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Commercial Speech and the Values of Free Expression

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EXECUTIVE SUMMARY

Commercial speech has become one of the most litigated and controversial areas of First Amendment protection. Yet the question of protecting such speech should not be in doubt. Controversy comes from a failure to recognize how commercial speech furthers the values implicit in the First Amendment's guarantee of free expression. To show how commercial speech advances free speech values, I adopt a "perspectives framework" for First Amendment theory. First Amendment values are appropriately viewed from four different perspectives: the speaker perspective, the listener perspective, the regulator perspective, and the rationalist perspective. Subsequently I will show how protecting commercial speech advances freedom of speech from each perspective; in contrast, rejecting or reducing constitutional protection for commercial speech contravenes the reasons each perspective values free speech.

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"Commercial speech protection serves foundational goals and premises of our democratic system."

INTRODUCTION

Over the last 40 years, the Supreme Court has extended an ever-increasing level of First Amendment protection to commercial speech. Indeed, it is difficult to find a Supreme Court decision upholding governmental suppression of truthful commercial speech in the last 25 years.[1] Yet the Court has continued to provide less protection for commercial speech than is given to traditionally protected categories such as political or artistic expression. Moreover, the scholarly community has, with only rare exception, been either grudging or downright hostile to extending constitutional protection to commercial advertising. Most, although not all, scholars believe that protecting commercial speech trivializes what the First Amendment is truly about,[2] reintroduces the threat to the smooth functioning of the regulatory system first presented by the specious and harmful pre–New Deal doctrine of economic substantive due process,[3] and risks diluting the strong protection traditionally given to more valuable areas of expression.[4]

Commercial speech has become one of the most litigated and controversial areas of First Amendment protection. The controversy arises from fundamental misunderstandings of the ways in which commercial speech furthers the values of the First Amendment's guarantee of free expression.

To understand the nature of the debate, it is necessary to understand how the Supreme Court has chosen to define the concept of commercial speech. The phrase does not include all expression concerning the relative merits of commercial products or services. Rather, the Court has confined the concept to speech that does no more than propose a commercial transaction.[5] Thus, speech either opposing a commercial purchase or neutrally describing the qualities of a commercial product or service receives full First Amendment protection,[6] while speech that directly promotes a purchase receives a reduced level of protection.[7]

Reducing or excluding First Amendment protection for commercial advertising contravenes core constitutional values of free expression. I intend to establish this conclusion by means of what I believe to be a fresh conceptual approach to understanding those values: what I call the "perspective" framework. By this I mean that I view the purposes served by free expression from four different focuses—the speaker-centric model, the listener-centric model, the regulatory-centric model, and the rationalist-centric model. Each of these models provides both a formal and intuitive normative basis for the constitutional guarantee of free expression. The conclusion I reach on the basis of the application of these four sufficient, but not necessary, perspectives is that commercial speech protection serves foundational goals and premises of our democratic system. Correspondingly, rejection of or reduction in the constitutional protection of commercial speech seriously threatens achievement of those goals.

THE EVOLUTION OF COMMERCIAL SPEECH PROTECTION

Prior to its watershed 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court had given short shrift to commercial speech.[8] In only one decision, *Valentine v. Chrestensen*, had the Court devoted anything approaching serious attention to the issue of First Amendment protection for commercial speech, and even there the analysis was, at best, cursory.[9] While the Court acknowledged that the First Amendment protected distributing noncommercial handbills, it summarily denied such protection to distributing *commercial* handbills. The Court reasoned that commercial advertising was merely ancillary to the proper performance of a business and could therefore be legislatively regulated in the public interest, much like all other business activities. *Valentine* was decided in 1942—the height of the New Deal period. The New Deal Supreme Court viewed one of its most important goals to be the dismantling of the conservative Court's economic substantive due process

regime associated primarily with *Lochner v. New York*.[10] It is therefore perhaps not surprising that the New Deal Court would tend to associate any constitutional protection of commercial activities with what it deemed to be the pathological and misguided framework derived from *Lochner.* In doing so, however, the Court appeared oblivious to the significant difference between *Lochner*-like property rights protection on the one hand and protection of commercial speech on the other hand. While *Lochner* and its progeny protected the commercial *conduct* of selling products and paying workers, *Valentine* involved *speech* by a commercial enterprise, informing its readers and listeners of truthful, and arguably valuable, information in much the same way that political expression seeks to inform and influence its recipients.

The situation remained this way, with only minor change, until the Court's decision in *Virginia Board.* There the Court invalidated the state's prohibition on prescription drug advertising as a First Amendment violation. "Advertising, however tasteless and excessive it sometimes may seem," the Court wrote, "is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[11] But while the decision was in many ways a constitutional breakthrough, subsequent decisions quickly made it clear that the Court was providing "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[12]

In its 1980 *Central Hudson* decision, the Court established a four-pronged test to determine whether commercial speech regulation violates the First Amendment, a test that for approximately the next 12 years shielded commercial speech far less than other protected expression.[13] There can be no doubt that the *Central Hudson* test as applied today provides dramatically greater protection than it did in its early years.[14]

Yet the protection given to commercial speech remains below the "compelling interest" standard that protects such categories as political and artistic expression, and equally noteworthy, leading free speech scholars doubt or deny the case for protecting commercial speech.[15] Such skepticism is both unfortunate and unjustified. Commercial speech fosters important First Amendment values that are improperly ignored or dismissed by those who wish to give commercial speech second-class First Amendment protection. A detailed exploration of the Supreme Court's definition of commercial speech shows such skepticism is wholly unwarranted.

DEFINING COMMERCIAL SPEECH

We need to understand the Court's definition of commercial speech to understand its differences from protected expression. While the Supreme Court has on different occasions employed varying, sometimes inconsistent definitions, for the most part it has defined commercial speech as speech that does "'no more than propose a commercial transaction.'"[16] This definition has a significant drawback. The distinction between promotional and nonpromotional commercial speech suggests both the Court and the scholarly community are discriminating against profit-motivated expression. Yet in no other area of free speech jurisprudence has it ever been held that the First Amendment discriminates against speech that is motivated by self-interest, either financial or otherwise. Individuals who advocate for a reduction in their taxes will often be acting out of financial self-interest, yet no one would seriously challenge full First Amendment protection for their advocacy. Indeed, the speech of every candidate for political office could easily be seen as inherently self-promotional.

More ominous is the dangerous viewpoint discrimination that inheres in the prevailing definition. A speaker *opposing* a commercial transaction presumably possesses a full First Amendment right to speak. For example, Ralph Nader has full constitutional protection for his criticism of the safety of the Chevrolet Corvair; however, if General Motors sought to defend

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“A commitment to free expression both reflects and implements a belief in the ability of adult individuals to judge for themselves the wisdom or persuasiveness of competing viewpoints.”

the safety of its product, it receives only the reduced protection given to commercial speech.[17] When the press criticizes Nike for using sweatshop labor in its foreign plants, its expression receives full First Amendment protection. Yet when Nike seeks to defend its practices, its arguments merit only the lesser protection afforded commercial speech because the ultimate purpose and effect of the speech is to promote product sale. It is hard to view such a distinction as anything more than a categorical attack on capitalistic expression—hardly an acceptable basis for stratifying First Amendment protection. Such a dichotomy in constitutional protection is inherently pathological. As I have previously written, “[v]iewpoint based regulations are, by definition, grounded not in a principled effort to interpret and apply the structural values underlying the free speech protection but rather in a subjective assessment of moral and/or sociopolitical considerations that are external to the First Amendment. Those considerations necessarily grow out of normative concerns that exist wholly external to the First Amendment.”[18] As Justice Scalia reasoned, in a world of viewpoint regulation, one side of the debate is forced to fight according to Marquess of Queensbury Rules, while the other side may hit below the belt.[19]

It is likely for this reason that in *Sorrell v. IMS Health, Inc.*[20] the Supreme Court subjected discrimination against commercial speech to strict scrutiny.[21] The state statute in question discriminated among speakers, favoring nonmanufacturer expression concerning prescription drugs over speech by manufacturers. But the Court overlooked an implication of its analysis: if discriminatory *regulation* of expression is constitutionally suspect, then discriminatory *protection* must logically be deemed equally questionable. Yet that is exactly what the Court’s own approach to First Amendment protection to commercial speech achieves. For while the level of constitutional protection extended to commercial speech has grown dramatically in recent years, it would be inaccurate to suggest that it has reached the level of full protection.

COMMERCIAL SPEECH AND THE THEORY OF FREE EXPRESSION

Let’s begin our case for protecting commercial speech by setting out a theoretical baseline, a foundation of normative precepts without which the protection of expression would be rendered either trivial or meaningless. These precepts postulate that a commitment to free expression both reflects and implements a belief in the ability of adult individuals to judge for themselves the wisdom or persuasiveness of competing viewpoints. A commitment to free expression presupposes an equally strong commitment to a principle of democratic self-rule, for neither free expression nor democracy would be of significant meaning or value absent the other. Both precepts are grounded in a normative commitment to the dignity of the individual citizens who, acting within the bounds of democratic government, contribute to the shaping and achievement of the goals they have set for themselves and for democratic society more generally.

Linking free expression and democratic government might seem a strange way to justify full First Amendment protection for commercial speech. One could argue that the matter of speech by “a seller hawking his wares” lies far from the heart of the democratic process.[22] It is thus not surprising that years before *Virginia Board,* a leading First Amendment scholar summarily concluded that “[c]ommunications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression.”[23] The opposite is true. Commercial speech substantially engages citizens on matters of public concern and debate (for example, issues surrounding governmental regulation of such high-risk industries as drug manufacturing), and correspondingly, governmental suppression of commercial speech undermines such progress in much the same way that suppressing traditionally protected categories of expression does. Why? Commercial speech, much like speech directly concerning collective self-government, reflects a belief

in individuals' ability to govern their lives and their right to seek to influence others, who, in turn, have the ability and right to make choices for their own lives.

My conclusions are best understood and defended by fashioning and explaining what I call the "perspective framework" approach to the theory of free expression. This framework significantly departs from traditional approaches to First Amendment theory. Generally First Amendment scholars use a functionalist categorization methodology. For example, some scholars may draw sharp lines between speech tied directly to the political process and to other subjects of expression.[24] Other scholars focus instead on expression that furthers individual liberty or self-realization.[25] Still others see free expression as fostering a variety of pragmatic goals.[26]

To be sure, my framework subsumes at least some of the factors included in the more traditional functionalist categorization approach. The functionalist categorization approach begs a central question: to posit the special position of political speech assumes away the very issue subject to debate—namely, whether political speech is, in fact, special. My perspective framework does not assume the answer to that disputed question. Rather, it posits four significant perspectives to inform the issue of whether commercial speech merits as much protection as noncommercial expression. This perspective framework compels the conclusion that commercial speech merits full First Amendment protection.

THE PERSPECTIVE FRAMEWORK

My perspective framework comprises the speaker-centric perspective, the listener-centric perspective, the regulatory-centric perspective, and the rationalist-centric perspective. The speaker-centric perspective focuses on how freedom of expression fosters the democratic needs and interests of the speaker. In contrast, the listener-centric perspective considers the liberal democratic values fostered for the recipient of the expression. The two are by no means necessarily the same. An expression that has no value to a recipient could still have value to a speaker—for example, writing in a private diary. In contrast, speech without value to a speaker might benefit a recipient in ways that further recognized values of free expression. For example, when a corporation disseminates communication, the developmental benefits traditionally associated with free speech are remote at best. But the recipient of that corporate expression can benefit substantially from the educational, informative, or thought-provoking impact of that corporate communication. However, when viewed as an organic whole, the two perspectives reflect the First Amendment's commitment to individual development, growth, and self-government. These benefits can derive equally from individuals' participation in collective self-government and the individuals' control of their personal affairs—what I have long referred to as "private self-government."[27] In a pragmatic manner, speech simultaneously enables speakers to achieve their goals by persuading others, and speech enables listeners to reach collective or personal choices by absorbing information and opinion.

The regulatory-centric and rationalist-centric perspectives add an entirely different analytical framework. The speaker-centric and listener-centric perspectives focus on the direct impact on the specific participants. The regulatory-centric and rationalist-centric perspectives consider broader, more systemically pervasive values and concerns. The regulatory-centric perspective posits that government may not do some things and still remain a liberal democracy. Some regulations of expression may undermine the democratic system by manipulatively skewing public debate. Others will do so by imposing a paternalism that contravenes the liberal democratic social contract between government and citizen. Both sorts of regulations must be invalidated to preserve liberal democracy.

The regulatory-centric perspective reflects what I have referred to as optimistic skepticism—a somewhat paradoxical belief

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"Protecting commercial speech serves numerous other values apart from those of the speaker."

in both the possibilities of human flourishing and, simultaneously, the dangers of the dark side of the human personality.[28] Humans can develop their intellectual and moral faculties by participating in the control of their lives.[29] This perspective also simultaneously recognizes the never-ending danger of tyranny that would crudely and inevitably disrupt the benefits of a liberal democratic system.

This paradoxical belief led the Constitution's Framers to diffuse political power to deter the creation of tyranny.[30] They divided power both laterally, within the three branches of the federal government, and vertically, between the federal and state governments, to deter or disrupt its concentration in the hands of one individual, group, or faction.

The regulatory-centric perspective is essential to the First Amendment's guarantee of free expression. Tyranny is likely to begin once those in power suppress views counter to their own. Thus, the Supreme Court has looked for red flags when expression is restricted. For example, the First Amendment categorically prohibits suppressing speech because a viewpoint is offensive.

The rationalist-centric perspective, in contrast, is best seen as a means to deter or prevent such regulatory-centric pathologies of government. This perspective provides a check on the rationales for offering different levels of First Amendment protection to various expressive categories. In a sense, the rationalist-centric perspective can be seen as a type of policeman, designed to ensure that the differences between levels of protection are neither under- nor overinclusive, and are not merely guises for regulatory hostility to the ideology or viewpoint of the suppressed expression.

The same logic applies to selective protection of expression. If a court chooses to extend First Amendment protection to picketing on the part of socialists, it cannot deny the same to anti-socialist demonstrators absent some non-ideological, principled basis for the distinction. Finally, the regulatory-centric model prohibits government from imposing restrictions on the expression of truthful information or advocacy to adult recipients for fear that those recipients might make the "wrong" decision—at least when that ensuing decision is lawful.[31] Such paternalistic motivations are inherently inconsistent with the notion of free citizens, who are worthy of dignity and respect.

For these reasons the Supreme Court has said that underinclusive regulation of expression violates the First Amendment.[32] Government cannot, for example, suppress burning of the American flag in order to prevent fires when burning the flag of any other nation gives rise to the very same danger. Such non-ideological rationales for suppression thus mask what is in reality an ideologically- driven selectivity that is anathema to the foundations of free expression in a democratic society. The rationalist-centric perspective enables a reviewing court to free constitutional analysis from ideologically driven disingenuousness and manipulation.

I will now apply the four perspectives to consider whether commercial speech should receive either less constitutional protection than more traditionally protected categories, or no protection at all.

THE SPEAKER-CENTRIC PERSPECTIVE AND COMMERCIAL SPEECH

Many observers believe commercial speech should be denied the protections accorded other expression because the speaker derives none of the benefits the First Amendment is designed to protect. Even if this were true, it would not necessarily follow that protection for commercial speech should be reduced or denied. Protecting commercial speech serves numerous other values apart from those of the speaker. We should see the various perspectives discussed here not as necessary, but as sufficient, conditions to trigger constitutional protection. Thus, even if expression does not advance the values underlying the speaker-centric perspective, it still deserves full protection if, for example, it fosters the values advanced by either the listener-centric

or regulatory-centric perspectives. Indeed, one of the leading free speech scholars of all time, Alexander Meiklejohn, grounded First Amendment right of free expression normatively in the listener's interest in receiving information and opinion so as to participate in self-government.[33] The Supreme Court has often echoed Meiklejohn's thinking.[34] Although perhaps unduly limited, this argument shows that even in the absence of First Amendment value to the speaker, expression may often serve valuable First Amendment interests. If *any* of the values underlying the First Amendment are threatened or undermined by governmental suppression of expression, the First Amendment will have been violated. That said, commercial speech does foster speaker-centric values.

Scholars have suggested two reasons why commercial speech fails to advance speaker-centric values. Initially, C. Edwin Baker long ago suggested that the underlying value of free speech protection is the exercise of liberty, and that when corporations speak they are not exercising their free will to speak because corporations are nothing more than robotic profit-maximizers.[35] Assuming for the moment the accuracy of Baker's unduly truncated version of the First Amendment's purpose,[36] he fails to understand the catalytic role that the corporate form plays in fostering individual self-realization.[37] Corporations are instruments created by the law so that citizens may achieve their personal economic or social goals. Indeed, the modern corporation finds its roots in Jacksonian democracy, as a device designed, through its limitation of liability, to enable the common person to combat New England industrialists and Southern landed gentry.[38] Thus, to divorce the corporate form from its roots in democratic theory incorrectly ignores the theoretical link between the corporation and the liberal democratic values fostered by the First Amendment's guarantee of free expression.

Robert Post articulated the second reason why commercial speech supposedly fails to advance the First Amendment speaker-centric value.[39] Post presumes that the First Amendment seeks to "safeguard public discourse from regulations that are inconsistent with democratic legitimacy."[40] He therefore reasons that to deserve the highest level of protection, under his participatory theory, the purpose of the expression must be to contribute to public discourse. Post summarily assumes that with commercial advertising, the expression's purpose is not to contribute to public discourse or communicative interchange, but rather to advance the economic interest of the speaker.[41] The commercial advertiser, according to Post, neither seeks nor derives the sort of public benefits that legitimize freedom of speech.

There is much that is troubling about Post's analysis. He is unable or unwilling to recognize the potentially complex, multilayered motivations of most expression. Speakers usually do not speak solely to contribute to public discourse or solely for purposes of narrow personal economic gain. For example, lobbyists working on behalf of labor unions seeking to engender political support for higher tariffs or the repeal of the North American Free Trade Agreement (NAFTA) may, on one level, truly believe in the political merits and morality of their position. Yet simultaneously their expression is undoubtedly influenced by economic motivation, both personally and on behalf of their clients. In this instance, presumably Post would focus exclusively on the effort to contribute to public discourse. In contrast, in the case of commercial advertisers—who also may well have mixed motivations for their expression—Post assumes exclusively a personal economic motivation and therefore rejects any protection founded on speaker-centric values.

In any event, Post's use of commercial advertising as an unwavering surrogate for economic motivation forces us to draw technical, formalistic distinctions that effectively render his entire conceptual framework incoherent. Consider the following example: a beekeeper firmly believes—contrary to accepted scientific thought—that bee pollen possesses scientifically provable health benefits. He wishes to publish an op-ed article that asserts such benefits

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"Advertising provides information and opinion, assisting individuals in making life-affecting choices that impact their lives and those of their families."

and mentions his own product. Regulatory authorities, believing that the beekeeper's assertion is scientifically incorrect, or at the very least, unproven, seek to suppress publication. Post would likely characterize such expression as a contribution to public discourse and therefore fully protected by the First Amendment, regardless of its accuracy. This is so, even though the beekeeper obviously possesses a strong economic interest in listeners accepting his viewpoint. Yet if, instead of writing an op-ed article, the beekeeper takes out an advertisement making the exact same claim about the product, Post would presumably deem the advertisement not a contribution to public discourse but rather pure commercial speech. To thus distinguish the two expressions represents the height of mindless formalism.

It makes no difference whether you agree with me that commercial speech fully serves the speaker-centric perspective of First Amendment analysis. One can reject that claim and still conclude that commercial speech unambiguously serves the interests fostered by the listener-centric perspective of First Amendment analysis, as I will show in the next section.

THE LISTENER-CENTRIC PERSPECTIVE AND COMMERCIAL SPEECH

Alexander Meiklejohn argued that the First Amendment served democracy by fostering self-governance by citizens.[42] By receiving information and opinion, he reasoned, citizens become better "governors." Meiklejohn went too far in denying any First Amendment value to the speaker. However, he was surely correct to recognize the important First Amendment value of expression to listeners. Individuals' faculties may be developed just as much by receiving expression as by expressing themselves.

Meiklejohn believed that his theory logically implied that only speech relevant to the political process deserved First Amendment protection (though he defined that concept broadly).[43] But his theory implies the opposite. Just as individuals needs free and open communication of information and opinion to participate in the collective self-governing process, so, too, do they require a similar uninhibited flow of information and opinion to govern themselves. Indeed, it is illogical to value expression that facilitates collective self-governance (where listeners have limited say in how they are governed), while simultaneously denying protection to expression that aids in the private self-governing (where an individual possesses 100 percent of the decisionmaking power). Commercial speech assists private self-governance. Advertising provides information and opinion, assisting individuals in making life-affecting choices that impact their lives and those of their families.

Listeners derive value from receiving information and opinion on commercial products and services when that information and opinion comes in some form other than commercial advertising. For example, *Consumer Reports* Magazine's comments on commercial products and services receives full First Amendment protection.[44] Similarly, press reports on manufacturers and the relative merits of their products are presumably fully protected by the First Amendment. The benefit to the reader or listener in making private choices justifies such protection. Yet those who would deny or reduce protection for commercial advertising overlook such benefits when they arise from advertising.

It is true, of course, that advertising is by no means objective. The speaker clearly has an economic interest in persuading listeners. Advertising is generally a form of advocacy, not purely the description of objective fact. But it does not follow that the information provided by an advocate has no value to the listener or reader. Speakers who contribute to political debate usually have their own personal, economic, or ideological agendas behind their expression. Their expression, like commercial advertising, is advocacy, not objective fact. Moreover, much like commercial advertising, political advertising may be more persuasion than pure information. Commercial speech

functions much like political speech. Scholars and jurists should recognize that such speech deserves full First Amendment protection.

THE REGULATORY-CENTRIC PERSPECTIVE AND COMMERCIAL SPEECH

One conceivable justification for downgrading First Amendment protection for commercial speech is that there is no reason to fear the possibility of improper or ideologically driven motivation for the regulation or suppression of commercial speech. The same is, of course, untrue of suppression of political speech. Continuing this line of argument, we might say that the regulation of commercial speech poses no threats to democratic values. Nothing could be further from the truth.

Even if commercial speech were never improperly suppressed, there may still be reason to have the courts act as a watchdog. Overzealous regulation that fails to demonstrate proper reverence for First Amendment values gives rise to legitimate concern. It is, after all, the judiciary that has primary responsibility for protecting and enforcing counter-majoritarian constitutional guarantees. This is particularly true of regulatory agencies, whose very reason for existence is to regulate and for whom the First Amendment is little more than an obstacle to attaining their goals. But the basis for concern extends far beyond this consideration.

There are at least three ways in which regulation of commercial speech could conceivably threaten the core values of the regulatory-centric perspective. First, as the public-choice literature teaches us, government is often vulnerable to capture by powerful economic interests.[45] It is certainly conceivable that a business could seek to have government suppress the advertising of its competitor. Second, government could choose to draw a regulatory distinction between commercial and noncommercial expression because of anti-capitalistic prejudice or hostility. Indeed, it was just such a suspicion that led the Supreme Court in *Sorrell v. IMS Health, Inc.* to impose strict scrutiny on a state's selective suppression of commercial but not noncommercial speech.[46] Finally, government could regulate truthful commercial speech out of fear that listeners either are incapable of comprehending the complexities of the information conveyed or will make unwise—even if perfectly lawful—decisions on the basis of it. In his 1996 opinion announcing the judgment of the Court in *44 Liquormart v. Rhode Island*,[47] Justice Stevens explained how such governmental paternalism is pathological: "[B]ans against truthful, nonmisleading commercial speech... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products."[48] All of these concerns involve the regulatory-centric perspective.

THE RATIONALIST-CENTRIC PERSPECTIVE AND COMMERCIAL SPEECH

Our constitutional system and the dictates of the rule of law demand that the courts interpret and apply the law in a rational manner. Distinctions drawn by the political branches and the courts must be grounded in precepts of rationality. Otherwise, asserted distinctions are nothing more than cynical disguises designed to obscure assertions of naked power and suppression. This is especially true of both judicial and governmental discriminations that impact expression. The regulatory-centric perspective tells us why this is such a concern.

Throughout this policy paper, we have seen a number of puzzlingly and troublingly irrational distinctions in the arguments opposing significant protection for commercial speech. On the one hand, some people suggest that commercial speech does not deserve protection because it does not concern the political process, yet at the same time they have no trouble protecting *Consumer Reports* Magazine,

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"There is no reason to assume that the existence of a profit incentive prevents chilling speech."

which focuses on the very same commercial products and services that are the subject of commercial speech. Others distinguish commercial speech because of the economic self-interest of the speaker, while at the same time wanting to fully protect the free speech rights of self-interested political actors. Still others would distinguish commercial speakers because of their corporate status, while having no problem protecting the First Amendment rights of media corporations.[49] It is difficult to understand how such irrational distinctions could be drawn absent some degree of underlying ideological hostility—conscious or subconscious—toward commercial advertising. The rationalist-centric perspective alerts us to the existence and dangers of such logically dubious distinctions and thereby enables us to invoke protections inherent in the regulatory-centric perspective.

THE PROBLEM OF FALSE COMMERCIAL SPEECH

Up to this point, my analysis has focused on the regulation of what is assumed to be truthful commercial speech. How would my approach would deal with the problem of false commercial speech?

Under long-established doctrine, false or misleading commercial speech is automatically excluded from First Amendment protection. Even as protection for truthful commercial speech has dramatically expanded, the categorical exclusion of false commercial speech has remained firm. One could conceivably conclude, purely as a theoretical matter, that truthful commercial speech is deserving of full First Amendment protection, while false or misleading commercial is not. The fact that false speech is denied protection logically says nothing about whether comparable truthful speech should be protected. But the issue of protection for false commercial speech is far more complex than court or commentators have to this point recognized.

False speech that is assumed by the listener to be truthful is never of societal value. The Court has chosen to protect certain forms of false speech about matters of public concern, not because of the inherent value of such expression, but because of the incidentally harmful impact of this form of regulation on truthful expression. In *New York Times Co. v. Sullivan*, the Court protected all but knowingly or recklessly false defamatory speech about public officials, because of the chill on truthful commentary arising from fear that the speech would later be deemed to be false.[50] The goal, then, was to avoid a chill on truthful speech by protecting false speech.

It has been argued that the danger of such a chill is nonexistent in the context of commercial speech, due to the speaker's profit incentive to communicate about its products. But surely many noncommercial speakers have similar self-interested motivations for their speech, yet they are uniformly protected to avoid chilling speech. In any event, there is no reason to assume that the existence of a profit incentive prevents chilling speech. Commercial enterprises will often be risk-averse about possible negative legal consequences of their actions in their commercial decisionmaking, and this applies to their advertising choices as well as to other economic decisions.

It does not follow that *all* false advertising should receive First Amendment protection. Knowingly false statements about commercial products amount to fraud, and there is no reason to believe that the First Amendment protects such activity. It follows only that false commercial speech receive the same protection as false and defamatory political speech: such expression is not to be protected when, and only when, it is determined to have been uttered with knowledge of falsity or reckless disregard of the statement's truth.

THE DILUTION DANGER

Some worry that if commercial speech receives a level of First Amendment protection comparable to that given to traditionally protected categories of expression, the result will not be the expansion of the reach

of First Amendment protection, but rather a dramatic pull-back of protection in those traditionally protected areas. Those who express this concern reason in the following manner: Whatever degree of protection is purportedly extended to commercial speech, under no circumstances will the courts protect many types of harmful expression that fall within this category. The danger of harm is simply too great. Therefore, if we demand at the outset that commercial speech receive the exact same level of protection as traditionally protected expression does, then the inevitable result will be a reduction in the degree of protection extended to those traditional categories.

There are two responses to this concern. First, the argument begs the very question that is the subject of debate—namely, whether commercial speech and traditionally protected categories of expression should be deemed to be of equivalent First Amendment value. If the answer is yes, then there is no basis for drawing the distinction in the first place. For example, if a manufacturer is prohibited from advertising the benefits of a product found by the government to be harmful, it is unclear why journalists or scholars should have any greater right to communicate the very same harmful information and opinion. Second, the real danger is not of dilution of traditional protection, but rather of what can be called *reverse* dilution. Once it is accepted that government may paternalistically suppress the general dissemination of truthful information about commercial products and services on the grounds that the public will not be able to make the "right" decision from that information, we will have irretrievably contravened the values of the regulatory-centric framework. People are either sheep, or they are not: if they cannot be trusted to make the "correct" commercial purchasing decision on the basis of free and open debate, how can they logically be trusted to make political choices on the basis of such debate? Once it is established that government can selectively suppress information and opinion because the citizens are effectively children, the result will be a real threat to the foundations of the liberal democratic social contract between government and citizen. Hence it is simply wrong to put commercial speech and noncommercial speech into hermetically sealed expressive categories. Excluding commercial speech from the First Amendment's protection will have negative consequences for the foundations of free expression and our democratic system.

CONCLUSION

Commercial speech has come a long way since the days before *Virginia Board* in 1976. Before that decision, due either to the absence of careful thought or disguised ideological hostility, both the Supreme Court and constitutional scholars gave short shrift to First Amendment protection to commercial speech. This was so, even though both court and scholars took for granted that other forms of expression about the relative merits of commercial products or services should receive full First Amendment protection.

Yet in no other area of First Amendment jurisprudence are speakers' constitutional protections reduced because of their self-interest, economic or otherwise. It is widely assumed that our democratic system is designed to protect the rights of citizens to advance their personal or economic interests by seeking to persuade others to accept their arguments. There exists no rational basis on which to categorically set commercial speakers apart, other than the ideologically driven desire to penalize those who benefit from the capitalistic system. Such justification is pathologically inconsistent with the very foundations of the First Amendment the argument purports to implement.

Fortunately, the trend in the Court has been to extend commercial speech protection to the point that it is rapidly approaching a level of constitutional insulation similar, if not yet identical, to that given more traditionally protected categories of speech. The perspective framework I have fashioned in this policy analysis clearly demonstrates the important constitutional values served by commercial

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speech. It is time for the Court to expressly acknowledge that commercial speech properly stands on an equal footing with all other kinds of expression given full protection by the First Amendment.

NOTES

1. See, for example, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

2. See Vincent Blasi, "The Pathological Perspective and the First Amendment," *Columbia Law Review* 85 (1985): 449.

3. Thomas H. Jackson and John Calvin Jeffries, "Commercial Speech: Economic Due Process and the First Amendment," *Virginia Law Review* 65 (1979): 1. Cf. R. George Wright, *Selling Words: Free Speech and Commercial Culture* (New York: NYU Press, 1997).

4. Ibid.; see discussion on page 15.

5. See *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 762 (1976); *Bolger v. Youngs Drug Products Corp*., 447 U.S. 557, 561 (1980).

6. *Bose Corp. v. Consumers Union of U.S.,* 466 U.S. 485 (1984).

7. *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

8. U.S. 748 (1976).

9. U.S. 52 (1942).

10. U.S. 45 (1905).

11. U.S. at 764.

12. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 456 (1978).

13. *Central Hudson Gas & Elec. Corp. v. Pub. Service Commission*, 447 U.S. 557 (1980).

14. For a detailed discussion of that doctrinal evolution, see Martin H. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* (New York: NYU Press, 2000), pp. 14–62.

15. Included on this list are, among others, such leading First Amendment scholars as Robert Post, Fred Schauer, Steven Shiffrin, and the late Ed Baker.

16. *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), quoting *Pittsburgh Press Co. v. Human Rights Comm'n*, 413 U.S. 378, 385 (1973).

17. See Ralph Nader, *Unsafe at Any Speed* (New York: Grossman Publishers, 1965).

18. Martin H. Redish, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy* (Stanford: Stanford Law Books, 2013), p. 106.

19. *R.A.V. v. City of St. Paul*, 504 U.S. 377, 392 (1992) (plurality opinion).

20. S. Ct. 2653 (2013).

21. Id. at 2663–65.

22. Thomas H. Jackson and John Calvin Jeffries, Jr., "Commercial Speech: Economic Due Process and the First Amendment," *Virginia Law Review* 65 (1979): 1.

23. Thomas Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966), p.105n46 (1966).

24. Alexander Meiklejohn, *Political Freedom* (New York: Harper, 1960); and Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971):1.

25. Martin H. Redish, "The Value of Free Speech," *Pennsylvania Law Review* 130 (1982): 591.

26. Steven H. Shiffrin, "The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment," *Northwestern University Law Review* 78 (1984): 1212.

27. Martin H. Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression," *George Washington Law Review* 39 (1971):429.

28. Martin H. Redish, "Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression," *Ohio State Law Journal* 76 (2015): 691.

29. Redish, "The Value of Free Speech."

30. See Martin H. Redish, *The Constitution as Political Structure* (New York: Oxford University Press, 1995), pp. 99–134.

31. When the speech advocates criminal behavior, different considerations may apply. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). However, those considerations are beyond the scope of this policy analysis.

32. *R.A.V. v. City of St. Paul*, 504 U.S. 377 (1992) (plurality opinion).

33. See generally Alexander Meiklejohn, *Political Freedom*.

34. See, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring); and Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969). See generally, William J. Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," *Harvard Law Review* 79 (1965): 1.

35. C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," *UCLA Law Review* 25 (1978): 964.

36. See Redish, "The Value of Free Speech."

37. This theory of catalytic self-realization and its relevance to corporate speech is explored in detail in Martin H. Redish and Howard M. Wasserman, "What's Good for General Motors: Corporate Speech and the Theory of Free Expression," *George Washington Law Review* 66 (1998): 235.

38. Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge, MA: Harvard University Press,1991), p. 3; Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* (1970) reprinted in *Conflict and Consensus in Early American History,* 6th ed., ed. Allen F. Davis and Harold D. Woodman (Lexington, MA: D.C. Heath,1984), pp. 216, 218; Ronald Seavoy, *The Origins of the American Business Corporation, 1784–1855* (Westport, CT: Greenwood Press, 1982), p. 256; and Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (Cambridge, MA: Sever and Francis, 1862), pp. 129–30, 132, 140–41.

39. I should note that Post does not totally exclude commercial speech from the scope of First Amendment protection because he recognizes a listener-centric informational value of such expression. See Robert C. Post, "The Constitutional Status of Commercial Speech," *UCLA Law Review* 48 (2000): 1, 32. However, Post extends a significantly lower level of protection than he does to speech that fosters speaker-centric related values. See Redish, *The Adversary First Amendment*.

40. Robert C. Post, "Reconciling Theory and Doctrine in the First Amendment," *California Law Review* 88(2000): 2353, 2373.

41. See the discussion in Redish, *The Adversary First Amendment,* pp. 60–62.

42. Redish, "The Value of Free Speech," pp. 604–05.

43. Ibid., pp. 601–02.

44. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

45. Martin H. Redish, "Commercial Speech, First Amendment Intuitionism and the Twilight

Zone of Viewpoint Discrimination," *Loyola Los Angeles Law Review* 41 (2007): 67; and Cass R. Sunstein, "The Republican Civic Tradition: Beyond the Republican Revival," *Yale Law Journal* 97 (1988): 1539.

46. In *Sorrell*, the Supreme Court struck down a state law prohibiting drug manufacturers from obtaining data-mined information about doctors' prescription patterns, but imposed no such restriction on academic researchers. The Court imposed strict scrutiny because it deemed the dichotomy to constitute a viewpoint-based discrimination. For a more detailed discussion of what I have labeled the "twilight zone" version of commercial speech regulation, see Redish, "Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination."

47. U.S. 484 (1996).

48. Id. at 503.

49. The argument that media corporations are distinguishable because they are protected by the separate guarantee of freedom of the press is specious. No compelling reason has been given as to why the corporate nature of a speaker matters for freedom of speech but not for freedom of the press. In any event, the Supreme Court has always treated the two First Amendment guarantees fungibly.

50. U.S. 429 (1964).

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