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A COMPARISON OF THE LEGAL ANALYSIS OF "THE MARKET" IN THE UNITED STATES  
AND EUROPEAN UNION

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HONORS PROJECT

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# A COMPARISON OF THE LEGAL ANALYSIS OF “THE MARKET” IN THE UNITED STATES AND EUROPEAN UNION<sup>1</sup>

*Facundo Bouzat*

*“It may well be that the classical theory represents the way in which we should like our Economy to behave. But to assume that it actually does is to assume our difficulties away.”*

- John Maynard Keynes<sup>2</sup>

*“[T]he tendency —and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more searching and more discriminating analysis.”*

-Wesley Newcomb Hohfeld<sup>3</sup>

*“Europeans prize the person and the person should be able to control his or her life. By contrast, Americans prize a faith in the markets; the markets can determine what is appropriate use of personal information. Here, the comparative law approach can be quite valuable: looking at the different legal orders to force a re-evaluation of either or both the foreign and our legal system. Should the free market control the use of personal data? Or should there be some concern for personal welfare in this matter concerning private information?”*

-Edward Eberle<sup>4</sup>

## I. INTRODUCTION

Words are perhaps our most important tool for communication. Yet, oftentimes, words are soaked in ambiguity, hindering our ability to understand one another. Consequently, when we do not take the time to clearly define the terms we use, the result is utter confusion. Take as an example Legal Scholar Edward Eberle’s quote at the beginning of this

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<sup>1</sup> This paper is an expansion to a previous work on the topic of market regulation, M. Neil Browne & Facundo Bouzat, THE CONTINGENT ETHICS OF MARKET TRANSACTIONS: LINKING THE REGULATION OF BUSINESS TO SPECIFIC FORMS OF MARKETS, 163 CHARLESTON LAW REVIEW 2 (Winter 2012).

<sup>2</sup> John Maynard Keynes, *The General Theory of Employment, Interest and Money*, 33-34 (1936).

<sup>3</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 26 (1919).

<sup>4</sup> *Infra*, note 5, at 480.

paper. What is meant when Eberle references the “free market”? Is he referring to a market where government regulation is entirely absent? Or is he alluding to a particular form of the “free market” that enhances consumer choice due to the existence of a set of institutional conditions that keep consumers fully informed and aware of the consequences of their choices? That is, a market that is very different from other types of markets that promote seller domination? The ambiguity surrounding the concept of “the market” inhibits our ability to fully comprehend legal scholars who reference “the market”. To say the word “market” is, essentially, to start a conversation about the particular characteristics of the market one is referencing.

In light of the confusion created by the concept of “the market,” this paper analyzes the extent to which different court systems are sensitive to the unique characteristics of different forms of markets.<sup>5</sup> Every market has particular social implications in terms of the wellbeing of buyers and sellers. The failure to understand the implications of market logic in different institutional contexts results in court rulings that often support the most malignant forms of markets.

Before looking at how courts appeal to “the market,” it is important to first clarify just what it is that we look for from the idea of the market and its multiple variants. Economics, the disciplinary home of market logic, tells us that “the market” is a social institution with great social potential—it can provide us, the consumers, with goods and services that we need to make ourselves optimally satisfied. But to realize this potential, market conditions have to be arranged in a particular manner.<sup>6</sup> This arrangement is what forms one particular type of market, the “competitive market.” Only the competitive market, through its alignment with consumer sovereignty, that is, the interests and desires of consumers, reflects Adam Smith’s utopian vision of a market that, through the invisible hand, is entirely responsive to consumer preferences.<sup>7</sup>

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<sup>5</sup> See Edward J. Eberle, *The Method and Role of Comparative Law*, 8 Wash. U. Global Stud. L. Rev. 451, 471-72 (2009), encouraging the use of comparative studies to think critically about the laws of other nations as well as those of our own nation: “The real aim of [\*472] comparative law is to offer insight and perspective so that we are better equipped to reflect critically about ourselves and our own legal culture.”

<sup>6</sup> This paper focuses on the importance of analyzing the structure of particular markets before assuming that those markets will behave in a way that is beneficial to society. As will be revealed later in this paper, the structure of a market consists of several tenuous assumptions. These assumptions directly influence whether a market is able to meet consumer needs. See Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory* 261, Am. Bus. L. J. 277-289 (2001) for a model of thoughtful scholarship concerning the impact of different market structures on consumer-wellbeing.

<sup>7</sup> See Robert H. Frank & Ben S. Bernanke, *Principles of Microeconomics* 128 (4<sup>th</sup> ed. 2009), who highlight that self-interested behavior is redirected in “the market,” as if by an invisible hand, to public benefit. At 204, Frank & Bernanke popular passage from Adam Smith’s work, *The Wealth of Nations*, to describe the invisible hand:

“It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard of their own interest. We address ourselves not to their humanity, but to their self-love, and never talk to them of our necessities but of their advantage.”

Thus, a “market” is beneficial to society, the market narrative tells us, only if it is a competitive market. When markets deviate from this ideal competitive structure, markets essentially become playgrounds whereby the wealthy and political powerful excel economically at the expense of the vulnerable and underprivileged members of society. Unfortunately, courts are often not sensitive to the many different forms of “the market,” and their respective implications on efficiency and fairness.<sup>8</sup> Rather, without intending to do so, courts often assume that the prevailing markets in their cases are purely competitive markets without robustly analyzing whether consumer behavior is rational, whether purchasing decisions are based on full and honest information, and whether firms and consumers can easily enter and exit particular markets.<sup>9</sup> Consequently, courts risk placing trust in markets that do not

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<sup>8</sup> See Alfred Korzybski, *The Role Of Language In The Perceptual Processes* (1950). Korzybski argues that the ways in which we are “conscious of abstracting” can become problematic when we evaluate an idea or concept, and our abstracting therefore affects the way in which we “perceive” the idea or concept. Korzybski sets out to devise a method for clear modes of “abstracting.” One method to clarify our abstractions is the use and application of “extensional devices,” i.e., *indexing*. Many of our words and ideas are ambiguous, like “the market” for example. Thus, proper clarification of thought is required whenever one uses the concept of “the market.” The idea of *indexing* helps in such situations, Korzybski would argue, because it decreases the potential for ambiguity and allows for greater “abstracting.” Indexing (as in market<sub>1</sub>, market<sub>2</sub>, market<sub>3</sub>, ...market<sub>n</sub>) produces an indefinite amount of “proper names” for “the endless array of unique individuals or situations with which we have to deal in real life. Thus, we have changed a *generic* name into a *proper* name.” Market<sub>1</sub> could refer to a perfectly competitive market structure, while market<sub>2</sub> could refer to a monopolistic market structure, and so on. Korzybski writes:

“If this indexing becomes habitual, as an integral part of our evaluating processes, the psychological effect is very marked. We become aware that most of our “thinking” in daily life as well as in science is hypothetical in character, and the moment-to-moment consciousness of this makes us cautious in our generalizations, something which cannot be easily conveyed within the [our current] system of language.”

The use of indexing draws attention to the various structure or forms that markets can take. The propensity with which concepts are used in an ambiguous fashion would decrease were we to stop and think “which market?” Korzybski, however, warns that the simplicity of extensional devices, such as indexing, can be misleading if they are not used with regularity in daily life. A mere “intellectual understanding” of indexing will not serve to eliminate the widespread ambiguity that currently serves to mar our concepts in a cloud of confusions and misunderstandings.

*Also see* Nassim Nicholas Taleb, *infra note 7* for Taleb’s discussion of “platonicity” that relates to the confusion created by the use of abstractions. Taleb refers to platonicity as “our tendency to mistake the map for the territory, to focus on well-defined forms...like utopias...” This tendency to talk of the abstract as though it is concrete is precisely what this paper aims to show in its analysis of the market logic courts use in their reasoning.

<sup>9</sup> See Sandra K. Miller, *Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties*, 46 Am. Bus. L.J. 243, 243, 278 (2009), highlighting the importance of analyzing the conditions on which exchanges take place before deeming a transaction as fair. Specifically, Miller points out how an analysis of the fairness of contracts is complicated when scholars apply contract theory to the “real world”. In other words, evaluating the fairness of a contract is over-simplified when our analysis takes place only in the abstract, ignoring the importance of context:

reflect the conditions that economists deem necessary for the existence of consumer sovereignty.

A discriminating analysis of market structure by courts, thus, is crucial to determine the extent to which a market abides by consumer sovereignty. The present paper will compare<sup>10</sup> the legal analysis of “the market” in the U.S. Supreme Court and the European Court of Justice (ECJ) to evaluate the extent to which each court is sensitive to the many different forms of markets that can exist in a given legal case.<sup>11</sup>

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“The contractarian theory presupposes a level contractual playing field and perfect market conditions free of repeat-player advantages; information asymmetries; and inequalities in education, sophistication, and legal representation. Such perfect conditions exist only in the abstract and empirical data suggest that there may be substantial inequalities in the real world.”

Miller’s reasoning above reflects an awareness of the multiple forms a market can take on. When contract theory assumes that the contractual playing field is fair and information is abundant, but does not validate whether such a map reflects the terrain, then Miller suggests that contract theory overlooks an important dimension in the negotiation of contracts. In the same spirit as Miller, see Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 Iowa J. Corp. L. 469, 488, 527 (2004), noting that “statements of ethical commitment are certainly not a guarantee of ethical performance.” The present comparative analysis hopes to provide insight as to whether the unfortunate tendency to assume that the abstract reflects reality is present beyond the boundaries of the U.S.

<sup>10</sup> See Vivian G. Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 Am. J. Comp. L. 657, 668 (1998), in which Curran points out the great insights of comparative law to intellectual legal debate. In particular, comparing the legal processes in different countries allows one to expand one’s thinking regarding the resolution of an innumerable amount of social problems. Curran coins this scholarly outlook to the exterior as “ideological drift”:

“When comparatists undergo the “ideological drift” that other scholars have experienced already, and consider the possibility that findings of difference need not imply exclusion of the different, the field of comparative law will be able to address more effectively the legal, social and political issues that modern legal systems and cultures will have to resolve, and comparatists will gain enhanced opportunities to join, benefit from, and enrich ongoing discussions in other areas of legal analysis and scholarship.”

<sup>11</sup> The comparative analysis in this paper looks to compare the two aforementioned jurisdictions by analyzing the way they *reason* when they consider trusting “the market” to fulfill consumer needs. Particularly, we are looking for the essential logical step of analyzing market structure before assuming ideal market conditions that meet consumer needs. *But see* Edward J. Eberle, *supra* note 5 at 477, who compares the consumer protection policies of Europe with the U.S. Eberle states: “While the American model is concerned with economics and competitive pricing, the Europeans tend to be more concerned with protection of the markets and protection of consumers.” The problem with the previous statement is that, because of the words Eberle chose, the American model and European model are not necessarily being contrasted. In other words, competitive prices (the apparent “American” focus) are essential for consumer sovereignty or, as Eberle writes, the protection of consumers (the “European” focus).

The objective of the present comparative paper is to urge legal practitioners to get past this sloppy use of “the market” by realizing that specific market structures have particular social implications. By comparing American and European case law, and focusing primarily on the different understandings that the different court systems seem

The different approaches of the U.S. Supreme Court and ECJ in the legal analysis of “the market” are particularly important because of the recent confusion expressed by legal scholars regarding the quality of the economic analysis of the law, i.e. using economic theory to discuss the law, in Europe relative to the U.S. For example, in a 2009 law review article, Edward G. Eberle commented, “While the American model is concerned with economics and competitive pricing, the Europeans tend to be more concerned with protection of the markets and protection of consumers.” Although some might interpret Eberle’s distinction between American and European approaches to economics and the law to suggest that the U.S. legal system could gain from studying the European concern for consumer protection, some legal scholars have reached different conclusions. For example, Kenneth G. Dau-Schmidt and Carmen L. Brun recently wrote, “Europe currently lags significantly behind the United States in the economic analysis of law...”

The comparison of judicial reasoning in American and European case law in this paper highlights that the failure to consider market structure has a major effect on the quality of legal reasoning.<sup>12</sup> The resolution of a case will be favorable to society when the resultant market conditions mimic those of the competitive market, for only that structure clearly advances the interests of consumers.<sup>13</sup> Thus, because it is this market structure and only this market structure that provided the promised benefits of capitalism in terms of consumer sovereignty, it seems to follow that courts should try to regulate or deregulate

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to have about the nature of “the market,” we hope to progress past superficial comparisons of American and European law

<sup>12</sup> See Nim Razook, *Common Law Obedience in a Regulatory State*, 47 Am. Bus. L.J. 75, 104 (2010), emphasizing the crucial role that the common law plays in our governing system. Judges necessarily have to pay particular attention to context if “the law” is going to be applied with precision: “If morals are academic abstractions and ethics are attempts practically to apply such abstractions, common lawmaking must be the most meaningful example of this application.” With respect to cases that deal with the regulation of “the market,” Razook’s quote entails that judges robustly analyze the prevailing structure of “the market” in question before making any positive prescriptions about the abstraction of “the market.”

<sup>13</sup> The argument in this paper emphasizes that markets can be good or bad at providing for communities depending on their underlying structures. Thus, rather than assuming that markets will behave in a certain way, scholars should endeavor to analyze the conditions of the market one is referencing. *But see* Paul H. Brietzke, *New Wrinkles In Law . . . And Economics*, 32 Val. U.L. Rev. 105, 130 (1997), for a book review that describes that the problem with the aforementioned market logic is that oftentimes markets that economists theorize about do not exist:

“Markets are assumed (almost) never to fail in the neoclassical economics of Chicago, while New Haven markets are assumed to fail regularly enough to license a fairly interventionist state. Ideology rushes in to fill this and other analytical vacuums. The problem is exacerbated where formal markets do not exist, and “market” gets used as a metaphor...”

In the previous quote, the author points out the impasse produced by simply assuming that certain market forms exist. The goal of the present paper is to transcend past this impasse by encouraging the legal analysis of “the market” to determine the degree to which particular markets meet consumer needs. Arguments centered on market structure, by definition, are essential for consumer sovereignty to be realized.

particular markets so that they can more closely resemble the assumptions of the competitive market.<sup>14</sup> Perhaps the first step in taking the appropriate measures to rearrange a market so it reflects the competitive market is to acknowledge that “the market” comes in many different forms.<sup>15</sup>

The present paper is structured in the following way. First, section II explains more thoroughly the multiple variants of “the market” and why it is that the competitive market in particular leads to consumer sovereignty. In section III and IV, the reasoning in three Supreme Court cases will be compared to the reasoning in three ECJ cases. Again, this comparison will focus on the extent to which a court decides to analyze market structure before it decides to trust a market to fulfill certain objectives. Finally, section V will explain the key logical differences between the reasoning in the Supreme Court and ECJ in regard to “the market.”

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<sup>14</sup> See Phillip Blond, *The Rise of the Red Tories*, Prospect, February 28, 2009. Though very distinct worldviews, if taken to the extreme, both economic liberalism and communitarianism rely on some form of regulative authority (usually, a government) for their application. Building on the necessity of regulatory institutions to ensure some sort social stability, see Colin Scott, *Privatization, Control, and Accountability*, in *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* 231-34 (Joseph McCahery et al. eds., 1993), highlighting that the assumption that deregulation will reduce the level of government intervention is itself contentious. By their very nature, deregulatory policies require that governments remain engaged in monitoring and assuring that human activities do not diverge from what would be expected from deregulation. Blond links the aforementioned role of government to the fact that the dictates of both worldviews (liberalism and communitarianism) often rely on assumptions about human nature that are far removed from our true complex selves:

“But so extreme did the defence of individual liberty become that each man was obliged to refuse the dictates of any other—for that would be simply to replace rule by one man’s will (the king) with rule by another. As such, the most extreme form of liberal autonomy requires the repudiation of society—for human community influences and shapes the individual before any sovereign capacity to choose has taken shape. The liberal idea of man is then, first of all, an idea of nothing: not family, not ethnicity, not society or nation. But real people are formed by the society of others. For liberals, autonomy must precede everything else, but such a “self” is a fiction. A society so constituted would be one that required a powerful central authority to manage the perpetual conflict between self-interested individuals. So the unanticipated bequest of an unlimited liberalism is that most illiberal of entities: the controlling state.”

The main point is that both liberal and communitarian economists should pay attention to the realism in their assumptions prior to assuming that their worldview represents “Truth”.

<sup>15</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 26 (1919).



## II. THE BEAUTY OF THE COMPETITIVE MARKET<sup>16</sup>

A proper understanding of “the market” begins by thinking about what we expect from markets. Consumers want goods and services, while sellers are willing to provide those goods in exchange for money. In other words, consumers want to maximize their utility<sup>17</sup> with a given budget of money. Pursuing this maximization, they benefit by a low price for the goods and services. On the other hand, firms that sell products or services want to increase their profits. Hence, firms are interested in selling goods and services for a high price. The struggle between the objectives of consumers and sellers is resolved in various important ways in different forms of markets.<sup>18</sup> In some market structures, the struggle primarily benefits the buyers; in others, the seller is the primary beneficiary.

Mainstream economic thought has developed the competitive market model to reconcile the struggle between consumers and sellers. Through the competitive market, the social legitimacy of “the market” was linked to consumer well-being. By focusing on consumer needs, the competitive market allows the needs of both buyers and sellers to be met.<sup>19</sup> In other words, the competitive market predicts that firms will set

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<sup>16</sup> The list in this section of four important market assumptions and the assumptions’ subsequent explanations were also developed in a previous work: M. Neil Browne & Facundo Bouzat, *THE CONTINGENT ETHICS OF MARKET TRANSACTIONS: LINKING THE REGULATION OF BUSINESS TO SPECIFIC FORMS OF MARKETS*, 163 *CHARLESTON LAW REVIEW* 2 (Winter 2012).

<sup>17</sup> See Frank & Bernanke, *supra* note 7 at 128, for a basic summary on the concept of “utility” as used in economics. Specifically, Frank & Bernanke describe utility as “the satisfaction people derive from their consumption activities.” Consequently, consumers try to spend their incomes in ways that maximize their utility.

<sup>18</sup> Though consumer sovereignty is fully dependent on specific market conditions, some things can be said about market in general. For example, one attractive feature of markets *in general* is that they are conceivably capable of providing a rapid reading of consumer preferences and create incentives for the parties to arrive at an exchange. Few political mechanisms can come close to matching the seeming automaticity of this coordinating accomplishment, particularly, though not necessary, when competitive market conditions are present. See Curtis Eaton, Diane Eaton, & Douglas F. Allen, *Microeconomics* 11 (1999), for the standard discussion of the creation of equilibrium price and quantity.

<sup>19</sup> See Frank & Bernanke, *supra* note 7 at 68, discussing the significance of market “equilibrium.” The concept of equilibrium refers to a state of affairs between buyers and sellers from which there is no tendency to change. The logic is that both are pleased by the resulting allocation of goods. Visually, the equilibrium process is illustrated by supply and demand curves. These curves represent the preferences of each group. Specifically, the demand curve represents the quantity of a good that buyers wish and are able to buy at different prices. Likewise, the supply curve represents the quantity of a good that sellers wish and are able to sell at specific prices. The point at which both buyers and sellers are satisfied by a specific price and quantity represents the equilibrium point; in other words, the market equilibrium represents a balance between the preferences of the two groups of people that “the market” aims to satisfy in terms of price and quantity. Market equilibrium, however, has deficiencies that are rarely acknowledged when a market partisan speaks about the virtue of market equilibrium. For one, the price and quantity at the equilibrium is attractive to only those buyers and seller who are both willing and *able* to buy or sell goods. Thus, the idea of market equilibrium ignores the needs of those who are not able to buy or sell goods. Unfortunately, those people with little money often do not have the ability to benefit

and adjust prices and quality pursuant to the preferences expressed by consumer demand.<sup>20</sup> As a result, the price and quality of goods and services reflect the needs of the community of consumers.<sup>21</sup>

Another way to link the legitimacy of the competitive market to consumer-wellbeing is to look at the competitive market's adherence to consumer sovereignty. The idea of consumer sovereignty means that the consumer has power—that is, that “the market's” central purpose is to satisfy consumers. More specifically, consumers hold power,<sup>22</sup> permitting the invisible hand<sup>23</sup> to guide market transactions toward socially optimal results in terms of the distribution and allocation of goods. In short, a market is socially legitimate only when a market abides by consumer sovereignty. Otherwise, to defend “the market” is equivalent to support for market forms that revolve around the principle of seller domination. Consequently, to be true to the story of capitalism according to mainstream economic thought, when praising the benefits of markets, courts have to demonstrate that the prevailing market in their cases is in fact a perfectly competitive market.<sup>24</sup>

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from the prices set at the market equilibrium. Also, notice that market equilibrium does not imply that sellers do not want higher prices and buyers do not want lower prices. Rather, it means that both (willing and able) buyers and sellers have reached a negotiated state in which they are “satisfied” because each can buy or sell the exact amount of goods they wish for a decent price.

<sup>20</sup> See Bradley R Schiller, *The Macro Economy Today* 12 (11<sup>th</sup> ed., 2008). The theory consistent with the responsiveness of firms to the needs of consumers is Adam Smith's invisible hand; Schiller calls this “the market mechanism.” A simple model of the market mechanism can be seen by looking at a particular product market, e.g. cars. According to this mechanism, the appropriate amount of cars will be produced by consumers signaling their wish to buy cars; in other words, buying a lot of cars. A car seller will respond by providing more cars, so that he can make more profit. However, if consumers stop buying cars, sellers will be producing more cars than are being sold, and will lose profits; thus, a producers response to keep profiting from cars will be to diminish their supply of cars so that it matches the demands of consumers. This “responsiveness” is “the market mechanism.” By relying on the preferences of consumers, this mechanism guides prices and the quality of goods to align with the preferences of consumers. See also note 22. However, as will be revealed later, for “the market” to work as touted, certain assumptions must be met. If these assumptions are not met, for example, that of adequate product information, then “the market” cannot be expected to function in the beautifully responsive way that Schiller highlights.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 72, in which Schiller describes the role of “market power” in markets. “The market” works in a socially optimal way when market power, “the ability to alter the market price of a good or service,” is with the consumer. On the other hand, when market power shifts to the firm's side, “the market's” ability to meet consumer needs or abide by consumer sovereignty is threatened. Rather “the market” becomes an abstraction that represents monopolies and oligopolies in which firms, because of their power, do not have to be as responsive to consumer needs. See also Frank & Bernanke *supra* note 4 at 237, appropriately adding to the definition of market power; that is, “a firm's ability to raise the price of a good without losing all its sales. As soon as the power shifts from consumers to sellers, “the market” loses its social legitimacy. Likewise, such a market is not the competitive market.

<sup>23</sup> *Id.*

<sup>24</sup> But even the conditions of the competitive market do not promote the optimal allocation of goods that consumers desire when externalities are present. See David Colander, *Microeconomics* 117 (3<sup>rd</sup> ed., 1998), for a description of the detrimental effects that can arise in any and all market structures from positive or negative externalities.

The competitive market model, however, relies on several assumptions. When one of the following characteristics is lacking, then consumer sovereignty crumbles, and the interests of sellers supersede those of consumers:

- (1) Consumers must have access to product information.
- (2) Consumers must have enough income to produce a signal in the market regarding the products they need.
- (3) Consumer must act rationally.
- (4) There must be many sellers, each of whom sells a small fraction of the total quantity exchanged.<sup>25</sup>

First, for the market mechanism to be responsive to consumer needs, consumers must be able to adequately express their tastes and preferences in the prevailing market. Thus, one of the most important features of the competitive market is that consumers have abundant product information. With this information, consumers have the power to choose exactly what products they wish sellers to provide.

However, firms often have an incentive to hide information. Maximizing profits may seem more attractive at first glance, and may very well be in the best interests of an individual firm. Thus, the integrity of the competitive market leans heavily on the honesty of the information that finalized the exchange.<sup>26</sup> The disharmonizing effects of asymmetrical information<sup>27</sup> shift market power<sup>28</sup> from the consumers to

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*Also see* Frank & Bernanke, *supra* note 7, at 68-69, who explain that public goods, like externalities, have the ability to negatively affect all market structures.

<sup>25</sup> *See generally* Frank & Bernanke, *supra* note 7.

<sup>26</sup> *See* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. Polit. Economy 615, 617, 621 (1981), for an archetypal description of how the competitive market should function; specifically, in relation to how the responsiveness of price to consumer demand assures the high quality of goods and services in market exchanges. The argument presented, however, is plagued with a plethora of assumptions that seems to counter any possibility of the alleged market mechanisms being actualized in any market other than that of the perfectly competitive market. For example, the authors “assume that the identity of firms is known by consumers and that the government enforces property rights to the extent that consumers voluntarily choose whom to deal with and must pay for the goods they receive.” The author’s assumptions lead to market forces yielding “quality-assuring prices,” because consumers would not voluntarily buy from sellers who are deceptive or sell low-quality products: “Because of such rational consumer anticipations, firms will not be able to cheat, but desired high quality output will not be supplied.” This logic eventually leads advertising investments to be positive indicators of quality and performance. But if the structural variables veered significantly from those assumed in this study, like consumers’ not being as “rational,” could one really expect the same degree fairness that this market claims to so wonderfully achieve? *E.g. see* Gerard J. Tellis & Birger Wernerfelt, *Competitive Price and Quality under Asymmetric Information*, 6 Marketing Sci. 240 (Summer 1987), who studied the effect that asymmetric information has on price and quality. Generally, the ability for market prices to adequately account for the quality of goods depends on the product information available to consumers. Consequentially, if the assumption of perfect information fails, then “the market” mechanism cannot be fully trusted to ensure adequate prices or optimal quality.

<sup>27</sup> *See* Frank & Bernanke, *supra* note 7 at 333, for a discussion of the detrimental effects of asymmetrical information on “the market.” Specifically, asymmetrical information refers to situations in which buyers and sellers are not equally informed about the

the firms; therein, threatening consumer sovereignty. A consumer's ability to purchase goods is constrained by the little information available about what he is buying.<sup>29</sup> Consequently, consumers are not well-informed individuals who can be relied on to demand the goods and services that are in the best interest of society. Simply, without well-informed buyers, the competitive market crumbles.<sup>30</sup>

A second assumption for the competitive market to display a high degree of consumer sovereignty is that all persons must have the deserved amount of income with which to purchase goods and services. If one believes that the income distribution is unfair, then one could not agree that the market could properly determine the worth of a product. Without fair income distribution, certain people lack purchasing power thereby making product distribution inequitable,<sup>31</sup> weakening the full consumer sovereignty that we seek from "the market." In other words, when market processes are charged with distributing goods and services essential to our living—health services, food, water, transportation, fire and police safety—then the effectiveness of those markets rely in large part on whether consumers can afford the going price for the goods and services sold. If only a small fraction can afford the going price for an important service, then markets lose their attractiveness as institutions that can meet the needs of the community; rather, they can meet the needs of only those who have substantial income. Consequently, the validity of the assumption that wealth and income distribution is essentially fair relies on our analyzing the existing inequalities in our communities. If we simply assume that income distribution is fair, we will not be equipped to distinguish the competitive market from non-competitive markets that meet the consumption needs of only the wealthier members of society.

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particular characteristics of the products being sold in "the market." The consequence of this inequality is often that sales only benefit one party, usually the sellers, versus both the buyer and seller. Consequently, sellers gain significantly more "power" than consumers. Thus, the existence of asymmetrical information has significant implications on the structure of "the market," and, consequently, consumer sovereignty.

<sup>28</sup> *Supra* note 22.

<sup>29</sup> See Corey A. Ciocchetti, *E-Commerce and Information Privacy: Privacy Policies as Personal Information Protectors*, 44 Am. Bus. L.J. 55, 69, 71 (2007). Ciocchetti highlights that "[w]eb site visitors are not appropriately reading or understanding these [privacy] policies because many Web sites inconspicuously post their electronic privacy policies and make them difficult for the average Internet user to understand." Companies' websites even have a legal incentive to limit website visitors' awareness about their privacy policies. Thus, to assume that consumers make a decision to visit websites with consideration of the privacy policies of the websites simply because somewhere on the website a privacy policy is posted overlooks any consideration as to how readable, understandable and accessible this information is. Consequently, to improve consumer awareness of the costs of visiting certain websites, Ciocchetti proposes a solution: "...[B]ecause the average Web site visitor does not understand the implications of submitting information electronically, he or she is less likely to sense a potential misuse and withhold PII [personally identifying information]." In general, this article serves as an example of how to go about validating whether a market abides by consumer sovereignty.

<sup>30</sup> See Tellis & Wernerfelt, *supra* note 26.

<sup>31</sup> *Supra* note 19 (discussing that "the market" is only useful to society to the extent that consumers are both willing and able to buy goods at "the market" price.)

For any market to mimic the ideal abstraction of the competitive market, one must also assume a high degree of consumer rationality.<sup>32</sup> That is, the consumer must be able to calculate the benefits and costs of all potential products and services prior to any transactions for consumer sovereignty to be realized. In other words, a market should abide by consumer sovereignty that reflects second order preferences to be deemed a competitive market. But how many consumers have the ability to adequately weigh the pros and cons of a seemingly infinite amount of different types of products? As with the very idea of “the market,” rationality is overtly oversimplified when judges use market language.<sup>33</sup>

A final assumption that needs to be considered before appealing to the competitive market is the even distribution of power among firms in the respective market one is talking about. Another way to say this is that there must be a decentralized market, with many firms competing for customers. No market can be trusted to adequately set prices in situations where some sellers violate any of the aforementioned competitive market conditions such that they possess an ability to charge a price greater than the cost of production. Significant market power allows firms to distort the consumer sovereignty that advocates of the market predict.<sup>34</sup> Further, as soon as one firm gains market power, the

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<sup>32</sup> An abundance of legal research exists debunking the rational actor assumption, homoeconomicus. See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Calif. L. Rev. 1051 (2000), arguing that law and economics is underlied by the unrealistic assumption that consumers act rationally most of the time (rational actor model). The authors provide psychology research to support their critique of the assumption of the rational actor. Consequently, the authors argue that a merger between the behavioral sciences and law and economics would greatly aid the economic analysis of the law. See also M. Neil Browne, Carrie Williamson & Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System*, 50 St. Louis L.J. 425 (2001) (highlighting how tenuous the rational actor assumption is in the context of juries.) See Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974) (asserting that the law exaggerates the assumption of the rational actor beyond humans’ actual cognitive capabilities.) See Robert C. Ellickson, *Symposium On Post-Chicago Law And Economics: Bringing Culture And Human Frailty To Rational Actors: A Critique Of Classical Law And Economics*, 65 Chi.-Kent L. Rev. 23 (1989) (arguing that the rational actor model has little empirical basis.)

<sup>33</sup> E.g. see Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 Duke L.J. 1045, 1058 (2001), for yet another example of the way many legal scholars often overconfidently assume high consumer rationality. In this case, Litan argues for deregulation of the Internet:

“If consumers object to websites collecting data about them and possibly forwarding it to third parties, consumers can choose not to do business with the sponsors of those websites - just as consumers can make the same choice with companies doing business that way in the physical world.”

The above claims assume that consumers will act rationally in the sense that they will avoid websites that invade their privacy. The author goes on to use this claim as support for anti-regulation of the Internet; specifically, that the market will regulate the need for privacy. This reasoning is flawed, however, because it assumes total consumer information. However, what is the likelihood that most consumers know which websites are compiling data on them and which are not?

<sup>34</sup> See Eric A. Schutz, *Markets and Power: The 21<sup>st</sup> Century Command Economy* (2001) (for an analysis of the role of power in mainstream economics.)

inherent rational self-interest that supposedly leads firms to meet consumer needs ends up guiding firms to pay more attention to profit.<sup>35</sup> Profit levels above the profits possible in a competitive market serve as an incentive for a misallocation of resources. The power of these firms enables them to ignore consumer sovereignty in the same sense as that concept is used in a purely competitive market. The ethos of “the market,” thus, shifts from meeting consumer needs to that of making the most revenue because the firm’s internal organizational needs can now be achieved.

The key understanding to be gleaned from this analysis of the competitive market’s specifics is that to appeal to “the market” as a socially benign tool requires one to identify the particular characteristics that constitute a market. When competitive market conditions are prevalent, then markets have great potential to meet the community’s needs.<sup>36</sup> In fact, to reference Eberle’s quote at the beginning of the paper again, some markets are extremely concerned with the welfare of consumers—i.e., purely competitive markets. In other words, the “free market” and “personal welfare” need not be mutually exclusive concepts. To appeal to the competitive market, however, requires one to validate several tenuous assumptions, each which encounters dilemmas of its own.<sup>37</sup> When even one market trait lags from the competitive market’s

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<sup>35</sup> See Richard Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (2009), for a discussion on the profit-maximizing duty to shareholders that commercial banks gave up, trying to compete with the more highly-leveraged investment banks. Within such a market, firms followed their path towards profit maximization at the expense of individuals who had invested their savings with these financial institutions.

<sup>36</sup> It is important to note that even in the abstract, “the market” has limits; in other words, one would be hard-pressed to argue that “the market” can solve *all* social problems. For example, all markets are limited in that some human needs are not capable of being assigned a price. When this occurs, markets, because they rely on commodification as a valuation procedure, fail to serve as adequate institutions to meet community needs. Those dimensions of the human experience, like caring, honesty, beauty, and friendship that are not as easily amenable to financial calculation are thereby discounted as inferior pursuits. *E.g., see generally* Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 Yale L.J. 1537 (1983), for an informative analysis of what the author coins “non-commodity values” in regulatory and administrative law.

Commodification is only one type of valuation procedure; the existence of a myriad of other ways to compare the worth of different worldly things challenges the social legitimacy of commodification. Additionally, no universal set of standards exist by which to measure the appropriateness of different valuation procedures other than that of personal intuition. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich. L. Rev. 779 (1994). *Also see generally* Richard Warner, *Topic in Jurisprudence: Incommensurability as a Jurisprudential Puzzle*, 68 Chi.-Kent L. Rev. 147 (1992).

*But see* Neil Duxbury, *Law, Markets and Valuation*, 61 Brooklyn L. Rev. 657 (1995), who warns that the critique of market valuation procedures, i.e., the price mechanism, is often taken too far. In other words, Duxbury points out that though market reasoning is clearly limited by valuation problems, oftentimes, scholars often jump to the unsupported conclusion that the market mechanism as a tool for valuating goods and services should be discarded as a whole.

<sup>37</sup> *E.g., see* Frank & Bernanke, *supra* note 4 at 271-277, highlighting how game theory can be helpful in analyzing the complexity of these dilemmas. For example, underneath the assumption of perfect information are sellers who face a dilemma between honesty

standard, “the market’s” ability to abide by consumer sovereignty crumbles. Consequently, it would be logically inconsistent to call the resultant market a competitive market.

### III. THE U.S. SUPREME COURT AND “THE MARKET”

The previous section highlighted the particular conditions that must exist for markets to abide by consumer sovereignty. The present section analyzes the reasoning in three landmark Supreme Court cases. Consistent with previous section, the Court will be justified in trusting “the market” to serve the public interest only if the prevailing market is the competitive market. Towards this end, the Court will necessarily have to analyze the structure of the market in question; the Court will have to be sensitive to the complexity and ambiguity surrounding the idea of “the market.”

Likewise, if the Court simply assumes that the market in question is benign and optimal without analyzing market structure, the Court will have no factual basis on which to rely that the prevailing market is a competitive market. Consequently, the unfounded assumption that a competitive market exists leads to inappropriate appeals to consumer sovereignty. Thus, the determination in each of the following cases relies heavily on the Court’s analysis of “the market.”

#### *A. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*

The first case worthy of analyzing in terms of market reasoning is that of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, hereinafter, *Virginia State Board*.<sup>38</sup> In this case, the plaintiff, a prescription drug user and two nonprofit organizations challenged, on First and Fourteenth Amendment grounds, a Virginia consumer protection statute that prohibited pharmacists in Virginia from advertising prices for prescription drugs. Countering the prescription users was the Virginia State Board of Pharmacy and its individual members. The defendants were against the commercial advertising of prescription drug information based on the fact that some products, because of their crucial significance for the well-being of individuals, should be precluded from what would typically be considered a market sale.

The district court decided that the statute in question violated consumers’ right to receive advertising about the prescription drugs they buy. On appeal, the Supreme Court affirmed the district court’s decision.

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and self-gain when selling a product or service. If honesty is pursued, a firm might lose profit opportunities that other dishonest firms are quick to take advantage of. If self-gain is pursued, then the community of consumers suffers in that they are not able to make informed decisions due to limited or deceptive advertising. What game theory reveals, thus, in terms of the perfect information assumption, is the importance of actually analyzing the behavior of market participants before assuming that an assumption will yield true simply because one wishes it to be true.

<sup>38</sup> See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The Court reasoned that it was in the consumers' best interest that the prescription drug market be left untouched so as to promote the free flow of commercial information. In other words, purely economic speech should not be disqualified from constitutional protection. Therein, this landmark decision gave considerable leniency to sellers.<sup>39</sup> *Virginia State Board's* line of reasoning established a new economic understanding of the strictness of regulation on commercial advertising.<sup>40</sup>

But only the competitive market would be able to provide the optimal conditions necessary for consumers' needs to be met. Thus, the Court in *Virginia State Board* necessarily assumed competitive market conditions. For example, pay attention to the Court's reasoning that leads to their ruling against the advertising regulation on prescription drugs, and in favor of the free flow of commercial information:

"So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."<sup>41</sup>

Unfortunately, here the Court assumes ideal market conditions without analyzing the market's specifics. That is, the Court confuses two things. First, its reasoning suggests that a "free market" is a market that is private. But a monopoly is a private market. However, a monopoly is the antithesis of what the Court says it is seeking. Their analysis shows limited awareness of alternative market structures. Rather, the Court seems to assume that any market mimics the ideal abstraction of the competitive market. Consequently, the Court displays little sophistication about what kind of freedom<sup>42</sup> they are discussing.

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<sup>39</sup> *Virginia State Board* relied on a new interpretation of the First Amendment in terms of protection from commercial advertising. See, e.g., Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 Am. Bus. L.J. 587, 588 (2000) (explaining essentially that the First Amendment should be interpreted in a matter of degrees. For example, the First Amendment protects most noncommercial speech, but at the same time precludes any form of hate speech. In relation to commercial speech, the First Amendment has applied medially. As will be revealed later in this paper, the ambiguity inherent in the application of the First Amendment puts a lot of pressure on the Court to analyze the conditions on which the First Amendment is applied.)

<sup>40</sup> See Peter Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 Hastings Int'l & Comp. L. Rev. 903, 907-08 (1998) (the leniency established in *Virginia State Board* with regards to product advertising has been refuted overseas. The Court of Justice of the European Communities was not persuaded by the Supreme Court's decision in *Virginia State Board*. The Court of Justice did not see eye-to-eye with the Supreme Court's wavering the minimal advertising restrictions to support the "free flow of information." Later sections of the present paper will reveal just why a court system might be hesitant to follow *Virginia State Board's* decision to place trust in the "free market.")

<sup>41</sup> See *Virginia State Board*, 425 U.S. at 765.

<sup>42</sup> "Free-market" advocates often appeal to the concept of freedom as a justification for the greater deregulation of markets. The problem is that "freedom", much like "consumer wellbeing" varies in its nature depending on how power is allocated among market players. Although this paper is primarily concerned with appeals to the "free



Secondly, for the “free enterprise economy” to truly function as previously stated, several assumptions have to be met. Those particular assumptions pertinent to this case include that (1) consumers have enough information with which to make a decision,<sup>43</sup> and (2) that consumers are intelligent or “rational” decision-makers.<sup>44</sup> The problem in the Court’s reasoning is that the Court does not consider whether these assumptions are actually valid in the aforementioned pharmaceutical market. Let’s consider each assumption individually.

First, for consumers to have abundant information about their purchases, sellers have to be willing to act in a specific manner. Oftentimes, however, sellers have the ability to maximize profits by withholding or distorting certain information. If sellers give in to such behavior, then consumers have little information to make wise purchasing decisions; therein, invalidating the conditions essential for consumer sovereignty. Thus, it is very questionable to simply assume benign sellers exist without analyzing their presentation of product information. Second, the Court assumes that consumers are intelligent decision-makers. However, an abundant amount of evidence suggests that, even if consumers were to have full-fledged access to product information, consumers rarely mimic the ideal rational actor model about which economists theorize.<sup>45</sup> Overlooking the previous questionable assumptions, the Court chooses to reify “the market” in a way that would make unhindered transactions appear fair, i.e., the Court assumes the competitive market exists. The validity of the Court’s reification of the “the market,” however, is never considered.

The specific Virginia statute in question in *Virginia State Board* declared it “unprofessional conduct” for a pharmacist to advertise the prices of prescription drugs.<sup>46</sup> One of the reasons underlying Court’s

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market” by courts, it is important to note that the sloppy use of “the market” is extends beyond the legal world. See Edward Stringham, *Market Chosen Law*, 14 *Journal of Libertarian Studies* 53, 53, 54 (Winter 1998–1999), arguing markets free from any government intervention will naturally lead to order. One reason Stringham provides for why an untouched market is best for society is that “[t]he market allows consumers to choose different types and degrees of services...” Here Stringham essentially argues that markets enhance consumer choice. However, are all types of markets as responsive as Stringham posits? As discussed in Section II of this paper, only the competitive market provides consumers with enough power to make fully informed and rational choices. Contrarily, when markets take the form of oligopolies or monopolies, consumers lose their power to choose different types of services because in these markets firms have enough power to withhold sales and still market high profits. In other words, the market that Stringham is referring to is necessarily a competitive market. But Stringham fails to consider that markets come in many forms, each with different implications on consumer choice and wellbeing. Ignoring the performance differences of different types of markets, Stringham concludes: “If the state stopped intervening, the consumer would finally be sovereign and the market would finally be able to flourish.”

<sup>43</sup> *Supra* note 27 and 29.

<sup>44</sup> *Supra* note 32.

<sup>45</sup> *Id.*

<sup>46</sup> See *Virginia State Board*, 425 U.S. at 750. The Virginia law stated:

"Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud

decision was that a consumer's interest in the free “flow [of information] is...protected by the First Amendment,” and that Virginia could not keep “the public in ignorance of the entirely lawful terms that competing pharmacists are offering.”<sup>47</sup>

Again though, the problem in the previous reasoning is that the Court does not provide any analysis of whether the market conditions necessary for the “free flow of commercial information” are actually valid in the aforementioned pharmaceutical market. Rather, the Court presumes that the conditions in the market at hand are competitive. In its own words, the Court chooses to believe that the “information [prescription drug advertisements] is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”<sup>48</sup> However, these assumptions about the behavior of buyers and sellers were never compared to the actual pharmaceutical market that was pertinent to this case. One would have to believe that sellers are voluntarily willing to give up certain advertising strategies that could increase their profits for the sake of maintaining a truthful and honest market. If sellers did behave as such, then opening the channels of communication might be beneficial to the consumer; however, if product information was deceptive, then consumer sovereignty would crumble.

Another unanalyzed assumption in the Court’s reasoning, in the previous quote, is the existence of a decentralized market. In other words, for consumers to be informed it is just as important for information to not be deceptive as it is for information to come from a variety of sources. The diverse channels of information in a market with many firms would be in the consumers’ favor because they stimulate an awareness of sellers’ natural inclinations to be biased towards their products. Thus, the Court necessarily assumes a decentralized type of “open communication” when overruling the advertising regulations. The problem is, though, that the Court never analyzes the prevailing market’s conditions to validate that the pharmaceutical market in question truly is a decentralized market. Consequently, when the Court adheres to “open channels of communication,” it overlooks the different implications of “openness of communication” in decentralized markets and monopoly or oligopoly markets. The previous assumption needs to be validated if market forces are going to be labeled benevolent. Otherwise, “the market” simply becomes a superficial cover for sellers to exploit consumers. Had the structure of “the market” been given particular

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or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

<sup>47</sup> *Id.* at 771.

<sup>48</sup> *Id.*

attention, the determination of the present case might have been considerably different.

*B. Citizens United v. Federal Elections Commission*

Another instance in which the Court's conceptualization of "the market" is truly significant in the outcome of a case is in the legal analysis of free speech; when defending speech against regulation, judges often refer to the need to maintain a "free marketplace of ideas."<sup>49</sup> This metaphor gains rhetorical strength from its allusion to free markets. However, the freedom of markets is a freedom from government regulation.<sup>50</sup> Ignoring the performance differences for the community between a free competitive market and a free monopoly market is analytically disappointing. The use of the "free marketplace of ideas" can be seen in the recent decision in *Citizens United v. Federal Election Commission*, hereinafter *Citizen United*.<sup>51</sup>

This case emerged when a corporation funded and released a documentary about a presidential candidate. The corporation, Citizens United, knew that this release would be subjected to the Federal Election Commission's ban through the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act, on corporate expenditures for electioneering communications. Thus, Citizens United sought relief from the federal statute to proceed with its documentary. The U.S. District Court for the District of Columbia denied the corporation's plea for constitutional relief from the ban.

On direct appeal, however, the Supreme Court reversed the district court's judgment in favor of Citizens United. The Court

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<sup>49</sup> See *Buckley v. Valeo*, 424 U.S. 1, 49 (1976), (striking down expenditure limits in the 1971 Campaign Act), stating, "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." The reasoning in the previous quote suggests that whether one is extremely impoverished or, contrarily, a part of the 1-percent is irrelevant in deciding whether a "free marketplace of ideas" is fair. However, the court overlooks the implications on fairness and consumer-wellbeing when only a few consumers are able to participate in a market. When markets prevent low-income individuals from producing a signal to guide the allocation of goods and services, or in the context of political speech, public policy, then such markets cease to be the competitive markets that care about the needs of all consumers.

<sup>50</sup> See Fowler & Brenner, *infra* note 64, who define freedom of speech in a way that appeals only to their argument: "First, it should be noted that the language of the first amendment protects the right of speech, not the right of access to ideas or even the right to listen." This statement lays the foundation for their eventual argument that broadcasting markets remain free from FCC regulations. The authors essentially define freedom of speech as solely freedom from government interference. However, even today people are not "free" to say anything they wish; for example, libel and slander are prohibited. The reason for their preclusion relies on the effects on the listener. Thus, the author's attempt to define the freedom of speech in a broad manner leads to a simplification of the complex nature of "freedom of speech," particularly, it overlooks the social harm that can come from different manifestations of "freedom of speech." The author fails, thus, to acknowledge the effects that contextual differences have on the application of the First Amendment.

<sup>51</sup> See *Citizens United v. Federal Election Commission*, No. 08-205, 2010 U.S. LEXIS 766 (U.S. Jan. 21, 2010).

reasoned that the FEC's ban restricted corporations' constitutional right to free speech. Subsequently, this restraint on speech would deprive the electorate from a "free marketplace of ideas" the Court posited, necessary for the democratic oath around which our culture is structured. The Court's reversing of the FEC's ban on corporate independent expenditures for electioneering communications revealed that a corporation's economic interest and status were de minimus factors when defending speech against regulation. The Court's allusion to a "free marketplace of ideas" surprisingly provided the legal grounds to seek protection through the First Amendment.

For example, in this case Justice Kennedy simply assumes benign market conditions when appealing to the First Amendment, which leads to the Supreme Court's reversing the Federal Election Commission's ban on corporate independent expenditures for electioneering communications:

"The Government has "muffle[d] the voices that best represent the most significant segments of the economy." *McConnell*, supra, at 257-258, 124 S. Ct. 619, 157 L. Ed. 2d [\*\*792] 491 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." *CIO*, 335 U.S., at 144, 68 S. Ct. 1349, 92 L. Ed. 1849 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on [\*\*76] which persons or entities are hostile to their interests."<sup>52</sup>

The marketplace of ideas to which Kennedy refers is necessarily a competitive market because an imperfectly competitive market results in decisions that are often the fruits of asymmetric information and highly unequal access to communication pathways. To assume that voters are being deprived of ideas, as Justice Kennedy does, under circumstances where corporations are limited in their speech implies that such corporate communications are beneficial to the interests of the community. However, for this kind of reasoning to be logical, the Court would need to explicitly make the case that the flow of information resulting from corporate communications is consistent with the needs of the community rather than with the narrower interests of the firm. In place of a robust evaluation of the communication market that would result from their finding, the Court simply assumes that the market is one composed of benign sellers who provide full and honest information to citizens:

"The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>53</sup>

The problem in the Court's reasoning is not only that perfect information is simply assumed, but also, individuals are assumed to make decisions with a high degree of rationality. In other words, the Court

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<sup>52</sup> See *Citizens United*, 2010 U.S. LEXIS 766, at 791-792.

<sup>53</sup> *Id.* at 802.

assumes that the common man will be able to distinguish and evaluate why some corporations may appear more persuasive than others, and also formulate adequate stances on which corporations present messages that are best for the individual as well as the community. With or without perfect information, the previous assumption that we are all essentially “rational” individuals is in itself very questionable.<sup>54</sup> A large trove of evidence suggests that our reliance on “rational” individuals to act in certain ways is often more optimistic than realistic.<sup>55</sup> In the end, the Court never actually analyzes the prevailing market conditions, and instead assumes that “the market” is one composed of benign sellers whom provide full and honest information to “rational” citizens.

In yet another instance in *Citizens United*, the Court more explicitly appeals to the “free market” without considering market structure. As revealed in the following quote, the Court’s decision was allegedly meant to preserve the “free marketplace of ideas:”

“When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech -- harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) [\*\*45] (citation omitted).”<sup>56</sup>

In the previous quote, the Court assumes that the FEC’s regulations on the communications market would deprive society of the fruits of an “uninhibited marketplace of ideas.” Once again though, the Court seems to be defining an uninhibited marketplace as one that is free from governmental regulation.<sup>57</sup> In doing so, the Court overlooks the different social implications that uninhibited markets, like a free competitive market and a free monopoly market, have on the electorate.<sup>58</sup>

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<sup>54</sup> *Id.* at 792, in which the Court seems to consistently rely on the intelligence of individuals to in its plea to preserve the “free marketplace of ideas:” “Factions should be checked by permitting them all to speak...and by entrusting the people to judge what is true and what is false.” The ability for individuals to make knowledgeable decisions is important because it is one of the many preconditions of a competitive market. However, this assumption, like many others, is very tenuous and needs to be validated rather than just presumed.

<sup>55</sup> *Supra* note 32.

<sup>56</sup> *See* *Citizens United*, 2010 U.S. LEXIS 766, at 779.

<sup>57</sup> *See* Milton & Rose Friedman, *Free to Choose* (1979) for a persuasive form of this argument. If we conceptualize freedom as indivisible, and if we define freedom in its negative form as “freedom from,” then the spirit of liberty experienced by the private property owner should carry over into his and her ordering of the state and its activities. Consequently, a market participant would be ever vigilant for threats to political freedom. *But see*, Elton Rayack, *Not So Free to Choose: The Political Economy of Milton Friedman and Ronald Reagan* (1987) for a well-reasoned critique of this linkage between markets and political freedom.

<sup>58</sup> The Court’s negligence to clarify what they mean by the “freedom” they are appealing to can be seen by contrasting the reasoning in *Citizens United* with that in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969). In the contrasting case the Court found that the regulations that the FCC had imposed on the Red Lion Broadcasting company (which allowed the FCC to allocate broadcast frequencies among broadcasting companies in the “public interest”) were constitutional because the regulation allowed

A market where a few corporations' voices have significant influence on society is very different from a perfectly competitive market where no firm has any abundant amount of power with which to excessively promulgate its opinions. The Court assumes that the "uninhibited marketplace" is one that aligns conveniently with the competitive market without considering the economic foundations of the prevailing market. Pay attention to yet another unfortunate appeal to "the market:" "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech..."<sup>59</sup> What type of marketplace is the "economic marketplace?"

At first glance, no market can be automatically deemed an optimal market unless one assumes that all markets mimic the ideal competitive model. Given that such an assumption would be flawed, the Court should endeavor to take one step further and analyze the preconditions necessary for a certain market to function in a way that meets communal needs. Had the Court in *Citizens United* used the "marketplace of ideas" metaphor with sensitivity to the ambiguity of "the market," the final decision could have very likely gone the other way.

### C. *Federal Communication Commission v. WNCN Listeners Guild*

A plethora of diverse arguments exist for the use of "the market" as the optimal distributor of certain commodities.<sup>60</sup> The legitimacy of these arguments require a thorough analysis of just what type of market is being referenced, and, further, a comparison of how closely the conditions of the market being referenced represent the conditions of

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listeners to be able to listen to both sides of issues. Notice how the Court acknowledges the inherent ambiguity of "freedom of speech," and proceeds to clarify what it defines as "freedom" in the current case:

"The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others...Otherwise, [\*\*\*1808] station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."

In other words, rather than simply stating that the First Amendment will take care of any social problems that arise on freedom of speech grounds, the Court acknowledges that the First Amendment can be applied in various ways; freedom of speech need not necessarily mean "freedom from government." In this case for example, the Court explicitly notes that "freedom" has its limits when the consequences of one's actions have the potential to negatively affect someone else. Freedom is defined in terms of capability.

<sup>59</sup> *Id.* at 789.

<sup>60</sup> *See, e.g.*, Richard A. Posner, *Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U.L. Rev. 59 (1987), arguing that the adoption market should be less regulated so that babies that are up for adoption can be distributed to those parents that value babies the most. *See, e.g.*, Alain Enthoven, *Connecting Consumer Choice to the Healthcare System*, 39 J. Health L. 289 (2006), arguing that health insurance would be most efficiently distributed through the private market.

real-world markets, opposed to “black-board” ideal markets.<sup>61</sup> The final case that will be considered in this paper, opting for “the market” mechanism as the primal distributor of broadcasting services, is *Federal Communication Commission v. WNCN Listeners Guild*, hereinafter *Listeners Guild*.<sup>62</sup>

Legal action in *Listeners Guild* originated from a group of citizens (Listeners Guild) who were interested in preserving particular entertainment formats in the radio market. To preserve the listeners’ desired formats required that the Federal Communication Commission (FCC) do two things. First, the FCC was required to review any past or anticipated changes in the radio market when deciding to transfer or renew radio licenses. Second, based on the FCC’s analysis, the FCC had to distribute licenses that would complement listeners’ tastes. The prime objective, as delineated in the statute in question, the Communications Act of 1934, was to serve the public interest through a careful distributive mechanism.

The FCC, on the other hand, had different intentions. The FCC posited in a Policy Statement that relying on market forces to allocate radio licenses would be in the public’s best interest. Contrary to this view, Listeners Guild petitioned for review in Court of Appeals for the District of Columbia Circuit. The district court ruled in favor of Listeners Guild on the grounds that the FCC’s Policy Statement violated the Communications Act. On the FCC’s appeal, though, the Supreme Court reversed the district court’s decision. The Court’s decision was based on the fact that the public interest thrives when the market mechanism is left to allocate radio licenses. Rarely do we see such an explicit display of trust in the market from our judges.

Particularly, this case deals with the regulation of the radio market; specifically, pertaining to the allocation of radio broadcasting frequencies. The objective of this market is similar to that of any other; there are a scarce number of resources (radio frequencies) that need to be

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<sup>61</sup> See generally John Cassidy, *How Markets Fail: The Logic of Economic Calamities* (2009), for a distinction between utopian economics and reality-based economics. Utopian economics involves taking and applying Adam Smith’s theory of the market to the real world. However, Cassidy points out that certain market imperfections like externalities, irrationality and asymmetrical information obstruct economic theory from being realized. Reality-based economics, on the other hand, involves the analysis of the many different contextual situations upon which specific markets rest. Thus, it requires going below the surface to evaluate the foundational assumptions of which generalized economic theory relies on.

Cassidy’s message is essentially that critics’ moral outrage should not be directed so much at the firms taking advantage of opportunities for profit afforded by the market, but rather at regulators and the economics profession advocating policies that are increasingly divorced from economic reality. See also, R. H. Coase, *The Institutional Structure of Production*, 82 *Amer. Econ. Rev.* 713, 714 (Sept. 1992), critiquing economists that choose to assume ideal market conditions: “What is studied is a system which lives in the minds of economists but not on earth. I have called the result “blackboard economics.” The firm and the market appear by name but they lack any substance.” The present manuscript hopes to build on Cassidy and Coase’s insight, and aims at clarifying the ambiguity of “the market” so that in the legal arena, regulatory decisions reflect practical applications to specific market systems.

<sup>62</sup> See *Federal Communication Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

distributed among competing users (programmers).<sup>63</sup> However, if market characteristics are not analyzed, judges risk making faulty decisions with respect to market performance.<sup>64</sup> In *Listeners Guild*, the Court concluded that the FCC had provided rational grounds for their argument that market forces should be left alone. The FCC posited that “the public interest is best served by promoting diversity in entertainment formats through market forces...”<sup>65</sup> However, the FCC never analyzed the nature of those market forces. For market forces to serve in the public’s interest, the market itself has to be structured in a certain way, usually, something similar to the competitive market. Otherwise, “market forces” may just as likely be monopolistic as

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<sup>63</sup> See Bradley R Schiller, *supra* note 17 at 5 (providing a basic overview of the principles of macroeconomics.) According to Schiller’s textbook, economics is essentially the study of “how best to allocate scarce resources among competing users,” in other words, the study of “the market.”

<sup>64</sup> See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Texas L. Rev. 207, 210, 211, 232, 233 (1982) (arguing that the communications market should be left alone and free of regulation by the Federal Communications Commission.) The authors argue: “[T]he Commission should rely on the broadcasters’ ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public’s interest, then, defines the public interest.” Fowler and Brenner essentially give us an argument in favor of market processes because of markets’ adherence to consumer sovereignty; the authors’ argument tries to undermine efficacy of the FCC’s distributing radio frequencies to broadcasters. The authors, however, necessarily assume that the communications market is a competitive market because only the competitive market promises consumer sovereignty. But the authors never provide a robust analysis that the competitive market assumptions are in fact present in the prevailing market. The authors continue: “A marketplace approach to exclusive use of radio frequencies would open all positions in the electromagnetic spectrum to bidding by those who want them.” This quote suggests that if a broadcaster wanted to participate in the communications market, they could just buy a license. However, do broadcasters have equal capability to buy such licenses? To adhere to the competitive market requires one to first consider whether all firms have the respective income with which to participate in “the market,” and, of equal significance, whether firms are free to enter and leave “the market.” If the free entry were to exist in the communications market, then one might be able to move closer to trusting the market to efficiently allocate radio frequencies. However, if the prevailing communications market is not a purely competitive market, then granting licenses through the market mechanism is essentially a way of allowing a few firms to get a hold on more market power. Yet another example of the authors’ assuming that the competitive market map reflects the terrain can be seen in the following quote:

“Advertisers sponsor programs that they expect to appeal to the viewers they want to reach with their messages. In a sense, the advertiser acts as the representative for consumers, sometimes for all consumers, sometimes for demographic subgroups...Although the advertiser, rather than the consumer, pays for the program, market forces still move the key resource—time on an exclusive broadcasting frequency—toward its highest and best use.”

The assumption in the previous statement is that advertisers will present listeners with full and comprehensible information about what possible programs are available through broadcasting frequencies. If, however, the advertising intermediaries provided deficient information about potential programming, then consumers preferences would not be fully accounted by the market in question. In sum, in reaching their conclusion for market deregulation, the authors seem to forget to analyze the preconditions necessary for a market to abide by consumer sovereignty.

<sup>65</sup> See *Listeners Guild*, 450 U.S. at 585.



competitive, in which case market forces need not necessarily allocate radio frequencies in a socially optimal way.<sup>66</sup>

Prior to the Supreme Court's decision, the district court had rejected the FCC's stance on the market mechanism. Even though the FCC's duty was to regulate the radio market, the district court recognized that the FCC's objectives were very broad. The FCC had the authority "to secure the maximum benefits of radio to [\*\*\*534] all the people of the United States... [and] it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved."<sup>67</sup> The previous objective reveals the ambiguity of the law. In other words, no specific standard is identified to ensure that the welfare of listeners will be maximized in a particular market; therein, lays the importance of scholarly clarity when referring to such things as "the market." In situations where the nexus between our abstract law and the wellbeing of our communities is obscure, large weight is placed on our judiciaries for the proper actualization of statutes.<sup>68</sup> Thus, because of the ambiguous guidelines that Congress passed on to the FCC, the district court appropriately put forth heavy scrutiny on the FCC's decision to trust "market forces." Essentially, the district court demanded for evidence that would validate that "market forces" behave as the FCC said they would; therein, expressing the sensitivity necessary to avoid using the term "the market" as if it only had one meaning.

On the FCC's appeal to the Supreme Court, though, the Court's logic seemed pay little attention to the gravity of analyzing market structure before implementing certain regulations or policies. Diving head-on to an ideal reification of "the market," the Court reversed the district court's decision, and accepted the FCC's three reasons for why market forces can be trusted to fairly allocate radio broadcast licenses:

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<sup>66</sup> Surprisingly, the reasoning *Listeners Guild* parallels the reasoning in a case more than 40 years prior. Once again, the reification fallacy emerges in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). At one point, the Court proclaims:

"Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

In the previous reasoning, the Court necessarily assumes competitive market conditions, where consumer demand decides the fate of businesses. Thus, allegedly, through recognition of consumer sovereignty, firms decide the future of their business by appealing to the desires of consumers. However, if market conditions were less than competitive, and other radio stations had excess market power, then those powerful stations could use their respective power to enrich themselves, and influence consumers to demand more of their time versus the time of other less powerful stations. In other words, the market structure that abides by complete consumer sovereignty would crumble. Consequentially, the Court's initial assertion would lose all of its legitimacy. In order to avoid false presumptions about "the market," the Court would benefit from analyzing market specifics before placing trust in "the market" to work in a certain way.

<sup>67</sup> See *Listeners Guild*, 450 U.S. at 594.

<sup>68</sup> See *Nim Razook*, *supra* note 12.

“First, in large markets, competition among broadcasters had already produced “an almost bewildering array of diversity” in entertainment formats. Second, format allocation by market forces accommodates listeners’ desires for diversity within a given format and also produces a variety of formats. Third, the market is far more flexible [\*\*\*532] than governmental regulation and responds more quickly to changing public tastes.”<sup>69</sup>

In the previous reasoning, like that of *Virginia State Board* and *Citizens United*, the Court adheres to benign market forces by assuming that “the market” meets various conditions. First, the Court assumes that merely mentioning competition validates that the prevailing market will function in a competitive way. All markets, however, are volatile entities. For the sake of preserving consumer sovereignty, competition cannot just be assumed. Rather, the Court must analyze the prevailing market’s specific characteristics to verify that that market will behave in a competitive fashion.

The Court then chooses to accept the FCC’s consumer sovereignty argument, the second and third reasons in the previous quote, without any evidence that the radio market is actually responsive to consumer needs. Instead, the FCC relies on positive generalizations about all markets to support its claim that the prevailing market forces are benign and, thus, trustworthy. For example, the Court accepts that market forces produce a variety of entertainment formats that will meet listeners’ desires and tastes. What “market forces,” though, are being referred to? In fact, the FCC and the Court go as far as to explicitly advocate their unwillingness to appreciate the ambiguity of market language:

“It is also convinced that the market, although imperfect, would serve the public interest as well or better by [than regulations] responding quickly to changing preferences and by inviting experimentation with new types of programming.”<sup>70</sup>

If the Court is to rely on the previous claim, it should at least consider the performance differences of the prevailing market with and without the regulation in question. Why? Because market forces in a competitive market are very different from market forces in any other market in terms of their effects on consumers. Consequently, not just any type of radio market produces a variety of entertainment formats that meet listeners’ needs. For example, radio markets in which a few radio broadcasting firms have an abundant amount of market power with which to influence the price of radio frequencies are very different from competitive markets where all radio broadcasting firms have equal access to a fraction of radio frequencies. In the imperfect market, broadcasters’ goal of domination could result in the exploitation of the smaller and weaker firms, and consequently, less diverse entertainment formats to meet the needs of consumers. In the competitive market, however, the little market power that firms necessarily have would cause radio firms to

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<sup>69</sup> See *Listeners Guild*, 450 U.S. at 590.

<sup>70</sup> *Id.* at 601.

be more responsive to consumer tastes (the “invisible hand” logic). Subsequently, in such a competitive market, radio broadcasters on an equal playing field would be more likely to strive to meet the diverse needs of listeners in order to stay in business.

The previous distinction of the performance differences of imperfect and competitive markets highlights sensitivity towards economic principles necessary for appropriate decisions regarding the imposition of certain regulations on markets. Generally, one of the objectives of “the market” is to allow firms to compete on a level playing field, where the success of firms depends on the tastes and desires of consumers. The competitive market through its alignment with consumer sovereignty serves as a means to that end. The Court in *Listeners Guild*, however, appealed to the positive ends of competitive markets without analyzing the prevailing market structure. In other words, competition was just assumed to be existent: “Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public.”<sup>71</sup>

As has been revealed throughout this case analysis, the Court has entrusted the FCC to follow the broad guideline of ensuring that public’s interest is met; therein, the FCC and, subsequently, the Court have defined “the market” in a way that would make the radio market free from regulation appear fair. Acknowledging the Court’s blind reverence of “the market,” Justice Marshall’s dissenting opinion provides some sound advice as to the how the Court should have gone about determining this case: “[T]he question before us is whether the Commission may apply its general policy on format changes indiscriminately and without regard to the effect in particular cases.” In other words, the Court has refused to acknowledge the complexity that arises when the law is applied to particular contexts.<sup>72</sup> Instead, the Court has assumed that market forces will always behave in a benign manner, as they do in theory. This sort of reasoning neglects to consider the ambiguity implicit in the idea of “the market.”

A common theme emerges from this analysis of Supreme Court cases regarding market regulation, i.e., they all share a “leave it to the market” sentiment. *Virginia State Board’s* ruling sought to preserve the free flow of information in the prescription drug market by overruling a regulation of price advertising. *Citizens United* appealed to the “free marketplace of ideas” to override the FCC’s ban on the corporate funding of electioneering campaigns. Finally, *Listeners Guild* relied on “unhindered market forces” to meet the listening tastes of the public. Is such a display of trust justified? Unfortunately, without analyzing the actual conditions of the markets that were referenced, we cannot know whether market conditions were more favorable to buyers or sellers or both.

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<sup>71</sup> *Id.* at 588.

<sup>72</sup> See Nim Razook, *supra* note 12. Also see note 8 (for the problems that emerge when one tries to apply the abstract to the concrete.)

The objective of this critical analysis has been to highlight that “the market” plays a very important role in a court’s final decision. But “the market” has multiple possible meanings. When judges fail to pay attention to its ambiguity, they risk overlooking the negative implications that certain types of markets have on communities. A significant number of judges who disseminate legal scholarship are only slightly less reverential to “the market.”<sup>73</sup> They too often assume competitive market conditions without analyzing the institutional organization of the markets they reference.

#### IV. THE EUROPEAN COURT OF JUSTICE AND “THE MARKET”

The United States and the European Union are similar in the sense that both jurisdictions seem to have a prescriptive interest against imperfect markets where the consumer is exploited by the seller.<sup>74</sup>

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<sup>73</sup> The following cases serve as additional evidence of the tendency of Supreme Court justices to not analyze the market characteristics of the market they allude to:

*See American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F. 2d 1401 (9th Cir. 1985). In an opinion by Justice Kennedy, without examining the specifics of the market in question, the court assumed that “the market” behaves in a competitive fashion. 15,000 employees of the state of Washington brought a class action suit for violation of Title VII of the Civil Rights Act of 1964 by compensating employees in the predominantly female jobs at a lower rate than employees in the predominantly male positions. The 9th circuit overturned the district court in favor of the State. The appeals court refers to the fact that the state policy is to pay wages that reflect the prevailing market rates and that reliance on the market cannot be deemed as intent to discriminate against women. In this case, “the market” is held as a benign force. The judges’ language is explicit that the law does not intend to abrogate, “the fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market.” The court is assuming that the labor market in question behaves in a competitive fashion, such that employers are relatively powerless to set wages. Therefore, the court concludes that employers should not be punished because the market values the services of jobs dominated by females less than those dominated by males. Such an assumption would hardly be justified if the market structure were anything less than competitive.

*See also Dupre Transportation v. Louisiana Public Service Commission*, 583 So. 2d 475, 482 (La. 1991). In this case, Justice Cole’s concurring opinion rests upon certain market assumptions, which underlie the reasoning and serve to grant legitimacy to the market as a solution to the issue in dispute. He opines that the State should grant a required permit to the motor carrier because, “The economy and the public interest thrive when rational men and women are left free to choose.” But, what is the market structure of the Louisiana motor carriers? Justice Cole, without justification, assumes that the motor carriers operate in a competitive market, allowing rational consumers to be “free to choose.” Before assuming that consumers are “free,” however, one must consider the institutional as well as psychological limitations abridging our “freedom to choose,” and consequently, distorting competitive market conditions.

<sup>74</sup> *Contra* Antoinette Sedillo Lopez, *A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology*, 10 *Hastings Women's L.J.* 347, 364 (1999), providing a comparative analysis of abortion law in the United States and Mexico. Contrary to the U.S. and the European Union’s similar prescriptive view about the market, Lopez reveals how U.S. and Mexico law are significantly different when the Court has to deal with the abortion issue: “The laws on abortion in the United States and Mexico are completely different. Generally, Mexico prohibits abortion while the United States permits it.” One reason for why there is an apparent difference in the legal analysis of

Consumer sovereignty is the target. The U.S. and European approaches, however, diverge in how each court system interprets the law in a given market setting. In this section, the reasoning in the previous Supreme Court cases will be contrasted with three European cases. As the reader will notice, each case is similar to the aforementioned Supreme Court cases in that the Judges express interest in consumer-wellbeing. Where the European Court deviates from the U.S. Court, however, is in its sensitivity to the structural conditions necessary for consumer needs to be met.

*A. Gintec International Import-Export GmbH v. Verband Sozialer Wettbewerb eV*

The proceedings in *Gintec International*<sup>75</sup> began when Verband, a German association defending the principle of “free competition,” filed a complaint regarding Gintec’s, a pharmaceutical company, advertising of an over-the-counter drug. Specifically, Verband argued that Gintec’s use of a survey that contained the opinions of third parties and a prize draw for advertising was against national law. Oberlandesgericht, the higher regional court in Germany, ruled in favor of Verband. When Gintec appealed to Germany’s Federal Court of Justice, that court referred the case to the European Court of Justice.

In making its judgment, first, the Court of Justice had to decide what legislative body had jurisdiction. But, like is generally the case with federal law’s authority over state law in the U.S., Europe’s Community Law had authority over German law. Therefore, the advertising regulations in question had to be evaluated in terms of European law. From this perspective, the resolution to the case focuses on “the achievement of the objectives of the free movement of medicinal products for human use and the elimination of obstacles to trade in such products.”<sup>76</sup>

To this point, the fact pattern in *Gintec International* resembles that of *Virginia State Board*, where advertising the advertising of prescription drugs was being questioned in Court. However, *Virginia State Board* and *Gintec International* part paths in their reasoning regarding how to approach medicinal product advertising.

First, the Court of Justice looked at the particular statements in the advertising in question:

“[T]he case of the Consumer survey evaluation’ at issue which, under the heading Reasons for taking Gintec’s Roter Ginseng’, the text of which is set out at paragraph 12 of this judgment, gives the impression that the use of the ginseng based medicines in question contributes to reinforcing general wellbeing.”<sup>77</sup>

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the market, thus, might be rooted in the ways in which the law is applied opposed to how it is structured.

<sup>75</sup> See Case C-374/05, *Gintec International Import-Export GmbH v. Verband Sozialer Wettbewerb eV*, 2007 ECJ CELEX LEXIS 852 (2007).

<sup>76</sup> *Id.* at 28

<sup>77</sup> *Id.* at 50.

The advantage of this analytical move is that of lowering the chances of overlooking deceptive and misleading information. For example, from its analysis, the Court found that the positive impression of the advertising in question can mislead consumers to believe that they can benefit from the drug, even in the absence of a health problem. This weakens consumer choice because, by firms advertising deceptive information, consumers are tricked into believing that they are purchasing one thing, when in fact they are purchasing something else. Consequently, consumer freedom is not defined by the ability to make well-informed positive choices, but rather the ability to choose among a diversity of products, regardless of whether the consumer knows anything about what he or she is purchasing. In addition, the specificity in the Court's analyzing the advertisement in question compensates for regulations that are formulated very broadly and loaded with ambiguity so that they can extend to all markets, independently of the particular characteristics that a specific market may have. In other words, an analysis of context reduces the divide between our abstract laws and the particular situational problems that arise in different, complex social contexts.<sup>78</sup> In other words, contrary to the Court in *Virginia State Board*, the Court of Justice seems to have a solid understanding of the implications of market assumptions on market performance.

For example, pay attention to the way the Court of Justice approaches the legality of the advertising in question:

“The limits on the use of such statements are specified, in particular, by Articles 87(3) and 90 of that directive. Article 87(3) of Directive 2001/83 requires that advertising should encourage the rational use of the medicinal product by presenting it objectively and without exaggerating its properties and that it should not be misleading. Article 90 of that same directive contains, for its part, specific directions regarding the content of advertising for medicinal products, prohibiting the use of various specific types of material.”<sup>79</sup>

As interpreted by the Court, the previous regulations seek to evaluate the quality of information in the current pharmaceutical market. Notice the difference from the aforementioned Supreme Court cases, in which the quality of information was not analyzed, and instead assumed benign. In addition to the Court of Justice's analysis of the quality of information available to consumers in the market, the Court also considers implications of different levels of consumer rationality:

“[T]he advertising of a medicinal product by means of prize draws encourages the irrational and excessive use of that medicinal product, by presenting it as a gift or a prize, thus distracting the consumer from an objective evaluation of whether he needs to take such medicine.”<sup>80</sup>

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<sup>78</sup> See Nim Razook, *supra* note 12.

<sup>79</sup> See Case C-374/05, *Gintec International Import-Export GmbH v. Verband Sozialer Wettbewerb eV*, 2007 ECJ CELEX LEXIS 852, at 36 (2007).

<sup>80</sup> *Id.* at 56.

Here the Court is careful to not assume that consumers necessarily behave rationally. That is, consumers might be forced to make choices in market contexts where they are naturally swayed towards making a particular purchasing decision without fully considering the costs and benefits. When consumers make decisions without carefully weighing the costs and benefits, purchasing decisions can result in a misallocation of resources. In the U.S., an individualistic culture where the individual is usually assumed to be an autonomous, careful thinker, courts and policy-makers have a tendency to believe that if a consumer buys something, then they “chose” to do so knowing the potential costs of the choice. Contrarily, the Court of Justice seems to be more hesitant to embrace the assumption that consumers act rationally in all markets without first considering the many ways a “choice” can be distorted by deceptive advertising.

Another difference in the reasoning of the Supreme Court and Court of Justice is in each court’s willingness to assume that sellers are benign and provide honest information. For example, look at the way the Court of Justice interprets the directive (law) in question:

“The directive must therefore be interpreted to the effect that a Member State may not provide, in its national legislation, for an absolute and unconditional prohibition, in the advertising of medicinal products to the general public, on the use of statements from third parties, whilst their use can be limited, under that same directive, only by reason of their specific content or the type of person making the statement.”<sup>81</sup>

Underlying the Court’s interpretation is the assumption that all markets are not the same. One cannot entirely prohibit or allow all advertising, without evaluating the particular characteristics that contribute to the pharmaceutical market. The Court acknowledges that certain conditions necessitate specific regulations. Hence, its conclusion:

“[Community law] requires Member States to provide, in their national legislation, for a prohibition on the use, in the advertising of medicinal products to the general public, of statements from third parties where those refer, in improper, alarming or misleading terms, to claims of recovery...[and] prohibit the advertising of a medicinal product by means of a prize draw announced on the internet, inasmuch as it encourages the irrational use of that medicinal product...”<sup>82</sup>

The previous quote reveals the ECJ’s tendency to acknowledge the complexity of consumer decisions. Because of the Court’s considering the many ways a consumer can be swayed into making irrational choice, the Court of Justice demonstrated a more robust understanding of the ambiguous nature of “the market.” Like the Supreme Court, the Court of Justice could very well have assumed competitive market conditions, consequently, waving the regulations in question in favor of the “free flow of information.” But such a decision might have actually hindered consumers from making informed, intelligent choices. Fortunately, the

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<sup>81</sup> *Id.* at 39.

<sup>82</sup> *Id.* at 52 & 59.

Court of Justice took one more step and analyzed the prevailing market conditions.

*B. Societe d'Importation Edouard Leclerc-Siplec v. TF1 Publicite SA and M6 Publicite SA*

The present case, hereinafter *Societe d'Importation*, provides yet another example of the difference in the U.S. Supreme Court's and the European Court of Justice's approaches to the regulation of the market. Conflict in this ECJ case commenced when Leclerc-Siplec, a distributor of petrol and other fuels in France, asked TF1 Publicite and M6 Publicite, two advertising companies, to run advertisements about Leclerc-Siplec over television.<sup>83</sup> The advertising companies, however, refused because French Law prohibited such advertising in the distribution sector. In response, Leclerc-Siplec sought action against the two advertising companies, on the grounds that the French regulations in question were not compatible with European Community Law provisions on freedom of expression, free movement of goods, and competition, which would allow the advertising in question. The Tribunal de Commerce de Paris, thus, referred the issue of compatibility to the Court of Justice.

To determine whether the advertising in question should be permissible, and generally whether national law trumps Community Law, the Court of Justice first clarified the significance of advertising in markets. Particularly, it pointed out that advertising, in its ideal form, is necessary for a market to be able to meet the diverse needs of consumers; advertising is essential for the consumers to be able to signal sellers what it is they want produced. Without this signaling process, sellers simply could not know what it is that consumers demand. In its explanation about the meaning of advertising, the Court of Justice even referenced a Supreme Court case that expressed the need to promote "the free flow of commercial information."<sup>84</sup> However, contrary to the Supreme Court, the Court of Justice expressly noted the importance of assuring that such commercial information was not deceptive or harmful to consumers:

"The recognition that freedom to advertise is an essential corollary to the fundamental freedoms created by the Treaty does not of course mean that Member States are prevented from regulating and restricting advertising. On the contrary, Article 36, supplemented by the case-law on "mandatory requirements", provides ample scope for Member States to subject advertising to reasonable restrictions. These may be based inter alia on the protection of health, public morality, consumer protection and

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<sup>83</sup> See Case C-412/93, *Societe d'Importation Edouard Leclerc-Siplec v. TF1 Publicite SA and M6 Publicite SA*, 1994 ECJ CELEX LEXIS 327 (1994).

<sup>84</sup> *Id.* at 19 for the European Court's reference of a U.S. Supreme Court case (*Virginia State Board*):

"So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."



fair trading, and protection of the environment. There is thus no reason to fear that by recognizing a general principle of freedom to advertise the Court will deprive Member States of the power to curb the worst excesses of the advertising industry.”<sup>85</sup>

The difference in the above reasoning from the previously visited Supreme Court cases is the recognition some forms of advertising are detrimental in markets. By considering the quality of product information, the Court of Justice acknowledges how the meaning of “freedom to advertise” (or freedom of expression) should be interpreted depending on the relevant advertising in question. In other words, sometimes the words “freedom to advertise” are used to mean freedom from government regulation—this reification of “freedom” does not necessarily insure that consumers have access to benign information. Contrarily, as the ECJ points out, “freedom” might necessitate the use of regulations such that sellers provide full product information—this reification of “freedom” insures that consumers have the ability to make well-informed decisions. The two aforementioned types of “market freedom” can also be generally labeled negative and positive freedoms. But only the latter, that freedom that considers a consumer’s capability to make a knowledgeable decision, is the one which is fundamental for a competitive market to abide by consumer sovereignty.

After addressing how positive freedom through regulation enables consumers to make adequate market decisions, the Court goes on to question whether the advertising regulation enacted by the French government hinders intra-Community trade, as set forth in Article 30 of the Treaty. To provide a substantive answer to the referring French Court, the Court of Justice appropriately warns us that the effects of the regulation on the structure of the prevailing market should be analyzed. In particular, the issue that brings Article 30 to the picture is that an advertising regulation might give an advantage to domestic companies over external companies, or vice-versa:

“If it [the advertising regulation] creates a substantial barrier to the entry of goods manufactured in another Member State, then it is incompatible with Article 30 unless justified on grounds recognized by Community law. If, on the other hand, a partial ban on advertising has no substantial effect on inter-State trade and does not constitute a barrier to market penetration for imported goods, there is no objection to excluding it from the ambit of Article 30.”<sup>86</sup>

Notice that the above reasoning not only demonstrates an awareness of market structure, specifically, the competitive market condition that there be easy entry and exist in markets, but the Court also pleads for an analysis of the prevailing market: “Once it is recognized that there is a need to limit the scope of Article 30 in order to prevent excessive interference in the regulatory powers of the Member States, a test based on the extent to which a measure hinders trade

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<sup>85</sup> *Id.* at 22.

<sup>86</sup> *Id.* at 52.

between Member States by restricting market access seems the most obvious solution.”<sup>87</sup> The previous logical move, i.e. requiring a test to measure the extent to which a regulation hinders trade, is necessary to determine the efficacy of a market, and consequently, distinguishes the ECJ court from previous U.S. Court decisions.

In the end, the Court of Justice eventually finds that the effects of the regulation in question are insubstantial in terms of affecting market trade because the advertising regulation applies to all firms equally; therein, complementing the structural goal of maintaining equally distributed power among firms. Further, the regulation in contention was found to not debilitate a market from advertising, which, as was made clear in the beginning, is essential for a market to meet consumer needs. Rather, the court’s decision hinged on its robust understanding of “consumer freedom” in different market contexts. That is, the Court advocated a regulation that would promote the positive type of freedom that allows the consumer to thrive:

“On the contrary, the general scheme of the directive is to pursue the aim of free movement of television broadcasts by laying down a minimum standard and leaving the Member States free to regulate broadcasters under their jurisdiction more stringently.”<sup>88</sup>

In the Supreme Court cases previously analyzed, allusions to “freedom,” as referred to in the previous quote, were used in ways that opposed any regulation because information was assumed benign. But the Court of Justice, cautious in assuming optimal market conditions and honest sellers, acknowledged that positive market conditions must be established if consumer choice is going to be enhanced; hence, the Court’s laying down a minimum standard in advertising for consumers. This sensitivity to the complexity of market logic and market freedom lead to the Court’s finding that the regulation in question was essential to achieve a competitive market. Consequently, the Court ruled in favor of the French Legislation, having found no evidence that the prevailing market as it stood had legal implications contrary to Community Law.

*C. Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorit[#224] per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*<sup>89</sup>

The final European Court of Justice Case, hereinafter *Europa*, analyzed in this paper involves the allocation of radio frequencies. The dispute in the present case arose when Centro Europa 7, a broadcasting company which held rights to radio frequencies, claimed that it had suffered from being denied the allocation of radio frequencies. Hence, Centro Europa 7 sought compensation. The defendants, including the

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<sup>87</sup> *Id.* at 42.

<sup>88</sup> *Id.* at 70.

<sup>89</sup> See Case C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorit[#224] per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, 2008 ECJ EUR-Lex LEXIS 2280 (2008).

Communications Regulatory Authority, posited that they had not done anything unlawful, according to national legislation. In response, the complainant alleged that such national law was incompatible with Community Law's provisions on "freedom to provide services and competition."<sup>90</sup> As such, the existence of competitive market conditions is crucial as to whether *Centro Europa 7* is deserving of reparation. The Italian Council of State referred to the Court of Justice for a preliminary ruling on the issue.

Contrary to the great trust that was placed on "market forces" in aforementioned Supreme Court cases without analyzing the context of those forces, the Court of Justice in *Europa* displays more sensitivity to the importance of market structure. For example, when attempting to make its ruling, the Court acknowledges its limitations, which prevents it from answering certain questions pertaining to market regulation. The Court, thus, posits that the referring court should "explain the factual circumstances on which those questions are based... Those requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations."<sup>91</sup> In this instance, the Court seems to be aware of the complexity of "the market," and consequently, that certain markets have particular implications.

From the information that the referring court did provide, however, the Court attempted to make a ruling. The important difference here between the European Court and the U.S. Supreme Court is the formers perseverance to analyze the nature of the prevailing broadcasting market:

"First, those radio frequencies were [\*46] allocated de facto to the incumbent networks under the transitional arrangements adjusted in Article 3(7) of Law No 249/1997, even though some of those networks had not been granted rights under that Law... Secondly, operators such as *Centro Europa 7* were not allocated radio frequencies even though they had been granted rights under that Law."<sup>92</sup>

The previous analysis brings to the open a crucial assumption of the competitive market; that of there being evenly distributed power among firms. The Court acknowledges that incumbent companies in the broadcasting market have an advantage in the allocation of radio frequencies. This, in turn, disrupts the competitive market mechanism because firms are can retain their positions in the market without necessarily having consumers demand entertainment from those broadcasting companies. In other words, consumer sovereignty is hindered because they have little voice regarding the fate of businesses. The Court, however, explains:

"[T]he assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria!"<sup>93</sup> Further, based on the Court's limited analysis,

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<sup>90</sup> *Id.* at 29.

<sup>91</sup> *Id.* at 32-33.

<sup>92</sup> *Id.* at 45-46.

<sup>93</sup> *Id.* at 45.

“the allocation of radio frequencies to a limited number of operators was not carried out in accordance with such criteria.”<sup>94</sup>

Notice the careful consideration to the structure of the market in question that the Court of Justice displays; whereas, the Court in *Listener’s Guild*, for example, trusted market forces that had not been analyzed. The Court of Justice emphasizes the need to compare the prevailing market with objective and non-discriminatory criteria; in other words, with the criteria that respect competitive market conditions. Such avoids, in this case, overlooking the socially adverse effects of a few firms having primary control over the allocation of radio frequencies. Consequently, contrary to the Court in *Listener’s Guild*, for example, the Court of Justice accounts for the structural conditions necessary for a market to fulfill the diverse interests of consumers. In conclusion, the Court in *Europa* readdresses the importance of market analysis:

“[T]he Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, [\*50] non-discriminatory and proportionate criteria.”<sup>95</sup>

In other words, here the Court concludes that national governments cannot encourage legislation that grants companies broadcasting rights, when there are no radio frequencies to allocate. Thus, Centro Europa 7 suffered an unfair loss, because it was denied radio frequencies in the broadcasting market, which the national court apparently overlooked when granting licenses.

The Court of Justice does not make a definite decision regarding compensation because it acknowledges that first the national court must robustly analyze the broadcasting market, and then decide on the most optimal way to allocate radio frequencies to Centro Europa 7. Had the Court assumed perfect competition, then the Court might have ruled against Centro Europa 7, and consequently, consumers may have been prevented from a greater diversity of entertainment formats.<sup>96</sup>

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<sup>94</sup> *Id.* at 45.

<sup>95</sup> *Id.* at 49-50.

<sup>96</sup> From a Western perspective, the beauty of “the market” is its ability to accommodate the many different tastes and preferences of a diverse population. In other words, in theory, markets provide the many goods and services which consumers want or need. Consequently, “the market” provides an arena that respects the diverse preferences of particular individuals. Recent studies seem to suggest that “the market’s” strong individualistic foundation aligns itself particularly with the values implicit in “American culture.” *E.g., see* Sharon Begley, *West Brain, East Brain: What a difference culture makes*, Newsweek, February 18, 2010. In this article, Begley highlights the important role that American culture plays in the moral development of this country’s citizens. Begley refers to several cultural neuroscientific studies to distinguish the individualism-collectivism split between Western and Eastern culture. For example, one study found that when shown certain pictures (representing the individualism-collectivism split), Asian-Americans and non-Asian Americans activated different brain regions.

*Also see* Jonathan B. Freeman, Nicholas O. Rule, Reginald Adams Jr. & Nalini Ambady, *Culture shapes the mesolimbic response to signals of dominance and subordination that associates with behavior*, 47 *NeuroImage* 353 (2009), for a recent study revealing results

Fortunately, the Court's appreciation for market structure led to a judgment that acknowledged the conditions that promote consumer sovereignty.

The overarching point that this comparative analysis has attempted to make is that the European Court of Justice seems to demonstrate more sensitivity to the complexity and ambiguity of "the market" in contrast to the U.S. Supreme Court. This paper does not argue that the European Court of Justice is flawless in its analyses regarding economic regulation.<sup>97</sup> Rather, the point is to suggest that the

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similar to those referenced by Begley. Freeman et al. performed an experiment in which they showed pictures of people in submissive positions and dominant positions to Japanese and American subjects, and then studied each subject's brain activity. The authors found that the brain's dopamine-fueled reward circuit became most active when human subjects saw stances that reflected their cultural values the most; Americans being more responsive to the dominant position, Japanese to the submissive position. The American preference for dominant positions suggested a strong individualistic mindset.

An abundance of studies exist suggesting a link between Western culture and individualistic tendencies. For example, see R. J. Lewicki & R. J. Robinson, *Ethical and unethical bargaining tactics: An empirical study*, 17 J. Bus. Ethics 665-682 (1998), who's study revealed that U.S. MBA students were generally more acceptant of competitive and hostile negotiating conditions than were non-U.S. business students. See C. H. Tinsley & M. M. Pillutla, *Negotiating in the United States and Hong Kong*, 29 J. Int. Bus. Stud. 711 (1998), for a study that found similar individualistic traits in American negotiations compared to the more collective-oriented Hong Kong Chinese negotiators. See S. J. Heine, T. Takata & D. R. Lehman, *Beyond self-presentation: Evidence for self-criticism among Japanese*, 26 Pers. Soc. Psychol. B. 71 (2000), who suggest that Canadian students are more reluctant to accept that they had performed below the average of the class than were Japanese students, who were actually reluctant to conclude that they had performed above average in comparison to the class. The self-criticism of the Japanese students was linked to a more collective mindset; on the other hand, the Canadian mindset was more likely to reveal threads of individualism.

The tendency of the abstraction of "the market" to align itself with U.S. values, thus, seems to appeal particularly to Western tastes. Individualism puts the consumer in control because individualism implies that people have control over their circumstances and lives—the competitive market conditions focus on empowering consumers to have the kind of "control" touted by individualism. However, as revealed throughout this paper, the competitive market and the resultant power it gives consumers relies on several tenuous assumptions. When the competitive market assumptions fail, then power shifts from consumers to sellers.

<sup>97</sup> E.g., see Case C-362/88, *GB-INNO-BM v. Confederation du commerce luxembourgeois*, 1990 ECJ CELEX LEXIS 177, 2, 10, 11, 15, 17, 18, 19 (1990) (in which the Court of Justice seems to overlook market structure in its ruling.)

The proceedings in this case began when Confederation du commerce luxembourgeois (CCL), a non-profit corporation, brought action against the GB-INNO-BM, a Belgian company that operates in Belgium and Luxembourg, for advertising leaflets in Luxembourg in a particular way that was against national law; viz., the regulation posited that "sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices." The district court in Luxembourg that first dealt with the dispute ruled in favor of the CCL, upholding the national advertising restrictions. The GB-INNO-BM appealed to the Cour de cassation, which sought clarification from the European Court of Justice as to whether Article 30 of the EEC Treaty precluded the previous injunction of advertising. Article 30 essentially prohibits any restraint of the free movement of goods from one nation-state to another.

In this case, the Court of Justice's acknowledgment of market structure is only a little better than that of the U.S. Supreme Court examples previously presented; it too

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falls victim to assuming certain ideal market conditions. To answer the prior courts question regarding Article 30, the Court first considers when obstacles to the free movement of goods may be justified:

“[O]bstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules... may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or the fairness of commercial transactions.”

Towards this end, the CCL as well as the district court posited that the regulation of advertising was in the interest of the consumer; i.e., to avoid the consumer from being confused as well as shown exaggerated prices. In fact, here the Court expresses the sensitivity required so that regulations are realized in terms of consumer welfare.

Next, the Court even explains the link between consumer well-being and his access to adequate information (essentially, touching on the underlying theme of this paper):

“The existence of a link between protection and information for consumers is explained in the introduction to the second programme. There it is stressed that measures taken or scheduled in accordance with the preliminary programme contribute towards improving the consumer's situation by protecting his health, his safety and his economic interest, by providing him with appropriate information and education, and by giving him a voice in decisions which involve him.”

Clearly, the Court seems to acknowledge that depending on certain market characteristics, in this case consumer information and rationality, certain regulations might be necessary to ensure consumer sovereignty. However, the Court seems to take a faulty turn in its final step in this case. The Court decides to assume that the prevailing market is one composed of rational individuals as well as benign sellers who provide honest product information:

“As the Court has held, a prohibition against importing certain products into a Member State is contrary to Article 30 where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts”

Based on the Court's final decision, here the Court seems to assume that companies will provide labels that are readable and understandable. Further, the Court also assumes that consumers will be able to figure out if certain labels are genuine; after all, the advertising regulation by the Luxembourg government was based on “the fact that the consumer is not normally in a position to check that a previous reference price is genuine.”

The Court's refusal to analyze market structure yet adhere to optimal conditions in which the “free movement of goods” would benefit the consumer can be seen in the following concluding statement:

“It follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection...In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection.”

The Court reasons that providing the consumer with information is in his or her interest. However, the Court relies on the unanalyzed assumption that that information

Supreme Court seems to be lagging behind court systems like the European Court of Justice in their legal analyses of “the market”—a potential reason being that the former court system seems to give less consideration to market structure than the latter.

## V. A KEY DIFFERENCE BETWEEN THE EUROPEAN AND U.S. COURTS: ALL MARKETS ARE NOT COMPETITIVE MARKETS

The European Court of Justice cases highlighted in this paper all sought to discern the structure of the market in question. On the other hand, the three Supreme Court cases seemed more inclined to simply assume competitive market conditions. Had those conditions been valid in the markets they were discussing, the Supreme Court’s appeal to “the market” may very well have been justified. Unfortunately, though, the Supreme Court’s line of reasoning relied on yet another assumption; i.e., that all markets mimic the abstract model of the competitive market.

Only the previous assumption would logically justify the Supreme Court’s inclination to assume competitive market conditions without analyzing market structure. If the Court did not assume that all markets mimic the conditions of the competitive market, then it would not make sense for the Court to appeal to the market as a socially benign tool—the existence of monopolies and oligopolies makes it quite clear that “the market” can very quickly become detrimental to society. But when the Court assumes competitive market conditions, it necessarily assumes many things: perfect information, rational consumers, equal wages, no externalities and equal power distribution among firms. These characteristics have the potential to be verified by studying the specifics of the market in question. The implications of this study suggest that the European Court of Justice gave greater consideration to these market particulars, which in the aggregate define a market structure, than the U.S. Supreme Court.

One potential factor for the difference in market reasoning in the U.S. and Europe could be that U.S. judges more often than European judges incorporate oversimplified market language into their writing. For example, in several instances the Supreme Court used “freedom” in ways that made any forms of regulation seem coercive. The ability of freedom to be enhanced by regulations was discarded because of an oversimplified definition of freedom as “negative liberty.”

Another related factor contributing to the European Court’s surpassing the Supreme Court in the legal analysis of “the market” may be that U.S. judges seem to struggle more to step away from their underlying psychological and cultural biases that potentially have

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is clear and honest, leading it to favor the prescriptions in Article 30 favoring the free movement of goods. Again, in other words, the advertising is assumed “lawful” and, thus, market conditions competitive or “fair.” The Court seems to believe that merely mentioning certain optimal market conditions is enough to validate that intra-Community trade is carried out in a way that is favorable to consumers. However, refusing to analyze the actual performance of the prevailing market could result in the Court relying on false presumptions; consequentially, weakening consumer sovereignty.

significant determinative effects on court decisions.<sup>98</sup> A strong belief in individualism, the idea that humans are in control of their own destinies, is highly consistent with the perfect competitive model where consumers pick and choose what goods will satisfy their utility function. However, a belief in individualism hardly approaches a discriminate analysis of market structure to determine the market conditions in reality mimic the conditions of the perfectly competitive market.<sup>99</sup> In other words, from an economic perspective, to appeal to the competitive market requires empirical validation.<sup>100</sup>

There are numerous reasons that exist for the diverging approach to the economic analysis of the law in the U.S. and Europe. This paper has emphasized that a court's willingness to assume that all markets resemble the competitive form of the market results in decisions that might support malignant forms of the market—this tendency seems to be more American than European.<sup>101</sup> But by robustly paying attention to

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<sup>98</sup> See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 Amer. Polit. Sci. Rev. 323 (Jun. 1992). George and Epstein highlight that there are two types of models that gravely influence how judges conceptualize the law: The legal and extra-legal models. The former stance posits that stare decisis is the fundamental determinant of Court decisions. In other words, the Courts always follow precedent, and judges have little say, if any, in the determination of cases; all reasoning is analogical. The extra-legal model, on the other hand, sees limitations in the doctrine of stare decisis. Court decisions are underlied by external and internal non-legal factors. External factors include the “repeat player” effect when certain attorneys become familiar with judges, pressures from the larger political environment surrounding the court, and pressures stemming from congressional and presidential positions. Internal factors include personal attitudes, values and beliefs. The combination of these extra-legal factors leads the Court to deviate from only relying on precedent. The present study leads to the conclusion that the legal and extra-legal models provide equally good and co-dependent frameworks with which to assess Court decisions. This article's relevance to markets lies in the fact that certain extra-legal factors can influence judges to see things that they want to see, regardless of whether those things actually exist. Thus, in economic regulation cases, judges, because of internal biases, may be predisposed to appeal to glories of competitive markets without warrant.

<sup>99</sup> See Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2007) (exposing the influence that the personal experiences and ideological beliefs of our Supreme Court Judges in the past two decades have had on those Judges' legal determinations in the Court.)

<sup>100</sup> The failure of many legal scholars and judges to adequately analyze the market, though, could be grounded in a faulty conception of what constitutes the economic analysis of the law. See, e.g., Kenneth G. Dau-Schmidt and Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 Colum. J. Transnat'l L. 602, 620 (2006), in which the authors posit that “Europe currently lags significantly behind the United States in the economic analysis of law...” The authors' conclusion, however, seems to be based on the fact that U.S. culture tends to be more accepting of the rational actor assumption and less desirous for government intervention; whereas, European countries tend to be more critical of the rational actor assumption and demand more government regulation. The authors, in other words, evaluate the effectiveness of the economic analysis of law of the U.S. and Europe based on the cultural biases and moral codes that analysts adhere to, rather than the ability of these analysts to remove their cultural biases and analyze the true structure of “the market.” The authors unknowingly provide the logical foundation for overlooking market structure, yet appealing to “the market” as a means to consumer sovereignty.

<sup>101</sup> See Jerry Kang & Benedikt Buchner, *Privacy in Atlantis, Market Regulates Information Best*, 18 Harv. J. Law & Tec 229, 230-33 (2004), for a playwright-style scholarly discussion about the main opposing views on the regulation of privacy, i.e. “the dignity



market structure, courts can attempt avoid ungrounded generalizations about markets that neglect to face the realities of the complex world in which we live, made up of a diversity of terrains.<sup>102</sup>

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approach” and “the market approach.” For example, Kang & Buchner present the argument that “the market” can be trusted to determine how much privacy individuals are entitled to. Throughout the play, although not made fully explicit, one can see that both approaches rely on different assumptions about human nature and market structure. The underlying question that can be gleaned from the discussion is: Which approach yields assumptions that most adequately portray reality? This distinction guides one’s argument to be more government-bound or more market-bound.

<sup>102</sup> This failure is especially unfortunate because so many of those who criticize the social impact of “the market” engage in their own kind of simplification of “the market” when they deride the negative effects of market behavior. In other words, critics of “the market” tend to lash out at concentrated, imperfect markets as if they are the norm. Perhaps they are, but given the habit of assuming competitive markets on the part of much of American culture, it would seem that some evidence to that effect should be a mandatory inclusion in a denunciation of “the market” that is true only if markets are typically anti-competitive. See, e.g., Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (2000). Sennett, for example, is denouncing the tendency of large corporations to treat workers unethically. But the critique is more or less valid dependent upon the form of market that is typical in our economy.

In other words, in the same way “the market” is often assumed to be a benign instrument for a good society, antagonists of “the market” are often inclined to view “the market” solely as a social hazard. The present paper aims to progress past both of these views by emphasizing that the social implications of “the market” fundamentally rely on the validity of the underlying assumptions of the market one is talking about.

See, e.g., *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-12, (1935). In this case, the Court prohibits the appellant, a dental practitioner, from advertising to the public. The appellant, however, argues that “the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.” The Court, however, assumes that the dentist’s firm conducted its business in poor market conditions: “[I]t could not be doubted that practitioners who were not [\*612] willing to abide by the ethics of their profession often resorted to such [deceptive] advertising methods to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.” The Court essentially assumes little consumer rationality and faulty information, without actually analyzing the specific market conditions in which the appellant dentist conducted business. The Court relies on a pessimistic generalization of practitioners’ behavior, without giving particular attention to the behavior of the dental practitioner in question. For example, the dentist may have appealed to a higher class of people who were aware and informed enough to make an adequate decision about whether to seek the dentist’s services. Or the dentist may have actually provided high quality services; thus, making his advertisements credible. Nevertheless, the Court never analyzed the prevailing market conditions, making the Court’s final decision, at minimum, contentious.

See also *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 426 (1963), for yet another example of the way even those who claim to be regulating “the market” may assume the existence of certain market conditions without robustly analyzing the prevailing market structure. In this case, the Court affirms the New Mexico Supreme Court’s ruling that the appellant’s advertising violated a New Mexico consumer protection statute. The Court stated that the statute’s purpose was to “protect...citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes.” Thus, the Court ruled that the prohibition enplaced on the appellants did not unlawfully hinder interstate commerce. The problem is the court never analyzed the effect that the appellant’s advertisements had on people in New Mexico. The application of the aforementioned statute relies on the existence of devious advertising behavior. Had the appellant’s advertisements truly been deceptive and of a solely selfish nature, then yes,

## VI. CONCLUSION

*“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”*

*“The question is,” said Alice, “whether you can make words mean...many different things.”*

-Lewis Carroll in “Through the Looking Glass”<sup>103</sup>

The key logical difference between the legal analysis of “the market” in the European Court of Justice and the U.S. Supreme Court is the former’s apparent relative tendency to appreciate the ambiguity of market language.<sup>104</sup> That is, to realize that markets have the potential to accommodate many of our interests. But many forms of markets can be destructive to societies. When court systems acknowledge that different markets have different capabilities to meet communal needs, they move one step closer to formulating regulations and policies that lead to consumer-wellbeing.<sup>105</sup>

The fundamental logical move for courts to avoid the assumption that all extant markets mimic the ideal competitive market that meets consumer needs is to analyze the particular characteristics of the market in question that determine how power is among between consumers and sellers. Mainstream economics as well as the capitalistic ethic tell us that markets can be trusted only when consumer have an exclusive hold on market power. Hence, it follows that if legal scholars need to analyze markets to assure us that they reflect a distribution of power that leads to consumer sovereignty. Without such an analysis, a court risks potentially aligning itself with market forms that lead to the antithesis of consumer sovereignty, i.e., producer sovereignty. At the time being, the findings in this comparative study suggest that the European Court of Justice tends to be more sensitive to the robust link between market structures and consumer-wellbeing.<sup>106</sup>

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such action would threaten the optimality of market transactions. However, the Court assumed that the market would be better off without the advertisements having not analyzed the effects of those advertisements on the people in the particular market in question. An unhindered market was concluded, but the factual basis for that conclusion was never provided.

<sup>103</sup>Lewis Carroll, *Through the Looking Glass* 72 (1872), available at: <http://www.fecundity.com/pmagnus/humpty.html>

<sup>104</sup> See Don Mayer, *Community, Business Ethics and Global Capitalism* 38 Am. Bus. L. J. 215, 228-31 (2001), for a model of thoughtful scholarship concerning market structure and its implications on the well-being of consumers.

<sup>105</sup> See James F. Blumstein, *The Application of Antitrust Doctrine to the Healthcare Industry: The Interweaving of Empirical and Normative Issues*, 31 Ind. L. Rev. 91, 99 (1998), highlighting that “[b]ehavior is shaped by structural incentives, so observed consequences must be evaluated in the context of the institutional milieu in which the empirical observation is made. Thus, in considering the consequences of increased competition in a particular market, one must be aware of the institutional constraints on how competition is channeled before drawing policy conclusions.”

<sup>106</sup> See Harold Hongju Koh, *International Law As Part of Our Law*, 98 Am. J. Int. Law 43 (2004), for an important article highlighting the constructive role that transnational jurisprudence plays in the improvement of both domestic and foreign law. Further, Koh

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links U.S. law and the law of other countries by pointing out the similar values and moral principles that seem to underlie different countries which at first glance may seem like polar opposites. Because Koh sees that U.S. law and international law are united, he argues against those judges and legal practitioners who detest references to foreign law in U.S. courts. Thus, in summary, looking to the exterior gives us insight and expands our understandings about the way the certain laws can be applied in a seemingly infinite amount of contexts.

