The Unstoppable App Campaign: The Dangers of First Amendment Protection for In-App Political Campaigning

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Technology platforms give Silicon Valley an unprecedented ability to shape the political reality of consumers. In the 2020 California election, gig corporations like Uber, Lyft, DoorDash, and Instacart won a major political battle ensuring that their workers remained independent contractors. This initiative, the Yes on Prop 22 ballot campaign, utilized the technology corporations' phone apps to inundate their consumers with deceptive messaging that tilted the election in their favor. These in-platform consumer-targeted politicking methods are a worrying harbinger of the way technology corporations may influence elections in the future. In fact, platforms are already rolling out Prop 22-esque campaigns across the country in the wake of Prop 22's success in California. Yet the solution is not as simple as passing a law to ban platform campaigning, because the First Amendment likely safeguards in-app political campaigns as protected political speech.

This Note uses a Law and Political Economy framework to situate the dangers of technology platform campaigning in light of First Amendment jurisprudence that aids corporations by translating economic might into political power. The Note explores Proposition 22, discusses the threat presented by technology platform campaigning targeted at consumers, and explains why these dangers extend much more broadly than Proposition 22. Then, this Note shows why this politicking is likely protected by the First Amendment, and describes how the technique fits within corporate speech jurisprudence. Last, the Note offers new ways of imagining the First Amendment to foreclose technology platforms' ability to manipulate their consumers' political reality for corporate gain.

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> Fundamentally, *we* govern markets; we are governed *by* democratic politics. This is a distinction that must have constitutional salience, or we will lose our democracy to the antidemocratic imperatives of laissez faire. Any protections for . . . speech must serve rather than subvert our democracy.[1]
>
> -Professor Amy Kapczynski

1. Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 206 (2018).

INTRODUCTION

In the months before the 2020 election, a non-stop political campaign waged across the phone screens of California consumers. Uber, Lyft, Instacart, DoorDash, and other gig corporations utilized their app platforms to inundate users with political messaging extolling the virtues of a ballot initiative known as Proposition 22 (Prop 22).[2] These efforts coalesced into the most expensive ballot campaign in United States history; gig corporations invested over $200 million in favor of Prop 22, out-spending their opposition by more than 12-to-1.[3] To bend the electorate towards their chosen vision for California law, the companies leveraged their app platforms to disseminate political messages that transformed their consumer bases into voter blocs. Prop 22 passed with 58 percent of the vote.[4]

The in-app messaging these companies presented to consumers ranged from misleading to outright deceptive.[5] Yet there is likely nothing legislatures can do to prevent tech companies from leveraging apps for politicking in this way. This is because the Supreme Court's First Amendment jurisprudence has enthroned corporations' right to engage in political debates in the midst of commercial transactions.[6]

Prop 22's passage sparked grave concerns for the implications of in-app politicking. It exemplified that, when threatened by unfavorable laws, tech giants can leverage their seamless integration into consumers' digital lives to bombard them with political messaging. Prop 22 will not be the last iteration of in-platform campaigning.[7] In fact, gig platforms already plan to roll out similar

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2. *See* Suhauna Hussain, Johana Bhuiyan, & Ryan Menezes, *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020), https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22 [https://perma.cc/HD3L-384X].

3. *Id.*

4. *Id.*

5. *See* Hussain, Bhuiyan, & Menezes, *supra* note 2; Alex N. Press, *With Prop 22's Passage in California, Tech Companies Are Just Writing Their Own Laws Now*, JACOBIN (Nov. 5, 2020), https://jacobinmag.com/2020/11/proposition-22-california-uber-lyft-gig-employee [https://perma.cc/H3HA-C6VL]; Alexander Sammon, *How Uber and Lyft Are Buying Labor Laws*, AM. PROSPECT (Oct. 5, 2020), https://prospect.org/labor/how-uber-and-lyft-are-buying-labor-laws [https://perma.cc/3NST-V3CL].

6. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (holding that corporate speech cannot be restricted based on topic); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533 (1980) (holding that corporate speech cannot be regulated based on context).

7. Nor was it the first iteration. In 2012, Google blacked out its logo to inform users and protest against the Stop Online Privacy Act and the PROTECT IP Act that had passed the House of Representatives. Additionally, in 2015, in response to NYC mayor's proposal to limit the number of ride-share cars, Uber utilized its app to tell users that rides could vanish if the mayor's proposal was approved. Andrew J. Hawkins, *Uber and Lyft Had an Edge in The Prop 22 Fight: Their Apps*, VERGE (Nov. 4, 2020), https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications [https://perma.cc/2UEY-BRZD].

political campaigns across the country.[8] This Note primarily contends that today's First Amendment jurisprudence bulwarks tech platform campaigning and allows corporations to significantly manipulate the political process.

Part I provides a brief history of Prop 22 and describes how gig corporations leveraged their app platforms as political machinery. Part II analyzes how the Supreme Court's First Amendment precedent has likely made it impossible to restrict tech companies from utilizing platforms as campaign tools, and uses a Law and Political Economy (LPE) framework to explain how this development fits in with the First Amendment's historical use as a deregulatory tool that insulates corporate power from democratic control. Part III examines the flaws in this jurisprudence and describes why its implications are particularly dangerous in the context of tech platforms' in-app political campaigns. Part IV proposes and evaluates two possible solutions to rein in the use of in-app campaigning to manipulate the political process: stripping corporations of First Amendment protections, and prohibiting misleading campaign messages.

I.
PROP 22 AND ITS CONSUMER-FUELED CAMPAIGN

A. Prop 22: Gig Companies Deny Workers Employment Protections

With Prop 22's passage in 2020, Uber, Lyft, DoorDash, and other gig worker platforms effectively bought themselves more favorable labor law.[9] In the 2018 case *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*,[10] the California Supreme Court had dealt a major blow to the workings of the gig economy. Dynamex, a same-day courier service, historically classified its drivers as employees, granting them full benefits under California law.[11] In 2004, however, the company re-classified all of its drivers as independent contractors to reduce costs.[12] Under the new classification, workers were required to "provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability

8. Terri Gerstein, *What Happened in California Is a Cautionary Tale for Us All*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/opinion/prop-22-california-gig-workers.html [https://perma.cc/KWW9-KSJQ]; Press, *supra* note 5; Adam M. Rhodes, *Lyft Won Big in California. Now It's Set Its Sights on Illinois*, CHI. READER (Nov. 23, 2020), https://www.chicagoreader.com/chicago/lyft-super-pac-illinois/Content?oid=84466710 [https://perma.cc/XU8L-Y6HE].

9. *See* Hussain, Bhuiyan, & Menezes, *supra* note 2; Cherri Murphy, *Uber Bought Itself a Law. Here's Why That's Dangerous for Struggling Drivers Like Me*, GUARDIAN (Nov. 12, 2020), https://www.theguardian.com/commentisfree/2020/nov/12/uber-prop-22-law-drivers-ab5-gig-workers [https://perma.cc/A4JG-C7H6].

10. *See* Dynamex Operations West, Inc. v. Superior Court of Los Angeles, 416 P.3d 1 (Cal. 2018).

11. *Id.* at 8.

12. *Id.*

insurance, as well as all taxes and workers' compensation insurance."[13] The drivers claimed that they were misclassified, arguing they did essentially the same work as contractors that Dynamex classified as employees.[14]

The California Supreme Court agreed.[15] In holding for the drivers, the court promulgated a three-step test to distinguish independent contractors from employees, also known as the "ABC Test."[16] Under this test, a worker is presumptively an employee under California law *unless* the employer can prove three elements:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business.[17]

If the employer cannot establish any one of the three elements, the worker is considered an employee of the hiring business under the suffer or permit to work standard in wage orders. After *Dynamex*, the California Assembly codified the ABC test by statute in AB-5.[18]

Gig corporations such as Uber, Lyft, Instacart, and DoorDash, viewed AB-5 as somewhat of a death sentence to their business models, which are predicated on the "misclassification of their workforce as private contractors and the cheap, substandard labor protections that brings."[19] By classifying their drivers as independent contractors prior to AB-5, Uber and Lyft alone saved $413 million by not paying into California's Unemployment Insurance Fund.[20] In contrast, if gig workers were deemed employees under AB-5, companies would have been legally obligated to provide workers with basic labor protections such as minimum wage, worker's compensation, paid sick leave, paid family leave, and unemployment insurance.[21] In fact, in documents submitted to the Securities and Exchange Commission, DoorDash acknowledged its dependance on cheap labor, stating "If [delivery workers] are reclassified as employees under federal or state law, our business, financial condition, and results of operations would be

13. *Id.*
14. *Id.*
15. *Id.* at 1.
16. *Id.* at 34.
17. *Id.*
18. *California Assembly Bill 5 (2019)*, BALLOTPEDIA, https://ballotpedia.org/California_Assembly_Bill_5_(2019) [https://perma.cc/EEW5-7R9E]; Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).
19. Sammon, *supra* note 5; *see also* Press, *supra* note 5 (posing AB-5 22 as an existential threat to the continued existence of the gig platforms).
20. Ken Jacobs & Michael Reich, *What Would Uber and Lyft Owe to the State Unemployment Insurance Fund?*, UC BERKELEY LAB. CTR. (May 7, 2020), https://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/./ [https://perma.cc/CMB4-MV4K].
21. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

adversely affected."[22] And for Uber, properly classifying workers as employees under AB-5 would have cost up to $500 million a year.[23] For gig corporations, AB-5 presented an existential threat to continuing business models dependent upon parsimonious wages for their workers.

This is why gig companies so doggedly pursued Prop 22—to save them from the added cost of giving workers dignified pay and employment benefits. In fact, nineteen days before Governor Newsom signed AB-5 into law, Uber, Lyft, and DoorDash each gave $30 million to the campaign for Prop 22 in an attempt to sidestep the incoming regulation.[24] Prop 22's purpose was to override AB-5 and require that gig workers remained legally classified as independent contractors not entitled to employee benefits under California law.[25]

By election time in November, funding in support of Prop 22 exceeded $200 million.[26] The initiative subsequently passed with 58 percent of the vote.[27] Gig corporations effectively exempted themselves from AB-5's ambit, allowing companies to continue classifying workers as independent contractors instead of employees.[28]

B. Gig Platforms Leveraged Consumers as a Voting Bloc

Prop 22's success is inseparable from its progenitors' statuses as popular consumer brands. This popular brand status bolstered Prop 22 in two ways. First, through consumers simply downloading and registering with an app, companies receive a trove of personal information from users like emails, phone numbers, credit card numbers, travel information, and even food preferences.[29] For any other campaign initiative, this type of information would be incredibly expensive to acquire.[30] Yet by virtue of their apps, the Prop 22 corporations are stocked

22. SEC, REGISTRATION STATEMENT DOORDASH, INC. 12 (2020), https://www.sec.gov/Archives/edgar/data/1792789/000119312520292381/d752207ds1.htm [https://perma.cc/3EKZ-8SCG].

23. Gerstein, *supra* note 8.

24. *California Proposition 22, App Based Drivers as Contractors and Labor Policies Initiative*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_ (2020) [https://perma.cc/9VJ3-2KJ7].

25. *Id.*

26. *Id.* In contrast, the No on Prop 22 campaign only raised $19 million with its largest donations coming from labor unions and organizations. *Id.*

27. Gerstein, *supra* note 8.

28. Sara Ashley O'Brien, *The $185 Million Campaign to Keep Uber and Lyft Drivers as Contractors in California*, CNN (Oct. 8, 2020), https://www.cnn.com/2020/10/08/tech/proposition-22-california/index.html [https://perma.cc/YV3V-CAC9].

29. Ben Christopher, *New Frontiers: How Gig Economy Titans Are Lobbying Their Customers*, CAL MATTERS (Oct. 16, 2020), https://calmatters.org/politics/post-it/2020/10/gig-economy-lobbying-customers-prop-22/ [https://perma.cc/3K2M-HPST].

30. Suhauna Hussain, *Uber Lyft Push Prop. 22 Message Where You Can't Escape It: Your Phone*, L.A. TIMES (Oct. 8, 2020), https://www.latimes.com/business/technology/story/2020-10-08/uber-lyft-novel-tactics-huge-spending-prop-22 [https://perma.cc/254Y-SQNJ] ("Uber contributed a 'consumer email list' with a value of $693,000.").

with consumer information that they can use to text and send mailers to addresses.[31]

Second, and the focus of this Note, is that Prop 22 gig corporations utilized their apps as campaign centers lodged in consumers' phones. As apps, gig platforms are woven into the fabric of users' digital lives. Such integration allows platforms to seamlessly incorporate influential political campaigns into consumers' everyday tech usage. Using this asset to their advantage, the gig platforms spammed users with Prop 22 push notifications and draped their in-app user interfaces with pro-Prop 22 messaging.[32] Professor Jessica Levinson at Loyola Law School referred to the gig platform campaign as "a new frontier in the sense that [it]" utilizes "a customer base that could become a voting base."[33]

Push notifications and in-app political messaging present a uniquely persuasive paradigm, because the political messaging becomes wrapped up in the consumer's desire for the product.[34] A consumer comes to the app in pursuit of a trusted service, whether it be a safe ride or a grocery delivery. Encountering political messaging in this context signals to consumers that the desire for the product or service is intertwined with the fate of the political campaign. Consumers' trust in the company and dependence on its services provides fertile ground for a company to tilt its customer base into a voter bloc.

Further, gig platforms designed their apps to guarantee that users encountered their messaging. The clearest example was a message that popped up on consumers' screens when they opened the Uber app. To get past the message and order a ride, Uber forced consumers to register that they had read the message by clicking "confirm."[35] This message informed users, "If Prop 22 fails riders and drivers will be affected. Your ride prices and wait times are likely to substantially increase while most drivers will lose their jobs."[36] This political message painted the stakes in stark terms for consumers who desired to continue using Uber: vote for Prop 22 or lose our services.

The in-platform messaging also deceived consumers about the consequences of Prop 22 for workers. An Uber in-app message told consumers, "We believe drivers and delivery people deserve more. Prop 22 protects driver's

31. Christopher, *supra* note 29. It could be argued that all corporations are similarly placed because shopping chains, like Target, offer cards or memberships that allow them to receive consumer information as well. However, the scope differs because not every person who shops at a Walmart or Target must register their personal information. In contrast, every person who uses a gig app must download the app and provide their personal information.

32. *Id.*; Kate Conger, *It's a Ballot Fight for Survival for Gig Companies Like Uber*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/technology/uber-lyft-california-prop-22.html [https://perma.cc/FUW2-RCY8].

33. Christopher, *supra* note 29.

34. Hawkins, *supra* note 7 (quoting NYU Professor Arun Sundararajan "[Consumers] feel positively towards the platforms, they don't want to see a disruption in something that they depend on, and so they vote for the platform's position").

35. *Id.*; Hussain, *supra* note 30.

36. Screenshot of Uber In-App Message #1 (on file with author) (Nov. 14, 2020).

freedom and independence while giving them access to benefits and protections. That's why 72% of drivers and delivery people support Prop 22."[37] If this was all a consumer saw, then voting yes on Prop 22 was straightforward. The message simultaneously promised a continuation of desired services and alignment with drivers' interests.

But it is likely untrue that 72% of drivers actually supported Prop 22. About two weeks before the election, a group of drivers sued Uber for:

> Tak[ing] advantage of its . . . exclusive control over communication through its driver-scheduling app by wrongfully pressuring its drivers to actively support Proposition 22. Uber . . . has directed its drivers . . . to respond to surveys regarding their voting preferences by stating they support Prop 22. Uber's solicitations have the purpose and effect of causing drivers to fear retaliation by Uber . . . and may induce drivers to falsely state . . . support for Proposition 22.[38]

It appears likely that the gig corporations propagated misleading statistics resulting from self-selecting survey groups and disingenuously phrased questions.[39] That the run up to the election was marked by organized resistance by drivers and delivery people, coalescing in gig-worker organized protests across California, undercuts the veracity of the companies' messaging.[40]

The Prop 22 campaign also deceived in-app consumers by framing the initiative as providing drivers with the dignified wages and benefits they deserved. A Lyft message categorized the campaign as "The way forward."[41] An Uber message said, "Prop 22 is progress. Prop 22 will provide guaranteed earnings and a healthcare stipend."[42] Another Uber message characterized Prop 22 as being about drivers "deserving more."[43]

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37. Screenshot of Uber In-App Message #2 (on file with author) (Nov. 14, 2020).

38. Class Action Complaint at 2–3, Valdez v. Uber Techs., Inc. (No. CGC-20-587266), https://beta.documentcloud.org/documents/20398520-uber-prop-22-complaint [https://perma.cc/UMQ5-VDP5].

39. Suhauna Hussain & Johana Bhuiyan, *Uber, Lyft, DoorDash Workers on Prop 22: 'I Don't Want to End Up on The Wrong Side,'* L.A. TIMES (Oct. 27, 2020), https://www.latimes.com/business/technology/story/2020-10-27/uber-lyft-doordash-drivers-prop-22 [https://perma.cc/86DC-7MV8].

40. *See* Megan Rose Dickey, *Human Capital: Prop 22 Puts the "Future of Labor" at Stake*, TECHCRUNCH (Oct. 16, 2020), https://techcrunch.com/2020/10/16/human-capital-prop-22-puts-the-future-of-labor-at-stake/ [https://perma.cc/633Q-UA35]; *Hundreds Protest at Lyft to Say No on Prop 22*, LA FED (Oct. 2, 2020), https://thelafed.org/news/hundreds-protest-at-lyft-to-say-no-on-prop-22/ [https://perma.cc/QHT7-AJRX]; *Ride-share Drivers Protest Proposition 22, Urging Voters to Vote "NO,"* KUSI NEWS (Oct. 9, 2020), https://www.kusi.com/ride-share-drivers-protest-proposition-22-urging-voters-to-vote-no/ [https://perma.cc/G7EX-MN2B]; *Our Fight Continues*, WE DRIVE PROGRESS (Nov. 4, 2020), https://www.wedriveprogress.org/news/4dr0ex0ho0l4asftqse425bertgwnz [https://perma.cc/AL8R-MPPF].

41. Screenshot of Lyft In-App Message (on file with author) (Oct. 6, 2020).

42. Screenshot of Uber In-App Message #3 (on file with author) (Dec. 3, 2020).

43. Screenshot of Uber In-App Message #4 (on file with author) (Oct. 5, 2020).

However, these ads neglected to mention that Prop 22 gives workers paltry benefits compared to their rights as full employees under California labor law.[44] For example, Uber and Lyft claim that Prop 22 gives workers $15.60 an hour.[45] However, a study by the Labor Center at the University of California, Berkeley found that, due to loopholes and subtracted fees in Prop 22, workers will only earn $5.64 per hour.[46] For comparison, on January 1, 2022, California's minimum wage became $14 an hour.[47]

Prop 22's deceptive messaging was a resounding success. A preliminary study found that 40 percent of California voters who supported Prop 22 did so because they believed it would ensure drivers received a livable wage.[48]

Beyond their deceptive nature, in-app messaging is dangerous because it allows gig platforms to frame the issues to consumers in whatever way they choose. For example, many campaign ads emphasized that Prop 22 was about workers' freedom to remain independent contractors with flexible schedules. One Lyft message warned that, without Prop 22, drivers will be "forced to become employees."[49] An Uber message portrayed Prop 22 as "protect[ing] driver's freedom and independence."[50] These claims painted AB-5 as robbing workers of their freedom because it would force them to classify as employees and prevent them the flexibility of choosing their hours. However, nothing in AB-5 provided that gig workers classified as employees would be required to have fixed or typical scheduled work shifts.[51] This messaging allowed gig corporations to frame freedom as equaling flexibility, wholly ignoring the freedom that comes with wage security and employee benefits.[52] Focusing on freedom as flexibility, instead of freedom through economic security, allowed the Yes on Prop 22 campaign to skirt over the freedom of a dignified life with

44. *See* Jacobs & Reich, *supra* note 20; Ken Jacobs & Michael Reich, *The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg*, UC BERKELEY LAB. CTR. (Aug. 26, 2020), https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/ [https://perma.cc/YYY7-BWGQ]; *Impact on Drivers*, NO ON PROP 22, https://web.archive.org/web/20201005124335/https://nooncaprop22.com/impact_on_drivers (last accessed Oct. 5, 2020).

45. Jacobs & Reich, *supra* note 20.

46. *Id.*

47. *Minimum Wage*, CAL. DEP'T INDUSTR. RELS., https://www.dir.ca.gov/dlse/faq_minimumwage.htm [https://perma.cc/J4A5-PV8Y] (last accessed July 30, 2022). Minimum wage is now $13 for employers with more than 26 employees, which the gig corporations also fall under.

48. Hussain, Bhuiyan, & Menezes, *supra* note 2.

49. Screenshot of Lyft In-App Message (on file with author) (Oct. 6, 2020).

50. Screenshot of Uber In-App Message #4 (on file with author) (Oct. 5, 2020).

51. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

52. *See* Franklin D. Roosevelt, State of the Union Address 21 (Jan. 6, 1941), https://www.fdrlibrary.org/documents/356632/390886/readingcopy.pdf/42234a77-8127-4015-95af-bcf831db311d [https://perma.cc/52HK-ARXE] (declaring that one of four essential human freedoms is the freedom from economic want).

employment protections, free from the anxieties that hound those faced with wage insecurity.

The gig corporations' selective and strategic framing allowed them to avoid the real-world implications of their policies. In September 2020, Khaled Zayyid, an Uber driver, passed away after contracting COVID while driving eighty hours per week to provide for his family.[53] He often told his family about passengers who would get in his car and refuse to wear a mask.[54] Without their breadwinner, Zayyid's family tried to apply for workers' compensation.[55] However, the program denied the family benefits, estimated to be at least $320,000, because Zayyid was an independent contractor and not an Uber employee.[56] In fact, because Zayyid's wife and two of his teenage children were dependent on him, the family could have received hundreds of thousands of dollars more over the coming years.[57]

Freedom for Zayyid was not being able to choose when he drove.[58] However, for his family now, freedom *should* be their ability to take time to mourn their ineffable loss without having to worry about their bills. Yet, freedom from economic anxiety in the face of travesty is precisely what Prop 22 denied them. This is because Prop 22 does not address how a death claim and workers' compensation will be handled for families like Zayyid's.[59]

The dangers of in-app political messaging are possible because the apps are closed informational universes where wide swaths of voters see only what the corporations choose. In California, Uber has more than 1.3 million users who use it for rides and over 1 million users who use Uber Eats for food delivery.[60] That number grows when factoring in users of DoorDash, Lyft, Instacart, and Postmates. As this massive consumer group accesses and uses the apps, those consumers receive a vision of the world that the platforms want them to see. The apps do not include a search bar for users to evaluate the political claims that the apps are making. And it appears unlikely that the consumer in such a situation would take the time, beyond the app, to investigate and weigh the benefits and costs of a political objective like Prop 22.[61] The ability of tech platforms to assert the informational boundaries of a consumer's world gives the apps tremendous

53. Suhauna Hussain, *This Uber Driver Died of COVID-19. Proposition 22 Will Sway His Family's Fate*, L.A. TIMES (Nov. 1, 2020), https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp [https://perma.cc/6ZB7-G4WU].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. If driving 80 hours a week to make ends meet and support a family can even be considered a flexible freedom in the first place.

59. Hussain, *supra* note 53.

60. Carolyn Said, *Uber App: Watch This Prop 22 Ad*, S.F. CHRON. (Sept. 25, 2020), https://www.sfchronicle.com/business/article/Uber-app-Watch-this-Prop-22-ad-15597834.php#photo-20017563 [https://perma.cc/9GJ7-NZVA].

61. *See* Hawkins, *supra* note 7.

power. Their control of what consumers see gives them free rein to deceive and frame the issues however they want. As the Prop 22 campaign illuminated, the world in-platform is theirs to create.

II.
IN-APP CAMPAIGNING IS POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT

The Supreme Court's corporate speech decisions have likely made the Prop 22 in-app politicking protected political speech. This means that the California State Legislature, or other state legislatures wary of Prop 22-esque initiatives coming to their states,[62] is likely powerless to prevent gig platforms from utilizing their apps for political ends. This Section first traces how Supreme Court precedent likely makes in-platform campaigning protected political speech. Then, it demonstrates how the LPE framework can explain unregulatable in-app political messaging.

A. Supreme Court Precedent Likely Protects In-App Campaigning as Political Speech

With two key decisions, *First National Bank of Boston*[63] and *Consolidated Edison*,[64] the Supreme Court has likely made it impossible to prevent tech companies from utilizing their apps as political campaign tools. These two cases make corporate political speech sacrosanct regardless of its topic or context.

First National Bank of Boston in 1978 afforded corporations the ability to take part in all political debates, regardless of topic.[65] Massachusetts law restricted corporations from donating to state ballot initiatives that had no relation to their businesses.[66] The State expressed to the Court that the legislature enacted the law because it was concerned about the "undue influence" corporate donations would have on the state's political processes.[67] However, the Court held that Massachusetts could not restrict corporate speech to certain topics, reasoning that "if the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[68]

In *Consolidated Edison*, the Supreme Court protected corporate political speech regardless of the *context* in which it took place, thereby allowing

62. Gerstein, *supra* note 8; Press, *supra* note 5.
63. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
64. Consol. Edison Co. of N.Y v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980).
65. *First Nat'l Bank of Boston*, 435 U.S. at 784–85.
66. *Id.* at 768.
67. *Id.* at 789.
68. *Id.* at 777.

corporations to leverage their consumer bases for political ends.[69] In reaching this holding, the Court relied heavily on *First National Bank of Boston*.[70] Consolidated Edison, the utility in New York, had inserted material about nuclear power into consumers' monthly utility bills.[71] The inserted material expressed Consolidated Edison's views on nuclear power, stating that "the benefits of nuclear power . . . far outweigh any risk."[72] Afterwards, New York's Public Service Commission prohibited utilities from inserting political material because "customers who receive bills containing inserts are a captive audience . . . who should not be subjected to the utility's beliefs."[73] The Supreme Court disagreed, holding that:

> The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech . . . [t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, where corporation . . . or individual . . . . The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.[74]

For the Court, it did not matter that the political speech happened during a commercial transaction. This distinction is notable because, on the same day, the Court held in *Central Hudson* that the government could restrict commercial speech in ways that would be unallowable for political speech.[75] Because *Central Hudson* relegates commercial speech to a lower rung of protection,[76] the Court in *Consolidated Edison* could have deemed the inserts' commercial context as a reason to limit the sacrosanct nature of corporate political speech. Yet, the Court decisively protected such speech regardless of its context.[77] In doing so, the Court effectively gave corporations permission to leverage consumer bases as political tools, making the commercial transaction a protected front on which to wage political battles.

The two-step protection of corporate political speech, first for topic, then for context, makes it likely impossible for the government to restrict in-app campaigning. First, *First National Bank of Boston* prevents regulation from targeting the topic of political debates that corporations can engage in.[78] Second,

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69. *See Consol. Edison*, 447 U.S. at 533 (rejecting the Commission's view that Consolidated Edison was abusing its monopoly status to take advantage of its captive consumer audience).

70. *Id.* at 533, 535, 540–41, 544.

71. *Id.* at 532.

72. *Id.*

73. *Id.* at 533.

74. *Id.*

75. Cent. Hudson Gas & Elec. Corp. v. Pub. Comm'n of N.Y., 447 U.S. 557, 557 (1980).

76. *Id.*

77. *See* Consol. Edison Co. of N.Y v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533 (1980).

78. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784–85 (1978).

and most importantly, *Consolidated Edison* protects corporate political speech that occurs in the context of a commercial transaction.[79] Indeed, in the Prop 22 campaign, corporations exposed consumers to in-platform political messaging while those consumers were in the midst of a commercial transaction, whether seeking a ride, ordering takeout, or buying groceries. This is analogous to the utility consumer in *Consolidated Edison* coming across the nuclear power pamphlet while paying their monthly utility bill.[80] Both situations involve consumers exposed to corporate political messaging in pursuit of fulfilling a commercial end.[81] In turn, these two rulings strongly suggest that the Court's First Amendment jurisprudence protects gig corporations when speaking on any political topic during commercial interactions with consumers.[82] Therefore, if California or another state restricted tech platform campaigning, the Court would likely strike down the rule. In such a case, it is easy to expect the Court to emphasize that a rule banning Uber's political use of its platform "cannot be upheld on the ground that" Uber "is not entitled to freedom of speech . . . [because] [t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source."[83]

B. Speech Protections for In-App Campaigning Fits within LPE Critiques of the First Amendment

1. The LPE Framework

The LPE Framework offers a critical lens to understand how the dangers presented by in-app political campaigns fit into larger undercurrents within First Amendment law and the American legal landscape more broadly. This Note views the Prop 22 in-app campaign not as a one-off, but as a dangerous trajectory of corporate domination over society. LPE provides a framework within which to situate the troubling aspects of Prop 22 in the larger movements of law over the past several decades. This Section will briefly summarize LPE's main critiques, with particular emphasis on its insight into constitutional law and the First Amendment, because these areas directly implicate tech platform political campaigning. Subsequent Sections will then analyze the Supreme Court precedent and First Amendment jurisprudence that relate to tech app campaigning, and will situate that jurisprudence within the LPE framework.

LPE seeks to understand the ways in which law has been foundational in creating manifold societal problems and in turn, how law is critical to solving

79. *See Consol. Edison*, 447 U.S. at 533.

80. *See id.* at 532.

81. *See id.*

82. *See First Nat'l Bank of Boston*, 435 U.S. at 777 (1978) (holding that corporate speech cannot be restricted based on topic); *Consol. Edison*, 447 U.S. at 533 (1980) (holding that corporate speech cannot be regulated based on context).

83. *Consol. Edison*, 447 U.S. at 533.

them.[84] Essential to these crises and our inability to solve them is the bifurcation of law into two distinct categories that keep their respective concerns separate.[85] On one side, private law doctrines like contract, torts, and antitrust were reoriented around a normative framework of efficiency that structurally vaunted the interests of the wealthy.[86] This orientation of private law contains no lens to critically analyze the relationship between economic and political power.[87]

On the other side, public law, particularly constitutional law, examines questions of coercion and legitimacy in relation to state power, while excluding questions of how economic ordering affects questions of coercion and legitimacy.[88] The resulting effect is that while constitutional law is normatively concerned with the aforementioned issues, it restricts investigations of "what kind of economic order might be necessary to make democracy real and vindicate constitutional principles such as equality."[89]

These simultaneous developments across public and private law erected a wall between the two areas, cordoning off any integration of their respective concerns.[90] As a result, these trends have "muted problems of distribution and power throughout public and private law."[91] However, LPE critically argues that the border between economic and political concerns cannot be split because "politics and the economy cannot be separated. Politics both creates and shapes the economy. In turn, politics is profoundly shaped by economic relations and economic power."[92] In stitching back together the bridge between politics and economics, LPE aims to understand how society arrived where it is today and to provide solutions moving forward.[93]

Two of LPE's critiques of public law are essential to this Note's examination of the First Amendment's jurisprudential relation to tech platform campaigning. First, decisions that struck down laws meant to limit private and corporate spending in elections consolidated the First Amendment doctrine with commerce.[94] Phrased another way, the Court transformed the First Amendment to equate speech with the commercial functioning of the marketplace.[95] These developments "fortif[ied]" the boundary between the political and economic by

84. Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *Law and Political Economy: Toward a Manifesto*, LPE PROJECT (Nov. 6, 2017), https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto [https://perma.cc/N4TU-BJAM].

85. *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 YALE L.J. 1784, 1790 (2020).

86. *Id.*

87. *Id.*

88. *Id.*

89. Britton-Purdy, Kapczynski & Grewal, *supra* note 84.

90. Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 85, at 1790.

91. *Id.* at 1791.

92. Britton-Purdy, Kapczynski & Grewal, *supra* note 84.

93. *Id.*

94. Britton-Purdy, Grewal, Kapczynski, & Rahman, *supra* note 85, at 1809.

95. *Id.*

"*shielding*" economic power from democratic political processes.[96] The result has been a First Amendment that "readily translate[s]" private economic power "into influence over public decisions."[97]

The second important LPE critique focuses on skepticism of regulation within constitutional law. Specifically, LPE questions the skepticism of statutes that sought to equalize the distribution of political power amidst imbalances in economic power.[98] This skepticism is signified by decisions that classified laws that sought to limit spending in elections as impermissible speech violations.[99] In subsequent Sections, this Note will show how both of LPE's central criticisms of public law play an essential role in understanding how the First Amendment dangerously props up tech companies' political use of their platforms.

These LPE critiques highlight the intractability of in-app campaigning because legislation banning Prop 22-esque tech politicking would run afoul of the aforementioned precedent and prove antithetical to First Amendment jurisprudence. Placing the Prop 22 issues within the LPE framework is important because it illuminates the impact of the Court's corporate speech cases. These cases are not just political judgments; they allow corporations to transform economic strength into political might. Phrased another way, the LPE framework helps advocates see that these decisions do not take place in a political vacuum. Instead, LPE demonstrates that the economic contexts which the Court chooses to overlook have a tremendous impact on its decisions.

2. Prop 22 and the LPE Critique of the First Amendment

One of the main LPE critiques of public law highlights that the First Amendment has become a tool that "shield[s]" economic power from "political disruption," especially when courts use it to strike down statutes that attempt to equalize money's influence in elections.[100] Scholars have referred to this trend as "[t]he 'Lochnerization' of the First Amendment."[101] This name invokes "the early twentieth century's Fourteenth Amendment jurisprudence" where "the federal courts us[ed] a select set of individual rights to protect the privileges of the economically powerful and to resist legislative . . . efforts to advance the interests of the economically marginal."[102] In this line of First Amendment cases, the freedom of speech "support[s] class entrenchment: the concentration of political power in relatively small and privileged echelon of Americans. It does so by constitutionally protecting the translation of unequal wealth into unequal

96. *Id.* at 1810.
97. *Id.* at 1811.
98. *Id.*
99. *Id.*
100. Britton-Purdy, Grewal, Kapczynski, & Rahman, *supra* note 85, at 1810.
101. Kapczynski, *supra* note 1, at 179.
102. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962 (2018).

political power."[103] As the end of this subsection will show, the argument that the First Amendment concentrates political power among the wealthy helps explain why legislation that bans tech platform campaigning would run afoul of the history underlying the First Amendment.

A zoomed-out history of the First Amendment establishes that a "resistance to the redistribution" of political power across wealth inequities "is at the heart of this jurisprudence."[104] In the early 1970s, center-right legal theorists—including Lewis Powell before he became a Justice—became concerned by control of the economy exerted by unions and the left. These theorists began to call for advocates to use the courts for the "preservation of the system [of free enterprise] itself."[105] Their strategy was to utilize the courts to ensure that questions of political power distribution throughout society remained untouchable by democratic politics.[106]

The per curiam opinion, *Buckley v. Valeo*, epitomized the stature of this jurisprudence.[107] In *Buckley*, the Court struck down a law that capped individual contributions to political campaigns.[108] The Court reasoned, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[109] The opinion espoused disdain for laws that sought to correct the inherent inequities of power that accompanied wealth. This ideology fully matured thirty-seven years later in *Citizens United*, where the Court waxed eloquent about speech that competes "in [a] marketplace 'without government interference.'"[110] These cases construct a First Amendment so concerned with everyone's opportunity to speak that it forecloses any constitutional inquiry into relative ability to speak. In doing so, the First Amendment now silences the voices of the "economically marginal."[111]

In the wake of this jurisprudence, any law or regulation that sought to restrict the ability of tech platforms' in-app campaigning would run afoul of the First Amendment. To be sure, a legislative or administrative attempt to curtail tech companies from in-platform politicking would be a redistributive policy that undercuts the power of gig platforms and places them on equal footing with those who lack equivalent resources. Yet, the Court has clearly established its disdain

103. *See* Jedidiah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2162 (2018).

104. *Id.* at 2170.

105. *Id.* at 2166.

106. *See id.* at 2169.

107. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Purdy, *supra* note 103, at 2163.

108. *Buckley*, 424 U.S. at 7, 51.

109. *Id.* at 48–49.

110. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010); Purdy, *supra* note 103, at 2162.

111. Kessler & Pozen, *supra* note 102, at 1962.

for policies that mute powerful voices in the hopes of encouraging greater democratic involvement in politics.[112]

Tech platforms exert enormous power over society through their access to troves of personal information and apps that spread political messaging. Indeed, in the wake of Prop 22's victory, gig corporations have already begun eyeing new states in which to bring similar initiatives[113] and will likely utilize their app-based might in similar ways. Yet, this line of First Amendment rulings indicates that there is nothing government can do to curtail such aggressive campaigning, because the First Amendment has made corporations' ability to speak sacrosanct. It appears that the only path forward is to watch from the sidelines as tech corporations pick their preferred laws.

3. Prop 22 and the First Amendment's Idealization of the Civic Consumer

The LPE critique of the First Amendment's merging of protected speech and commerce also highlights how the First Amendment actually encourages tech-platform political campaigning.[114] Over the last several decades, constitutional doctrines, like the First Amendment, have idealized notions of political liberty as epitomized by market consumption as self-expression.[115] Therefore, citizenship and full enjoyment of rights, in the constitutional sense, becomes conflated with one's ability to be a consumer.[116] Under this conception of the First Amendment, the exchange of information in the marketplace gains constitutional protection that is perilously close to political speech.[117] Furthermore, corporations, as major actors in the market, receive constitutional speech rights because courts view the information they provide about the market as essential to the civic consumer.[118] The sacred status of corporations as knowledge-bearers of the market is best epitomized in *Citizens United*, where the Court declared that "the Government has 'muffle[d] the voices that best represent the most significant segments of the economy.'"[119]

The First Amendment's conception of the civic consumer implicates in-app campaigning because it suggests that tech corporations leveraging consumers into voters would not bother the Court. As this Note has argued, tech platform

112. *See Buckley*, 424 U.S. at 48–49.

113. *See* Gerstein, *supra* note 8; Hussain, Bhuiyan & Menezes, *supra* note 2; Rhodes, *supra* note 8.

114. *See* Britton-Purdy, Grewal, Kapcynzski & Rahman, *supra* note 85, at 1810.

115. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 15 (2014).

116. *See id.*

117. Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for A New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198, 200–01 (2014).

118. *See id.* at 202.

119. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (quoting McConnell v. Fed. Election Comm'n 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)) (alteration in original).

campaigning vests corporations with tremendous power to tilt consumer desire for a product into political alignment. This is troubling for anyone who can see the clear difference between the role of a consumer and the role of civic engagement with politics. Yet, as discussed in the last paragraph, the Court views such a distinction between politics and the market as "spurious."[120] Therefore, if advocates challenge a new law banning tech platform campaigning, the Court would dismiss legal arguments appealing to a distinction between a market consumer and a political voter as misunderstanding the essential role that corporations play in informing the public.[121] In the current state of First Amendment jurisprudence, leveraging consumers into voters is not troubling; it is the logical endpoint of the conception of citizenship idealized by the civic consumer.

III.
THE FIRST AMENDMENT IS DIVORCED FROM ITS IMPLICATIONS

The Court obfuscates the implications of its corporate speech decisions. In analyzing *First National Bank of Boston* and *Consolidated Edison* in relation to Prop 22, four major issues with the Court's First Amendment jurisprudence arise. This Section analyzes each of these in turn. First, the Court forecloses any investigation into the comparative power of corporations to reach audiences. Second, the Court blurs the inherent difference of purpose with which individuals and corporations use their speech rights. Third, the Court's decisions attempt to paint corporate political speech as natural to the corporate form. Lastly, the Court manipulates its previous precedent to create unrecognizable outcomes.

The Court is able to avoid dealing with the implications of its decisions because the First Amendment's jurisprudence rests on the rhetorically abstract foundation of generalized freedoms.[122] This framing allows for rulings that are "formulated in highly abstract and depoliticized terms . . . to be invoked by very different jurists in support of very different outcomes."[123] For example, *Consolidated Edison* described the First Amendment as "the liberty to discuss publicly and truthfully all matters of public concern."[124] *Buckley*, in similarly abstract terms, reasoned that "the First Amendment affords the broadest protection . . . in order 'to assure [the] unfettered interchange of ideas . . . .'"[125] Taken at face value, few would disagree with benefits of such descriptions. Yet, in the cracks of the Courts' idealized extolling of the First Amendment's virtues

120. Purdy, *supra* note 117, at 202.

121. *See id.*; *Citizens United*, 558 U.S. at 354.

122. Kessler & Pozen, *supra* note 102, at 1979.

123. *Id.*

124. Consol. Edison Co. of N.Y v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 (1980) (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

125. Buckley v. Valeo, 424 U.S. 1, 49 (1976) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (alteration in original).

hide the lurking dangers of corporate power. These perils take on particular salience in the context of Prop 22.

A. The Court Precludes Investigations into Relative Speaking Power

The Court's corporate speech cases foreclose investigation into the serious discrepancy between corporations' and individuals' abilities to reach audiences. *First National Bank of Boston* epitomizes this point. There, the Court looked askance on any attempt to differentiate speakers, noting that "if the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[126] In language that suggests incredulity to any other constitutional outcome, the Court forecloses any attempt to examine disparities in power. The Court casts such concerns as not only unworthy of First Amendment analysis, but also as undermining the very values the First Amendment seeks to protect.

Ineffable distinctions in power exist between corporations and individuals' abilities to reach audiences, even if the Court refuses to address them. In California, Uber alone has more than 1.3 million users who use the app for rides. An additional 1 million California users use the Uber Eats app for food delivery.[127] The gig corporations' respective apps give them the ability to directly message millions of consumers. Contrast this campaign asset to the labor unions opposing Prop 22, who did not have access to the attention of millions of consumers or $200 million. This discrepancy gives tech companies an enormous amount of relative power to twist the narrative in their favor.

A Facebook experiment around the 2010 congressional elections reveals the advantages of mass messaging.[128] Facebook chose sixty-one million people at random to receive a message that urged them to vote, gave them information about polling locations, and supplied them with a status they could use to notify others users that they had voted.[129] The study's results indicated that the messaging to users "directly influenced self-expression, information seeking and real world voting behaviour of millions of people."[130] The researchers also showed that these interventions affected not only the randomly chosen sample, but their close friends as well.[131] The experiment's success depended on its ability to reach a mass of Facebook users because past "[v]oter mobilization experiments have shown that most methods of contacting potential voters have

126. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

127. Said, *supra* note 60.

128. *See* Robert M. Bond, Christopher J. Fariss, Jason J. Jones, Adam D.I. Kramer, Cameron Malow, Jaime E. Settle & James H. Fowler, *A 61-million-person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295, 295 (2012).

129. *Id.*

130. *Id.*

131. *Id.*

small effects (if any) . . . [h]owever, the ability to reach large populations online means that even small effects could yield behaviour changes for millions of people."[132]

The implications of the Facebook study with respect to the Prop 22 campaign are troubling. The experiment is an alarming augury of the relative speaking power of tech platforms and their ability to leverage their consumer bases. To be sure, a non-partisan message from Facebook that did not tie continued use of Facebook to a political campaign is different from Prop 22's tightly orchestrated political blitz. Indeed, in the several ways argued in Part I, the Prop 22 messaging was manipulative and deceptive in leveraging consumer support. Compared to the Facebook experiment's non-partisan message to vote, Prop 22's in-app political siege had the capability to be much more convincing. And Prop 22's deceptive program of in-app political messages reached millions of consumers. The campaign allowed the gig corporations to manipulatively claim the mantle of helping workers achieve protections, while largely denying workers the same touted benefits.[133] It is hard to even try to quantify the power that in-app campaigning imbued on the Yes on Prop 22 campaign.

Gig companies' power to use apps to manipulate the political process is especially salient when compared to the No on Prop 22 campaign, which labor unions largely supported.[134] Yet, the First Amendment currently forecloses any attempt to constitutionally evaluate the tech corporations' abilities to leverage a consumer mass into a voting bloc.[135]

B. A Fundamental Distinction Exists Between Protecting a Corporation's Speech and an Individual's Speech

The Court's First Amendment jurisprudence also refuses to acknowledge that corporations and individuals use their free speech for fundamentally different purposes. This was best highlighted in Justice White's dissent in *First National Bank of Boston.* He argued that the majority misunderstood an integral distinction between the purpose of protecting a corporation's speech and the purpose of protecting an individual's speech.[136] For Justice White, "the principal function[s] of the First Amendment . . . self-expression, self-realization, and self-fulfillment" are not encompassed in speech by "profitmaking corporations" because corporations "do not represent a manifestation of individual freedom or choice" in the same way that a citizen's use of free speech does.[137] In a separate

132. *Id.*

133. *See* Gerstein, *supra* note 8; Press, *supra* note 5; Jacobs & Reich, *supra* note 20; *Impact on Drivers*, NO ON PROP 22, https://web.archive.org/web/20201204172457/https://nooncaprop22.com/impact_on_drivers (last accessed Oct. 5, 2020).

134. BALLOTPEDIA, *supra* note 24.

135. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

136. *Id.* at 804 (White, J., dissenting).

137. *Id.*

dissent, Justice Rehnquist argued the analogous point that corporations are "mere creatures of law," given their special status to accumulate wealth, and that "[i]t cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes."[138]

The foundational difference of purpose between corporate and individual free speech is striking when examined through the anti-democratic lens of Prop 22. AB-5, the bill to which Prop 22 is a reaction,[139] was enacted through the democratic processes of both of California's political branches of government,[140] and so can be considered California's citizens' "self-expression"[141] of political will. While it could be argued that Prop 22 was, as a ballot initiative, also an expression of Californian's democratic choice, this argument falls short. As explained in Part I, Prop 22 corporations utilized their platforms to wage a deceptive campaign that misled voters about what was at stake for workers.[142] 40 percent of those who voted yes on Prop 22 did so with the goal of giving workers a livable wage,[143] even though Prop 22 denies workers the basic protections necessary for economic security.[144] A large portion of those who voted for Prop 22 did so because they were deceived about what it stood for.[145] Therefore, Prop 22 cannot be considered to be the political manifestation of California voters.

Prop 22 is even more anti-democratic than its process of corporate law purchasing would suggest because of its built-in insulation from popular disapproval. Prop 22 contains a provision that, once enacted, requires a seven-eighths majority of each house to amend the law.[146] Associate Dean of McGeorge Law School in Sacramento, Mary-Beth Moylan, described the provision as "crazy."[147] According to Dean Moylan, initiatives usually require a two-thirds majority; she had never seen a provision like Prop 22's seven-eighths requirement.[148] She emphasized that to overturn Prop 22 would take a "super,

138. *Id.* at 825 (Rehnquist, J., dissenting).

139. BALLOTPEDIA, *supra* note 24.

140. BALLOTPEDIA, *supra* note 18.

141. *First Nat'l Bank of Boston*, 435 U.S. at 804 (White, J., dissenting) (highlighting a key distinction of the first amendment for individuals in contrast to corporations).

142. *See* Hussain, Bhuiyan & Menezes, *supra* note 2.

143. *Id.*

144. *See* Jacobs & Reich, *supra* note 20; *Impact on Drivers*, NO ON PROP 22, https://web.archive.org/web/20201204172457/https://nooncaprop22.com/impact_on_drivers (last accessed Oct. 5, 2020).

145. *See* Hussain, Bhuiyan, & Menezes, *supra* note 2.

146. Lizette Chapman, *California's Prop 22 Would Be Virtually Permanent if It Passes*, BLOOMBERG (Oct. 20, 2020), https://www.bloomberg.com/news/newsletters/2020-10-20/california-s-prop-22-would-be-virtually-permanent-if-it-passes [https://perma.cc/TMX3-X5YC].

147. *Id.*

148. *Id.*

super, super majority. . . . It really speaks to the fact that proponents want this unchangeable."[149]

Now that Prop 22 has been enshrined into California law, it appears unlikely that even voracious organizing can overturn it. It is this corporate behavior that is emblematic of the concerns that Justices White and Rehnquist noted in their respective *First National Bank of Boston* dissents.[150] Yet, the Supreme Court places corporate profit-seeking endeavors on equal footing with the quintessential functioning of democratic governance by refusing to acknowledge the difference in purpose between corporate speech and individual speech. In doing so, the Court cheapens individual citizens' "self-expression"[151] of democratic will by equating such expression with the profit-seeking chicanery of corporate greed. Troublingly, Prop 22 elucidates that what the Court sees as parity between individuals and corporations actually serves to sabotage the foundations of democratic organization.

C. The Court Portrays Corporate Political Speech as Natural

In both *First National Bank of Boston* and *Consolidated Edison*, the Court treats a corporation's speech rights as some natural endpoint of corporate formation. The naturalness of this gift of speech to corporations goes with the LPE critique of the First Amendment, which argues that using the First Amendment to translate economic power into political power is a key facilitator of corporate political might.[152]

In *First National Bank of Boston*, the Court implicitly endorsed a naturalization theory of the First Amendment by avoiding the question altogether.[153] In his opinion, Justice Powell is explicit that "identity," corporate or citizen, does not matter in evaluating the level of First Amendment protection.[154] He wrote, "The inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation . . . or individual."[155] By hinging the opinion's holding on a speech's content rather than its source, the Court avoids addressing whether corporate political speech even exists in the first place.

149. *Id.*

150. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting); *id.* at 825 (Rehnquist, J., dissenting).

151. *Id.* at 804 (White, J., dissenting).

152. *See* Britton-Purdy, Grewal, Kapczynski, & Rahman, *supra* note 85, at 1811.

153. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1019 (1998). Greenwood refers to what the court is doing as simply "assum[ing], without discussion" about corporate speech rights. *Id.* He does not take this idea to its fruition that the Court is using a naturalization theory as this section argues, but he does bolster the argument that the court largely avoids dealing with this issue. *Id.*

154. *First Nat'l Bank of Boston*, 435 U.S. at 776.

155. *Id.* at 777.

To be sure, this question was apparent to the Justices. In fact, the circuit court had framed the issue as "whether and to what extent corporations have First Amendment rights."[156] Yet, Justice Powell responded, "The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts statute] abridges expression that the First Amendment was meant to protect."[157] For the Court here, the important question was whether or not the speech fell within a certain arena of designated subject matter protection. But this logic presumes that corporations possess speech capable of falling within a protected arena. The Court's dismissal of the question, "do corporations have political speech?" suggests a view that no other outcome was possible. The decision thus posits corporate speech as a natural outcome of mere corporate existence.

Yet, as the dissents in *First National Bank of Boston* make clear, there is nothing natural about this conclusion. Justice White highlighted that corporations are "artificial" creations of the law created for the sole purpose of "furthering certain economic goals."[158] With these economic goals in mind, states give corporations legal rights such as "limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them."[159] In skipping over the question of whether corporations have political speech, the majority makes the unwarranted assumption that a state's awarding of economic rights to corporations naturally means that the additional right of political speech is tacked on too. In reality, corporations are nothing more than Frankenstein's monsters of jumbled economic privileges created by the state. As the state defines the legal contours of the corporation, the state should also decide if and when corporations can speak. This is precisely what Massachusetts attempted in *First National Bank of Boston*.

The assumption that corporate speech is natural dangerously conditions society into accepting the dominant role that corporations now possess. As these issues surrounding Prop 22 epitomize, our current First Amendment framework allows corporations to bend elections and political discussions in their favor. In assuming corporate speech is natural, the Court conditions a belief that corporate political power is inevitable because the power derives from the natural fact of mere corporate existence. But this is misguided. Society creates corporations, and society does not have to allow itself to become dominated by its own creation.[160]

156. *Id.* at 775–76.
157. *Id.* at 776.
158. *Id.* at 809.
159. *Id.*
160. *Id.* at 809 (White, J., dissenting).

D. The Court Perverts its First Amendment Precedent

The Court's corporate speech cases have unrecognizably twisted its First Amendment precedent from "weapons of the weak into one . . . that [the] wealthy . . . deploy to preserve their advantages."[161]

In *First National Bank of Boston*, the majority explained the "heart of the First Amendment's protection"[162] with language quoted from *Thornhill v. Alabama*: "The freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . . Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[163]

Not surprisingly, the Court quoted this language without any indication of *Thornhill*'s facts.[164] *Thornhill* was a case from 1940 that struck down an Alabama law that prevented workers from picketing near factories or businesses.[165] With an eye to the discrepancies in power between workers and corporations, the Court emphasized that protecting workers' ability to picket and organize was "essential to the securing of an informed and educated public opinion."[166] As to the corporate interests, the Court found no serious or imminent injury.[167] Underlying *Thornhill*'s holding is a First Amendment that repudiates the anti-redistribution principles that have since come to populate First Amendment rulings.[168] Yet, the Court in both *First National Bank of Boston* and *Consolidated Edison* twisted *Thornhill*'s language by divorcing it from its context into a protector of corporate power.[169]

The perversion of *Thornhill* is sadly ironic in the context of Prop 22. As explained in Part II, under precedent from *Consolidated Edison* and *First National Bank of Boston*, it is unlikely that government can restrict tech platforms from utilizing their apps for political campaigns. And Prop 22, at its core, is about entrenching corporate interests to disenfranchise workers' basic labor rights.[170] Yet, *Thornhill*'s language of empowering workers in the face of corporate pressure, twisted by both *Consolidated Edison* and *First National Bank of Boston*,[171] antipodally stands against Prop 22's politics of corporate domination.[172] In the First Amendment's Lochner transformation, *Thornhill*'s precedent has been corrupted into a bulwark for tech platform power. The First

161. Kessler & Pozen, *supra* note 102, at 1960.
162. *First Nat'l Bank of Boston*, 435 U.S. at 776.
163. *Id.* (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).
164. *See id.*
165. Thornhill v. Alabama, 310 U.S. 88, 91, 101 (1940).
166. *Id.* at 104.
167. *Id.* at 105.
168. *See generally id.*
169. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534–35 (1980); *First Nat'l Bank of Boston*, 435 U.S. at 776.
170. *See* Gerstein, *supra* note 8; Press, *supra* note 5; Jacobs & Reich, *supra* note 20.
171. *See Consol. Edison*, 447 U.S. at 534–35; *First Nat'l Bank of Boston*, 435 U.S. at 776.
172. *See* Gerstein, *supra* note 8; Press, *supra* note 5; Jacobs & Reich, *supra* note 20.

Amendment has fallen from a "weapon[] of the weak"[173] to a cudgel used against workers seeking basic labor protections.[174]

IV.
SOLUTIONS

Despite the seemingly intractable challenges that the First Amendment poses, LPE hopes to shift the discourse towards a just and equitable future.[175] The reorientation of First Amendment jurisprudence necessary to curtail in-app campaigning seems unlikely given the Supreme Court's conservative super majority. Yet, in a spirit akin to LPE's argument on the malleability of market structure to political choice,[176] author Ursula K. Le Guin once said, "We live in capitalism, its power seems inescapable – but then, so did the divine right of kings. Any human power can be resisted and changed by human beings."[177] The First Amendment and its current captivity to speech as a reflection of an idealized marketplace is one such "human power."[178] As this Note has shown, interpretation of the First Amendment is not an unchanging monolith. Ideation of new possible conceptualizations is an integral element of change.

In *Building a Law and Political Economy Framework*, the authors offer three reorientations to consider in envisioning solutions.[179] First, the authors recommend shifting from focusing on efficiency to questions of how power is distributed.[180] Second, they discuss moving from the supposed neutrality of laws mimicking market ordering to an emphasis on equality.[181] Third, they argue for prioritizing the democratic will of the people to have a say in the market ordering, rather than fostering a legal system that defaults to efficiency's purported neutrality.[182] With these three goals in mind, this Section suggests two possible conceptions of the First Amendment that would allow for curtailment of tech platform political power.

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173. Kessler & Pozen, *supra* note 102, at 1960.

174. *See* Gerstein, *supra* note 8; Press, *supra* note 5; Jacobs & Reich, *supra* note 20; *Impact on Drivers*, NO ON PROP 22, https://web.archive.org/web/20201204172457/https://nooncaprop22.com/impact_on_drivers (last accessed Dec. 4, 2020).

175. *See* Britton-Purdy, Kapczynski & Grewal, *supra* note 84.

176. *Id.*; Grewal & Purdy, *supra* note 115, at 7.

177. Ursula K. Le Guin, *Ursula K Le Guin's Speech at National Book Award: 'Books Aren't Just Commodities,'* GUARDIAN (Nov. 20, 2014), https://www.theguardian.com/books/2014/nov/20/ursula-k-le-guin-national-book-awards-speech [https://perma.cc/9Y3Y-EKVS].

178. *See* Britton-Purdy, Grewal, Kapcynzski, & Rahman, *supra* note 85, at 1809–10; Purdy, *supra* note 117, at 198.

179. Britton-Purdy, Grewal, Kapcynzski, & Rahman, *supra* note 85, at 1818, 1823, 1827.

180. *Id.* at 1818.

181. *Id.* at 1823.

182. *Id.* at 1827.

A. Stripping First Amendment Speech from Corporations

The most effective and extreme solution to the issues presented in this Note would be to eliminate First Amendment speech protections for corporations. Doing so would allow legislatures to pass laws that limited the ability of tech corporations to utilize their apps for political influence. This solution would also deal with the larger issue of corporations dominating society.[183] As this Note has explained, the First Amendment awards corporations massive political influence so as to make their power seem natural. Stripping these rights from corporations would remove both their actual power and the societal conditioning that has naturalized this power. As corporations are legal fictions created by legislatures in the first place, *legislatures*—not the Court—should decide the extent to which those corporations receive speech rights.

It could be argued that it is undesirable to defer to legislatures to set the parameters of corporate speech, because doing so could lead to a race to the bottom where states provide heightened speech rights to attract attention. But we are already nationally at the bottom, as the Supreme Court has awarded full, unencumbered speech rights to corporations. Furthermore, this contention misses important framing. We should not ask whether it is desirable for states to set the scope of speech rights, but rather *who* should have the power to do so—democratically elected legislatures accountable to their electorate, or nine lawyers on the country's highest Court who have no accountability to the populace? Empowering legislatures to decide questions of corporate speech rights fosters democratic oversight, as it allows us collectively to decide the role corporations should play in this country.

In fact, leaving the parameters of corporate speech up to legislatures accords with historical understandings of corporations. In 1819, Chief Justice John Marshall elucidated the Supreme Court's first view on corporate legal theory.[184] He wrote, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[185] Historically, corporations could only act in ways in which their charters explicitly allowed.[186] Furthermore, corporate charters were viewed as regulatory "legal tool[s]" which allowed legislatures to specify conditions under which a corporation was allowed

183. *See, e.g.*, K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321, 325 (2016) (suggesting that a modern theory of domination must not only account for government actors, but also private actors "like corporations, where owners and managers can dominate workers and where monopoly firms can dominate other firms").

184. *See* John Coates, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 CONST. COMMENTARY 223, 229 (2015).

185. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

186. Coates, *supra* note 184, at 229.

to exist.[187] Removing First Amendment protections would restore corporations to their proper place as socially restricted creations, and not entities deserving of speech rights by virtue of their mere existence.

Removing First Amendment protections from corporations would not negatively impact corporations organized for the purpose of organizing and advocacy. It could be argued that stripping corporate speech is undesirable because it would negatively impact corporations like the NAACP or Planned Parenthood. But given the purpose of these organizations, this need not be a concern. In his dissent in *First National Bank of Boston*, Justice White highlighted that one issue with corporate speech is that it doesn't embody "self-expression" of the speaker in the way that speech rights do for living individuals.[188] Yet, as the example of the NAACP makes clear, sometimes corporations are created in order to enhance a collection of individuals' self-expression. Indeed, in *National Association for Advancement of Colored People v. Alabama*, this understanding of the specialness of corporations organized for the purpose of facilitating members' speech underlaid the Court's decision.[189] This case stands as an example that the Court can determine whether a corporation is an economic profit entity, or one meant to encourage its "members to pursue their collective effort to foster beliefs."[190] Therefore, stripping speech rights away from corporations need not negatively impact corporations that are organized for the facilitation of members' views.

B. A Prohibition on Misleading Campaigns

While not nearly as efficacious as stripping speech protections entirely, at the very least the First Amendment should not give corporations the ability to

187. William J. Novak, *The Public Utility and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 150 (Naomi R. Lamoreaux & William J. Novak ed., 2017).

188. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting).

189. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958) ("Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.").

190. *Id*; *see also* Charles R.T. Kelly, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1365 ("As in *Patterson*, the NAACP attempted to assert the first amendment rights of its members. Again, the Court found the NAACP to be a proper party to assert those rights for its members. The Court further held that the NAACP was entitled to assert first amendment rights of association and expression 'on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail . . . the Court . . . recognized that when a group of individuals shares unanimity of interest and desires to express their common views, those individuals may exercise their freedom of expression through the medium of a corporation, through other representatives, or through both. The Court in *Button* further held that any corporation so utilized could assert first amendment rights available to its members as natural persons, not only on behalf of those members, but also for itself as their instrument.").

mislead voters. As this Note has explained, the Prop 22 campaign spread many falsehoods to California voters. For example, the campaign asserted that drivers would make $15.60 per hour, but the fine print of Prop 22 actually only adds up to $5.64 per hour.[191] Other falsehoods have also become clear since the election. For example, one of the supporters' main claims was that without Prop 22, prices would rise.[192] However, even with Prop 22's success, the gig corporations have still raised prices for their services.[193] If the Court must bestow corporations with speech protections, then the Justices should at least be explicit that corporations cannot use their speech rights to mislead the public on political matters.

This solution is not perfect. First of all, what would misleading even mean in a legal sense? The term itself is highly conclusory and subjective, making it difficult to apply in practice. Second, misleading conduct often becomes clear only in hindsight. Perhaps there could be a cause of action when the fraudulent nature of corporate political activity comes to light, like how it is now obvious that the gig corporations lied about needing Prop 22 to avoid raising prices.[194] However, the damage will have been done. In this case, Prop 22 passed, so it is unclear what an ex-post solution would accomplish in reversing the now-in-place political paradigm. Third, this solution would not deal with the overall issue of corporate power over society in the way stripping corporate speech rights would. Anything short of stripping corporate speech rights will continue to allow corporations to take part in political debates, which means they could continue leveraging their economic power into political might.

Nonetheless, while this proposal does not get to the root of the corporate power problem, it might shift the baseline. As this Note's discussion of Prop 22 has illuminated, the gig corporations felt emboldened to lie and mislead California voters about what was at stake.[195] Shifting First Amendment jurisprudence to allow corporate political speech rights, with a prohibition on outright lying, could condition corporations to be more forthright. Again, while it would likely not affect overall corporate power, at least the illegality of fraudulent corporate political campaigns would be clear.

CONCLUSION

Prop 22 is a warning siren of the power of tech corporations to wield their apps as tools of political influence. The gig apps' seamless integration into consumers' daily lives, along with their status as popular brands, allowed companies to transform their consumer bases into voting blocs during the Prop

191. Jacobs & Reich, *supra* note 20.

192. Sean Hollister, *Instacart, Uber, Lyft, and DoorDash Totally Conned You into Paying for Prop 22*, VERGE (Feb. 19, 2021), https://www.theverge.com/2021/2/19/22291580/prop-22-instacart-doordash-uber-lyft-postmates-grubhub-price-hike [https://perma.cc/G9QQ-NB33].

193. *Id.*

194. *See id.*

195. *See* Jacobs & Reich, *supra* note 20; Hussain, Bhuiyan & Menezes, *supra* note 2; Press, *supra* note 5; Sammon, *supra* note 5; Hollister, *supra* note 192.

22 campaign. As political tools, the apps amplified and framed the issues of a campaign in a way that was manipulative and deceptive.[196] Now, gig companies are rolling out similar campaigns across the United States.[197]

In a society that prioritized citizen engagement and empowerment above all else, we would have a First Amendment that shielded the fundamental democratic processes from such corporate influence. Yet, we find ourselves in the opposite situation, with a First Amendment that vitiates the invaluable essentials of civic engagement into analogies of marketplace supply and demand.[198]

This Note has utilized an LPE framework to situate corporate speech protections for in-app campaigning within current trends of American law. This analysis not only suggests that this kind of politicking is constitutionally bulwarked, but that the logical end point of this jurisprudence makes consumer products fertile ground for corporate political campaigns. Yet, at its core, LPE is an exercise in hope of articulating more just futures. As the most just solution, this Note envisions a world in which the Court strips the First Amendment away from corporations. Without a naturalized right to speak, corporate power over society would be severely diminished.

With Prop 22's passage, California's gig workers lost the opportunity to work without fear of economic insecurity.[199] As similar initiatives pop up across the United States, it is crucial to take note of the Prop 22 campaign in California and the ways in which the gig corporations leveraged their platforms for political gain. Until there is a sea change in the First Amendment jurisprudence that allows for such campaigning, we can only hope that activists and organizers can drum up enough support to meet the combined speaking prowess of the gig corporations.

196. Hussain, Bhuiyan & Menezes, *supra* note 2; Press, *supra* note 5; Sammon, *supra* note 5.

197. Hussain, Bhuiyan & Menezes, *supra* note 2; Press, *supra* note 5; Sammon, *supra* note 5.

198. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010); Purdy, *supra* note 103, at 2162.

199. *See Impact on Drivers*, NO ON PROP 22, https://web.archive.org/web/20201204172457/https://nooncaprop22.com/impact_on_drivers (last accessed Dec. 4, 2020).