforms would protect the *epieikeia* that Congress encoded in the original CAA and prevent *nomos* from being weaponized against the equitable corrections it was designed to enable.

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[30] Aristotle, *NE*, *supra* note 1, at bk. V, ch. 10.
[31] Clean Air Act § 209(b), *supra* note 2.

C. California v. United States (N.D. Cal. 2025): Distributive Justice, Telos, and Eudaimonia

*California v. United States*, No. 4:25-cv-04966-HSG (N.D. Cal. 2025), brings the analysis to the present. In June 2025, President Trump signed three joint resolutions under the CRA revoking EPA waivers for California's Advanced Clean Cars II program, its Advanced Clean Trucks regulation, and its Omnibus Low NOx rule. California and ten other states filed suit the same day in the Northern District of California, arguing that EPA waiver decisions are adjudicatory orders rather than "rules" subject to congressional disapproval under the CRA.[32] As of this writing the case remains pending, with particular concern over retroactive enforcement against vehicles already sold.

Analyzed through Aristotle's principle of distributive justice (*dianemetikon dikaion*), the question is what is materially lost in public-health terms when the waivers are revoked. Distributive justice is not arithmetic equality but proportionality: honors, burdens, and benefits should be allocated among members of a community according to their relevant characteristics and needs.[33] In the emissions context, this means communities bearing the greatest pollution burden are owed the strongest regulatory protection. The San Joaquin Valley and South Coast Basin absorb a disproportionate share of the harm from vehicle emissions and register among the highest rates of pediatric asthma and respiratory illness in the country.[34] Low-income residents are concentrated near high-traffic corridors, and relocation away from polluted environments is least available to those most exposed.

Translating that principle into enforceable practice is admittedly difficult, and the harder question is how distributive justice can be quantified or codified rather than merely invoked. One concrete mechanism would be to amend the CAA to give residents of pollution-impacted communities a statutory right to intervene in EPA enforcement proceedings affecting their region, measured by objective exposure metrics such as ambient PM2.5 and ozone concentrations and documented public-health outcomes. Tying the right to intervene to such data would give the communities bearing the greatest burden a defined legal voice in the penalty

[32] Complaint, *California v. United States*, No. 4:25-cv-04966-HSG (N.D. Cal. filed June 12, 2025); see also H.J. Res. 87, 88, 89, 119th Cong. (2025).
[33] Aristotle, *NE*, *supra* note 1, at bk. V, ch. 3.
[34] Am. Lung Ass'n, *supra* note 8, at 22–24.

negotiations that determine how that burden is addressed, and would translate a contestable moral claim into an administrable standard.

Aristotle's political philosophy is organized around *telos*—the end toward which a thing strives—and the claim that the telos of the political community is human flourishing, the active realization of one's highest capacities.[35] Within this framework, clean air is not an amenity but a precondition. Market-based approaches such as cap-and-trade can provide flexibility at low cost, but they are not sufficient on their own to guarantee the threshold of protection required when air quality already falls below the minimum for public health.[36] A child whose respiratory development is compromised by chronic ozone exposure is not suffering a mere inconvenience; she is being deprived of a condition necessary for the full exercise of her human capacities. A community living under air quality the American Lung Association consistently grades as failing experiences not abstract regulatory inadequacy but a structural impediment to the very end the political community exists to promote.

The pattern across the three cases is now complete. The Volkswagen fraud subordinated the *koinon sympheron*[37] to deliberate legal evasion for competitive gain. *Diamond Alternative Energy* deployed the apparatus of standing doctrine against an equitable correction, using *nomos* against *epieikeia*. And the 2025 waiver revocations removed the distributive protection most owed to the communities most harmed. Each represents a different facet of the same failure: the subordination of human flourishing to chrematistics, the unchecked pursuit of private gain.

Problem and Proposed Reform: Durable Federal Protection for CARB Authority

*California v. United States* lays bare the fragility of California's waiver authority in the face of executive action. Even if California ultimately prevails on the CRA argument—and as of this writing the case remains pending, with an amended complaint filed in October 2025[38]—the litigation itself imposes enormous costs: regulatory uncertainty for manufacturers, enforcement gaps for affected communities, and years of attrition that benefit only those who profit from delay. When the telos of the regulatory system is human flourishing, a system that

[35] Aristotle, *NE*, *supra* note 1, at bk. I, ch. 1.
[36] *Id.* at bk. I, ch. 7.
[37] *Id.* at bk. I, ch. 2.
[38] Amended Complaint, *California v. United States*, *supra* note 32 (filed Oct. 2025).

permits routine disruption of the conditions necessary for flourishing is structurally deficient, regardless of whether any single disruption ultimately prevails in court.

A measured reform would amend Section 209(b) so that waivers granted to California remain durable unless revoked through a subsequent administrative proceeding under Section 307's notice-and-comment requirements, supported by substantial evidence on the record—rather than by Congressional Review Act resolution, executive order, or informal guidance. This approach deliberately stops short of insulating California's standards from all scrutiny. California's standards are not beyond review, and the EPA should remain free to revisit a waiver on the merits; the reform requires only that revocation follow the same procedural path, and meet the same evidentiary burden, as the original grant. Because stricter standards impose real costs on some parties as well as benefits on others, preserving a genuine merits pathway—rather than an irrevocable entitlement—keeps the mechanism flexible enough to accommodate changed circumstances while protecting affected communities from purely political reversal. The distributive-justice logic follows directly: protection owed in proportion to disproportionate burden should be structurally durable, not contingent on the enforcement posture of whichever administration holds office.

## V. CONCLUSION

Aristotle teaches that the Golden Mean is not a compromise between two equally valid extremes; it is the correct response, calibrated to the situation, the agent, and the stakes. In vehicle-emissions enforcement, one extreme is regulatory overreach that stifles innovation and individual freedom; the other is a regulatory structure so attenuated it cannot constrain deliberate corporate misconduct. The federal framework has drifted toward the latter through a compounding series of failures that are philosophical as much as technical.

The period from 2009 to 2025 tells this story precisely. It begins with Volkswagen's chrematistic decision to install defeat devices in more than 590,000 vehicles, subordinating the *koinon sympheron* to competitive gain while NOx emissions ran between nine and thirty-eight times the legal maximum for six years—undetected not by regulatory vigilance but by independent university researchers. The corrective-justice response that followed failed the Aristotelian standard of proportionality: a $1.5 billion civil penalty against a company reporting €213.3 billion in annual sales revenue amounted to less than one percent of a single year's revenue, leaving the competitive advantages secured through fraud substantially intact. A deterrence architecture calibrated for a mid-twentieth-century industry cannot serve as a proportionate corrective for a twenty-first-century multinational.

The arc continues through *Diamond Alternative Energy*, where the chrematistic interests of the fuel industry were deployed against the *epieikeia* built into California's waiver authority—an attempt to use *nomos* to undo the equitable correction that *nomos* itself had created. The theory of harm was speculative and monetary: cleaner cars reduce fuel consumption, which reduces revenue. Notably, the Supreme Court found that theory sufficient to confer standing, reversing the D.C. Circuit and confirming that even attenuated, purely economic injuries can open the courthouse to challenges against environmental protections—an outcome that makes the standing reforms proposed above more pressing, not less.

The arc closes in 2025 with the political revocation of the distributive protections most owed to the communities most burdened by vehicle emissions. When President Trump signed three joint resolutions revoking California's Clean Air Act waivers, the San Joaquin Valley and South Coast Basin, communities that already register among the highest rates of pediatric asthma and respiratory illness in the country, lost the strongest regulatory protection they had. This is a direct assault on the conditions necessary for human flourishing.

Each case demands remedy. Volkswagen demands that CAA civil penalties be indexed to corporate revenue rather than a flat per-vehicle amount, because a corrective that does not scale with the unjust gain does not restore equality. *Diamond Alternative Energy* demands a carefully drawn standing rule and statutory clarification that the Congressional Review Act does not reach adjudicatory waiver orders, because *epieikeia* cannot function if it can be undone by parties whose only injury is reduced fossil-fuel consumption. *California v. United States* demands that California's waiver authority be made durable through full notice-and-comment proceedings rather than executive fiat, because distributive justice owed in proportion to disproportionate burden must be structurally secure. These remedies share a commitment to proportionality: calibrating the legal response to the actual scale of the problem rather than to the scale that prevailed when the statute was first written.

Aristotle's telos for the political community was human flourishing, not aggregate wealth, not gross domestic product, not the efficient allocation of resources. Clean air is not peripheral to that telos. A child whose respiratory development is compromised by chronic ozone exposure is not a statistical externality in a cost-benefit analysis; she is a member of the polis whose capacity for flourishing is at stake in every enforcement decision, every penalty negotiation, and every judicial ruling examined here. The Golden Mean in vehicle-emissions enforcement is not found by splitting the difference between industry preference and public-health ambition. It is found by asking, as Aristotle would, what justice requires, and then building the law to deliver it.

# Gilded Age Laws in the Digital Era: Judicial Narrowing and the Limits of Antitrust Enforcement Against Digital Platforms

Written by Carter Hanson
*Article*
Edited by Maya Fitzpatrick, Shawnly Behnia, and Andreu Beltran

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## I. INTRODUCTION

The rapid digitization of commerce in the modern age has transformed vertical integration, when a singular company owns and operates multiple levels of a supply chain, from a business efficiency tool into a far more consequential mechanism. A handful of large digital platform companies have capitalized on this development to both own the marketplace and compete within it. This growth has undeniably benefited consumers in some ways, such as by lowering prices, expanding access to goods and services, and increasing convenience.[39] Yet the same structural features that make these platforms efficient also enable new types of anticompetitive conduct. One of the most notable forms is digital platform self-preferencing. This is the practice where so-called "dual-role platform" companies, firms that both operate the marketplace as well as sell products within that marketplace, use their control to favor their own products over competitors.[40]

Theoretically, the American antitrust system, primarily rooted in the Sherman Antitrust Act of 1890[41] and the Clayton Antitrust Act of 1914,[42] should cover any antitrust issues arising from digital platform self-preferencing. These laws attempt to promote competition by prohibiting anticompetitive conduct. However, in practice, the U.S. court system has strongly restricted the scope of these laws, rendering them systemically inadequate to address digital platform self-preferencing. Beginning with the 1979 Supreme Court case *Reiter v. Sonotone Corp.,*[43] and continuing into the modern judicial age, courts have repeatedly limited antitrust enforcement almost exclusively to cases with demonstrated consumer price harm. A type of harm that is generally not immediately apparent in instances of self-preferencing. In theory, Section Two of the Sherman Act could apply to digital platforms' self-preferencing, as the practice is a unilateral act made by firms with significant market power and can facilitate monopolization. However, this article demonstrates that judicial antitrust rulings have systematically narrowed the scope of the antitrust enforcement system in various ways, rendering it ill-suited to address the practice at issue. Accordingly, legislative intervention is necessary to

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[39] Erik Brynjolfsson, Yu Jeffrey Hu & Michael D. Smith, Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers, 49 Mgmt. Sci. 1580 (2003) (finding substantial consumer welfare gains from greater variety and lower prices in online retail).
[40] Yuta Kittaka, Susumu Sato & Yusuke Zennyo, Self-Preferencing by Platforms: A Literature Review, 66 Japan & World Econ. 101191, 2–3 (2023).
[41] Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2018).
[42] Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2018).
[43] *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

establish a calibrated regulatory framework to address the unique anticompetitive risks posed by digital platform self-preferencing.

## II. TRADITIONAL VERSUS DIGITAL SELF-PREFERENCING

Self-preferencing is not a new phenomenon. At its core, it is simply a function of vertical integration, a practice that traditional brick-and-mortar retailers have used for decades to maximize efficiency. In both the traditional and digital cases, the marketplace owner, such as Walmart or Amazon, creates and sells its own products (generic brands) alongside those of traditional third-party vendors. Third-party vendors do not control their own marketplaces and must pay large platform companies to list and sell their products. The practice of vertical integration, thus, gives marketplace owners a competitive advantage by cutting out the middleman and associated fees, often allowing them to sell their own products at lower prices. Self-preferencing takes that practice one step further as marketplace owners advantage their own products over those of third-party vendors. In the traditional brick-and-mortar setting, retailers routinely do this by reserving the best shelf space for themselves, placing their products at eye level and on aisle-end cap displays to boost sales.[44] This practice disadvantages third-party vendors, but courts typically do not consider it an illegal anticompetitive practice because it makes the market more efficient by putting downward pressure on prices and generally does not facilitate illegal monopolization. However, several aspects that are unique to the tech sector differentiate digital platform self-preferencing from the traditional retailer practice of self-preferencing.

Firstly, digital platforms can use data and their highly customizable consumer interfaces to leverage product placement to their advantage in ways that are inherently impossible for traditional retailers. Physical retailers have no choice but to offer an identical product display to every customer who walks through their doors. A structure that places a substantial, if not complete, limit on their ability to tailor product selection to individual consumer preferences, and forces retailers to take a more generalized approach to product display. Digital sellers, on the other hand, have vast amounts of data on individual consumer preferences compiled from account histories. The platforms would argue that this enables them to promote the products that individual customers are most interested in purchasing. However, it

[44] Taylor O'Neill, Turning Shelf Space into Sales, Mars United (Mar. 2, 2026), https://www.marsunited.com/turning-shelf-space-into-sales/.

can also be said that these platforms' access to customer data allows them to promote their own products while limiting the visibility of competing products that customers may prefer.

That data advantage makes a real difference, as the benefits of superior digital product placement far outweigh those of superior retail shelf space in a brick-and-mortar setting. Research shows that the most advantageous shelf space in a traditional retailer typically yields a mere 23% sales boost.[45] Other practical factors further constrain the benefits of self-preferencing in traditional retail: heavy products must generally be placed at lower levels, out of customers' sightlines, which is less advantageous to sales; perishable products must be kept in fridges and freezers, which physically limits where retailers can place products. While the structural differences between traditional retail and e-commerce make directly comparable statistics difficult to find, it is notable that Amazon's own internal data shows that the first search result generated 35% of clicks.[46] Furthermore, 81% of clicks happen on the first page, and 70% of customers never click beyond the first page of search results.[47] This means that the vast majority of e-commerce shoppers will never see certain products if they are algorithmically buried on an online platform. In comparison, at physical stores, customers still must walk past similar products, even if they are at a disadvantaged placement relative to the competition. This data shows the considerable advantage digital platforms have in increasing their own sales and freezing out their competitors through self-preferencing.

Finally, the broader market power dynamics between the two settings differ markedly, giving digital platforms greater leverage over the third-party producers they also compete with at the product level relative to their traditional counterparts. In the traditional retail setting, if a generic option undercut an outside producer's product through self-preferencing, the outside producer could still rely on sales at numerous other retailers, thereby maintaining some level of market competition. Market power in the digital space is fundamentally more centralized, with Amazon holding over 40% of the U.S. e-commerce market share and Walmart holding over 9%, meaning that just those two entities control nearly

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[45] *Id.*

[46] Loren Baker, Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know, Search Engine J. (Aug. 14, 2018), https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173/ (citing Amazon internal data).

[47] *Id.*

half of the entire e-commerce market.[48] The search engine market is even more heavily concentrated, with Google holding a staggering 90% market share.[49] By comparison, even the relatively concentrated brick-and-mortar American grocery sector is significantly less centralized; the five largest grocery chains (Walmart, Kroger, Costco, Albertsons, and Publix) collectively account for only 47.7% of the grocery market.[50] Setting aside the broader antitrust issues surrounding such a high level of market concentration in the tech sector, that amount of power dangerously exacerbates the anticompetitive effects of self-preferencing. Third-party vendors cannot rely solely on marketplace-level competition to protect their business against generic undercutting as they can in a traditional retail context. If, for example, Amazon created its own version of a popular third-party product and pushed it to consumers while algorithmically burying the original product, the original producer would be left with few options to continue business, given Amazon's market dominance.

Lastly, the practice of digital self-preferencing does not always manifest as higher prices for consumers in the short term, or even in the medium term. However, that does not mean the practice has no harmful anticompetitive effects. It can be used to push competitors out of markets and possibly out of business entirely, reducing product variety for consumers.[51] This has a knock-on effect of discouraging future innovation by other actors, as their prospects of earning profits are severely constrained.[52] As a result, these dual-role platforms experience even greater market power, which they can then use to raise prices on consumers in the long term.

## III. IMPACT OF CURRENT U.S. DOCTRINE

The Sherman Antitrust Act of 1890 was the first federal law to regulate monopolies and anticompetitive conduct. It arose as a result of America's "Gilded

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[48] Statista Research Dep't, Market Share of Leading Retail E-Commerce Companies in the United States in 2025, Statista (Apr. 22, 2026), https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/.

[49] Tiago Bianchi, Global Market Share of Leading Search Engines 2015–2025, Statista (June 30, 2025), https://www.statista.com/statistics/1381664/worldwide-all-devices-market-share-of-search-engines/ (reporting that Google held approximately 89.62% of the global search engine market as of Mar. 2025).

[50] Matthew Stern, Walmart Holds Tight to 1st Place in Grocery Market Share, Progressive Grocer (July 8, 2025), https://progressivegrocer.com/walmart-holds-tight-1st-place-grocery-market-share.

[51] Kittaka et al., *supra* note 40, at 4–5.

[52] *Id*. at 9–10.

Age," when the first national and multinational companies were coming into existence and using their newfound power to suppress competition.[53] The act is composed primarily of two sections, the first of which prohibits collaboration among multiple business entities to suppress competition.[54] Section Two of the act governs the unilateral conduct of companies that hold significant market power or a monopoly, which is typically defined as holding a market share of 50% or more.[55] These two sections have formed the foundation of the American antitrust system since their implementation. Yet, they have proven wholly ineffective at combating digital platform self-preferencing.

A. Section Two of the Sherman Act

Given that Section Two applies to unilateral conduct, it is much more relevant to the practice of digital platform self-preferencing. Still, jurisprudence has nevertheless restricted Section Two in ways that prevent it from being an effective remedy. Depending on the circumstances, practices that may violate Section Two include refusals to deal, use of most-favored-nations clauses, exclusive-dealing contracts, loyalty discounts, denial of access to competitors, and predatory pricing.[56] A company engaging in this conduct does not guarantee that it is liable for an antitrust violation; plaintiffs must further show that the conduct causes "antitrust injury," a term the judiciary has increasingly, and almost exclusively, interpreted to mean consumer price harm, which is when a monopolist harms consumers by creating higher prices and/or reduced output. This doctrine is problematic because consumer price harm is often the last anticompetitive effect to materialize in cases of self-preferencing, meaning that the damage to market competition may be difficult or impossible to reverse long before courts would intervene under the current doctrine.

The first significant Section Two case illustrating the issues with the current doctrine is the 1993 Supreme Court case *Brooke Group Ltd. v. Brown & Williamson*

[53] Ryan Eichler, Sherman Antitrust Act: Definition, History, and What It Does, Investopedia (Aug. 30, 2024), https://www.investopedia.com/terms/s/sherman-antitrust-act.asp.
[54] Sterling Miller, Antitrust Law Basics: Section 1 of the Sherman Act, Thomson Reuters Legal Blog (May 2, 2023),
https://legal.thomsonreuters.com/blog/antitrust-law-basics-section-1-of-the-sherman-act/.
[55] Sterling Miller, Antitrust Law Basics – Section 2 of the Sherman Act, Thomson Reuters Legal Blog (May 7, 2023),
https://legal.thomsonreuters.com/blog/antitrust-law-basics-section-2-of-the-sherman-act/.
[56] *Id.*

*Tobacco Corp*.[57] This case was a dispute over predatory pricing in the generic cigarette market, with plaintiff Brooke Group, arguing that Brown & Williamson was using their market power to slash the prices of generic cigarettes below cost in an attempt to force Brooke Group out of the market and later raise prices well above cost to recoup their losses and turn a profit. The Supreme Court sided with Brown & Williamson, first asserting that a party making a predatory pricing claim must initially prove the price was actually below cost. Second, the majority opinion required proof that the offending firm had a "dangerous," or extremely high probability of recouping its losses or, in other words, the investment in artificially low prices was likely to pay off in the form of higher prices long-term.[58]

Brooke Group failed to prove both elements, but the Supreme Court's ordering of their presentation is key to understanding the implications that *Brooke* has for potential suits over self-preferencing.[59] This is because self-preferencing and predatory pricing are distinct in that self-preferencing does not require the investment in below-cost pricing. However, the practices are comparable in that they both cause an antitrust injury by excluding other firms from participation in the market. In *Brooke*, the majority created a system that implicitly separates the exclusionary conduct from the antitrust injury, the latter of which the Court tied exclusively to future consumer price harm.[60] This is a functional framework for combating predatory pricing practices, in which the offending firm must first make a prolonged upfront investment by selling below cost. However, the framework fails in the context of self-preferencing. Unlike predatory pricing, which requires a sustained effort to freeze out competitors, a platform's algorithmic suppression of a third-party vendor's product pushes those competitors out of the market far more rapidly. Thus, in the self-preferencing context, the antitrust injury created by the exclusionary conduct could be irreversible by the time courts would have the evidence necessary to intervene under the *Brooke* standard.[61]

Compounding this issue is that an offending dual-role platform can turn a profit by selling its own product while engaging in exclusionary conduct. In a predatory pricing case, such as *Brooke*, offending firms must take a loss by selling the product below cost for a sustained period in their efforts to push their

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[57] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

competitors out of the market.[62] This creates a structural barrier that strongly discourages firms from using predatory pricing against competitors. Unlike predatory pricing efforts in more traditional markets, digital platform self-preferencing does not require the offending firm to take a loss by pricing below cost. In fact, the offending firm may even increase its profits in the short term through the algorithmic suppression of competing products, a structural feature that is impossible to replicate in the context of predatory pricing. Additionally, the second element of the tests focuses on future increases in consumer prices, further embedding price harm in the antitrust doctrine, which, as previously mentioned, is not particularly applicable to the practice of self-preferencing. As a result, the precedent in *Brooke*, despite ruling on a different type of exclusionary conduct, has shaped the antitrust system's doctrinal framework around exclusionary conduct in a manner that leaves it broadly ill-suited to the realities of digital platform self-preferencing.[63]

The 2004 Supreme Court case, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* further illustrates the narrowing of Section Two of the Sherman Act in a way that limits the law's applicability to digital self-preferencing.[64] This case centers on the intersection of Section Two and the Telecommunications Act of 1996, which required telecom companies to share their networks with their competitors.[65] The antitrust element of the case centered on a prior Section Two case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* in which the Supreme Court held that the termination of a prior voluntary business relationship with a competitor could constitute anticompetitive exclusionary conduct when it is done for the purposes of reducing competition rather than "legitimate business reasons."[66] This created a narrow "refusal to deal" exception to the general antitrust principle that companies have no duty to assist their competitors, an exception that Justice Scalia would later describe as being "at or near the outer boundary of [Section] 2 liability."[67]

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[62] *Id.*
[63] *Id.*
[64] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[65] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
[66] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
[67] *Trinko*, 540 U.S. 398.

In *Trinko*[68], the plaintiffs alleged that Verizon violated both the Telecommunications Act and the *Aspen*[69] "refusal to deal" exception by intentionally degrading competitors' service on its network, including AT&T, whose services Trinko utilized. The Supreme Court deferred to the Federal Communications Commission (FCC) on the question of Verizon's Telecommunications Act compliance, as Congress had designated the agency as the statute's primary enforcer, and eventually the FCC would impose a fine on Verizon.[70] As for the Section Two claims based on the *Aspen* exception, the Court unsurprisingly sided with Verizon.[71] This was because the Telecommunications Act had forced Verizon to share its network with competitors such as AT&T, rather than Verizon having done so freely as the parties in *Aspen* had.[72]

However, that decision, while logical in its own context, once again created additional challenges for addressing the anticompetitive nature of digital platforms' self-preferencing. Firstly, rather than restricting its analysis to how the Telecommunications Act compelled Verizon to deal involuntarily, the Court took a broader approach. After rejecting the applicability of the *Aspen* exception, the Court took the extra step of applying the traditional antitrust principle that companies have no duty to aid competitors to a platform company for the first time. Verizon can be understood as a platform in *Trinko* as it both owned and shared the network infrastructure at issue, while competing with the firms it leased the infrastructure to on consumer telecom service.[73] The principle reinforced in *Trinko*, that companies should have no obligation to assist their competitors, can be a reasonable one in a platform when two companies are competing in a traditional peer-against-peer market like Verizon and AT&T were.[74] However, this dynamic shifts considerably in the context of digital platform self-preferencing, as a competing company, for example YouTube, is also owned and operated by the marketplace itself, Google. Meanwhile, third-party competitors, such as Rumble, remain dependent on the platform company, Google, for visibility and access to consumers. At that point, the principle that a platform company has no duty to aid its competitors becomes an anticompetitive weapon. This is a dangerous precedent, further exacerbated by the

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[68] *Id.*
[69] *Aspen Skiing*, 472 U.S. 585.
[70] *Trinko*, 540 U.S. 398.
[71] *Id.*
[72] *Aspen Skiing*, 472 U.S. 585.
[73] *Trinko*, 540 U.S. 398.
[74] *Id.*

lack of competition in the wider tech markets (search, e-commerce, etc.) due to the aforementioned lack of alternative platforms for third-party competitors to turn to. Platforms' dual-role structure, in conjunction with minimal platform-level competition, means that their having “no duty to aid competitors” transforms a decision not to do business with another firm into a determination of that firm's ability to survive as a business.[75]

The *Trinko*[76] decision presents other problems in the context of digital self-preferencing through its restriction of the “refusal to deal" exception originally crafted in *Aspen*.[77] Firstly, by deferring to existing regulatory networks, the Court created a gap in antitrust law for industries that lack significant regulation, such as digital platforms. This logic of deference works when there is an effective and empowered regulatory regime to correct market failures in lieu of judicial antitrust enforcement. However, when regulatory agencies are disempowered, or when there is a lack of regulation to begin with, as is the case with dual-role digital platforms, the logic of deferring to regulatory agencies collapses, with no executive authority to address the market problems at the intersection of administrative and antitrust law.

Furthermore, the majority opinion in *Trinko* significantly limited courts' ability to fill the enforcement gap created by this underregulation.[78] The Court declared that Section Two does not give judges “carte blanche to insist that a monopolist alter its way of doing business” simply because another approach is more pro-competitive.[79] That language, along with the aforementioned “outer boundary" characterization, may signal that the majority viewed its decision as limited in scope. However, the Court’s decision to go beyond the limited voluntary-versus-compulsory distinction necessary to decide the case in Verizon’s favor reveals the decision to be considerably less restrained than the majority opinion’s framing suggests. As the regulatory frameworks the Court deferred to in *Trinko* do not exist in the digital self-preferencing context, and because the decision simultaneously limits judges' ability to fill that void through Section Two, targeted legislation becomes the only viable mechanism to correct the anticompetitive nature of digital platform self-preferencing.[80]

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[75] *Id*.
[76] *Id*.
[77] *Aspen Skiing*, 472 U.S. 585.
[78] *Trinko*, 540 U.S. 398.
[79] *Id*.
[80] *Id*.

B. Section One of the Sherman Act

Like Section Two, the Supreme Court has systematically narrowed the scope of Section One of the Sherman Act, substantially reducing the likelihood of success in any antitrust claims arising from digital platform self-preferencing. Section One regulates agreements between separate entities that, if allowed, would "unreasonably restrain trade" in a market. Possible violations of Section One include, but are not limited to, agreements to fix prices at a certain level, dividing the market between competitors, and steering provisions, which are clauses designed to force one party to push customers towards the other party's products.[81] While the two-party nature of Section One cases generally limits their applicability to digital platform self-preferencing, they are still relevant when the structural context of the claims is comparable.

In the 2018 Supreme Court case, *Ohio v. American Express Co.*, Ohio and several other states sued the credit card firm American Express over contractual steering provisions it had with merchants. The clauses at issue prohibited the merchants from informing customers that other credit cards had lower fees than American Express's cards. In a 5-4 decision, the Supreme Court sided with American Express. The decision in *American Express* was less clear-cut in its own context than the others discussed above, as some believed it should have been considered illegally anticompetitive.[82] Nonetheless, it was once again not the decision itself but the implications of applying its reasoning that created problems.

The majority opinion in *American Express* limited the potential of future antitrust claims over self-preferencing in two key ways. Firstly, the Court redefined platform markets in the antitrust system as two-sided markets that simultaneously connect merchants and purchasers. This simple definition is already problematic for self-preferencing, as it logically applies to credit cards that connect merchants and customers, as well as to search engines that connect searchers and advertisers, such as Google. Yet it is unclear whether e-commerce giants like Amazon fit this definition, as searching for products and actually purchasing them, while strongly correlated, do not occur simultaneously, which may preclude them from being defined as platform markets under the current antitrust framework created by *American Express*.

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[81] *Miller, Antitrust Law Basics*: Section One, supra note 54.

[82] John Newman & Thibault Schrepel, *Ohio v. American Express*: The Good, The Bad, and the Ugly, NETWORK L. REV. (2018).

Furthermore, the Court raised the evidentiary standard for antitrust plaintiffs to succeed in their claims, further limiting the chances of a successful antitrust claim over self-preferencing. The Court declared that plaintiffs must first prove that a firm's conduct limits competition among other firms in the market. What is more, the plaintiffs must then prove that the lack of competition created higher prices than would have otherwise existed in a competitive market, which is inherently challenging to demonstrate. The plaintiffs were unable to meet this standard in *American Express*, when the contractual provisions in Amex's contracts directly prevented merchants from informing consumers of lower prices. In the context of self-preferencing, it is practically insurmountable to prove that self-preferencing led to higher prices, as the harm manifests in the short- to medium-term as reduced variety and suppressed innovation rather than explicitly higher consumer costs. Antitrust scholar Herbert Hovenkamp criticized the majority opinion over this evidentiary standard, arguing that the Court created this standard despite never laying out the means by which it should be tested.[83] This evidence illustrates how, even as a Section One case, *Ohio v. American Express Co.* further constrained antitrust enforcers' ability to protect against the harms of digital platform self-preferencing by raising the evidentiary burdens on antitrust claims against platforms.

C. The Clayton Act

In the early twentieth century, lawmakers sought to further strengthen the antitrust system created through the Sherman Act by passing the Clayton Act of 1914, which outlawed price discrimination, the conditioning of sales on exclusive dealing, and anticompetitive mergers and acquisitions. These specifically enumerated provisions are unique in comparison to the Sherman Act, which only outlines broader prohibitions.

While there are no Clayton Act Supreme Court cases as analytically relevant to digital platform self-preferencing as the previously discussed Sherman Act cases, there are two that further contextualize the judicial narrowing of the US antitrust system. The first is the 1979 Supreme Court case *Reiter v. Sonotone Corp.,* which was the first case to explicitly connect antitrust injury with price harm to consumers.[84] While the case did not limit the focus of antitrust injury to price harm,

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[83] Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 Colum. Bus. L. Rev. 35, 75 (2019).
[84] *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

as the aforementioned cases did, it laid the groundwork for narrowing this focus in future cases. The 1990 Supreme Court case *Atlantic Richfield Co. v. USA Petroleum Co. (ARCO)* not only furthered that price-harm focus but also raised the standard of proof for antitrust injury by holding that the antitrust injury must flow from the anticompetitive aspect of the conduct itself.[85] This excludes harm to competitors from being considered an antitrust injury if the conduct benefits consumers, even when the practice has been proven to be an explicit antitrust violation, such as setting artificially low gas prices. This is potentially significant for digital self-preferencing, as, being a function of vertical integration, it can often appear to benefit consumers, particularly in the short term. Taken together, these Clayton Act cases are significant for the extent to which they demonstrate the judiciary's broader limits on antitrust enforcement, particularly in cases without clear consumer price harm, thereby creating further challenges to potential antitrust claims against digital platforms' self-preferencing.

## IV. CURRENT SCHOLARSHIP

In his 2023 article *Antitrust and Self-Preferencing*, pre-eminent antitrust scholar Herbert Hovenkamp is one of the few authors to directly address how the current antitrust system applies to digital platform self-preferencing. While he discusses the implications of both *Trinko* and *Aspen* in his analysis of current legal doctrine, his focus is on the structural statutory limitations of the antitrust laws (Sherman, Clayton, and Robinson-Patman Acts). This enabled him to highlight the statutory flaws to consider when crafting new legislation, with the cases illustrating the inapplicability of specific provisions to the practice of self-preferencing. His work analyzing antitrust's statutory failures in “Antitrust and Self-Preferencing” forms the foundation of this article's argument. If statutory law applied cleanly to self-preferencing at the outset, then the subsequent jurisprudence on other kinds of antitrust cases would not be nearly as relevant to the practice as it currently is.

That said, Hovenkamp’s article makes an interesting logical leap from the statutory limitations of antitrust law to considerations of wholly new regulation efforts without fully addressing the faults of current jurisprudence, a gap this article attempts to fill by highlighting the limitations of judicial antitrust enforcement. Nevertheless, he raises a few key points in his discussion of considerations for new legislation. Firstly, a market whose competitiveness is

[85] *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

partially stifled by self-preferencing remains superior to one in which regulation inhibits competition from occurring in the first place.[86] Policymakers risk that outcome if a new regulation is so restrictive that it forces a platform to offer no third-party products at all and to sell only its own products directly. Additionally, he criticizes the proposed American Innovation and Choice Online Act (AICOA), which would, if passed, regulate digital platform self-preferencing for the first time in the U.S. First, he criticizes the proposal for its gatekeeper structure, which would regulate just a small number of highly productive online firms, primarily Alphabet (Google), Amazon, Apple, Meta, and Microsoft, but not "offline" firms such as Walmart.[87] Hovenkamp declares that "singling out online firms for harsher treatment is inconsistent with good antitrust enforcement policy."[88] Additionally, he criticizes the AICOA's "gatekeeper" framework as ill-suited to digital platform self-preferencing.[89] The "gatekeeper" framework focuses on the broader monopolistic power held by platforms, but the anticompetitive aspects of self-preferencing occur at the individual product level, leaving the framework ill-fitted to the issue it is supposed to address.[90] Ultimately, Hovenkamp's *Antitrust and Self-Preferencing* provides a well-grounded legal analysis of the statutory flaws of the antitrust system and considerations for a new framework. Still, it does not meaningfully address how decades of judicial narrowing have compounded those statutory limitations, which is the central concern of this article.

## V. CONCLUSION

Digital platform self-preferencing presents a unique challenge to antitrust enforcement due to its relative novelty, the rapidly aging nature of antitrust statutes, and the judiciary's continued narrowing of enforcement. Self-preferencing is not a new phenomenon, but in a digital environment dominated by a few large platforms and with product placement playing an outsized role in sales performance, it is a far greater antitrust concern. As Hovenkamp's article demonstrates, these century-old antitrust laws are simply not applicable to this new practice as written. But as this article has argued, the issues extend well beyond the statutory text alone, as decades of judicial narrowing have substantially limited

[86] Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 Antitrust 5, 7 (2023).
[87] *Id*. at 8.
[88] *Id*.
[89] *Id*. at 11.
[90] *Id*.

the scope of antitrust enforcement against digital platforms' self-preferencing practices. As a result, wholly new legislation is necessary to address both the statutory flaws Hovenkamp identifies and the doctrinal limitations this article has highlighted. But that legislation must also take into account the risks of excessive regulation so as not to destroy the competition it seeks to strengthen. Absent such reform, antitrust enforcement will remain dangerously disconnected from the harmful realities created by digital platform self-preferencing, leaving dominant dual-role platforms governed by judicially narrowed doctrinal frameworks designed in a fundamentally different era.

# The Transformation of American Political Markets Ex Post *Citizens United*

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## I. INTRODUCTION

Corporate political spending is not a modern phenomenon; its influence can be traced to the infancy of American political campaigns. Spending has become such an integral part of the political process that it seems more a fundamental component than a platform to run on. *Citizens United v. FEC*[91] and its progeny have shifted the legislative paradigm, allowing incumbent business interests to co-opt the annals of power and leaving labor unions, new entrants, and the general public without feasible recourse to have their interests fairly represented. It is now simply a matter of who can support their interests most robustly via political expenditures. The campaign finance jurisprudence established by the Supreme Court decisions, beginning with *Buckley v. Valeo*[92] and running up through *McCutcheon v. FEC*,[93] has paradoxically disenfranchised many political participants in attempting to protect the right of individuals to participate in political speech. The *Citizens United* decision triggered a cascade of regulatory changes which birthed the modern instantiation of the super PAC, intensified incumbency advantages, neutered disclosure requirements, and shifted Congressional distributions on both state and federal levels – all accruing massive gains for corporate shareholders at the expense of individual citizens. Super PACs are now afforded blanket authority to wield billions of dollars in dark money[94] as a political tool in independent expenditures.[95]

Empirical reviews on the practical effects of the *Citizens United* tree consistently and increasingly identify large, incumbent corporations as the true beneficiaries given their outsized spending power relative to small donors, labor interests, and everyday Americans. The jurisprudence established under these decisions cannot be understood solely as a constitutional law issue; the complexities introduced by implementation and market dynamics must be considered as well. The marketplaces for both ideas and products have been reshaped by anticompetitive behaviors enabled and accelerated in the institutional fallout of the *Citizens United* tree. Incumbents have the ability to reap outsized rewards from legislative capture

[91] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[92] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[93] *McCutcheon v. FEC*, 572 U.S. 185 (2014).
[94] Money funneled through multiple layers of different non-profit and for-profit corporate structures in an effort to mask the source.
[95] "An expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate." Federal Election Commission, Understanding Independent Expenditures, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/understanding-independent-expenditures/ (last visited June 26, 2026).

and use them to raise barriers to entry. They have created a market structure advantage not sufficiently addressed under the Court's established measures of corruption.

## II. SUPREME COURT DOCTRINAL ARC

The evolution of modern campaign finance regulations begins with the confrontation of the constitutionality of the Federal Election Campaign Act (FECA)[96] explored by the Court in its *Buckley v. Valeo*[97] ruling. The decision established two critical ideas around which the *Citizens United* progeny organized themselves: distinguishing contributions from expenditures and quid pro quo exchange as the central determinant of political corruption. The Court ruled that the government was only constitutionally permitted to limit contributions directly to political campaigns and not independent expenditures of supporting groups or campaign expenditures themselves.[98] This distinction was made on the basis that expenditures constitute a much more direct form of political speech and laws restricting it were thus subject to strict scrutiny[99] and utmost protections under the First Amendment. This initial separation widened into a gulf of regulatory troubles as nearly all marginal political spending shifted toward the staunchly protected expenditures.[100] The Court also established prevention of quid pro quo corruption[101] or its appearance as the sole measure by which the government could justify its interest in restricting individuals' ability to finance political campaigns.

The most widespread governmental regulations sustained by the Court, subsequently eroded by future judicial rulings and practical implementation, are found in its *McConnell v. FEC*[102] decision. The case began as a challenge of the Bipartisan Campaign Reform Act (BCRA)[103] wherein the Court upheld restrictions

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[96] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended.
[97] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[98] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended.
[99] "The highest standard of review that a court will use to evaluate the constitutionality of a government action." The Legal Information Institute at Cornell Law School, Strict Scrutiny, https://www.law.cornell.edu/wex/strict_scrutiny (last visited June 26, 2026).
[100] *Buckley* had a third core finding which bears mention but is less aligned with our doctrinal sketch: Congress had violated the Appointments Clause, Art. II Section 2, cl. 2, in its direct appointment of members to the FEC, bypassing the executive branch's power to nominate all US officers.
[101] The specific intent to give or receive a "thing of value" in exchange for some future action that the public official will take (and may already have determined to take).
[102] *McConnell v. FEC*, 540 U.S. 93 (2003).
[103] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

on soft money contributions, more stringent disclosure requirements, limitations on electioneering communications,[104] and established a broader scope of corruption by which the government could justify these restrictions.[105] These holdings of the Court sanctioned the government's use of the BCRA to prevent wealthy individuals' circumvention of the campaign contribution limits established under the FECA by way of direct contributions to political parties to finance electioneering communications and issue ads supporting the candidates they wished to contribute to in excess of the cap. The Court holdings validated restrictions applied to corporate and union treasury funds[106] and expanded the government's scope of interest in finance regulations to the prevention of excess influence on the judgment of government officials or the appearance of such.[107] In its *McConnell* decision, the Court paradoxically upheld the most complete framework of regulatory stability anywhere in the *Buckley* progression and simultaneously hinted at its unraveling amidst the sea of 527 and 501(c) organizations on the horizon.

The beginnings of this rapid devolution were sparked by the paradigm shift in the Court's *Citizens United v. FEC*[108] holdings. In its decision, the Court held that corporations were entitled to political expenditure protections under the First Amendment and findings of *Buckley,* overturned the broadened definition of corruption to justify government interests in regulating campaign finance established in *McConnell*, and overruled the *Austin v. Michigan Chamber of Commerce*[109] recognition of corporate identity as a sufficient distinction to limit wealth aggregation in preventing distortion of political discourse. The majority opinion of the Court, penned by Justice Kennedy, centered on political campaigns as marketplaces of ideas;[110] the government having no ability to regulate which ideas

[104] "Any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of a general election and is targeted to the relevant electorate." Federal Election Commission, Making Electioneering Communications,
https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ (last visited June 26, 2026).
[105] *McConnell*, 540 U.S. at 48–51, 143–44.
[106] A holding which inadvertently sets up the explosion of PAC and super PAC formations given the Court's justification that these vehicles afforded them continued ability to participate in political speech but under regulation.
[107] This finding was derived from the lower court's holdings. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001).
[108] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[109] *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).
[110] *Citizens United*, 558 U.S. at 365.

reach the public, regardless of its motivations to do so.[111] As the again narrowed conception of corruption centered on quid pro quo exchange, the structural advantages achieved in this marketplace by wealth aggregation were constitutionally non-germane. The Court upheld the enhanced disclosure requirements enacted in the BCRA as a less imposing means to regulate political spending than outright bans.[112] However, as will be examined in the subsequent empirical studies of its outcomes, the Court's faith in the efficacy of disclosure to check the corruptive influence of political contributions was not upheld by the reality of its implementation.

The incoherence of this siloed conception of corruption had been foreshadowed by the Court itself while *Citizens United* was pending. In *Caperton v. A.T. Massey Coal Co.*,[113] the Court understood the potential for independent expenditures to directly influence the decisions of a sitting official – a state supreme court justice. The *Caperton* majority found $3 million in strictly independent spending channeled predominantly through a 527 organization created what Justice Kennedy termed a "debt of gratitude," and disproportionate influence requiring the sitting judge's recusal.[114] Justice Kennedy framed his opinion with language such as "significant," "disproportionate," and "outsized," matching the antidistortion rationale of *Austin*. However, this would prove to be almost word for word the theoretical framework that *Citizens United* would deny as pernicious a mere twelve months later, in an opinion also authored by Kennedy. The *Citizens United* majority declared that independent expenditures "do not give rise to corruption or the appearance of corruption" and that "ingratiation and access [...] are not corruption," [115] isolating Caperton as a case about remedial recusal rather than free speech; this distinction collapses under scrutiny. [116] Recusal is only an effective remedy if the spending created tangible influence to attenuate; if independent expenditures categorically cannot corrupt, recusal achieves nothing. Positioning recusal as an effective remedy in *Caperton* necessarily contradicts the Court's rationale in *Citizens United*.

[111] *Id.*
[112] *Id.* at 367.
[113] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
[114] *Id.* at 882–84.
[115] *Citizens United*, 558 U.S. at 357, 360.
[116] Richard L. Hasen, Citizens United and the Illusion of Coherence, 109 Mich. L. Rev. 581 (2011).

The reality of political regulations was further upended as the Court built upon its *Citizens United* decision in *McCutcheon v. FEC*.[117] Its primary holding found aggregate contribution limits within a given election cycle unconstitutional[118] on the basis that it punished individuals for exercising their First Amendment rights to their fullest extent.[119] The Court found regulations enacted in the interim[120] since its *Buckley* ruling as fully sufficient in deterring circumvention of the individual contribution limits. Thus, the Court found the aggregate limits to be an unnecessary abridgement of individuals' First Amendment rights, as they had not been sufficiently closely drawn.[121] Here the Court continued to rely on the disclosure requirements as a protection against corruption – one they claim had increased in efficacy given the progression of modern technology.[122] These holdings again find themselves at odds with the reality of regulatory implementation in the wake of the *Citizens* decision.

## III. THE REGULATIONS OF CAMPAIGN FINANCING

Properly depicting the regulatory change and erosion wrought in the wake of the *Citizens United* decision tree requires a brief overview of the history of regulatory implementations. Originally (i.e. prior to the *Citizens* decision) political spending was necessarily channeled through distinct, regulated institutions. Political Action Committees (PACs) were organizations restricted in their capacity to engage in direct expenditures[123] but free to engage in independent expenditures as they saw fit; they were required to submit full disclosures of all donors and expenditures to the public. 527 organizations[124] were not subject to monetary caps

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[117] *McCutcheon v. FEC*, 572 U.S. 185, 192–93 (2014).
[118] The aggregate contribution limit capped an individual's total contributions during a two-year election cycle at $123,200, including $48,600 to candidates and $74,600 to noncandidate committees. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102–03; *McCutcheon v. FEC*, 572 U.S. 185, 194–95 (2014).
[119] *Id*. at 203–04.
[120] Namely restricting the contributions of individuals to specific committees and restrictions on donors controlling a tree of affiliated committees.
[121] *Id*. at 207–08.
[122] *Id*. at 235–236.
[123] "An expenditure made by any person in connection with a campaign for an elective office or on a measure that does not constitute a contribution." Texas Ethics Commission, Filing a Campaign Finance Report, https://www.ethics.state.tx.us/filinginfo/dce/DCEindex.php (last visited June 26, 2026).
[124] Organizations established under I.R.C. § 527.

on the contributions of any individual donor but were expressly disallowed from participation in any form of direct expenditures or independent expenditures of the express advocacy nature (i.e. explicitly identifying and endorsing a particular candidate for office) while retaining the ability to engage in issue advocacy and electioneering communication. 501(c) organizations[125] had a uniquely advantaged position in which there were no monetary caps on contributions of any kind, nor was there mandated public disclosure of their donors. Their lone restriction under this paradigm was a limitation that campaign financing activities could not constitute more than 50% of their total expenditures as an organization. The BCRA amendments to close the soft money loopholes present under the original FECA structuring drove massive amounts of capital into these 527 and 501(c) organizations, which proliferated rapidly as expenditure constraints eroded.

In combination with *Citizens United* unleashing corporate expenditures, the *SpeechNow.org v. FEC*[126] finding that held contribution limits on committees utilizing only independent expenditures as unconstitutional created the super PAC. The findings enabled 527 and 501(c) organizations to access much deeper pools of corporate and union capital for activities from which they had been previously barred. The massive increases in subsequent political spending were concentrated in the 501(c) organizations which enabled this new money to avoid disclosure requirements altogether, rendering the key regulatory lever upon which the Court based its findings in both *Citizens United* and *McCutcheon* completely inert.

## IV. EMPIRICAL CONSEQUENCES

Empirical evidence is consistently and increasingly showing the erosion of a fair and full democracy alongside the entrenchment of incumbents, both political and economic, in the fallout of *Citizens United*. The evidence on incumbency advantage is particularly striking: a reduction of 0.22 candidates per state House legislative race was seen after the decision.[127] The "marketplace of ideas" that was so fervently touted in the Court's decision is dominated overwhelmingly by candidates with established corporate relationships and the ability to leverage them. An effort to ensure access for all in this marketplace has resulted in fewer

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[125] Organizations established as nonprofit entities under I.R.C. § 501(c)(4).
[126] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).
[127] Tilman Klumpp, Hugo M. Mialon & Michael A. Williams, The Business of American Democracy: Citizens United, Independent Spending, and Elections, 59 J.L. & ECON. 1 (2016).

participants even able to compete. Money flooded into 501(c) groups and super PACs with an over 200% increase across all independent spending, 91% of the spending concentrated among super PACs and 501(c) groups, and total spending surpassing $1B; all occurring just in the 2012 election cycle.[128] Moreover, corporations contributed four times more money to super PACs than labor interests did during the 2012 cycle.[129] The ostensible equality of access to the marketplace of ideas was just a narrative with no basis in reality.

The data notes considerable advantages connoted to the economic incumbents stemming from their established relationships and bankrolls in maintenance of political influence. This relationship highlights one of the key failings in the logic freeing corporations from expenditure limits: corporate political spending acts as an investment to generate favorable regulations rather than free political speech deserving constitutional protections. Overwhelming evidence of this can be found by examining the lobbying efforts and subsequent tax savings of 93 of the largest corporations lobbying for the passage of the American Jobs Creation Act (AJCA). The 93 corporations invested a collective $282.7M into various lobbying activities while repatriating[130] $208 B and realizing a total tax savings of $62.5 B – an implied return of over 22,000%.[131] This provides concrete evidence that corporate political spending can be directly tied to massively outsized returns. Any competent corporate leadership understands this relationship and subsequently directs campaign financing according to interests that maximize their profits, rather than as an exercise of First Amendment rights. Any financial opportunity presenting itself with an implied rate of return on the order of 22,000% cannot be rationalized as free speech; it is a clear investment in favorable regulation.

## V. CONCLUSION

*Citizens United* and the tree of resultant decisions were framed around free speech protections. However, the practical results were a distortion of the

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[128] *Id.*
[129] *Id.*
[130] "The ability of a firm to send foreign-earned profits or financial assets back to the firm's home country in hard currency such as USD, EUR and others, after meeting the host nation's tax obligations." Kantox, Repatriation of Profits, https://www.kantox.com/glossary/repatriation-of-profits (last visited June 26, 2026).
[131] Raquel Meye Alexander, Stephen W. Mazza & Susan Scholz, Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations, 25 J.L. & Pol. 401 (2009).

marketplace of ideas and diminished capacity for democratic participation; results canted toward corporate incumbents rather than the constituencies ostensibly represented. The entire doctrinal arc eroded the regulatory capabilities put in place under the assumption that disclosure requirements would sufficiently check the interests of parties for whom the regulations were initially enacted. The Court undermined even its prescribed remedy in lifting the expenditure constraints intended to limit organizations specifically because they lack disclosure requirements. These missteps all emanate from the decision to limit corruption to quid pro quo activities and the failure to recognize a broader category of potential conflicts. The empirical data on the returns to political capture paints an unambiguous picture: corporations reap outsized benefits from legislative capture, which translates directly to increased profits and ability to invest in further capture. The marketplace, both political and economic, is increasingly dominated by incumbents with a distinct incentive to continue raising barriers to entry as a means of consolidating their power. Regulatory power must be restored to realize the vision of an open forum for ideas which served as the foundation for the very First Amendment protections at issue. A distinct sense of urgency must be assumed in remedying the outlined issues as spending gaps widen recursively with the passage of time. Moats deepen, and the incumbents become ever more difficult to regulate or displace.

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