

“MATTERS OF HIGHEST PUBLIC INTEREST AND CONCERN”: *NEW YORK  
TIMES CO. v. SULLIVAN* AND THE CONTINUING EVOLUTION OF THE  
COMMERCIAL SPEECH DOCTRINE

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by  
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“MATTERS OF HIGHEST PUBLIC INTEREST AND CONCERN”: *NEW YORK TIMES CO. v. SULLIVAN* AND THE CONTINUING EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

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## INTRODUCTION

### *New York Times Co. v. Sullivan* as a Commercial Speech Case

More than two decades after categorically denying protection for commercial speech,<sup>1</sup> the United States Supreme Court opened the door to First Amendment protection in *New York Times Co. v. Sullivan* when it held that a paid political advertisement was fully protected speech.<sup>2</sup> Shortly thereafter, in the mid-1970s, with its rulings in *Bigelow v. Virginia*<sup>3</sup> and *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>4</sup> the Court began to develop a commercial speech doctrine that afforded limited protection to commercial speech. Then in 1980, with *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*,<sup>5</sup> the Court introduced an intermediate level test which was used to balance the regulatory interests of the State against the First Amendment rights of commercial speakers.<sup>6</sup>

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<sup>1</sup>See *Valentine v. Chrestensen* 316 U.S. 52 (1942).

<sup>2</sup> 376 U.S. 254 (1964).

<sup>3</sup> 421 U.S. 809 (1975).

<sup>4</sup> 425 U.S. 748 (1976).

<sup>5</sup> 447 U.S. 557 (1980).

<sup>6</sup> See Susan Dente Ross, *Reconstructing First Amendment Doctrine: the 1990s Revolution of the Central Hudson and O'Brien Tests*, 23 *Hastings Comm. & Ent. L.J.* 723 (2001). Ross provides a succinct breakdown of the different levels of scrutiny in the constitutional analysis of laws regulating speech: "The United States Supreme Court has adopted a three-tiered approach to constitutional analysis whereby the Court increases its scrutiny of laws as their infringement upon fundamental rights increases. Laws that directly limit fundamental constitutional rights are subject to strict scrutiny and must be narrowly tailored to advance a compelling government interest. In First Amendment jurisprudence, the Court has applied strict scrutiny to content-based laws that discriminate on the basis of viewpoint or content. Content-neutral laws, which present a reduced risk of illicit government

For more than a decade after *Central Hudson*, the Court generally applied this test to all commercial speech cases that came before it. It became apparent during this time that commercial speech was, as one critic put it, “the stepchild of First Amendment jurisprudence.”<sup>7</sup> Some wondered if the *Central Hudson* test provided a meaningful check on commercial speech regulations at all.<sup>8</sup> However, the latter half of the 1990s saw the Court reshape the *Central Hudson* test and thereby increase First Amendment protection for commercial speech. At key points in the doctrine’s development, in particular when the Court initiated First Amendment protection and then when it strengthened that protection in the 1990s, the First Amendment philosophy of *New York Times Co. v. Sullivan* provided the Court with a guiding rationale for protecting commercial speech.

Although *Sullivan* is mostly remembered for revolutionizing libel law, its impact on the commercial speech doctrine is noteworthy. Consider a recent case<sup>9</sup> the Court dismissed in 2003 that, like *Sullivan*, involved the intersection of commercial and speech on matters of public interest. The case involved a suit brought by California resident Marc Kasky against Nike, Inc. for unfair and

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motives to suppress specific ideas, face intermediate scrutiny, a type of constrained balancing test. Laws of general application that impose the most minor intrusions on speech are exposed to the minimal scrutiny of rational review” at 726-727.

<sup>7</sup> See Nicholas P. Consula, *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Ass’n v. United States*, 28 Pepp. L. Rev. 353 (2001) at 353.

<sup>8</sup> See, e.g., Michael Hoefges and Milagros Rivera-Sanchez, “Vice” Advertising under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 Hastings Comm. & Ent. L.J. 345 (2000).

<sup>9</sup> *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

deceptive practices that he argued violated California's Unfair Competition Law and False Advertising Law. Kasky accused Nike of making false and misleading claims in a public relations campaign aimed at countering allegations of worker mistreatment in the shoe and clothing manufacturer's foreign factories.<sup>10</sup> Nike argued, invoking *Sullivan*, that because its PR campaign addressed matters of public interest it should receive full First Amendment protection.<sup>11</sup> Although the lower courts agreed with Nike, the California Supreme Court held that Nike's PR campaign messages were commercial speech.<sup>12</sup>

For some scholars the *Nike* case illustrates the failings of the commercial speech doctrine. By allowing less protection for commercial speech and by failing to clearly establish what constitutes commercial speech, too much discretion has been left to the lower courts, leading to inconsistent rulings.<sup>13</sup> For others,<sup>14</sup> one of the central questions presented by the *Nike* case is will corporations, using the *Sullivan* argument, be able to "immunize false or misleading product information" by

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<sup>10</sup> *Id.* at 656.

<sup>11</sup> See generally Robert L. Kerr, *From Sullivan to Nike: Will the Noble Purpose of the Landmark Speech Case Be Subverted to Immunize False Advertising?* 9 Comm. L. & Pol'y 525 (2004) (arguing that this could potentially immunize any false or misleading statements. In *Sullivan*, the Court said the "erroneous statement is inevitable in free debate, and ...it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive" 376 U.S. 254 (1964) at 272).

<sup>12</sup> 539 U.S. 654 (2003) at 657 (quoting the California Supreme Court as saying that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speakers own business operations for the purpose of promoting sales of its products, ...[the] messages are commercial speech").

<sup>13</sup> See, e.g., William Warner Eldridge IV, *Just Do It: Kasky v. Nike, Inc Illustrates That it is Time to Abandon the Commercial Speech Doctrine*, 12 Geo. Mason. L. Rev. 179 (2003).

<sup>14</sup> See, e.g., Kerr, *supra* note 11.



including a public issue with its commercial message?<sup>15</sup> Some scholars think this is a possibility.<sup>16</sup> After all, the California Court of Appeals ruled that Nike's statements were "part of a public dialogue on a matter of public concern within the core expression protected by the First Amendment."<sup>17</sup> Statements such as these evince the continuing influence of *Sullivan* on the ever-evolving commercial speech doctrine.

As a commercial speech case, *Sullivan* marks the beginning of the end of the Court's categorical refusal of protection for commercial speech. And, as we have seen, the legacy of *Sullivan* has important implications in the current debate. The recent attention given to *Sullivan* as a commercial speech case by both scholars<sup>18</sup> and in the courts warrants a closer look at the decision with an eye to its historical underpinnings and ideological assumptions.

The text of *Sullivan* provides a good opportunity for this type of investigation. In the opinion, Justice Brennan wrote that the Court's decision was "compelled by neither precedent nor policy."<sup>19</sup> The Court focused more on the lessons of history and on what they believed to be the "central purpose and meaning of the First

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<sup>15</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) at 68.

<sup>16</sup> See Kerr, *supra* note 11.

<sup>17</sup> 539 U.S. 654 at 657 (Stevens, J. concurring).

<sup>18</sup> See Susan Dente Ross and R. Kenton Bird, *The Ad That Changed Libel Law: Judicial Realism and Social Activism in New York Times Co. v. Sullivan*, 9 Comm. L. & Pol'y 489 (2004); See also Kerr, *supra* note 11.

<sup>19</sup> 376 U.S. 254 (1964) at 269.

Amendment” to justify their decision.<sup>20</sup> For this reason, *Sullivan* presents a unique opportunity to develop, trace and evaluate a First Amendment philosophy that could be used to inform the current discussion on the commercial speech doctrine.

Therefore the following research questions were proposed. If the text of *Sullivan* relies on neither precedent nor policy, what are the historical justifications and First Amendment principles used to arrive at the decision? Does the Court’s opinion present a coherent First Amendment philosophy? And, if so, what impact, if any, has this philosophy had on the commercial speech doctrine?

This paper shows that it is indeed possible to delineate a coherent First Amendment philosophy from the text of *Sullivan*. In that opinion, there are two First Amendment values underlying the Court’s rationale: the search for truth and democratic self-governance. The First Amendment philosophy of *Sullivan* can be seen as a synthesis of these two values. The search for truth or the marketplace of ideas theory of free speech assumes that truth or correct opinion is best achieved in an environment in which multiple and competing viewpoints, opinions and ideas are interchanged freely. In the opinion, this libertarian view of speech is tempered by democratic self-governance theory, which the Court locates in lessons of history, namely the debate surrounding the Alien and Sedition Acts of 1798. Self-governance theory is grounded in the idea that freedom of expression is necessary for the operation of a democratic form of government. On the whole, the First Amendment philosophy of *Sullivan* views speech as valuable insofar as it educates

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<sup>20</sup> See Ross and Bird, *supra* note 18, at 507.

and informs the decision-making public; that speech that serves this interest, what the *Sullivan* Court called speech on matters of public interest, should enjoy free, uninhibited entry into the public arena.

This paper then argues that the rationale of *Sullivan* can be seen at work at key points in the development of the commercial speech doctrine. Commercial speech was introduced under the aegis of the First Amendment because the Court concluded that the free flow of commercial information was vital to the decision-making public and therefore warranted First Amendment protection. Although the Court strayed from this rationale when it introduced the *Central Hudson* balancing test, it returned to it in the 1990s when it strengthened First Amendment protection for commercial speech. This paper argues then, that the founding rationale of the commercial speech doctrine can be traced to the philosophy of *Sullivan* and that when the Court follows this rationale, commercial speech is provided with significant protection.

## CHAPTER 2

### METHODOLOGY

This project begins with basic legal research. Most legal research relies on a relatively uniform methodology. Simply put, legal research begins with the presentation of a hypothesis or a legal question. It then discusses the relevant case law and provides a conclusion that typically argues for a particular approach to the legal area under investigation. Legal research can investigate both primary and secondary source material. Primary source material includes “Constitutional provisions, statutes, court opinions, and administrative regulations.”<sup>21</sup> Secondary source material is commentary on or analysis of the law.<sup>22</sup> The primary source materials for the present project are the relevant federal and state court decisions. The secondary source materials include law review articles and legal treatises. The source materials were gathered primarily from the Lexis / Nexis database.

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<sup>21</sup> See Amy E. Sloan, *Basic Legal Research: Tools and Strategies*, 2<sup>nd</sup> Edition (2003) at 4.

<sup>22</sup> *Id.* at 4.

## CHAPTER 3

### LITERATURE REVIEW

Almost from its inception, the commercial speech doctrine has been the object of widespread academic criticism.<sup>23</sup> In addition, much scholarly work has examined the level of constitutional protection that should be afforded commercial speech and the viability of this type of speech as a protected class.<sup>24</sup> Scholars have debated the distinction between commercial and other types of protected speech and the possibility or impossibility of maintaining such a distinction.<sup>25</sup> And other studies have focused on the social and judicial climate surrounding decisions that have impacted the doctrine.<sup>26</sup>

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<sup>23</sup> See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1,2 (2000) (characterizing the doctrine as “unstable and contentious”); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212, 1212-16 (1983) (asserting that the commercial speech doctrine is fraught with various problems and conceptual difficulties). Criticism grew more intense with the adoption of the *Central Hudson* test, with critics asserting that the Court complicated the commercial speech doctrine by creating a test that lower courts would have difficulty following. See, e.g., Alex Kozinski and Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 Va. L. Rev. 627,632 (1990); Ronald A. Cass, *Commercial Speech, Constitutionalism and Collective Choice*, 56 U. Cin. L. Rev. 1317, 1374-75 (1988); Matthew L. Miller, *Note, The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 Colum. L. Rev. 632, 633-635 (1985); Brian Waters, *Comment, A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Commercial Speech Test*, 27 Seton Hall L. Rev. 1626, 1628 (1997); Jonathan Weinberg, *Note, Constitutional Protection of Commercial Speech*, 82 Colum. L. Rev. 720, 730 (1982).

<sup>24</sup> See, e.g., Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 420, 429 (1971); Daniel Hays Lowenstein, *Too Much Puff: Persuasion, Paternalism and Commercial Speech*, 56 U. Cin. L. Rev. 1205 (1988); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449 (1985); S. Prakash Sethi, *Advocacy Advertising and Large Corporations* (1977); Bruce Ledewitz, *Corporate Advertising’s Democracy*, 12 B.U. Pub. Int. L.J. 389 (2003); Kerr, *supra* note 11; Eldridge IV, *supra* note 13; Consula, *supra* note 7.

<sup>25</sup> See, e.g., Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 Comm. L. Pol’y 237 (2004); David A. J. Richards, *A New Paradigm for Free Speech Scholarship*, 139 U. Pa. L. Rev. 271, 279-84 (1990);

One example of the historical approach is Kozinski and Banner.<sup>27</sup> The authors investigate the historical and cultural circumstances surrounding the 1942 case *Valentine v. Chrestensen*<sup>28</sup>—the case recognized by scholars as the beginning of the commercial speech doctrine. The authors examine the legal developments and changes in the advertising industry in the early stages of the doctrine’s development. They suggest that the current and hotly debated distinction between commercial and non-commercial speech was born during this period. The authors conclude that the commercial speech doctrine might look quite different had its inception followed the 1964 case *New York Times Co. v. Sullivan*<sup>29</sup> than when it did. Before *Sullivan*, the Court did not even consider the question of commercial speech insofar as advertising was

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Kozinski and Banner, *supra* note 23; Scott Wellikoff, *Mixed Speech: Inequities that Result From an Ambiguous Doctrine*, 19 St. John’s J.L. Comm. 159 (2004); Erwin Chemerinsky and Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 Case W. Res. 1143 (2004); David Hoch and Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 Alb. L. Rev. 441, 461 (1994); Bob D. Cutler and Darrel D. Muehling, *Advocacy Advertising and the Boundaries of Commercial Speech*, Journal of Advertising, Vol. 18 No. 3, 40 (1989); Kent R. Middleton, *Advocacy Advertising, the First Amendment, and Competitive Advantage: A Comment on Cutler & Muehling*, Journal of Advertising, Vol. 20, No.2, 77 (1991).

<sup>26</sup> See, e.g., Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1993); Soontae An, *From a Business Pursuit to a Means of Expression: The Supreme Court’s Disputes Over Commercial Speech from 1942 to 1976*, 8 Comm. L. & Pol’y 201 (2003).

<sup>27</sup> See generally Kozinski and Banner, *supra* note 26.

<sup>28</sup> 316 U.S. 52 (1942).

<sup>29</sup> 367 U.S. 254 (1964).

considered a business act not a speech act. Thus, the Court was more interested in the regulation of commerce than the regulation of speech.<sup>30</sup>

An continues with this type of historical inquiry by exploring the slow and gradual evolution of the commercial speech doctrine between *Valentine* and the Court's decision to grant some level of First Amendment protection in 1976.<sup>31</sup> An argues that the Court's rulings during the period leading up to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>32</sup> reflected general social and cultural attitudes toward advertising; as advertising began to be seen in a more positive light, by both government and society, the Court increasingly softened its earlier stance against commercial speech.<sup>33</sup>

The level of protection that should be accorded commercial expression has been hotly debated throughout the evolution of the commercial speech doctrine. Even before it came under the umbrella of the First Amendment in 1976, legal scholar Martin Redish was arguing for constitutional protection.<sup>34</sup> This was countered by several scholars<sup>35</sup> including Sethi who feared that First Amendment protection for commercial speech presented the “danger of

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<sup>30</sup> See generally Kozinski and Banner, *supra* note 26.

<sup>31</sup> See generally An, *supra* note 26.

<sup>32</sup> 425 U.S. 748 (1976).

<sup>33</sup> See An, *supra* note 26, at 201.

<sup>34</sup> See generally Redish, *supra* note 24.

<sup>35</sup> See, e.g., Lowenstein, *supra* note 24; Blasi, *supra* note 24.

squeezing out alternative viewpoints from the public communication space and thereby impairing public access to information.”<sup>36</sup>

The debate continues. Ledewitz, for example, argues that any speech protection for advertisers is a serious threat to democracy.<sup>37</sup> In his view, the culture of advertising conditions people to become consumers and treats corporations as persons.<sup>38</sup> Such a culture is fostered by what he calls “corporate advertising’s democracy” and is a serious threat to political life.<sup>39</sup> Kerr also argues against extending full protection to commercial speech, citing potentially disastrous social consequences.<sup>40</sup> At the other end of the spectrum, Eldridge argues that denying commercial speech full protection encourages “overly broad statutes [that] risk restricting speech that is not necessarily commercial.”<sup>41</sup>

This debate seems to hinge on the distinction or lack of distinction between commercial and non-commercial speech. There is some consensus among scholars that the present doctrine lacks bright lines in this area. Hindman, for example, characterizes the evolution of the commercial speech doctrine as an era of confusion brought on by the Court’s vacillation between collectivist and

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<sup>36</sup> See Sethi, *supra* note 24, at 4.

<sup>37</sup> See Ledewitz, *supra* note 24, at 391.

<sup>38</sup> *Id.* at 400.

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

<sup>40</sup> See Kerr, *supra* note 11, at 560 (responding to questions raised by *Nike v. Kasky*, the author asks the reader to “consider the inestimable societal cost represented by the nightmare scenario of a consumer market in which any false/misleading-speech regulation at all could be evaded merely by linking commercial messages to an issue of public interest”).

<sup>41</sup> See Eldridge IV, *supra* note 13, at 207.



individualist approaches to First Amendment jurisprudence.<sup>42</sup> In some cases such as *Posadas de Puerto Rico Assoc. v. Tourism Co.*,<sup>43</sup> the Court took the collectivist approach, hoping to protect consumers from potentially harmful advertising messages.<sup>44</sup> At other times, the Court attempted to protect the rights of individuals to receive information in order to make rational choices, the individualist approach.<sup>45</sup> In trying to “carve a path between” these two ideologies, the Court has created a confusing and ambiguous doctrine.<sup>46</sup>

In calling for full First Amendment protection for commercial speech, Hindman seems to suggest that speech is speech no matter the origin or the intent. In a similar vein, Kozinski and Banner argue for abandoning the legal distinction and adopting the O’Brien test to determine the constitutionality of government regulations on commercial speech.<sup>47</sup> As we have seen, these arguments are based on the difficulty of drawing distinct lines between commercial and noncommercial speech. As one scholar observes, new modes

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<sup>42</sup> See Hindman, *supra* note 25, at 237.

<sup>43</sup> 478 U.S. 328 (1986).

<sup>44</sup> See Hindman, *supra* note 25, at 249.

<sup>45</sup> *Id.* at 249.

<sup>46</sup> *Id.* at 237.

<sup>47</sup> See Kozinski and Banner, *supra* note 23, at 651. (writing that under this standard content-neutral analysis, “[g]overnment regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary”). See *United States v. O’Brien*, 391 U.S. 367,377 (1968).

of expression have made the line “so blurry as to be indistinguishable.”<sup>48</sup> The result is a commercial speech doctrine that cannot adequately categorize the various modes of expression used by corporate and non-corporate speakers alike.<sup>49</sup> Yet, however difficult line drawing may be, for some scholars, this is no “reason to abandon the effort altogether.”<sup>50</sup>

Other scholars maintain that there is indeed a distinction between commercial and non-commercial speech,<sup>51</sup> even if definitional questions still surround the issue.<sup>52</sup> Cutler and Muehling argue that the distinction can be determined by the “competitive impact” of the speech; that if an ad benefits the sponsor it should be considered commercial speech and if it benefits society, political speech.<sup>53</sup> By contrast, Middleton argues that this approach fails to properly distinguish between the two types of speech and might even “permit undue regulation of fully protected expression.”<sup>54</sup> Richards argues for a distinction on the basis that the First Amendment protects “the spontaneous and automatic expression of sincere, moral, social, or political conviction” and that

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<sup>48</sup> See Deborah J. La Freta, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. 1205 (2004) at 1207.

<sup>49</sup> *Id.* at 1207.

<sup>50</sup> See Chemerinsky and Fisk, *supra* note 25, at 1160.

<sup>51</sup> See, e.g., Hoch and Franz, *supra* note 25.

<sup>52</sup> See Edward J. McAndrew, *City of Cincinnati v. Discovery Network, Inc.: Elevating the Value of Commercial Speech?*, 43 Cath. U. L. Rev. 1247, 1248 (1994). The Court is aware of these definitional problems and subsequently has had to rely in some cases solely on a “common-sense” distinction. See, e.g., *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993).

<sup>53</sup> See generally Cutler and Muehling, *supra* note 25.

<sup>54</sup> See Middleton, *supra* note 25, at 78.

this is lacking in commercial speech.<sup>55</sup> This suggests that commercial speech is inherently different from other forms of protected speech. However, Wellikoff points to cases such as *Bolger v. Youngs Drug Products Corp.*<sup>56</sup> that undermine this assumed distinction and add to the “endless confusion in classifying speech as commercial.”<sup>57</sup>

The effect this ambiguous doctrine has had on lower courts is exemplified by *Nike v. Kasky* in which the California Supreme Court disagreed with two lower courts over the definition of commercial speech.<sup>58</sup> It has also been argued that the current commercial speech doctrine gives non-commercial speech an unfair advantage in public debate.<sup>59</sup> Nike’s critics, for example, were able to publicize allegations against Nike using fully protected speech. Yet when Nike responded, its speech was subject to regulation as commercial speech.<sup>60</sup> For opponents of the commercial speech doctrine, this inherent unfairness calls for abandoning the distinction altogether.<sup>61</sup>

One such opponent, Terilli, argues that the current commercial speech doctrine is unacceptable insofar as it unnecessarily chills speech by so-called

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<sup>55</sup> See generally Richards, *supra* note 25.

<sup>56</sup> 463 U.S. 60 (1983).

<sup>57</sup> See Wellikoff, *supra* note 25, at 177.

<sup>58</sup> See Eldridge IV, *supra* note 13, at 192.

<sup>59</sup> See Wellikoff, *supra* note 25, at 189; see also Eldridge, *supra* note 13.

<sup>60</sup> See Wellikoff, *supra* note 25, at 192.

<sup>61</sup> *Id.*

commercial speakers.<sup>62</sup> As *Nike v. Kasky* evinces, the doctrine has the effect of constricting public debate.<sup>63</sup> Terilli argues that “a commitment to wide-open and robust debate is a limited commitment if it is subject to an exception based on the poorly defined and broad commercial speech category.”<sup>64</sup> Terilli argues, along with Kozinski and Banner,<sup>65</sup> that granting full First Amendment protection to commercial speech does not necessarily put it out of the reach of government regulation. This position is supported by the relevant case law.<sup>66</sup>

The basis for the regulation of advertising and public relations practices

would be the government’s power to regulate food, drugs, intimidating conduct, land use, employment, discrimination, sales and similar matters—and not any regulation of speech.<sup>67</sup>

For some, even if there were a clear cut distinction between commercial and non-commercial speech, commercial speech should still receive full protection. These critics argue that corporate and commercial speech are just as valuable as political speech in American democratic life. La Freta argues that corporations play a vital role in the American political economy and this imbues corporate speech “with inherent value.”<sup>68</sup> In addition, corporate speech potentially could

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<sup>62</sup> See Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, *Comm. L. & Pol’y*, 10 (4), 383-432 (2004).

<sup>63</sup> *Id.* at 424.

<sup>64</sup> *Id.* at 424.

<sup>65</sup> See generally Kozinski and Banner, *supra* note 23.

<sup>66</sup> See Terilli, *supra* note 62, at 426.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1207.

provide opinions otherwise left unexpressed in the marketplace of ideas.<sup>69</sup> In a similar vein, *Consula* looks at the social and economic context of American culture to determine that commercial speech should be accorded full First Amendment protection.<sup>70</sup> He argues that in the free market economy, the right to provide information to consumers might be even more important than political, religious or artistic expression.<sup>71</sup> The U.S. is an economic as well as a social and political institution; the free market economy relies on the free flow of all information so consumers can make well informed decisions in the economic marketplace as well as the marketplace of ideas.<sup>72</sup> Despite this, *Consula* does not see the current Court abolishing the commercial speech doctrine anytime soon.<sup>73</sup> Yet, according to Langvardt, greater protection for commercial speech within the boundaries of the current doctrine seems right on the horizon.<sup>74</sup>

Some scholars have argued that in the 1990s the Court's rationale for protecting commercial speech seems to have shifted its emphasis away from the

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<sup>69</sup> *Id.* at 1207.

<sup>70</sup> *See, generally* *Consula*, *supra* note 7.

<sup>71</sup> *Id.* at 379; *see also* Kozinski and Banner *supra* note 23, at 652 (writing that “in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature”).

<sup>72</sup> *See* *Consula*, *supra* note 7, at 379.

<sup>73</sup> *Id.* at 379.

<sup>74</sup> *See generally* Arlen Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 *Am. Bus. L. J.* 587 (2000).

listener’s right to a “concern for the expressive rights of the speaker.”<sup>75</sup> This has resulted in a ratcheting up of protection for commercial speech. Indeed, as Ross argues, the increased rigor of the Court’s “review of laws affecting commercial speech” has coincided with the reduced “rigor of its review of laws affecting the media.”<sup>76</sup> Alarming, the author believes that this has resulted in a hierarchical shift where commercial speech has become more protected than other types of protected speech.<sup>77</sup> In a similar vein, Hoefges and Rivera-Sanchez show that protection for commercial speech has been enhanced by a string of cases—*Rubin v. Coors*,<sup>78</sup> *44 Liquormart v. Rhode Island*<sup>79</sup> and *Greater New Orleans Broadcasting v. U.S.*<sup>80</sup>—involving “vice” advertising.<sup>81</sup> Yet despite this increased protection, “the one thing that ties together all of the

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<sup>75</sup> See David C. Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 Case W. Res. 1049 (2004) at 1072; See also Rodney A. Smolla, *Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 Case W. Res. 1277 (2004) at 1297.

<sup>76</sup> See Ross, *supra* note 6, at 726.

<sup>77</sup> *Id.* at 726.

<sup>78</sup> 514 U.S. 476 (1995).

<sup>79</sup> 517 U.S. 484, 489 (1996).

<sup>80</sup> 527 U.S. 173 (1999).

<sup>81</sup> See Hoefges and Rivera-Sanchez, *supra* note 8, at 387-388 (arguing that these cases effectively reversed earlier decisions in *Posadas* and *Edge* and extended protection to vice advertising. The authors also show that four current Justices—Stevens, Kennedy, Ginsburg and Thomas—“have expressed their support for abandoning intermediate scrutiny under *Central Hudson* analysis when government restricts truthful, non-deceptive advertising in order to manipulate lawful consumers choices in the marketplace”).

Court’s commercial speech cases [...] is the Court’s hostility to false commercial speech.”<sup>82</sup>

For proponents of the commercial speech doctrine, such as Chemerinsky and Fisk, this is good news. In their view, commercial speech will not function in the marketplace of ideas like other protected speech;<sup>83</sup> the entire premise of the commercial speech doctrine is “the Court’s longstanding belief that the truth about a company’s products and facilities will not emerge if the seller can lie about it.”<sup>84</sup> Consumers simply lack access to company facilities and they lack the time to investigate the truth about the hundreds of commercial messages they are confronted with on any given day.<sup>85</sup> On the other hand, some scholars question whether it’s the government’s responsibility to vet the truth of commercial statements.<sup>86</sup> Instead they argue that this is the responsibility of the free press.<sup>87</sup>

For Johnson and Fisher this is exactly what happened in the *Nike* case— Nike’s statements, because they were met with vehement counter-argument, did not survive that test of the marketplace of ideas.<sup>88</sup> In other words, the

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<sup>82</sup> See Vladeck, *supra* note 75, at 1074.

<sup>83</sup> See Chemerinsky and Fisk, *supra* note 25, at 1132.

<sup>84</sup> *Id.* at 1153.

<sup>85</sup> *Id.* at 1153.

<sup>86</sup> See generally Bruce E. H. Johnson and Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 Case W. Res. 1243 (2004).

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

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

marketplace sorted the lies from the truth. This suggests that media response to false statements made by corporations is sufficient to keep the public safe from those false statements.<sup>89</sup> There is no need to level the playing field through corporate censorship; for example, in the Nike case, it was already evened out by the more than 15,000 news articles and opinion columns written about Nike's labor practices.<sup>90</sup> Rather than create a "constitutional imbalance" by censoring one side of the debate, Collins and Skover argue that we need more protection for the citizen critic.<sup>91</sup>

Almost completely absent from the literature on the commercial speech doctrine is any prolonged discussion of the role of *Sullivan*. There are, however, two noteworthy exceptions. In one, Kerr argues that *Nike v. Kasky* brings to the fore a question that has been mostly left undecided by the current doctrine: what level of protection should be accorded commercial speech that addresses matters of public debate?<sup>92</sup> Kerr points out that *Sullivan* opened the door to First Amendment protection for commercial speech at the same time that it established the fullest level of protection for "debate on public issues."<sup>93</sup>

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<sup>89</sup> *Id.* at 1254 (writing that "the very press coverage of Nike that forms the backdrop of the *Kasky* case demonstrates that the media serves as an effective watchdog over corporate press releases and more than adequately counterbalances companies' assertions regarding controversial business practices").

<sup>90</sup> See Ronald K. L. Collins and David M. Skover, *The Landmark Free Speech Case That Wasn't: The Nike v. Kasky Story*, 54 Case W. Res. 965 (2004) at 1045.

<sup>91</sup> *Id.* at 1045 (arguing that what is needed is not censorship but greater free speech protections in order to keep the debate in the court of public opinion and out of the trial courts).

<sup>92</sup> See Kerr, *supra* note 11.

<sup>93</sup> *Id.* at 526.



*Nike v. Kasky*, like *Sullivan*, involves the intersection of these two types of speech. Kerr writes, the

question at the heart of the *Nike* case derives from the crossroads of those two *Sullivan* legacies: When speech potentially implicates both commercial speech doctrine and the political speech doctrine, how should speech be assessed in terms of First Amendment protection?<sup>94</sup>

For Kerr, the answer can be found in what he calls *Sullivan*'s noble purpose—“protecting people from concentrations of power.”<sup>95</sup>

Ross and Bird take a different approach to *Sullivan*, but still consider it as an important commercial speech case.<sup>96</sup> The author's argue “that advocacy advertising plays an important social, democratic and political role” and that this was recognized by the Court in *Sullivan*.<sup>97</sup> The authors study the social and historical context of the decision and show the impact it had on newspaper coverage of the civil rights movement.<sup>98</sup>

As we have seen, the commercial speech doctrine has received a thorough and thought provoking examination since its inception. The literature addressing the doctrine has remained relatively thematically consistent. Scholars have argued for greater or lesser protection, a distinction or lack of

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<sup>94</sup> *Id.* at 526.

<sup>95</sup> *Id.* at 535.

<sup>96</sup> See generally Ross and Bird, *supra* note 18.

<sup>97</sup> *Id.* at 490.

<sup>98</sup> *Id.* at 490.

distinction between commercial and other types of protected speech, and whether or not to retain or abolish the doctrine altogether. Other scholars have examined the historical basis for some decisions, while others have examined the First Amendment values that guide the doctrine. Whatever the approach, there remains some consensus that the doctrine has remained in flux since its inception. To better understand why this may be the case we turn to a study of the doctrine's history.

## CHAPTER 4

### A HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

#### Commercial Speech 1942-1976: Slouching Toward Protection

The history of the commercial speech doctrine is rooted in an incident in New York City involving F.J. Chrestensen, who owned a decommissioned naval submarine that he opened to the public for a small admission fee.<sup>99</sup> Chrestensen advertised his tours through handbills passed out to pedestrians in lower Manhattan. City officials informed Chrestensen that his handbill distribution was in violation of the New York City Sanitary Code which specifically prohibited the distribution of “commercial and business advertising matter.”<sup>100</sup> Political speech was exempted from the regulation, so Chrestensen reprinted the handbills to include a political message petitioning the City Dock Department’s refusal to let him dock his submarine at a city pier.<sup>101</sup> The city still refused permission to distribute. Chrestensen sought an injunction against the police department from interfering with his constitutionally protected speech. The case eventually made its way to the Supreme Court.

In a unanimous three-page decision, the Court decided against Chrestensen. The Court said although streets are traditionally places where the dissemination of information “may not be unduly” burdened or proscribed by the government, “the

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<sup>99</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>100</sup> *Id.* at 53.

<sup>101</sup> *Id.* at 53.

Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>102</sup> In categorically denying protection to commercial advertising, the Court not only failed to provide much of a rationale for its decision, it did not define what was meant by “purely commercial advertising.” Two decades later, confronted with this very issue, the Court began the process of chipping away at its decision in *Valentine* and forging a path to greater, although limited, protection for commercial speech.

In 1964, the Supreme Court moved closer to First Amendment protection for commercial speech with the landmark libel case *New York Times Co. v. Sullivan*.<sup>103</sup> L.B. Sullivan, the Commissioner who supervised Montgomery police, brought a libel suit against four clergymen and the *New York Times* for publishing the editorial advertisement, “Heed Their Rising Voices.” The full-page editorial, which ran on March 29, 1960, harshly criticized police action against a civil rights protest at an Alabama state university. The editorial also solicited contributions for the Martin Luther King defense fund. The *Times* argued that the ad was protected by the First Amendment. Sullivan argued, relying on *Valentine*, that because the allegedly libelous statements were published as part of a paid advertisement, freedom of speech and of the press did not apply to his case.<sup>104</sup>

The Supreme Court of Alabama sided with Sullivan, but the U.S. Supreme Court disagreed. Justice Brennan, writing for the Court, said editorial

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<sup>102</sup> *Id.* at 54.

<sup>103</sup> 376 U.S. 254 (1964).

<sup>104</sup> *Id.* at 265.

advertisements of this type were an important avenue for the dissemination of ideas.<sup>105</sup> The Court distinguished between the advertisement in question and the “purely commercial speech” in *Valentine*:

The publication here was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.<sup>106</sup>

The opinion noted that even though *Chrestensen* added a political statement to his handbill, he did so only to evade the ordinance.<sup>107</sup> Therefore his handbill was purely commercial speech and not the type of advertisement the Court was considering in *Sullivan*. According to one scholar, *Sullivan* “substantially improved the status of advertising by establishing that even though they were paid for, political advertisements were protected by the Constitution.”<sup>108</sup>

The Court did not return to the question of purely commercial speech until almost a decade later in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>109</sup> In 1969, the National Organization for Women (NOW) filed a complaint with the Commission claiming *Pittsburgh Press* was violating a city

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<sup>105</sup> *Id.* at 266.

<sup>106</sup> *Id.* at 266.

<sup>107</sup> *Id.* at 266.

<sup>108</sup> See An, *supra* note 26, at 213.

<sup>109</sup> 413 U.S. 376 (1973).

ordinance that prohibited “any notice or advertisement relating to ‘employment’ or membership which indicates any discrimination because of...sex.”<sup>110</sup> *Pittsburgh Press* divided its help wanted columns under the headings “Help Wanted Male” and “Help Wanted Female.”

In a 5-4 decision the Court upheld the lower court’s ruling that the ordinance did not infringe on the paper’s First Amendment rights. In doing so, the Court reaffirmed an important idea first given voice a decade earlier in *New York Times, Co. v. Sullivan*,<sup>111</sup> that profit motive does not solely determine whether speech is protected or not:

If a newspaper’s profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with the view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.<sup>112</sup>

However, the Court found that the advertisements in question were “classic examples of commercial speech” that did not come under First Amendment protection, thus applying the rule in *Valentine*.<sup>113</sup> *Pittsburgh Press* argued that commercial speech should be accorded a higher level of protection than that provided by *Valentine*. The Court’s response? “Whatever the merits of this

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<sup>110</sup> *Id.* at 378.

<sup>111</sup> 376 U.S. 254 (1964).

<sup>112</sup> 413 U.S. 376 (1973) at 385.

<sup>113</sup> *Id.* at 385.

contention may be in other contexts, it is unpersuasive in this case.”<sup>114</sup> Any First Amendment considerations in the present case were outweighed by the illegality of the underlying conduct.<sup>115</sup> The language in *Pittsburgh Press* and in the next commercial speech case, *Bigelow v. Virginia*,<sup>116</sup> seemed to open the door ever so slightly to First Amendment protection for commercial speech.<sup>117</sup>

Bigelow was director and managing editor of the newspaper *The Virginia Weekly*. He got in trouble with a Virginia statute that outlawed “the sale or circulation of any publication to encourage or prompt the processing of an abortion” when he printed an advertisement for abortion services in New York state.<sup>118</sup>

Bigelow printed the following advertisement:

UNWANTED PREGNANCY LET US HELP YOU abortions are  
now legal in New York. There are no residency requirements.  
FOR IMMEDIATE PLACEMENT IN ACCREDITED  
HOSPITALS AND CLINICS AT LOW COST  
Contact WOMEN’S PAVILION 515 Madison Avenue New York,  
N.Y. 10022 or call any time (212) 371-6670 or (212) 371-6650  
AVAILABLE 7 DAYS A WEEK STRICTLY CONFIDENTIAL.

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<sup>114</sup> *Id.* at 388.

<sup>115</sup> *Id.* at 388.

<sup>116</sup> 421 U.S. 809 (1975).

<sup>117</sup> Although the ban on *Pittsburgh Press*’ gender biased classified section was upheld, it was a split decision and the dissents by Chief Justice Burger and Justices Douglas, Stewart and Blackmun are noteworthy. It is to be recalled that Justice Douglas was on the Court during the time of its unanimous decision in *Valentine*. In his dissent, Douglas refers to his changing opinion over the years regarding commercial speech: “Commercial matter, as distinguished from news, was held in *Valentine v. Chrestensen* not subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. As I have stated on early occasions, I believe that commercial materials also have First Amendment protection” (Douglas, J. dissenting at 397-8); See also An, *supra* note 26, at 212 (writing that “[t]welve years after *Valentine*, [Douglas] began to point out the deficiencies in the unanimous decision and came to advance the value of commercial information in the free enterprise system”).

<sup>118</sup> 421 U.S. 809 (1975) at 812.

We will make all arrangements for you and help you with information and counseling.<sup>119</sup>

Although the advertisement conveyed factual information, Bigelow was convicted and fined \$500. The conviction was upheld by the Virginia State Supreme Court which rejected Bigelow's claim that the statute was unconstitutional. On appeal, the Supreme Court overturned Bigelow's conviction.

In writing for the Court, Justice Blackmun reasserted that speech that appears in paid commercial advertisements does not automatically lose all First Amendment protection.<sup>120</sup> The Court also limited the reach of its ruling in *Valentine*. The Court said the fact that *Valentine* “had the effect of banning a particular handbill does not mean that [it] is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.”<sup>121</sup> The Court referred to its ruling in *Pittsburgh Press* that “indicated that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal.”<sup>122</sup> The Court said Bigelow's advertisement was “factual material,” about a legal activity and a matter of “public interest,” that “did more than simply propose a commercial transaction”<sup>123</sup>:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to

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<sup>119</sup> *Id.* at 812.

<sup>120</sup> *Id.* at 818.

<sup>121</sup> *Id.* at 820-821.

<sup>122</sup> *Id.* at 822.

<sup>123</sup> *Id.* at 826.



readers probably in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter of the law of another State and its development, and to readers seeking reform in Virginia.<sup>124</sup>

In *Bigelow*, we see the beginning of the Court’s interest in protecting the listener’s right to receive potentially valuable information. This rationale for protecting commercial speech would be expanded one year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>125</sup>

### **Under the Umbrella: *Virginia Pharmacy to Central Hudson***

In 1976, the Court decided a case that provided commercial speech some level of First Amendment protection.<sup>126</sup> *Virginia Citizens Consumer Council*, representing a number of prescription drug users, mainly the elderly and the infirmed, challenged a Virginia statute that prohibited pharmacists from advertising prescription drug prices. This was the second time the statute had been challenged. A failed first attempt was brought by a licensed pharmacist.<sup>127</sup> But this time it was challenged by consumers, a distinction that was important to a three-judge district

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<sup>124</sup> *Id.* at 826.

<sup>125</sup> 425 U.S. 748 (1976) at 826 (stating that the “relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas”).

<sup>126</sup> See An, *supra* note 26, at 220 (writing that in *Virginia Pharmacy* the “Court finally explicitly overruled *Valentine*, thus providing First Amendment protection to ‘purely commercial advertising’”).

<sup>127</sup> 425 U.S. 748 (1976) at 753.

court that declared the statute void.<sup>128</sup> The Supreme Court affirmed the district court's ruling.

The Virginia State Board of Pharmacy's argument followed the Court's ruling in *Valentine*; that advertising of prescription drug prices was outside First Amendment protection because it is purely commercial speech. The plaintiffs argued they would benefit greatly if the ban was lifted and that access to the prohibited information was a constitutional right.<sup>129</sup> Justice Blackmun, writing for the majority, continued his line of thought from *Bigelow*; that the information contained in the advertising had social value even if the pharmacist's intent was for solely commercial purposes.<sup>130</sup> From the listener's perspective, the Court reasoned, advertised prescription drug prices is valuable information. So valuable that the opinion's language places commercial information alongside speech that is important to democratic decision-making:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price [...E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.<sup>131</sup>

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<sup>128</sup> *Id.* at 755.

<sup>129</sup> *Id.* at 754.

<sup>130</sup> *Id.* at 761 (the majority states that “[o]ur pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The ‘idea’ he wishes to communicate is simply this: ‘I will sell you the X prescription drug at the Y price’”).

<sup>131</sup> *Id.* at 765.

Although this seems to equate political speech and commercial advertising,<sup>132</sup> the latter is subject to greater regulation. For example, the Court distinguishes between the levels of falsehood tolerated in each. In political speech, considerable falsehood is permitted so as not to create a “chilling effect.”<sup>133</sup> On the other hand, for commercial speech to receive protection, it must be truthful. This should not be a hard requirement to satisfy, the Court reasons, because the “truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary.”<sup>134</sup> It also has the ability to withstand greater scrutiny because it is hardier and more durable than other types of protected

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<sup>132</sup> In the sole dissenting opinion, Justice Rehnquist feared that the logical consequences of the Court’s decision would put commercial speech on a par with traditionally protected speech such as political speech; that the decision’s far reaching consequences would be to elevate “commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas.” at 781 (Rehnquist, J. dissenting). He wrote that the First Amendment protects information that is important to democratic decision-making in the area of political, social and public issues and not information that involves “whether to purchase one or another kind of shampoo.” at 787 (Rehnquist, J. dissenting). A few years later, Justice Powell, writing for the Court in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), seems to attempt an answer to Rehnquist’s *Virginia Pharmacy* dissent. In the opinion, Powell recognizes “the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” Powell suggests that this “common-sense” distinction will keep protected lower-valued speech from diluting higher valued speech: “To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.” at 456.

<sup>133</sup> For example, in cases of libel against public officials acting in their official capacity, the Court said the “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive.” *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964) at 272.

<sup>134</sup> 425 U.S. 748 (1976) at footnote 24.

speech;<sup>135</sup> it is more difficult to “chill” the flow of commercial information since “advertising is the *sine qua non* of commercial profits.”<sup>136</sup>

In *Virginia Pharmacy* the Court officially held for the first time that truthful speech which does nothing more than propose a commercial transaction is entitled to First Amendment protection. *Virginia Pharmacy* is, for this reason, widely considered the beginning of the modern commercial speech doctrine. The following term, a case dealing with lawyer advertising provided the Court with the opportunity to revisit and reexamine its rulings in *Bigelow* and *Virginia Pharmacy*.

In *Bates v. State Bar of Arizona*<sup>137</sup> a pair of licensed attorneys violated a disciplinary rule of the Supreme Court of Arizona when they advertised their legal services and fees in the *Arizona Republic*. The rule stated, among other things, that a “lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm.”<sup>138</sup> Facing possible suspensions for the violation, the lawyers sought review in the Arizona Supreme Court. They argued that the rule impeded their First Amendment rights.<sup>139</sup> The Arizona Supreme Court

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<sup>135</sup> *Id.* at footnote 24.

<sup>136</sup> *Id.* at footnote 24 (stating that “[a]ttributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints”).

<sup>137</sup> 433 U.S. 350 (1977).

<sup>138</sup> *Id.* at 355.

<sup>139</sup> *Id.* at 356.

upheld the constitutionality of the rule. On appeal, the U.S. Supreme Court reversed in part and upheld an attorney's right to advertise.<sup>140</sup>

In writing for the Court, Justice Blackmun once again framed the First Amendment issue in terms of the consumer's right to information. Looking back at *Virginia Pharmacy*, the Court reaffirmed that commercial speech "should not be withdrawn from protection merely because it proposed a mundane commercial transaction."<sup>141</sup> As in *Bigelow* and *Virginia Pharmacy*, the Court found that such commercial transactions often include valuable information that the public has a right to access:

The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue[...]. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system [...]. In short, such speech serves individual and societal interests in assuring informed and reliable decision-making.<sup>142</sup>

Thus, the State Bar of Arizona's ban on lawyer advertising, like the Virginia State Board of Pharmacy's ban on advertised prices, served only to keep the public ignorant of important information.<sup>143</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 364. Justice Blackmun also reaffirmed that commercial speech could and should be distinguished from non-commercial speech ("it 'must be distinguished by its content'" citing *Virginia Pharmacy* at 761) but that this does not strip it of all First Amendment protection.

<sup>142</sup> *Id.* at 364.

<sup>143</sup> *Id.* at 365. The public's right to the information contained in commercial messages is an important consideration in these early cases. Indeed, without this key element, a commercial transaction that involves speech is almost entirely stripped of its First Amendment protection. Consider *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) which involved a suit against an Ohio attorney engaged in the direct solicitation of potential clients. The attorney argued that face-to-face solicitation was "an

With reasoning largely based on the right of consumers to receive the information contained in commercial messages, *Virginia Pharmacy* and *Bates* recognized a limited First Amendment right to commercial speech. Yet, neither opinion established a test to determine the level of protection that should be afforded commercial speech. This would come a few years later. In the interval, the Court handed down two important cases involving corporate political speech that would eventually implicate the commercial speech realm<sup>144</sup>—*First National Bank of Boston v. Bellotti*<sup>145</sup> decided in 1978 and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*<sup>146</sup> decided in 1980.

*Bellotti* arose when the attorney general of Massachusetts informed First National Bank that it could not pay to publicize its views on a proposed constitutional amendment promoting a graduated income tax.<sup>147</sup> At issue was a Massachusetts statute that prohibited corporations from spending money ““for the purpose of...influencing or affecting the vote on any question submitted to voters” that did not “materially” or directly affect that corporation’s property, business or

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exercise of free speech rights”” constitutionally identical to the rights protected in *Bates*. 436 U.S. 447 (1978) at 456. The Court disagreed, ruling that unlike speech that conveyed information, the face-to-face solicitation is “a business transaction in which speech is an essential but subordinate component.” 436 U.S. 447 (1978) at 457. These types of business transactions, where speech is a subordinate component, could still receive First Amendment protection but the “level of appropriate judicial scrutiny” is lowered. 436 U.S. 447 (1978) at 457.

<sup>144</sup> These two areas of the law collided in *Nike v. Kasky*, 539 U.S. 654 (2003) when Nike insisted that its corporate speech was political when it was accused of disseminating false commercial speech.

<sup>145</sup> 435 U.S. 765 (1978).

<sup>146</sup> 447 U.S. 530 (1980).

<sup>147</sup> 435 U.S. 765 (1978) at 768.

assets.<sup>148</sup> First National Bank challenged the constitutionality of the statute and the case made its way to the Supreme Judicial Court of Massachusetts. The statute was upheld. National Bank then appealed to, and was granted certiorari by, the United States Supreme Court.

Justice Powell, writing for the majority, noted that the principle question asked by the lower court was “whether business corporations, such as [appellants], have First Amendment rights coextensive with those of natural persons or associations of natural persons.”<sup>149</sup> By contrast, Justice Powell focused on whether the statute abridged speech deserving of First Amendment protection regardless of who the speaker was. The speech in question, Powell wrote, “is at the heart of the First Amendment protection.”<sup>150</sup> Therefore,

[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or, individual.<sup>151</sup>

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<sup>148</sup> *Id.* at 768.

<sup>149</sup> *Id.* at 771.

<sup>150</sup> *Id.* at 776. (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment...Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period” quoting *Thornhil v. Alabama*, 310 U.S. 88, 101-102 (1940)).

<sup>151</sup> *Id.* at 777.

The question then, is not whether corporations have First Amendment rights but whether speech with a “clear entitlement of protection” is deprived of that protection because of the corporate identity of the speaker.<sup>152</sup> The Court ruled that it was not.

The constitutional protection afforded corporate speech by *Bellotti* was reinforced in *Consolidated Edison Co. v. Public Service Commission of New York*.<sup>153</sup> Consolidated Edison, a public utility, included inserts in its monthly bills promoting nuclear energy.<sup>154</sup> The National Resources Defense Council, Inc. asked Consolidated Edison to enclose a rebuttal prepared by the NRDC in its next billing cycle. Consolidated Edison refused. The NRDC then asked the Public Service Commission to open the electric company’s bills to contrasting viewpoints on public issues.<sup>155</sup> The Commission denied the request but then barred the general use of electric company bill inserts to discuss “controversial issues of public policy.”<sup>156</sup> Consolidated Edison sought review of the ban in the New York State courts. The ban was upheld. The United States Supreme Court reversed the lower court’s decision holding that the prohibition infringed upon Consolidated’s First and Fourteenth Amendment rights.<sup>157</sup>

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<sup>152</sup> *Id.* at 778.

<sup>153</sup> 447 U.S. 530 (1980).

<sup>154</sup> *Id.* at 532.

<sup>155</sup> *Id.* at 532.

<sup>156</sup> *Id.* at 532.

<sup>157</sup> *Id.* at 544.



1980 was not a good year for the Public Service Commission of New York. In the landmark commercial speech case, *Central Hudson Gas Electric Corp. v. Public Service Commission of New York*,<sup>158</sup> which was decided the same day as *Consolidated Edison*, the Court once again ruled against the Commission. The state of New York, in the interest of conserving energy during the middle-eastern oil embargo crisis in the early 1970s, banned advertising by electric utilities. The ban remained on the books after the crisis was over; it was eventually challenged by Central Hudson. The U.S. Supreme Court ruled that the ban violated the First Amendment and in doing so outlined a four-part test to determine the constitutionality of commercial speech regulations.

Looking back at the history of commercial speech cases, Justice Powell, writing for the majority, said “a four-part analysis has developed.”<sup>159</sup> The first part is concerned with whether the speech is protected or not. For commercial speech to receive protection it cannot be misleading or deceptive or related to illegal activity.<sup>160</sup> The second part asks whether the government has a substantial interest in regulating the speech.<sup>161</sup> If it has a substantial interest, the Court then asks whether the “regulation directly advances” the interest.<sup>162</sup> If all these are satisfied, the final prong requires that the regulation be “narrowly drawn” or narrowly

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<sup>158</sup> 447 U.S. 557 (1980).

<sup>159</sup> *Id.* at 566.

<sup>160</sup> *Id.* at 566.

<sup>161</sup> *Id.* at 564.

<sup>162</sup> *Id.* at 564.

tailored.<sup>163</sup> The New York Commission’s advertising regulation failed the fourth prong. The Court found that the blanket ban on all electricity advertising was too broad.<sup>164</sup> Particularly damaging to the New York Commission was Central Hudson’s argument that it would promote energy conservation had it not been for the ban. In other words, the ban actually impaired the State’s interest in promoting energy conservation.<sup>165</sup>

The first part of the *Central Hudson* test asks whether the commercial speech qualifies for First Amendment protection. This assumes the speech in question is commercial rather than non-commercial. But what about speech that communicates a social or a political message and at the same time draws attention to a brand name or corporate sponsorship? This question was one of the central issues in a 1983 case, *Bolger v. Youngs Drug Products Corp.*<sup>166</sup>

Youngs was distributing direct mail advertising that promoted a wide variety of contraceptive devices including its most popular product, Trojan-brand condoms. The advertising included a multi-page promotional flyer and one exclusively devoted to prophylactics. It also included “informational pamphlets discussing the

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<sup>163</sup> *Id.* at 565. The government cannot “completely suppress information when narrower restrictions on expression would serve its interests as well.” This language in *Central Hudson* would be modified by a later case, *Board of Trustees, State Univ. of N.Y. v. Fox* 492 U.S. 469 (1989). In *Fox*, the Court said to pass the fourth prong the government must show a “reasonable fit” between the regulation and the government interest.

<sup>164</sup> *Id.* at 570.

<sup>165</sup> *Id.* at 570.

<sup>166</sup> 463 U.S. 60 (1983).

desirability and availability of prophylactics in general.”<sup>167</sup> The Postal Service informed the manufacturer that its unsolicited mail advertising violated Title 39 U.S.C. 3001 (e) which “states that ‘any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter.’”<sup>168</sup> Youngs brought an action for declaratory and injunctive relief arguing that the statute violated its First Amendment rights.

The Federal District Court held that the statute violated the First Amendment. The Supreme Court agreed. The Court said the government’s asserted interest, to help parents control when and how their children would learn about sensitive subjects, was indeed substantial. However, the restriction provided “only the most limited incremental support for the interest asserted” and therefore failed the third prong of *Central Hudson* analysis.<sup>169</sup> The Court also said because the restriction purged “all mailboxes of unsolicited material that is entirely suitable for adults” it was too broad to satisfy the final prong of the test.<sup>170</sup>

An interesting aspect of the case was the question of how to classify Youngs’ informational pamphlets. In arriving at the decision, the Court agreed with the lower court that all three of Youngs’ advertising materials were commercial speech. The Court recognized its long-held “‘common sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to

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<sup>167</sup> *Id.* at 62.

<sup>168</sup> *Id.* at 61.

<sup>169</sup> *Id.* at 73.

<sup>170</sup> *Id.* at 73.

government regulation, and other varieties of speech.”<sup>171</sup> The Court said, following *Virginia Pharmacy*, that most of the speech in the advertising materials “did no more than propose a commercial transaction.”<sup>172</sup> However, the informational pamphlets could not so easily be characterized this way and therefore required further analysis.

The Court used a limited-purpose three-part analysis to categorize the informational pamphlets.<sup>173</sup> First, citing *Sullivan*, the Court said acknowledging the pamphlets were advertisements did not automatically classify them as commercial speech; neither did “the reference to a specific product” nor Youngs’ economic motivation justify this classification.<sup>174</sup> However, the Court reasoned, the combination of all of these did characterize them as commercial speech:

The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which “links a product to a current public debate” is not thereby entitled to the constitutional protection afforded noncommercial speech.<sup>175</sup>

Commercial speech does not need additional constitutional protection, the Court reasoned, because companies already have “the full panoply of protection

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<sup>171</sup> *Id.* at 64.

<sup>172</sup> *Id.* at 66.

<sup>173</sup> *Id.* at 67. In a footnote, the Court stated that the three part analysis used to determine the category of speech in *Bolger* did not constitute a broad test such as the *Central Hudson* test.

<sup>174</sup> *Id.* at 66.

<sup>175</sup> *Id.* at 68.

available.”<sup>176</sup> The Court also feared that full protection might lead to the immunization of “false or misleading product information from government regulation simply by including references to public issues.”<sup>177</sup>

As Langvardt points out, after *Virginia Pharmacy*, *Bolger*, *Central Hudson*, and other related cases decided during this period, restrictions on truthful, non-misleading commercial speech seemed unlikely to pass the First Amendment scrutiny established by the *Central Hudson* test.<sup>178</sup> In particular, *Central Hudson* and *Bolger* seemed to suggest that the third and fourth prongs presented a formidable challenge to regulations on commercial speech.<sup>179</sup> However, a string of cases from 1986 to 1993 leaves a different impression: one of confusion wrought by doctrinal inconsistency.

### **Post-Central Hudson Confusion**

In the first of these cases, *Posadas de Puerto Rico Assoc. v. Tourism Co.*,<sup>180</sup> a five-member majority seemed to scale back the earlier trend toward greater protection for commercial speech. The majority opinion paid great deference to the government’s argument that its speech restrictions were a direct, non-extensive means of advancing its substantial interests. In addition, *Posadas* offered an

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<sup>176</sup> *Id.* at 68.

<sup>177</sup> *Id.* at 68.

<sup>178</sup> See Langvardt, *supra* note 74, at 602.

<sup>179</sup> *Id.* at 602.

<sup>180</sup> 478 U.S. 328 (1986).

alternative mode of analysis to the *Central Hudson* test—that if the activity or product being advertised is not constitutionally protected, governments are free to regulate it as they deem necessary.<sup>181</sup>

In 1948, the Puerto Rican Legislature passed The Games of Chance Act in order to stimulate tourism. The act legalized gambling in licensed casinos but prohibited gambling rooms from advertising or otherwise offering “their facilities to the public of Puerto Rico.”<sup>182</sup> Posadas de Puerto Rico Associates, owners of a hotel and casino, were fined and threatened with suspension of their license for violating the act’s advertising restrictions. Posadas paid the fine under protest and then sought review in the Puerto Rican courts. The Superior and Supreme Courts of Puerto Rico upheld the statute as did the U.S. Supreme Court.

In determining *Posadas*, then Justice Rehnquist, writing for the majority, applied the *Central Hudson* test. The majority accepted the government’s argument that gambling would have an adverse effect on the local population and therefore agreed that the government had a substantial interest in dampening this demand. The majority also accepted the government’s argument that the advertising ban would further that interest:

The Puerto Rico Legislature obviously believed, when it enacted the advertising restriction at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to

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<sup>181</sup> See Denise M. Trauth and John L. Huffman “The Commercial Speech Doctrine: *Posadas* Revisionism” in *Advertising and Commercial Speech* 99 (1990) at 111. (The authors write, “[p]ut very simply, if the conduct is constitutionally protected, such as access to contraceptives or abortion, the advertising cannot be banned. However, if the conduct is not constitutionally protected, such as access to casino gambling, the advertising can be banned”).

<sup>182</sup> 478 U.S. 328 (1986) at 332.

increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that [Posadas] has chosen to litigate this case all the way to this Court indicates that [Posadas] shares the legislature's view.<sup>183</sup>

The Court also concluded that the ban was sufficiently narrow because it did not ban all casino ads, just those targeted at the Puerto Rican public.<sup>184</sup> The ban therefore passed all four phases of *Central Hudson* analysis.

For Rehnquist, the advertising ban was constitutionally permissible because the legislature could, if it wanted to, ban casino advertising altogether:

[I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.<sup>185</sup>

Thus the Court drew a distinction between the advertising in *Posadas* and that in earlier cases such as *Bigelow*. In *Bigelow*, the advertisement's underlying conduct "was constitutionally protected and could not have been prohibited by the State."<sup>186</sup> On the other hand, gambling by the residents of Puerto Rico is not a constitutional right and since the government had the power to ban the conduct altogether, this "necessarily includes the lesser power to ban advertising of casino gambling."<sup>187</sup>

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<sup>183</sup> *Id.* at 341-342.

<sup>184</sup> *Id.* at 343.

<sup>185</sup> *Id.* at 346.

<sup>186</sup> *Id.* at 345.

<sup>187</sup> *Id.* at 346.

Another commercial speech case involving gambling was decided by the Court seven years later. Once again, the Court had an opportunity to examine advertising that dealt with “vice” related activities, this time a state lottery. However, in *U.S. v. Edge Broadcasting Co.*,<sup>188</sup> the Court dismissed the government’s argument based on *Posadas* “that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement.”<sup>189</sup>

Edge Broadcasting Company owned and ran a licensed radio station in North Carolina near the Virginia border. Ninety-percent of the station’s listeners lived in neighboring Virginia. To boost revenue, the station decided to run commercials for the Virginia lottery. However, because North Carolina does not have a lottery, this violated a federal statute. 18 U.S.C. 1304 only allows “broadcasters to advertise state-run lotteries on stations licensed to a State which conducts such lotteries.”<sup>190</sup> The station was therefore barred against broadcasting the advertisements for the Virginia lottery. Edge filed a suit arguing the restriction violated the First Amendment and the Equal Protection Clause. The case made its way to the Supreme Court.

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<sup>188</sup> 509 U.S. 418 (1993).

<sup>189</sup> *Id.* at 425. The 1996 case *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 effectively put an end to the “greater-includes-the lesser” reasoning: “The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.” at 512.

<sup>190</sup> *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) at 418.



In applying *Central Hudson*, the Court said the advertisements were for a lawful activity and were not misleading or deceptive. The Court also stated that the government had “a substantial interest in supporting the policy of non-lottery states, as well as not interfering with the policy of states that permit lotteries.”<sup>191</sup> And the Court disagreed with a lower court’s ruling that the statutes failed to “advance directly” the government interest.<sup>192</sup> Thus the statute passed the first three phases of the test.

The Court now needed to resolve the fourth part of the test, whether the regulation was more extensive than necessary to serve the government interest. The Court considered this in light of its ruling in *Board of Trustees, State University of New York v. Fox*.<sup>193</sup> In *Fox*, the Court noted that in decisions following *Central Hudson*, the fourth prong had occasionally been interpreted to mean that the regulation must be the “least restrictive” possible.<sup>194</sup> However, in *Fox*, the Court modified the fourth prong and said it required “only a reasonable ‘fit’ between the government’s ends and the means chosen to accomplish those ends.”<sup>195</sup> The Court ruled that it was indeed reasonable to require Edge to comply with the statute. Doing so, the Court reasoned, “advances the governmental interest in enforcing the

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<sup>191</sup> *Id.* at 426.

<sup>192</sup> *Id.* at 427.

<sup>193</sup> 492 U.S. 469 (1989).

<sup>194</sup> *Id.* at 469.

<sup>195</sup> *Id.* at 469.

restriction in non-lottery States, while not interfering with the policy of lottery States like Virginia.”<sup>196</sup>

In a sharp dissent, Justice Stevens said the government in *Edge* “unquestionably flunked” the reasonable fit test<sup>197</sup> and that the Court’s decision contradicted its ruling in *Bigelow* that struck down a ban on the advertising of out-of-state abortion services. In *Bigelow*, the Court “held that a State ‘may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.’”<sup>198</sup> It was unfair to assume, as had the majority in *Posadas*, that the advertisement in *Bigelow* was only protected because the underlying conduct was a constitutional right.<sup>199</sup> For Stevens, *Bigelow* could not be read so narrowly; the case is about more than a constitutional right to an abortion, it’s “about paternalism, and informational protectionism. It is about one State’s interference with its citizen’s fundamental right to travel in a state of enlightenment, not government-induced ignorance.”<sup>200</sup> This, according to Stevens, was what the ban on *Edge*’s advertising amounted to. It is the most dangerous and intrusive “form of regulation possible” because it bans

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<sup>196</sup> 509 U.S. 418 (1993) at 430.

<sup>197</sup> *Id.* at 436 (Stevens, J. dissenting).

<sup>198</sup> *Id.* at 437 (Stevens, J. dissenting).

<sup>199</sup> *Id.* at 438 (Stevens, J. dissenting).

<sup>200</sup> *Id.* at 439 (Stevens, J. dissenting).

truthful speech about lawful activity and is “imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens.”<sup>201</sup>

Justice Stevens decried the government’s attempts to “manipulate public behavior” by banning “speech.”<sup>202</sup> The themes sounded in this dissent suggest his growing dissatisfaction with the commercial speech doctrine and its reliance on what he thought was a less-than-clear distinction between commercial and non-commercial speech. This latter theme, which would be developed in later cases, appeared in incipient form in *City of Cincinnati v. Discovery Network Inc.*,<sup>203</sup> an opinion he wrote three months prior to *Edge*.

The case involved a Cincinnati municipal code that banned, for aesthetic and safety purposes, newsracks that were used to distribute commercial publications but that allowed newsracks for traditional newspapers. The city justified this preferential treatment because of the lower value accorded commercial speech compared to other types of protected speech.<sup>204</sup> The Court struck down the ban that it said amounted to content discrimination. In doing so, Justice Stevens discussed the many similarities between the two types of publications.<sup>205</sup> He also noted the “difficulty of drawing bright lines that will clearly cabin commercial speech in a

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<sup>201</sup> *Id.* at 439 (Stevens, J. dissenting).

<sup>202</sup> *Id.* at 436 (Stevens, J. dissenting).

<sup>203</sup> 507 U.S. 410 (1993).

<sup>204</sup> *Id.* at 415.

<sup>205</sup> *Id.* at 423. (“Under the Fox test it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents’ promotional publications is not what we have described as ‘core’ commercial speech”).

distinct category.”<sup>206</sup> In addition, he wrote that it was wrong for the city to attach “more importance to the distinction between commercial and non-commercial speech than our cases warrant.”<sup>207</sup> For Stevens, the city’s discrimination “seriously under estimate[d] the value of commercial speech.”<sup>208</sup> For scholars such as Smolla, the message of *Discovery* is clear: The “government may not ‘pick on’ commercial speech just because it *is* commercial speech.”<sup>209</sup>

### **Strengthening the Test: The 1990s “Vice” Cases**

The inconsistency that characterized the Court’s commercial speech rulings between 1986 and 1993 raised questions for the commercial speech doctrine. Would the Court’s decisions continue to show deference to government regulations as in *Posadas* and *Edge* or would the review of such restrictions be applied more rigorously as in *Discovery*? Was the *Central Hudson* test a stringent enough test for commercial speech? Or would the Court discard the test in favor of a stricter standard of review? These questions began to be worked out in a string of cases beginning in 1995. In these cases, Justice Stevens, one of the Court’s most outspoken proponents for commercial speech protection, would continue to play a prominent role.

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<sup>206</sup> *Id.* at 419.

<sup>207</sup> *Id.* at 419.

<sup>208</sup> *Id.* at 419.

<sup>209</sup> See Smolla, *supra* note 75, at 1293.

The first of the “vice” cases, *Rubin v. Coors Brewing Co.*<sup>210</sup> arose when Coors, after having its proposed labels and advertising rejected by the Bureau of Alcohol, Tobacco and Firearms, challenged a federal statute that prohibited “beer labels from displaying alcohol content.”<sup>211</sup> Coors filed the suit in federal district court on First Amendment grounds. The government argued that the ban was necessary to curtail “strength wars” among producers who would seek to increase market share by promising the most potent brew.<sup>212</sup> The district court found the ban unconstitutional. On appeal, the 10<sup>th</sup> Circuit affirmed the lower court’s ruling. The appeals court found that although the government had a substantial interest in curbing “strength wars,” the ban failed to directly and materially advance that interest. The United States Supreme Court affirmed and in doing so applied *Central Hudson* analysis.<sup>213</sup>

All parties involved agreed that the labels conveyed truthful, non-misleading factual information about a legal product.<sup>214</sup> The Supreme Court also agreed with the lower courts that the government

has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs.<sup>215</sup>

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<sup>210</sup> 514 U.S. 476 (1995).

<sup>211</sup> *Id.* at 478.

<sup>212</sup> *Id.* at 479.

<sup>213</sup> *Id.* at 482.

<sup>214</sup> *Id.* at 483.

<sup>215</sup> *Id.* at 485.

The “critical” third prong of *Central Hudson* required that the commercial speech regulation directly advance that interest. Justice Thomas, writing for Court, cites *Edenfield v. Fane*,<sup>216</sup> decided two years earlier, in which the third factor was revised.<sup>217</sup> The *Edenfield* Court said the government must show that the “regulation advances the government’s interest ‘in a direct and material way.’”<sup>218</sup> Justice Thomas said the labeling ban not only failed to do this, but amounted to an irrational regulatory scheme.<sup>219</sup> For example, although beer labels could not disclose alcohol content, beer advertisements could if not prohibited by state law. As a result, 32 states allowed beer producers to disclose alcohol content in their advertisements. For Thomas, the

failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government’s true aim is to suppress strength wars.<sup>220</sup>

In addition, the government failed to present any convincing evidence that the ban materially and directly advanced its interest; at best the government offered

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<sup>216</sup> 507 U.S. 761 (1993).

<sup>217</sup> See *Vladeck*, *supra* note 75, at 1056 (writing that *Edenfield* “gave teeth to *Central Hudson*’s third prong”: “In language not before seen in commercial speech cases, the *Edenfield* Court emphasized that it is not enough for the government simply to point to a substantial governmental interest; the government also bears the burden of demonstrating that the restriction furthers the interest ‘in a direct and material way’”).

<sup>218</sup> 514 U.S. 476 (1995) at 487 quoting *Edenfield v. Fane*, 507 U.S. 761 (1993) at 767. *Edenfield* states that the government’s burden “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” at 770-771.

<sup>219</sup> *Id.* at 488.

<sup>220</sup> *Id.* at 488.

only “anecdotal evidence and educated guesses to suggest” that strength wars were in fact occurring and if not controlled, “would burst out of control.”<sup>221</sup> The Court also found that the regulation failed the fourth prong of *Central Hudson*—it was not “sufficiently tailored to its goal.”<sup>222</sup> The Court noted a number of less intrusive alternatives that could have been used to advance the government’s interests.<sup>223</sup>

The *Coors* decision followed the line of cases that applied *Central Hudson* analysis with rigor. That the opinion was one justice shy of a majority seemed to signal the Court’s growing skepticism toward blanket bans on truthful commercial speech. The deference toward the government’s efforts to protect society through speech regulations as in *Posadas* seemed to be a thing of the past. Yet, even though *Central Hudson*, as applied in *Coors*, seemed a significant check on commercial speech restrictions, Justice Stevens was not satisfied.

In his concurring opinion, Justice Stevens asserts that the case should not be considered under the commercial speech doctrine at all because the Federal Alcohol Administration Act “neither prevents misleading speech nor protects consumers from the dangers of incomplete information.”<sup>224</sup> In any other context, Stevens writes, a truthful statement about alcohol content would receive full first amendment protection.<sup>225</sup> But because of the commercial context and the Court’s

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<sup>221</sup> *Id.* at 490.

<sup>222</sup> *Id.* at 490.

<sup>223</sup> *Id.* at 491.

<sup>224</sup> *Id.* at 492 (Stevens, J. concurring).

<sup>225</sup> *Id.* at 493 (Stevens, J. concurring).

subsequent “misguided” reliance on *Central Hudson*, “this case appear[s] more difficult than it is.”<sup>226</sup>

For Stevens, the *Central Hudson* test “is not related to the reasons for allowing more regulation of commercial speech than other speech.”<sup>227</sup> These reasons, as set forth in *Virginia Pharmacy*, are related to “commercial speech’s potential to mislead”<sup>228</sup> and because it is more verifiable than political speech.<sup>229</sup> Also, false and misleading commercial speech is not only valueless but has potentially severe social consequences.<sup>230</sup> For these reasons, regulation should only be allowed if directed at false and misleading commercial speech. For Stevens, one of the problems of the current commercial speech doctrine is that courts sometimes take other motives (e.g. paternalistic motives as in *Posadas*) seriously.<sup>231</sup>

It appears then that Justice Stevens is in favor of scrapping the current commercial speech doctrine and the *Central Hudson* test. Indeed his *Coors* concurrence suggests that any statute restricting truthful and non-misleading

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<sup>226</sup> *Id.* at 493 (Stevens, J. concurring).

<sup>227</sup> *Id.* at 493 (Stevens, J. concurring).

<sup>228</sup> *Id.* at 493 (Stevens, J. concurring).

<sup>229</sup> *Id.* at 494 (Stevens, J. concurring).

<sup>230</sup> *Id.* at 494 (Stevens, J. concurring).

<sup>231</sup> *Id.* at 497 (Stevens, J. concurring).



commercial speech “should be subjected to the same stringent review as any other content-based abridgement of protected speech.”<sup>232</sup>

Justice Stevens picked up where he left off in his *Coors* concurrence a year later in *44 Liquormart, Inc. v. Rhode Island*<sup>233</sup> in which the Court struck down a Rhode Island law that banned “the advertising of retail liquor prices except at the point of sale.”<sup>234</sup> 44 Liquormart, a licensed liquor retailer, was fined for advertising in a Rhode Island newspaper. The ad showed bottles of liquor next to the word “WOW.” The Rhode Island liquor control board concluded that this suggestion of bargain liquor prices violated the ban. 44 Liquormart, joined by Peoples Super Liquor Store, challenged the ban in federal district court on First Amendment grounds.<sup>235</sup>

The district court said Rhode Island failed to produce evidence of the ban’s effectiveness. The ban did not directly advance the state’s interest in decreased alcohol consumption and was therefore unconstitutional.<sup>236</sup> However, the appeals

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<sup>232</sup> *Id.* at 497 (Stevens, J. concurring). For Stevens, *Coors* demonstrates the problems with the current doctrine and its reliance on “the artificiality of a rigid commercial / non-commercial distinction.” The speech in the present case, “the words ‘4.73% alcohol by volume’” would not be treated as commercial “if a non-profit group were to publish the identical statement, ‘Coors beer has 4.72% alcohol by volume’ on the cover of a magazine.” “It thus appears,” Stevens writes, “that whether or not speech is ‘commercial’ has no necessary relationship to its content. If the Coors label is commercial speech, then, I suppose it must be because (as in *Central Hudson*) the motivation of the speaker is to sell a product, or because the speech tends to induce consumers to buy a product. Yet, economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged. Neither can the value of speech be diminished solely because its placement on the label of a product.” *Id.* at 494.

<sup>233</sup> 517 U.S. 484,489 (1996).

<sup>234</sup> *Id.* at 484.

<sup>235</sup> *Id.* at 493.

<sup>236</sup> *Id.* at 494.

court reversed finding “inherent merit” in the state’s assumption that price advertising led to price competition, which led to lower prices and consequently to increased consumption.<sup>237</sup>

The Supreme Court justices were unanimous in ruling the ban unconstitutional but were split on their rationale. In all, the decision produced four opinions. Justice Stevens, who wrote the principal opinion for the Court, agreed with the district court that the state did not show “that the price advertising ban will significantly advance the state’s interest in promoting tolerance,” thus failing the third part of *Central Hudson*.<sup>238</sup> The law also flunked the fourth prong when Rhode Island failed to “establish a ‘reasonable fit’ between its abridgement of speech and its temperance goal.”<sup>239</sup> Steven’s cited “alternative forms of regulation” unrelated to the restriction of speech that could have been used to achieve the stated goals.<sup>240</sup>

Stevens once again took up his position in *Coors*, calling for stricter scrutiny when reviewing government regulations aimed at truthful, non-misleading messages about a lawful product “for reasons unrelated to the preservation of a fair bargaining process.”<sup>241</sup> When dealing with this type of speech, Stevens writes, “there is far less reason to depart from the rigorous review than the First

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<sup>237</sup> *Id.* at 494.

<sup>238</sup> *Id.* at 505.

<sup>239</sup> *Id.* at 507.

<sup>240</sup> *Id.* at 507.

<sup>241</sup> *Id.* at 501.

Amendment generally demands.”<sup>242</sup> Stevens goes on to say, the “First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what government perceives to be their own good.”<sup>243</sup> However, only Justices Kennedy and Ginsberg joined him on this point.

In his concurring opinion, Justice Thomas wrote that if “the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,” that interest is “*per se* illegitimate.”<sup>244</sup> Therefore in such cases, the *Central Hudson* test “should not be applied.”<sup>245</sup> However, Justice Thomas seemed satisfied with the direction Justice Stevens and Justice O’Connor were taking the *Central Hudson* analysis.

In her concurring opinion, Justice O’Connor agreed with Stevens that Rhode Island could have controlled liquor prices through a more direct means, such as taxation, “without intruding on sellers’ ability to provide truthful, non-misleading information to consumers.”<sup>246</sup> Taken together, the Stevens opinion and the O’Connor concurrence signaled for Justice Thomas a tightening of the fourth prong of *Central Hudson*:

Both Justice Stevens and Justice O’Connor appear to adopt a stricter, more categorical interpretation of the fourth prong of *Central Hudson* than that suggested in some of our other opinions,

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<sup>242</sup> *Id.* at 501.

<sup>243</sup> *Id.* at 503.

<sup>244</sup> *Id.* at 518 (Thomas, J. concurring).

<sup>245</sup> *Id.* at 518 (Thomas, J. concurring).

<sup>246</sup> *Id.* at 530 (O’Connor, J. concurring).

one that could, as a practical matter, go a long way toward the position I take.... The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective manner of dampening demand by users.<sup>247</sup>

Not only did the separate opinions seem to strengthen the *Central Hudson* test, they also rejected the holding and rationale of *Posadas*. In the principal opinion, Stevens rejected the “greater-includes-the-lessor” rationale.<sup>248</sup> And in her concurrence, which was joined by Justices Souter, Breyer and the Chief Justice who authored the *Posadas* opinion, O’Connor noted that although the majority paid great deference to the government in *Posadas*, since then the

Court has examined more searchingly the State’s professed goal, and the speech restriction put into place to further it, before accepting a State’s claim that the speech restriction satisfies First Amendment scrutiny.<sup>249</sup>

Ten years after *Posadas*, the Court gutted that opinion’s rationale and strengthened the scrutiny of commercial speech regulations under *Central Hudson* analysis. Although united in their skepticism toward broad-based bans on commercial speech, the Justices were divided on their rationale. A more unified Court would emerge on this issue three years later in *Greater New Orleans Broadcasting Association v. United States*.<sup>250</sup>

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<sup>247</sup> *Id.* at 524 (Thomas, J. concurring).

<sup>248</sup> *Id.* at 512.

<sup>249</sup> *Id.* at 531 (O’Connor, J. concurring).

<sup>250</sup> 527 U.S. 173 (1999).

*Greater New Orleans* once again involved a First Amendment challenge to section 1304 of title 18 of the U.S. Code, the same portion of the 1834 Communications Act that was challenged in *Edge Broadcasting*. The statute prohibited FCC licensed radio and television stations from broadcasting advertisements for a number of gambling activities.<sup>251</sup> The regulation also barred commercials for privately owned casinos.<sup>252</sup> The statute was challenged by an association of FCC licensed New Orleans broadcasters who wanted to air radio and television commercials for private, for-profit casinos located in Louisiana and neighboring Mississippi.<sup>253</sup>

Both the district court and Fifth Circuit Court of Appeals ruled in favor of the government, with the Fifth Circuit relying heavily on the ‘greater-includes-the-lesser’ rationale of *Posadas*.<sup>254</sup> The U.S. Supreme Court granted *certiorari* but vacated the judgment of the appeals court and remanded the case for further consideration in light of the ruling in *44 Liquormart*. The Fifth Circuit majority, while recognizing that *Central Hudson* had “‘become a tougher standard for the state to satisfy,’” upheld its earlier ruling for the government.<sup>255</sup> At around the same time, the Ninth Circuit reached a contrary conclusion in a similar case.<sup>256</sup> The

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<sup>251</sup> *Id.* at 177.

<sup>252</sup> *Id.* at 177.

<sup>253</sup> *Id.* at 180.

<sup>254</sup> *Id.* at 181-182.

<sup>255</sup> *Id.* at 183.

<sup>256</sup> *Id.* at 183.

Supreme Court, therefore, granted *certiorari* a second time and unanimously ruled the ban unconstitutional.<sup>257</sup>

Justice Stevens, writing for all but one justice,<sup>258</sup> used *Central Hudson* to strike down the ban. Stevens recognized that “certain judges, scholars and *amici curiae* have advocated repudiation of the *Central Hudson* standard” in favor of “a more straightforward and stringent test.”<sup>259</sup> Yet, he wrote invoking *44 Liquormart*, “reasonable judges may disagree about the merits of some proposals.”<sup>260</sup> The present case did not call for such a novel approach. Rather, the application of *Central Hudson* in recent cases provided “an adequate basis for decision.”<sup>261</sup>

Under the first *Central Hudson* factor, the Court found that the statute barred truthful, non-deceptive commercial messages about a legal product.<sup>262</sup> Under the second factor, the government argued that casino gambling contributes to such social ills as corruption, organized crime, narcotic trafficking and other illegal conduct as well as costs related to gambling addiction.<sup>263</sup> The Court agreed that

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<sup>257</sup> *Id.* at 183.

<sup>258</sup> *Id.* at 197 (Thomas, J. concurring) (reasserting his position from *44 Liquormart*; that “[i]n cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because ‘such an ‘interest’ is *per se* illegitimate and can no more justify regulation of ‘commercial speech’ than it can justify regulation of ‘noncommercial’ speech’”).

<sup>259</sup> *Id.* at 184.

<sup>260</sup> *Id.* at 184.

<sup>261</sup> *Id.* at 184.

<sup>262</sup> *Id.* at 184.

<sup>263</sup> *Id.* at 185.

curbing these social costs was a substantial government interest.<sup>264</sup> However, under the third factor the Court found that the ban did not directly and materially further the interest asserted.<sup>265</sup> The Court rejected the government's assumption that the advertising would create a greater demand for gambling. Casino advertising could, after all, "merely channel gamblers from one casino rather than another."<sup>266</sup> The Court also invoked *Coors*, stating that there were more "practical and non-speech related forms of regulation" that could be used to further the government's interest.<sup>267</sup> Because the government could have used a more direct means for achieving its goals, the regulatory scheme was not narrowly tailored.<sup>268</sup> Also under the fourth factor, the Court once again rejected the "greater-includes-the-lesser" rationale: "the power to prohibit or to regulate particular conduct does not necessarily include the power to regulate speech about that conduct."<sup>269</sup>

At the same time the Court was strengthening *Central Hudson* analysis, a commercial speech case that presented novel questions was making its way through the California courts. That case, which would present the first formidable challenge to the Court's commercial / noncommercial speech distinction, is the subject of the next chapter.

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<sup>264</sup> *Id.* at 185.

<sup>265</sup> *Id.* at 187.

<sup>266</sup> *Id.* at 189.

<sup>267</sup> *Id.* at 192.

<sup>268</sup> *Id.* at 192.

<sup>269</sup> *Id.* at 193.

## CHAPTER 5

### *NIKE V. KASKY*

In the spring of 2003, the Supreme Court dismissed a case that some hoped would raise the level of protection and do for commercial speech what *New York Times Co. v. Sullivan*<sup>270</sup> had done for libel law.<sup>271</sup> For others, doing so would have betrayed the noble purpose of *Sullivan*—to protect the powerless from the powerful.<sup>272</sup> At any rate, *Nike v. Kasky*<sup>273</sup> presented novel First Amendment questions. Up until that point, the Court’s commercial speech cases were for the most part product information cases. *Nike*, however, involved speech that was somewhere between product information and comment on matters of public interest. Justice Breyer summed up the crux of the matter during oral argument: “I think its both. [Nike is] both trying to sell their product and they’re trying to make a statement that’s relevant to a public debate.”<sup>274</sup> Indeed, the threshold question of whether Nike’s statements defending their foreign labor practices were commercial

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<sup>270</sup> 376 U.S. 254 (1964).

<sup>271</sup> See Collins and Skover, *supra* note 90, at 967 (writing that “[f]or some liberals, libertarians, and conservatives, the *Nike* controversy had less to do with corporate power than with constitutional principle. After all, the great marketplace-of-ideas principle is betrayed when corporate critics hurl barbs but corporations cannot speak back. Moreover, could the First Amendment meaningfully exist in a capitalist culture without safeguarding corporate speech? Accordingly, these free-speech advocates also saw great potential in *Nike*, but of an affirmative nature. That is, they hoped the case would become the *New York Times Co. v. Sullivan* counterpart for commercial speech”).

<sup>272</sup> See generally Kerr, *supra* note 11.

<sup>273</sup> 539 U.S. 654 (2003).

<sup>274</sup> Transcript of Oral Argument at 56, April 23, 2003, *Nike, Inc.* 2003 Trans. LEXIS (no. 02-575).



as Kasky contended or political as Nike had argued, was the critical issue confronting first the California courts and then the Supreme Court.

The story of *Nike v. Kasky* began to take shape in the mid-1990s when Nike was routinely and harshly criticized for labor conditions in its foreign factories by both activists and in the press. In 1993, CBS News exposed the plight of “sweatshop” workers in Djakarta, prompting Nike to move its operations to Vietnam.<sup>275</sup> The move failed to improve Nike’s standing in the press. Nike drew fire from *New York Times* columnist Bob Herbert and CBS’ *48 Hours*. These reports fueled more bad press and drew international attention from human rights activists such as Vietnam Labor Watch who, in 1997, issued an incriminating report about conditions in Nike’s factories.<sup>276</sup>

In response, Nike launched a vigorous public relations campaign. Among other things, Nike held press conferences by phone with college newspaper staffs and sent letters to college presidents and athletic directors assuring them that Nike was a socially responsible company. Nike even hired the civil rights leader and former U.N. ambassador Andrew Young to visit and report on conditions in Nike’s foreign factories. When Young returned with the news that Nike was doing a good job but that they could do better,<sup>277</sup> Nike ran full-page editorial advertisements in major newspapers to report Young’s findings.<sup>278</sup>

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<sup>275</sup> See Collins and Skover, *supra* note 90, at 969.

<sup>276</sup> *Id.* at 970.

<sup>277</sup> *Id.* at 976.

<sup>278</sup> *Id.* at 976.

Nike's aggressive campaign caught the eye and ire of activist and California resident Marc Kasky who then decided to sue the footwear company for making false statements of fact in the course of its public relations campaign.<sup>279</sup> To understand Kasky's cause of action requires a closer look at California's unfair competition law ("UCL"). The law

defines 'unfair competition' to mean and include 'any unlawful, unfair or fraudulent business act or practice and unfair deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law].'<sup>280</sup>

The UCL also made it possible for Kasky to sue on behalf of the general public acting, in effect, as a private attorney general:

Under this provision, a private plaintiff may bring a UCL action even when 'the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action.'<sup>281</sup>

Kasky also sued Nike under California's false advertising law ("FAL") which

makes it "unlawful for any person, ... corporation ..., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services ... or to induce the public to enter into any obligation relating thereto, to make or disseminate ... before the public in this state, ... in any newspaper or other publication ... or in any other manner or means whatever ... any statement, concerning that real or personal property or those services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading ..."<sup>282</sup>

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<sup>279</sup> *Kasky v. Nike*, 27 CAL. 4<sup>th</sup> 939 (2002) at 945.

<sup>280</sup> *Id.* at 948.

<sup>281</sup> CAL. BUS & PROF. CODE, section 17204; 27 CAL. 4<sup>th</sup> 939 (2002) at 950.

<sup>282</sup> CAL. BUS & PROF. CODE, section 17500; 27 CAL. 4<sup>th</sup> 939 (2002) at 950.

According to Kasky, Nike violated California law when it made several misstatements of fact about its foreign labor practices and working conditions. In all, he counted seven such misstatements:

- "workers who make NIKE Products are protected from and not subjected to corporal punishment and/or sexual abuse."<sup>283</sup>
- "NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;"<sup>284</sup>
- "NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;"<sup>285</sup>
- "NIKE pays average line-workers double-the-minimum wage in Southeast Asia;"<sup>286</sup>
- "workers who produce NIKE products receive free meals and health care;"<sup>287</sup>
- "the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and "operating morally";"<sup>288</sup>
- and "NIKE guarantees a "living wage' for all workers who make NIKE products."<sup>289</sup>

For Kasky, these statements were not opinions made in the course of an ongoing public debate; rather they were factual assertions that "were false and made with the intent of improving Nike's financial performance."<sup>290</sup> In short, Kasky was accusing

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<sup>283</sup> Complaint for Statutory, Equitable and Injunctive Relief P 1(a), Kasky (No. 994446).

<sup>284</sup> *Id.* at P 1(b).

<sup>285</sup> *Id.* at P 1(c).

<sup>286</sup> *Id.* at P 1(d).

<sup>287</sup> *Id.* at P 1(e).

<sup>288</sup> *Id.* at P 1(f).

<sup>289</sup> *Id.* at P 1(g).

<sup>290</sup> See Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest For a Constitutional Right to Lie*, 78 Temp L.Rev. 151 (2005) at 165.

Nike of lying and therefore his lawsuit posed a serious threat. If Nike lost, it would have to “disgorge all monies” acquired as a result of its allegedly deceptive statements and would also have to “undertake a court-approved public information campaign’ to correct any false or misleading statements.”<sup>291</sup>

In response to the complaint, Nike filed a demurrer on grounds that the complaint “failed to state facts sufficient to constitute a cause of action” and that the relief sought was “absolutely barred by the First Amendment.”<sup>292</sup> The trial court and the appeals court said the crucial issue was whether Nike’s allegedly false speech was “commercial or noncommercial for purposes of analyzing the protections afforded by the Constitution.”<sup>293</sup> The trial court ruled that the speech was noncommercial and therefore sustained Nike’s demurrer without leave to amend.<sup>294</sup> The Court of Appeals affirmed. Kasky appealed to the California Supreme Court who reversed the lower court rulings by a tight 4-3 vote.

Justice Kennard, writing for the majority, agreed with the lower courts that because of the lesser degree of constitutional protection for commercial speech and because false commercial speech could be prohibited outright, categorizing the speech is crucial.<sup>295</sup> The majority recognized however, that the Supreme Court had

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<sup>291</sup> 27 CAL. 4<sup>th</sup> 939 (2002) at 948.

<sup>292</sup> *Id.* at 948.

<sup>293</sup> *Id.* at 949.

<sup>294</sup> *Id.* at 949.

<sup>295</sup> *Id.* at 946. To determine where to place Nike’s speech, the California Supreme Court looked closely at the United States Supreme Court’s decision in *Bolger v. Youngs Drug Products Corp.* 463

not formulated “an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment.”<sup>296</sup> Yet, a close examination of the Supreme Court’s commercial speech cases, Kennard wrote, makes it “possible to formulate a limited-purpose test.”<sup>297</sup> The California Supreme Court’s test—one suited for cases “when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception”—required the consideration of three elements: “the speaker, the intended audience, and the content of the message.”<sup>298</sup>

Under this formulation, the speaker is “someone engaged in commerce” or someone acting on behalf of someone so engaged.<sup>299</sup> The intended audience is comprised of actual or potential customers of the speaker.<sup>300</sup> To satisfy the final factor, “the factual content of the message should be commercial in character.”<sup>301</sup>

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U.S. 60 (1983). The California Supreme Court took particular interest in the discussion surrounding the problematic “informational pamphlets” that addressed the desirability of prophylactics in general. The majority was impressed that when the three separate factors of the *Bolger* test—advertising format, product references, and commercial motivation—were considered in isolation they did not make the pamphlet’s commercial speech, but that the combination of all three did. The opinion also points to two important footnotes in *Bolger* that provide additional insight into the distinction. First, the Supreme Court cautioned that the three *Bolger* factors do not necessarily all have to be present in order to categorize the speech as commercial. Second, discussing the information pamphlets that did not refer specifically to the company’s own products, the high Court said “[t]hat a product is referred to generically does not, however, remove it from the realm of commercial speech.” In addition, the *Bolger* Court warned that “[a]dvertisers should not be able to immunize false or misleading product information from government regulation simply by including references to public issues.” *Id.* at 957.

<sup>296</sup> *Id.* at 968.

<sup>297</sup> *Id.* at 960.

<sup>298</sup> *Id.* at 960.

<sup>299</sup> *Id.* at 960.

<sup>300</sup> *Id.* at 960.

<sup>301</sup> *Id.* at 961.

Typically in a commercial context the speaker will make “representations of fact” about its “business operations, products or services” for commercial purposes.<sup>302</sup>

The California Supreme Court drew this conclusion from a broad reading of the third *Bolger* factor—product references. For the majority, product references include any number of statements about a company’s products (e.g. information about manufacture, distribution, warranty or repair services, etc.). In the “context of a modern, sophisticated public relations campaign intended to increase sales and profits” this broad understanding of “product references” is necessary.<sup>303</sup>

Applying the test to Nike’s speech, the majority concluded that the speech was indeed commercial for First Amendment purposes. The opinion specifically points to Nike’s letters to university presidents—actual and potential buyers of Nike’s products—to satisfy the second element.<sup>304</sup> Under the third factor, the majority found that Nike “was making factual representations about its own business operations” and that “Nike was in a position to readily verify the truth of any factual assertions made on these topics.”<sup>305</sup>

*Kasky v. Nike* produced two dissenting opinions. In his dissent, Justice Chin said the majority unconstitutionally handicapped one side of an important debate:

While Nike’s critics have taken full advantage of their right to “uninhibited, robust, and wide open” debate, the same cannot be said

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<sup>302</sup> *Id.* at 961.

<sup>303</sup> *Id.* at 961-962.

<sup>304</sup> *Id.* at 963.

<sup>305</sup> *Id.* at 965-966.

of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike’s critics enjoy.<sup>306</sup>

Justice Chin also points to the Supreme Court’s decision in *First National Bank of Boston v. Bellotti*<sup>307</sup> to show that the speaker’s corporate identity should not be a factor when deciding if speech is protected or not.<sup>308</sup> Chin said the public “has the right to receive information from both sides of this international debate.”<sup>309</sup> That Nike’s speech was allegedly false and misleading did not seem to matter much to Justice Chin. He wrote that the company provided “relevant information” that “gave the public insight and perspective into the debate” and that such speech should be fully protected.<sup>310</sup>

In her dissenting opinion, Justice Brown agreed that the majority unconstitutionally favored one side of the debate.<sup>311</sup> For Brown, the majority’s test handicaps commercial speakers and holds them “strictly liable for their false or misleading representations” while other speakers can make the same factual misrepresentations without fear of this same level of liability.<sup>312</sup> In addition, Brown writes, the majority has created an overly broad test that in effect “renders all

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<sup>306</sup> *Id.* at 970-971 (Chin, J. dissenting).

<sup>307</sup> 435 U.S. 765 (1978).

<sup>308</sup> 27 CAL. 4<sup>th</sup> 939 (2002) at 971 (Chin, J. dissenting).

<sup>309</sup> *Id.* at 972 (Chin, J. dissenting).

<sup>310</sup> *Id.* at 976-977 (Chin, J. dissenting).

<sup>311</sup> *Id.* at 985 (Brown, J. dissenting).

<sup>312</sup> *Id.* at 985 (Brown, J. dissenting).

corporate speech commercial speech.”<sup>313</sup> For Brown, the test will therefore unconstitutionally chill “a corporation’s ability to participate in the debate over matters of public concern.”<sup>314</sup>

It appears that Brown finds the majority’s test problematic because it attempts the impossible—to make a satisfactory distinction between commercial and noncommercial speech when the speech contains elements of both. According to Brown, as a result of the growing sophistication of strategic communication plans and the “growing politicization of commercial matters,” the gray area between commercial and noncommercial speech is getting larger,<sup>315</sup> while the gap between them is shrinking.<sup>316</sup> The Supreme Court’s commercial speech doctrine has failed to keep pace with these developments:

As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity.<sup>317</sup>

For this reason, Brown said the Supreme Court must re-evaluate the doctrine.<sup>318</sup>

Brown calls for “a more nuanced inquiry that accounts for the realities of today’s

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<sup>313</sup> *Id.* at 984 (Brown, J. dissenting).

<sup>314</sup> *Id.* at 984 (Brown, J. dissenting).

<sup>315</sup> *Id.* at 994 (Brown, J. dissenting).

<sup>316</sup> *Id.* at 979 (Brown, J. dissenting).

<sup>317</sup> *Id.* at 994 (Brown, J. dissenting).

<sup>318</sup> *Id.* at 994 (Brown, J. dissenting).



commercial world.”<sup>319</sup> She suggests developing an intermediary speech category where “commercial and noncommercial elements are closely intertwined.”<sup>320</sup> In short, the Court needs to devise an “approach that guarantees the ability of speakers engaged in commerce to participate in the public debate without giving these speakers free reign to lie and cheat.”<sup>321</sup>

This, however, is what the majority thought it was accomplishing with the limited-purpose test. Justice Kennard begins the majority opinion by stating that

[o]ur holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.<sup>322</sup>

According to Kennard, the majority’s test leaves ample room for corporations to speak on public issues. Nike, for example, is free to express an opinion on globalization. That speech would be fully protected noncommercial speech. However, as soon as Nike makes factual statements about its own business products or practices, it loses that level of protection.<sup>323</sup>

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<sup>319</sup> *Id.* at 994 (Brown, J. dissenting).

<sup>320</sup> *Id.* at 994 (Brown, J. dissenting).

<sup>321</sup> *Id.* at 995 (Brown, J. dissenting).

<sup>322</sup> *Id.* at 946.

<sup>323</sup> *Id.* at 967.

It is important to note that the California Supreme Court never decided whether Nike's commercial speech was false or not.<sup>324</sup> This was a factual issue that needed to be resolved in the lower courts. Because the decision was reversed and remanded to the appeals court, the case would now be allowed to enter the discovery phase, but not before Nike would appeal to and be granted certiorari by the Supreme Court.

The challenge before Nike's lawyers was how to craft an argument that said in effect that allegedly false commercial expression was entitled to First Amendment protection. In response to that task, Nike's brief, using language and rhetoric akin to *New York Times Co. v. Sullivan*, argues two things. First, it argues that its speech should be treated as fully protected political speech<sup>325</sup> and second, that even if the California Supreme Court was correct in categorizing its speech as commercial it should not be subjected to the legal regime upheld by that court.<sup>326</sup> In other words, it appears that Nike wanted the Court to carve out the same "breathing space" for its speech as the Court had done for political speech in *New York Times Co. v.*

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<sup>324</sup> *Id.* at 970 (stating that "[i]n concluding, contrary to the Court of Appeals, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading, nor do we decide whether plaintiff's complaint is vulnerable to demurrer for reasons not considered here. Because the demurrers of Nike and the individual defendants were based on multiple grounds, further proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both. Our decision on the narrow issue before us on review does not foreclose those proceedings").

<sup>325</sup> See Piety, *supra* note 290, at 163 ("Characterizing its statements as speech on matters of public concern was central to Nike's rhetorical strategy").

<sup>326</sup> See Petitioners Brief at i, *Nike Inc.* (no. 02-575).

*Sullivan*.<sup>327</sup> To this end, Nike presented itself as an “embattled citizen,”<sup>328</sup> as a victim on par with civil rights leaders and lunch-counter protestors.<sup>329</sup>

According to the Petitioner’s Brief, Nike is a “voice”<sup>330</sup> that has been stifled by California’s legal regime. If that regime is left standing, the Brief states, it “would chill much communication that is truthful and fully protected by any measure.”<sup>331</sup> Since Nike’s “voice” contributes to the “marketplace of ideas,” any limitation on it would severely hamper “the free exchange of ideas.”<sup>332</sup> This, the Brief assures us using a well worn quote from *Sullivan*, strikes at the heart of the First Amendment and the “‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.’”<sup>333</sup> Also, the Brief argues based on *Bellotti*<sup>334</sup> that Nike’s corporate identity is immaterial; rather the inherent worth of the expression is all that should be considered when deciding its

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<sup>327</sup> 376 U.S. 254 (1964) at 271-272 (arguing that the “erroneous statement is inevitable in free debate” and “must be protected if the freedoms of expression are to have the ‘breathing space’ that they need....to survive”). See also Piety, *supra* note 289, at 153 (arguing “that Nike was asking for a constitutional right to lie”).

<sup>328</sup> See Piety, *supra* note 290, at 160 (writing that “Nike painted a picture of itself as an embattled citizen merely trying to defend itself in a public debate against an unfair attempt to stifle its voice—as opposed to a multi-billion dollar corporation attempting to engage in damage control and regain market share through the free advertising of press releases”).

<sup>329</sup> Indeed, *Sullivan* is invoked early in the brief with the statement that Nike responded to its critics in an “‘editorial advertisement’—i.e., paid political advertisements,” precisely the type of expression that was given full protection in *Sullivan*. See Petitioners Brief at 2, *Nike Inc.* (no. 02-575).

<sup>330</sup> See Petitioners Brief at 2, *Nike Inc.* (no. 02-575) at 44.

<sup>331</sup> *Id.* at 38.

<sup>332</sup> *Id.* at 38 (citing *Bigelow v. Virginia*, 421 U.S. 809).

<sup>333</sup> *Id.* at 26 (citing *New York Times Co. v. Sullivan* 376 U.S. 254).

<sup>334</sup> 435 U.S. 765 (1978).

protection.<sup>335</sup> In addition, the courts should not be the final arbiter of truth; rather the ““best test of truth,”” the Brief states quoting *Sullivan* again, ““is the power of the thought to get itself accepted in the competition of the market.””<sup>336</sup> This, the Brief reminds us, is the central meaning and purpose of the First Amendment—a value given expression in Judge Learned Hand’s stirring and classic formulation with which the Brief ends:

the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.”<sup>337</sup>

Although the Nike brief used the language and rhetoric of *New York Times Co. v. Sullivan*, many commentators said it turned that ruling on its head.<sup>338</sup> However, some Supreme Court Justices, perhaps moved by Nike’s argument, showed themselves sympathetic to Nike’s position. *Nike v. Kasky* arrived on the Court’s docket accompanied by 31 amicus curiae briefs—the majority arguing in favor of Nike’s position. Those interested were soon disappointed when the Court dismissed the case as improvidently granted.

In his concurring opinion, Justice Stevens said there were three reasons why the case presented jurisdictional problems. First, the California Court never reached a

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<sup>335</sup> See Petitioners Brief at 31, *Nike Inc.* (no. 02-575).

<sup>336</sup> *Id.* at 50 (quoting Justice Brandies in *Whitney v. California*, 274 U.S. 357 (1972)).

<sup>337</sup> *Id.* at 50 (citing *United States v. Associated Press*, 52 F. Supp. 362,372 (S.D.N.Y. 1943)).

<sup>338</sup> See, e.g., Kerr *supra* note 11; Piety *supra* note 290.

final judgment on the case.<sup>339</sup> Second, “neither party has standing to invoke the jurisdiction of the federal courts.”<sup>340</sup> And finally, the difficulty and importance of the First Amendment questions raised by the case provides good reasons for not anticipating “a question of constitutional law in advance of the necessity of deciding it.”<sup>341</sup>

Although the justices were split on their decision to dismiss—Justices Breyer and O’Connor wanted to rule on the merits of the case—a majority of the Court rejected the Supreme Court of California’s categorization of Nike’s speech as unprotected commercial speech. Justice Stevens saw the speech as “a blending of commercial speech, noncommercial speech and debate on an issue of public importance.”<sup>342</sup> There were, Stevens wrote, two competing but important interests at stake. First, the “regulatory interest in protecting market participants from being misled by such misstatements is of the highest order.”<sup>343</sup> But on the other hand,

[k]nowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.<sup>344</sup>

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<sup>339</sup> *Nike v. Kasky*, 539 U.S. 654 (2003) at 658 (Stevens, J. concurring).

<sup>340</sup> *Id.* at 661 (Stevens, J. concurring).

<sup>341</sup> *Id.* at 663 (Stevens, J. concurring).

<sup>342</sup> *Id.* at 663 (Stevens, J. concurring).

<sup>343</sup> *Id.* at 664 (Stevens, J. concurring).

<sup>344</sup> *Id.* at 664 (Stevens, J. concurring).

As some commentators have noted, “[s]uch language suggests a constitutional mindset more akin to that of *New York Times Co. v. Sullivan* than of *Central Hudson* and its commercial speech progeny.”<sup>345</sup>

In dissent, Justice Breyer, joined by Justice O’Connor, said waiting to decide the case could exact a heavy toll on the First Amendment rights of the speaker.<sup>346</sup> Nike and other potential speakers, for fear of being sued under California’s unfair competition statute, Breyer writes, “may censor their expression well beyond what the law may constitutionally demand. That is what a ‘chilling effect’ means. It is present here.”<sup>347</sup> For Breyer, this chilling effect is an affront to First Amendment values regardless of whether the speaker is a corporation or not.<sup>348</sup>

When the Court dismissed *Nike v. Kasky* for jurisdictional reasons, many scholars saw it as a missed opportunity for the Court to clarify its position on commercial speech.<sup>349</sup> The central issue in the case, as we have seen, was the ever elusive definition of commercial speech,<sup>350</sup> an especially important issue

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<sup>345</sup> See Collins and Skover, *supra* note 90, at 1018.

<sup>346</sup> *Nike v. Kasky*, 539 U.S. 654 (2003) at 683 (Breyer, J. dissenting).

<sup>347</sup> *Id.* at 683 (Breyer, J. dissenting).

<sup>348</sup> *Id.* at 684 (Breyer, J. dissenting).

<sup>349</sup> See, e.g., J. Wesley Earnhardt, *Comment, Nike, Inc. v. Kasky: A Golden Opportunity to Define Commercial Speech—Why Wouldn’t the Supreme Court Finally “Just Do It®”?*, 82 N.C. L. Rev. 797, (2004); Robert O’Neil, *Nike v. Kasky—What Might Have Been...*, 54 Case W. Res. 1259 (2004) (asserting that *Kasky* was “a seemingly ideal opportunity to clarify several key issues in the increasingly confusing doctrine of commercial speech”); James J. Barney, *The Mixed Message: The Supreme Court’s Missed Opportunity to Address the Confused State of Commercial Speech in Nike, Inc. v. Kasky?*, 37 U West L.A. L. Rev. 1 (2004).

<sup>350</sup> See generally Collins and Skover, *supra* note 90 (asserting that before *Nike*, commercial speech cases were relatively easy to sort out and therefore did not present any direct challenge to the

for *Nike* since if its speech were considered political expression it would have received even greater protection than its critics' speech.<sup>351</sup> The case also brought to the fore the issue of "hybrid or "mixed" speech—speech that contains elements of both political and commercial expression. For some, Nike's speech exemplifies the blurred line between commercial and political speech, a blurry and shifting line that "defies capture and definition."<sup>352</sup> And since the commercial speech doctrine has not developed a standard of review to exclusively evaluate this blurred, "mixed speech,"<sup>353</sup> the Court missed that opportunity when it dismissed *Nike*.<sup>354</sup>

For others, Nike's speech, because it contained product information aimed at potential consumers, clearly fell on the side of commercial speech.<sup>355</sup> Baker, for example, asserts that Nike's speech is commercial speech largely because for profit, non-media corporations are not entitled to the same free speech rights

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distinction between commercial and non-commercial speech. *Nike*, for the first time, presented a case the directly challenged the distinction).

<sup>351</sup> See Chemerinsky and Fisk, *supra* note 25, at 1156.

<sup>352</sup> See La Freta, *supra* note 48, at 1226. La Freta argues that the "common sense approach taken by the Court" leads to confusion and that "marketing and advertising are no longer necessarily identifiable or separable from noncommercial speech" at 1230.

<sup>353</sup> See generally Post, *supra* note 23.

<sup>354</sup> See generally Barney, *supra* note 349.

<sup>355</sup> See, e.g., Jason A. Cade, *Wall Street in Turmoil: Who is Protecting the Investor?: Note: If The Shoe Fits Kasky v. Nike and Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech*, 70 Brooklyn L. Rev. 247 (2004) (noting that corporations are aware that a good public image helps sell product and therefore "today's commercial speech encompasses communications beyond traditional advertising about products or services").

as flesh and blood individuals.<sup>356</sup> In his view it is “idiocy” to treat people and corporations (“mere legal creations”) as beings “equally worthy of moral and legal concern.”<sup>357</sup> For Baker then, the identity of the speaker is crucial for determining whether the speech is commercial or not.<sup>358</sup> The Court’s concern in commercial speech, after all, was never about the speaker’s right to expression, but about the listener’s interest in the free flow of commercial information.<sup>359</sup>

For proponents of Nike’s speech rights, the identity of the speaker is irrelevant; whether or not Nike’s speech is treated as commercial or political should depend entirely on the format of the expression.<sup>360</sup> For Johnson and Fisher, corporate speech should only be treated as commercial when it is made in the course of an economic transaction.<sup>361</sup> On the other hand, when corporate speech is disseminated through media channels outside traditional advertising, it should be treated as political speech.<sup>362</sup> For example, Nike’s speech was made

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<sup>356</sup> See generally C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 Case W. Res. 1161 (2004).

<sup>357</sup> *Id.* at 1163.

<sup>358</sup> *Id.* at 1169 (arguing against Judge Brown’s dissent in *Kasky* in which she wrote “that the majority’s ‘test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent on the identity of the speaker—and not just the speech’s content.’” By contrast, Baker argues that by looking at commercial speech case law, one can only conclude that “commercial speech is crucially about the identity of the speaker”).

<sup>359</sup> See Baker, *supra* note 356, at 1170; see also Chemerinsky and Fisk, *supra* note 25 (when it comes to commercial speech, “it is the interest of the listener that’s paramount, rather than the speaker”).

<sup>360</sup> See generally Johnson and Fisher, *supra* note 86.

<sup>361</sup> *Id.* at 1245.

<sup>362</sup> *Id.* at 1245.



“to the media in the context of” a rapidly developing public debate.<sup>363</sup> Since a company does not have unlimited time to respond to its critics in this rapid-fire situation, it is unfair to hold it “accountable for inadvertent or negligent statements.”<sup>364</sup> Therefore, since Nike’s campaign utilized formats such as letters to the editor and press releases, its speech falls outside the commercial speech doctrine.<sup>365</sup>

However, some argue that when Nike’s speech is examined under the governing *Bolger* test, the format becomes irrelevant.<sup>366</sup> Attaching commercial speech to a public issue does not take it outside the realm of the commercial speech doctrine.<sup>367</sup> Indeed, as any student of modern advertising can attest, focusing on format to decide the issue is problematic at best. As one scholar asks, “is there any format immune from [commercial] advertising?”<sup>368</sup> But others fear that disregarding format altogether and subsequently labeling all

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<sup>363</sup> *Id.* at 1245.

<sup>364</sup> *Id.* at 1252.

<sup>365</sup> *Id.* at 1245.

<sup>366</sup> *See*, Chemerinsky and Fisk, *supra* note 25, at 1148.

<sup>367</sup> *Id.* at 1148. (writing that “[i]n an era when corporations increasingly see news coverage as a form of PR, and news shows as crucial forum in their advertising and public relations campaigns, the line between news and advertising is blurred. But that does not mean that the line should not or does not exist. Nike’s statements were on the PR side of the line”).

<sup>368</sup> *See* James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 Case W. Res. 1091 (2004) at 1120.

corporate speech as commercial will have a chilling effect on speech on public issues,<sup>369</sup> corporate speech that has important social value.<sup>370</sup>

For the moment these issues have been left undecided and no doubt will continue to be debated in the academic literature. However, it does appear that a majority of the Supreme Court justices rejected the categorization of Nike's speech as strictly commercial. This perhaps shows that Nike was partly successful in persuading the Court that its speech was similar to the speech at issue in *Sullivan*. But was it? Should the First Amendment protections provided by *Sullivan* be extended to Nike's corporate speech? In other words, did the California Supreme Court err in its reading of the commercial speech doctrine when it developed a test to determine that Nike's speech was indeed commercial? Can the First Amendment philosophy of *Sullivan* help address the difficult issues presented by *Nike*? To answer, it is necessary to obtain a clear understanding of the type of speech *Sullivan* was intended to protect. To this end, we turn to an examination of the philosophy and rationale of that case.

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<sup>369</sup> See Vicki McIntyre, *Nike v. Kasky: Leaving Corporate America Speechless*, 30 Wm. Mitchell L. Rev. 1531 (2004) at 1565.

<sup>370</sup> See generally La Freta, *supra* note 48.

## CHAPTER 6

### *SULLIVAN AND THE FIRST AMENDMENT*

Chief Justice Earl Warren wrote revealingly in 1968 that the Supreme Court’s “essential function is to act as the final arbiter of minority rights.”<sup>371</sup> Four years earlier, in *New York Times Co. v. Sullivan*,<sup>372</sup> the Court did just that and in the process revolutionized libel law and planted the seeds for the greater protection of commercial speech. The historical context of the case is significant—Montgomery, Alabama at the height of the civil rights era and a minority population trying desperately to have its voice heard. One of the channels open to it was advocacy and editorial advertising.<sup>373</sup> In precedent-setting *dicta*, the *Sullivan* Court recognized such advertising as “an important outlet for the promulgation of ideas by persons who do not themselves have access to publishing facilities.”<sup>374</sup> Yet, recognizing the paid advertisement “Heed Their Rising Voices” as core political speech was not enough to win the case for the *New York Times*. The question still remained whether the First Amendment protected speech that contained false statements of fact and that allegedly defamed a public official.

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<sup>371</sup> As quoted in the *Philadelphia Inquirer*, Oct. 4, 1968.

<sup>372</sup> 376 U.S. 254 (1964).

<sup>373</sup> See Ross and Bird, *supra* note 18, at 266.

<sup>374</sup> 376 U.S. 254 (1964) at 266.

Under Alabama libel law, the ad was considered “libelous *per se*.”<sup>375</sup> This meant that if the jury found that the statements were published in the *Times* and were “of and concerning” Sullivan, the *Times* would be held liable.<sup>376</sup> Once libel *per se* had been established, the *Times*’ only defense was to persuade the jury that the stated facts “were true in all their particulars.”<sup>377</sup> The defense was unable to overcome this burden.

When the case arrived before the Supreme Court, all sides agreed that some of the statements “were not accurate descriptions” of the events that occurred in Montgomery.<sup>378</sup> The ad contained a short laundry list of minor mistakes. Students sang “My Country ‘Tis of Thee” rather than the National Anthem. The ad stated that nine students were expelled for leading a demonstration at the state Capitol when in fact they were expelled for demanding service at a lunch counter.<sup>379</sup> Students did not refuse to register for classes, but boycotted class on a single day. The dining hall was not padlocked and the police did not “ring” the campus although they had been deployed there three times. And Dr. King was arrested four times, not seven.<sup>380</sup>

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<sup>375</sup> *Id.* at 262.

<sup>376</sup> *Id.* at 262.

<sup>377</sup> *Id.* at 267.

<sup>378</sup> *Id.* at 259.

<sup>379</sup> *Id.* at 262.

<sup>380</sup> *Id.* at 259.

Because of these misstatements of fact, Alabama law said the speakers lost their “privilege of ‘fair comment’” because that privilege “depends on the truth of the facts upon which the comment is based.”<sup>381</sup> The question before the Supreme Court then was “whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.”<sup>382</sup>

In ruling for Sullivan, the Alabama courts relied on past Supreme Court decisions that said in effect that libelous statements were not protected by the First Amendment.<sup>383</sup> However, Justice Brennan refused to treat these cases as controlling because none of them “sustained the use of libel law to impose sanctions upon expression critical of the official conduct of public officials.”<sup>384</sup> The only previous case that came near to the novel questions presented by *Sullivan* was left undecided by an equally divided court.<sup>385</sup> Therefore, Brennan wrote,

[i]n deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel

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<sup>381</sup> *Id.* at 267.

<sup>382</sup> *Id.* at 262.

<sup>383</sup> *Id.* at 268. (citing, *Konigsberg v. State Bar of California*, 366 U.S. 36, 49; *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48; *Roth v. United States*, 354 U.S. 476, 486 -487; *Beauharnais v. Illinois*, 343 U.S. 250, 266; *Pennekamp v. Florida*, 328 U.S. 331, 348-349; *Chaplinsky v. New Hampshire* 315 U.S. 568,572; *Near v. Minnesota*, 283 U.S. 697, 715).

<sup>384</sup> *Id.* at 268.

<sup>385</sup> *Id.* at 268. (citing *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642).

can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.<sup>386</sup>

Although the opinion certainly cites Supreme Court case law, this serves only to lay the groundwork for a more profound discussion of the lessons of history and the First Amendment principles and values on which Brennan's argument relies. By looking at the opinion's language, these principles can be traced to an intellectual tradition that includes the marketplace of ideas theory<sup>387</sup> and James Madison's writings in response to the Alien and Sedition Acts of 1798. I argue that when taken in conjunction with one another, the historical justifications and the First Amendment principles the Court uses to arrive at its decision present a coherent First Amendment philosophy.

### **Marketplace of Ideas Theory**

Brennan begins the opinion with the premise that the advertisement contains speech on matters of public interest.<sup>388</sup> That such speech "is secured by the First Amendment," Brennan writes, "has long been settled by our decisions."<sup>389</sup> In *Roth v. United States*,<sup>390</sup> the Court said the purpose of the First Amendment was "to assure unfettered interchange of ideas"; to serve as a catalyst for political and social

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<sup>386</sup> *Id.* at 269.

<sup>387</sup> J.S. Mill is quoted in footnotes 13 and 19 of the opinion.

<sup>388</sup> *Id.* at 266. ("The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen* [...] That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold").

<sup>389</sup> *Id.* at 269.

<sup>390</sup> 354 U.S. 476, 484.

change.<sup>391</sup> Another case recognized free speech as “a prized American privilege.”<sup>392</sup> Brennan quotes Judge Learned Hand’s Millian principle that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>393</sup> This principle was echoed by Justice Brandeis in his concurring opinion in *Whitney v. California*,<sup>394</sup> which Brennan calls the “classic formulation”:

“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of American government [...] the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”<sup>395</sup>

Justice Brennan concludes that there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open” and that such debate often includes “sharp attacks on government and public officials.”<sup>396</sup> The question that remained was whether such speech is protected

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<sup>391</sup> 376 U.S. 254 (1964) at 269.

<sup>392</sup> *Id.* at 270 (quoting *Stromberg v. California*, 283 U.S. 359, 369).

<sup>393</sup> *Id.* at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362,372 (D.C.S.D.N.Y. 1943)).

<sup>394</sup> 274 U.S. 357, 375-376.

<sup>395</sup> 376 U.S. 254 (1964) at 270.

<sup>396</sup> *Id.* at 270.

even when it contains factual misstatements and allegedly defames a public official.<sup>397</sup>

To answer, Brennan quotes *NAACP v. Button*<sup>398</sup> to show that constitutional protection is not predicated by the truthfulness, “popularity, or social utility” of the political statement.<sup>399</sup> In fact, Brennan writes, quoting James Madison, “[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in the press.”<sup>400</sup> Brennan also quotes a lengthy passage from *Cantwell v. Connecticut*<sup>401</sup> in which the Court stated that despite the use of exaggeration and the vilification of public officials in political discussion, the liberty to speak freely “is essential to enlightened opinion and right conduct on the part of citizens in a democracy.”<sup>402</sup> Indeed, the very inevitability of such hyperbole coupled with “‘half-truths’ and ‘misinformation’” in free debate make it

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<sup>397</sup> *Id.* at 271.

<sup>398</sup> 371 U.S. 415,445 (1963).

<sup>399</sup> 376 U.S. 254 (1964) at 271.

<sup>400</sup> *Id.* at 270. (quoting *4 Elliot’s Debates on the Federal Constitution* (1876), at 571); see also James Madison, *The Virginia Report of 1799-1800* (De Capo Press) (1970) [178-237] (the entire quote reads: “Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour [sic] of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect, that to the press alone, chequered [sic] as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression” at 222).

<sup>401</sup> 310 U.S. 296, 310 (1940).

<sup>402</sup> 376 U.S. 254 (1964) at 271.



necessary to carve out “the breathing space” that free expression needs “to survive.”<sup>403</sup>

The language that Brennan uses and the passages he quotes in the first section of the opinion are traceable to the marketplace of ideas theory of free speech. This theory, named after Justice Oliver Wendell Holmes’ spirited dissent in *Abrams v. United States*,<sup>404</sup> assumes, in short, that in the arena of public debate, truth is not known beforehand; rather it emerges through the interchange of ideas.<sup>405</sup> Many trace this theory to John Milton’s famous 17<sup>th</sup> century defense of unlicensed printing in the *Areopagitica*:

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?<sup>406</sup>

Milton believed that in the field of competing doctrines, opinions and ideas there was Truth to be found and that human rationality was capable of finding it.

Although Milton’s 17<sup>th</sup> century notions of truth sound quaint to our sophisticated 21<sup>st</sup> century ears, his self-righting principle has been influential in First Amendment

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<sup>403</sup> *Id.* at 272.

<sup>404</sup> 250 U.S. 616, 630 (Holmes, J. dissenting) (1919).

<sup>405</sup> This is precisely why error and falsehood should be allowed uninhibited entry into the debate, as the *Sullivan* Court recognized when it wrote that the “erroneous statement is inevitable in free debate” and “must be protected if the freedoms of expression are to have the ‘breathing space’ that ‘they need....to survive.’” 376 U.S. 254 (1964) at 272-273.

<sup>406</sup> See John Milton, *Areopagitica and Of Education* (George H. Sabine ed., Harlan Davidson 1987) (1644) at 50.

theory.<sup>407</sup> Yet, before it was adopted by 20<sup>th</sup> century philosophers and judges, it was modified by the British philosopher John Stuart Mill.

Mill was a little less optimistic about the power of truth when confronted with falsehood. In his 1859 defense of free speech in *On Liberty*, Mill said history is full of examples of truth being “put down by persecution.”<sup>408</sup> Yet, even though he recognized that truth does not always triumph over falsehood, Mill had great hope that truth would eventually surface in the course of history:

The real advantage which truth has consists of this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of the ages, there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.<sup>409</sup>

For this reason, all viewpoints, and in particular dissenting viewpoints, should enjoy uninhibited entry into the public arena. For Mill, the unpopular idea or opinion may, in the course of time, prove quite valuable. Mill believed in the potential for human knowledge to grow and build upon itself. However, this could only take place in an atmosphere of open and free discussion.

In *On Liberty*, Mill puts forth three reasons why diversity of opinion is advantageous. The first and most obvious is that the received opinion may be false

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<sup>407</sup> See Lyrisa Barnett Lidsky and R. George Wright, *Freedom of the Press: A Reference Guide to the United States Constitution* (Praeger) (2004) at 15 (writing that “John Milton and John Stuart Mill both famously argued that the free exchange of ideas fosters the search for truth. The ‘marketplace of ideas’ metaphor, which was introduced to First Amendment jurisprudence by Justice Oliver Wendell Holmes, is perhaps the dominant theoretical justification for protecting freedom of expression”).

<sup>408</sup> J.S. Mill, *On Liberty* (Currin V. Shields ed. Macmillan 1986) (1859) at 34.

<sup>409</sup> *Id.* at 36.

and can only be corrected with an open confrontation with the correct opinion.<sup>410</sup>

Second, if the received opinion is true and no opposing viewpoints are offered, the true opinion can only be accepted as dogma. And, as Mill writes, “the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth.”<sup>411</sup>

Mill’s third reason goes to the heart of his philosophy on human liberty and concerns the problematic nature of truth itself. Mill maintained that public opinions were not like mathematical truths—true for all places and all times. Rather, public opinion, by its nature, is such that it allows for multiple viewpoints. In fact, for Mill, it was only by entertaining multiple and opposing viewpoints that publics or cultures or societies would ever get to anything like the truth. For Mill, truth or correct public opinions are the result of a quasi-dialectical synthesis of opposing viewpoints:

Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.<sup>412</sup>

The dialectical nature of truth is such that opinions and ideas grow to fruition only through confrontation with opposing viewpoints. For Mill, all opinions or truth-

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<sup>410</sup> *Id.* at 55.

<sup>411</sup> *Id.* at 55. Mill writes that “the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.” *Id.* at 21.

<sup>412</sup> *Id.* at 58.

claims are partially true and therefore dependent on one another.<sup>413</sup> When one truth-claim is synthesized with its opposite, what emerges is a truth-claim that is truer than either of the previous truth-claims.<sup>414</sup> Mill suggests then, that human knowledge grows and builds upon itself as a result of the continuing synthesis of opposing truth-claims and that this synthesis is fostered “through diversity of opinion.”<sup>415</sup>

Mill strongly asserted the fallibility of the human mind and that human knowledge is never complete. For this reason, no person is in a position to decide for others what is truthful or certain.<sup>416</sup> As Mill writes, “[a]ll silencing of discussion is an assumption of infallibility.”<sup>417</sup> Indeed, silencing opinion decides in advance for others the correct answer to any question and does not allow others the same opportunity to examine all sides of the argument.<sup>418</sup> Since no person or government is in a position to make these decisions, and because each person should have the opportunity to decide for him or herself, the free flow of information is necessary. In addition, since it is only by receiving and entertaining all sides of the debate that one can ever come to know the truth, Mill asserts a speaker’s right to engage in the discussion and a listener’s right to hear all available

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<sup>413</sup> *Id.* at 58.

<sup>414</sup> *Id.* at 44. (“But on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons”).

<sup>415</sup> *Id.* at 58.

<sup>416</sup> *Id.* at 29.

<sup>417</sup> *Id.* at 21-22.

<sup>418</sup> *Id.* at 29.

sides.<sup>419</sup> Neither popular majorities nor governments have the right to censor unpopular opinion, whether these opinions are true or false; rather public opinions are inherently valuable and should be voiced and heard by all who wish to do so.

Mill's ideas in *On Liberty* have been influential in American political thought. The American pragmatist John Dewey incorporated Mill's insights into his early 20<sup>th</sup> century political philosophy of communication. Dewey's ideal democracy is a multi-dimensional society fostered by the interaction between diverse people and groups.<sup>420</sup> Dewey said democracy is "more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience."<sup>421</sup> For Dewey, communication is a precondition and the very foundation of democratic society; it provides a link to critical perspectives on culture and opens a space for the questioning and critique of political and economic structures.<sup>422</sup> The status quo, in such a democracy, is fluid and is under constant revision due to the import of different viewpoints. Deweyan democratic society views individual and group variations to the status quo as the engine of social progress. At the same time, such

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<sup>419</sup> *Id.* at 45. For Mill, it is not enough to just hear a version of the opposing argument; rather one should be exposed to the argument by one who believes it. The listener "must know [the argument] in [its] most plausible and persuasive form."

<sup>420</sup> See John Dewey, *Democracy and Education: The Introduction to the Philosophy of Education* (The Free Press) (1967).

<sup>421</sup> *Id.* at 87.

<sup>422</sup> For a brief discussion on the critical perspective of John Dewey see Hanno Hardt, *Contemplating Marxism—and Other Theoretical Challenges*. Interactions: Critical Studies in Communication, Media, & Journalism (Rowman & Littlefield) (1998).

a community is bounded by common goals, interests and the cooperative and free interchange of ideas.<sup>423</sup>

Dewey seems to adopt Mill's insight into the dialectical nature of human communication. For both Dewey and Mill, intellectual and social progress is the outcome of a synthesis of opposing viewpoints. When the free interchange of ideas occurs, truth develops and progresses. Truth in this sense is ever-changing. Thus, we discover in the philosophies of both Dewey and Mill an assumption about the nature of truth that is grounded in the philosophical doctrine of fallibilism, or the belief that knowledge is imperfect and that there is always a degree of uncertainty in any truth-claim.<sup>424</sup>

This philosophical outlook was shared by another early 20<sup>th</sup> century writer who had a more direct influence on the *Sullivan* Court, Justice Oliver Wendell Holmes. Holmes, like his contemporary Dewey, believed that human knowledge was fallible and could at best produce only provisional knowledge. Like Dewey, he also believed that such provisional knowledge was best obtained through the free interchange of ideas. Holmes' famous marketplace of ideas passage in his dissenting opinion in *Abrams v. United States* synthesized a lot of the free speech philosophy that came before:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your

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<sup>423</sup> *Id.*

<sup>424</sup> This doctrine is most closely associated with the American philosopher C.S. Peirce. Simply put, fallibilism "maintains that our scientific knowledge-claims are invariably vulnerable and turn out to be false" (*The Oxford Companion to Philosophy*).

wishes in law and sweep away all opposition [...] But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>425</sup>

The passage sounds many of the themes and ideas prevalent in the philosophies of Mill and Dewey concerning free speech. Opinions and truth claims are fallible. Human knowledge is imperfect and therefore open-ended. For this reason, ideas need to be traded freely. The passage also seems to echo Milton and Mill’s hope that truth will eventually triumph in the marketplace of ideas.

With the support of marketplace theory, the Court decided that neither falsehood nor defamatory content removes “the constitutional shield from criticism of official conduct.”<sup>426</sup> However, the question remained whether the First Amendment protected speech that contained a combination of these elements.<sup>427</sup> To answer, Brennan turns to the lessons of history, in particular the controversial debates surrounding the Alien and Sedition Acts of 1798. And in doing so, arrives at what he calls the “central meaning of the First Amendment.”<sup>428</sup>

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<sup>425</sup> 250 U.S. 616, 630 (Holmes, J. dissenting) (1919) at 630.

<sup>426</sup> 376 U.S. 254 at 273.

<sup>427</sup> *Id.* at 273.

<sup>428</sup> *Id.* at 274.

## **The Alien and Sedition Acts of 1798**

When Federalist John Adams became the second president of the United States, he inherited strained relations with France. Because of mounting tensions between the two countries, Adams called a special session of Congress in May of 1797 and asked for increased military spending. Thomas Jefferson, Adams' vice president and leader of the Republican opposition, interpreted Adams' request as a call for war.<sup>429</sup> Whether or not this was Adams' intent, his requests were denied. More importantly however, the moment signaled a growing political and ideological rift between Adams and Jefferson.

Adams next tried a diplomatic track. He sent envoys to France to negotiate an amity treaty, which resulted in the notorious XYZ affair. The French foreign minister Talleyrand not only refused the American delegation but sent three French operatives, known as XYZ, to demand a bribe as a prerequisite for dealing with the Americans. American popular reaction to the affair produced a wave of hostility toward France and its supporters, among them Jefferson. The event touched off a war of words in Federalist and Republican newspapers.

Jefferson, roundly attacked in the Federalist press, aired his own bad feelings about Adams and the Federalists in the Republican press, characterizing them as ““an Anglican, monarchical and aristocratic party.””<sup>430</sup> The rift between party lines deepened and Republican opposition grew more intense as Adams' presidency

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<sup>429</sup> See Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* (Cornell University Press) (1999).

<sup>430</sup> *Id.* at 167.



progressed. Republicans tried to take advantage of the loss of the popular George Washington as the Federalist leader; their hope was that with Washington gone they could paint the party with the broad brush of corruption.<sup>431</sup>

This was the background against which the Federalist-controlled Congress passed four pieces of legislation in the summer of 1798 known as the Alien and Sedition Acts. As Joseph Ellis points out in *Founding Brothers*, those statutes “were designed to deport or disenfranchise foreign born residents, mostly Frenchmen, who were disposed to support the Republican Party.”<sup>432</sup> The Acts also aimed at silencing the Republican opposition.<sup>433</sup> To this end, Congress passed section two, the Sedition Act, which contained language aimed directly at freedom of expression:

SEC. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat

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<sup>431</sup> *Id.* at 169.

<sup>432</sup> See Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (Alfred A. Knopf) (2000) at 190.

<sup>433</sup> See Lynch, *supra* note 429, at 186 (writing that when the Acts were debated in the House, “the Federalist speaker made clear at the outset that the bill was directed primarily at Republicans”).

any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or Government, then such persons, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.<sup>434</sup>

The broad language against criticism of the government served its intended purpose. Prominent Republicans and newspapermen were tried and convicted in sedition proceedings. The Acts, however, proved a political disaster for Adams and the Federalists, who ultimately lost the presidency of 1800 to Jefferson. The Acts also provoked the *Kentucky* and *Virginia Resolutions* authored by Jefferson and James Madison respectively. Madison's response to the Acts played an especially important role in Brennan's *Sullivan* opinion.

In *Make No Law*, Anthony Lewis said Brennan "did something quite extraordinary [when he] held unconstitutional an act of Congress that had expired one hundred and sixty-three years before."<sup>435</sup> Brennan wrote that even though the act was never challenged in the Supreme Court, "the attack upon its validity has carried the day in the court of history."<sup>436</sup> The debate surrounding the Alien and Sedition Acts allowed Brennan to fashion a narrower view of the First Amendment than that provided by the marketplace of ideas theory. Following the marketplace

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<sup>434</sup> See Juhani Rudanko, *The Forging of Freedom of Speech* (University Press of American) (2003) at 60.

<sup>435</sup> See Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Random House) (1991) at 145.

<sup>436</sup> *Id.* at 276. ("The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-289 [...] These views reflect the broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment").

theory, it would seem as if all speech, regardless of content or original intent, should enjoy free, uninhibited entry into the public arena. However, the “lessons of history” cited in the opinion presents a First Amendment that privileges speech vital to republican forms of government. In this view, the First Amendment is intended to protect speech that provides citizens with the information they need to be free and self-governing.

To this end, Brennan cites a key passage from the *Virginia Resolutions of 1798* in which Madison states that the Alien and Sedition Act

exercises... a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.<sup>437</sup>

For Madison, that the right to freely speak and thereby criticize governing officials is “the guardian of every other right,” is due to the very nature of republican governments in which the power is intended to reside with the people.<sup>438</sup>

In the *Virginia Report* Madison distinguishes between the British and American forms of government. In a monarchical system, the government is led by a hereditary king. The king is sovereign and the people are his subjects. The king is considered an infallible ruler who answers only to himself. By contrast, in the American system, the people are sovereign and their elected officials are considered

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<sup>437</sup> *Id.* at 275.

<sup>438</sup> See James Madison, *The Virginia Report of 1799-1800* (De Capo Press) (1970) [178-237] (writing “[t]he people, not the government, possess the absolute sovereignty” at 220).

both fallible and accountable to them. Madison asked, “[i]s it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?”<sup>439</sup>

Thus, the very form and structure of republican government determines, for Madison, the level of free speech that should be accorded the citizens and by extension, the press. In a republican government the character of public officials needs to be examined so that citizens can make wise political decisions. This examination cannot take place without a free press. As Madison writes,

[I]et it be recollected [...] that the right of electing the members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.<sup>440</sup>

To understand the importance of a free press and the perniciousness of any law that places restraints on it, one need only look at the history of the American founding. Madison writes,

[h]ad “sedition-acts,” forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?<sup>441</sup>

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<sup>439</sup> *Id.* at 221.

<sup>440</sup> *Id.* at 227.

<sup>441</sup> *Id.* at 222.

This was perhaps on the minds of many during the discussions that led to the final drafting and ratification of the Constitution. Indeed, many feared that the powers granted to Congress under the necessary and proper clause could be used to silence the press and limit other rights.<sup>442</sup> For this reason, many urged the adoption of a bill of rights that would guarantee limits on the powers of Congress.

For Madison, the original meaning of the First Amendment was to protect speech and the press precisely from laws like those under the Sedition Act. Indeed, the Constitution, according to Madison, absolutely forbids the abridgment of speech that examines “public characters and measures,” even speech that defames public officials:

Is then the federal government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous [sic] attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the federal government is destitute of all authority.<sup>443</sup>

Clearly then, for Madison, the primary purpose of the First Amendment is to protect the citizen’s right to criticize government and other forms of concentrated power.

This, I would argue, is the central tenet of the First Amendment philosophy adopted by the *Sullivan* Court.

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<sup>442</sup> *Id.* at 222.

<sup>443</sup> *Id.* at 224.

L.B. Sullivan was an elected official who brought suit against “critics of his official conduct.”<sup>444</sup> These critics were four individual petitioners and, because they published the criticism, the *New York Times*. In writing the opinion, Justice Brennan noted that the petitioners were “Negroes [sic] and Alabama clergymen” who supported a movement that was fighting for “the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”<sup>445</sup> The Court also noted the non-profit nature of the ad which sought financial support for three purposes: “support of the student movement, ‘the struggle for the right-to-vote,’ and the legal defense of Dr. Martin Luther King, Jr.”<sup>446</sup>

The *Sullivan* Court clearly wanted to protect “expression critical of the official conduct of public officials.”<sup>447</sup> Indeed, the opinion states that the primary purpose of the First Amendment is to protect the “citizen-critic” and notes that it is “as much [the critic’s] duty to criticize as it is the official’s duty to administer.”<sup>448</sup> Therefore, the criticism’s appearance in a paid editorial advertisement does not change what it is—core First Amendment speech. Indeed, the Court found that, despite several factual inaccuracies, the advertorial “Heed Their Rising Voices” was exactly the

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<sup>444</sup> 376 U.S. 254 at 256.

<sup>445</sup> *Id.* at 256.

<sup>446</sup> *Id.* at 257. The ad also criticized the power structure of the South as evidenced by the response toward the civil rights movement. The ad said the student movement and other civil rights protests in the South had been “met by an unprecedented wave of terror by those who would deny and negate that document [the U.S. Constitution] which the whole world looks upon as setting the pattern for modern freedom.” The ad criticized “southern violators” which purportedly included any powerful groups or person who had responded to the movement with “intimidation and violence.”

<sup>447</sup> *Id.* at 268.

<sup>448</sup> *Id.* at 282.

type of speech the framers must have had in mind when penning the First Amendment. It was speech that

communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives [were] matters of the highest public interest and concern.<sup>449</sup>

### ***Sullivan's First Amendment Philosophy***

The present chapter attempts to delineate a coherent First Amendment philosophy from the text of *New York Times Co. v. Sullivan*. According to Weinstein, there are three basic values underlying American free speech doctrine: democratic self-governance, the search for truth, and non-instrumental values such as individual self-fulfillment.<sup>450</sup> An emphasis on the first two values is prevalent in *Sullivan*.

The opinion first relies on the search for truth or the marketplace of ideas theory in order to justify protection for political speech that contains misstatements of fact. This theory assumes that truth or correct opinion is best achieved in an environment in which multiple and competing viewpoints, opinions and ideas are interchanged freely. Thus, “debate on public issues,” the Court concludes, “should be uninhibited, robust and wide-open.”<sup>451</sup> This libertarian view of speech is then tempered by a discussion of the Alien and Sedition Acts, the result of which

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<sup>449</sup> *Id.* at 266.

<sup>450</sup> See James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press) (1999) at 13.

<sup>451</sup> 376 U.S. 254 (1964) at 270.

justifies protection for political speech that contains both falsehoods and allegedly defames a public official. The theory that emerges from this discussion emphasizes republican values and goals rather than individual rights. Although marketplace theory goes a step beyond the political realm to include vast areas of human knowledge, both “justify free speech instrumentally, that is, in terms of the good it produces for society as a whole.”<sup>452</sup> On this basis, the *Sullivan* Court concludes that since the speech in question is about “matters of the highest public interest and concern,” it deserves full First Amendment protection.

However, the opinion also seems to emphasize that the core speech protected by *Sullivan*—political speech by the “citizen critic” aimed at governing officials—is more than just beneficial to society, it is necessary for the survival of the American republic. As Thomas Emerson points out, “[t]he crucial point...is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.”<sup>453</sup> This, I would argue, is the reason Brennan discovers the central meaning and purpose of the First Amendment in the controversy surrounding the Alien and Sedition Acts. It should also be noted that under this theory “speech matters more for the audience than for the speaker. We value speech because it’s a way of educating the sovereign assembly.”<sup>454</sup> This

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<sup>452</sup> *Id.* at 13.

<sup>453</sup> See Thomas I. Emerson, *Toward A General Theory of the First Amendment in The First Amendment: A Reader* (West Publishing) (1992) at 52.

<sup>454</sup> *Id.* at 52.



Meiklejohnian view of free speech assumes that the necessity of free speech springs from the very nature of republican government.<sup>455</sup>

On the whole, the First Amendment philosophy of *Sullivan* is grounded in the democratic self-governance theory. Therefore the discussion of marketplace theory should be understood in that context. The opinion suggests then, that only certain types of speech (i.e. core political speech) should enjoy free, uninhibited entry into the arena of public debate. In addition, in both Mill and Madison, the emphasis is on how freedom of speech serves the interests of the community. We must keep this in mind as we turn to a discussion of the values that guide the commercial speech doctrine.

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<sup>455</sup> See generally Alexander Meiklejohn, *Political Freedom in The First Amendment: A Reader* (West Publishing) (1992).

## CHAPTER 7

### **SULLIVAN’S FIRST AMENDMENT PHILOSOPHY AND THE COMMERCIAL SPEECH DOCTRINE**

The predominant rationale of *Sullivan*, that speech on matters of public interest should enjoy free, uninhibited entry into the public arena, can be seen at work in the Court’s commercial speech cases of the mid-1970s. In both *Bigelow* and *Virginia Pharmacy*, the Court decided that commercial information can be of great public interest. For this reason, the Court concluded that the free flow of commercial information is vital to the decision-making public and therefore warrants First Amendment protection. However, the Court strayed from this rationale when it introduced the *Central Hudson* balancing test. The test began an era of confusion that saw the Court vacillating between protecting commercial speech on the one hand and deferring to government regulations on the other. This confusion was forestalled quite a bit through a series of 1990s “vice” cases in which the return to the rationale of *Virginia Pharmacy* was urged by some of the Justices. This chapter begins by highlighting the connection between self-governance theory and speech on public issues. It then traces the theory’s impact on the modern commercial speech doctrine. The chapter closes by assessing the California Supreme Court’s handling of *Kasky v. Nike* in light of the recent changes in the modern commercial speech doctrine.

As Estlund points out, the Court “has declared that ‘speech concerning public affairs is more than self-expression; it is the essence of self-governance.’”<sup>456</sup> And among the most celebrated cases that adheres to this declaration is *New York Times Co. v. Sullivan*.<sup>457</sup> According to Estlund, the *Sullivan* Court “followed a well-worn path” when it recognized public interest speech as a central First Amendment concern.<sup>458</sup> Protecting speech on public issues has led to a broader conception of the First Amendment and as a result commercial and corporate speakers have benefited greatly.<sup>459</sup> Indeed, the granting of greater protection for commercial speech in *Virginia Pharmacy* and for corporate speech in *Bellotti* and *Consolidated Edison* “originated in part to protect messages of political and social significance.”<sup>460</sup>

But who decides what is of political or social significance? To answer is to recognize the peculiar nature of speech on matters of public concern and its theoretical dependence on democratic self-governance. Self-governance theory rests on the assumption of popular sovereignty; that speech that informs and educates the decision-making public is central to a democratic form of government. Taking the idea of popular sovereignty to its logical end, it must be concluded that

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<sup>456</sup> See Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo Wash. L. Rev. 1 (1990) at 1 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

<sup>457</sup> *Id.* at 13.

<sup>458</sup> *Id.* at 14.

<sup>459</sup> *Id.* at 15.

<sup>460</sup> *Id.* at 19-20.

it is the sovereign or the public who decides what messages have political or social significance. For this reason, it is impossible to determine in advance what should be included in this category of speech. As Estlund writes,

Democratic self-governance posits that the people control the agenda of government. They have the power to determine the content of public issues simply by the direction of their interests. This means that every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially for public concern.<sup>461</sup>

The Court recognized this in *Consolidated Edison*, stating that “[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”<sup>462</sup> And the Court also recognized this at the beginning stage of the modern commercial speech doctrine. As can be seen in *Bigelow* and then in *Virginia Pharmacy*, self-governance theory helped bring an end to the categorical exclusion of commercial speech from First Amendment protection.<sup>463</sup>

Highlighting the informational value of *Bigelow*’s advertisement, Justice Blackmun said the ad “contained factual material of clear ‘public interest’ [and that

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<sup>461</sup> *Id.* at 30 (drawing heavily on Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603, 667-79 (1990)). This is precisely why some commentators find the *Connick v. Myers* public concern test problematic. As Estlund writes, “[t]he theoretical underpinnings of the public concern test lie in the widely shared view that the First Amendment is particularly concerned with speech that is relevant to the process of self-governance. Yet the very concept of a circumscribed category of speech on matters of public concern applied on a case-by-case basis by the judiciary is at odds with basic tenets of democratic self-governance. As Professor Robert Post recently wrote, any normative or prescriptive conception of matters of public concern ‘would lead directly to doctrinal impasse’”).

<sup>462</sup> 447 U.S. 530 (1980) at 538.

<sup>463</sup> See Estlund, *supra note* 456, at 20.

it] conveyed information of potential interest and value to a diverse audience.”<sup>464</sup>

For Blackmun, the Virginia statute clearly violated a First Amendment that is supposed to foster the “dissemination of information and opinion.”<sup>465</sup> The First Amendment, Blackmun writes, does not only protect against press censorship, but against “any action of the government by means of which it might prevent such free and general discussion of public matters.”<sup>466</sup>

One year after *Bigelow*, when formally introducing commercial speech under the aegis of the First Amendment, Blackmun once again capitalized on the language of self-governance theory. Early in the opinion, Blackmun cites several cases that point to “a First Amendment right to ‘receive information and ideas,’ and that the freedom of speech ‘necessarily protects the right to receive.’”<sup>467</sup> Blackmun points out that information and ideas that concern a matter of public interest are often embedded within speech that “does ‘no more than propose a commercial transaction.’”<sup>468</sup> Blackmun notes that some people may be more interested in commercial information than in political speech.<sup>469</sup> Commercial information may also contain matters of a more general public interest as in, for example, *Bigelow*’s

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<sup>464</sup> 421 U.S. 809 (1975) at 822.

<sup>465</sup> *Id.* at 829.

<sup>466</sup> *Id.* at 829 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130,150 (1967)).

<sup>467</sup> 425 U.S. 748 (1976) at 756 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972)).

<sup>468</sup> *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973) at 385).

<sup>469</sup> 425 U.S. 748 (1976) at 764.

advertisement for abortion services.<sup>470</sup> For Blackmun, the free flow of commercial information contributes to a better informed citizenry. As Blackmun writes, “even if the First Amendment were thought primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.”<sup>471</sup>

According to Blackmun, Virginia’s ban on prescription drug price advertising attempted to protect citizens by keeping them in ignorance.<sup>472</sup> He therefore offers “an alternative to this highly paternalistic approach” one that would not only be less offensive to the First Amendment, but that is also in line with the ideal of popular sovereignty.<sup>473</sup> For Blackmun, information is not in itself harmful; “people will perceive their own interest if only they are well informed, and that the best means to that end is to open the channels of communication rather than close them.”<sup>474</sup> The first principle of American republican government, as recognized here by Blackmun, is the belief that the people have the capacity to make wise decisions when provided with the necessary information. For this reason, the courts and the government have no choice but to allow the dissemination of truthful commercial speech. There is no alternative between “suppressing information” on the one hand

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<sup>470</sup> *Id.* at 764.

<sup>471</sup> *Id.* at 766.

<sup>472</sup> *Id.* at 769.

<sup>473</sup> *Id.* at 770.

<sup>474</sup> *Id.* at 770.

and “the dangers of its misuse if freely available” on the other.<sup>475</sup> “It is precisely this kind of choice,” Blackmun writes, “that the First Amendment makes for us.”<sup>476</sup>

This, however, does not rule out the regulation of commercial speech altogether. Time, place and manner restrictions on commercial speech, like other varieties of protected speech, are permissible.<sup>477</sup> Also, false and misleading speech or speech about an unlawful activity or product can be completely suppressed. “The First Amendment,” Blackmun writes, “does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.”<sup>478</sup>

So we see then, that in *Bigelow* and *Virginia Pharmacy* Blackmun justified commercial speech protection in language that invoked democratic self-governance theory. It was recognized that commercial speech can include matters of public interest and, in true Madisonian self-governance fashion, that it is up to the public, not the government, to decide what is of interest. This became the controlling rationale in commercial speech cases leading up to *Central Hudson*.

Beginning with *Central Hudson*, the Court veered away from the self-governance rationale of *Virginia Pharmacy* and began to focus more on the ways in which government can regulate commercial speech. Absent from the *Central*

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<sup>475</sup> *Id.* at 770.

<sup>476</sup> *Id.* at 770.

<sup>477</sup> *Id.* at 771. (citing the O’Brien Test and writing that “[w]e have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of information”).

<sup>478</sup> *Id.* at 772.

*Hudson* opinion are any extended analyses of the reasons for commercial speech protection that characterized earlier cases. In its place are a few lines citing *Virginia Pharmacy*'s assertion that because commercial speech furthers the social interest in disseminated information, unwarranted "governmental regulation" is barred by the First Amendment.<sup>479</sup> The extent to which governments may regulate commercial speech is the subject of the opinion.

According to Justice Powell, governments can place greater restrictions on commercial speech than other types of protected speech because the Court has long recognized a "common-sense" distinction between the two.<sup>480</sup> The level of protection granted commercial speech "turns on the nature both of the expression and of the governmental interest served by the regulation."<sup>481</sup> This interesting line, devoid of any reference to past cases, introduces into the commercial speech doctrine a balancing test. This test goes beyond the reasons for placing restrictions on commercial speech as laid out in *Virginia Pharmacy*. In addition to banning false and misleading commercial speech, it could be now be regulated if the state could show a substantial interest in doing so and if the restriction was narrowly tailored.<sup>482</sup>

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<sup>479</sup> 447 U.S. 557 (1980) at 562.

<sup>480</sup> *Id.* at 563.

<sup>481</sup> *Id.* at 564.

<sup>482</sup> *Id.* at 563-564.



The precedent for the test is provided by five cases from the late 1970s.<sup>483</sup> Powell discovers about seven lines from these decisions that holds open the possibility of allowing restrictions that go beyond ensuring a fair bargaining process. For example, Powell cites *Carey v. Population Services International* in which the Court “held that the State’s ‘arguments...do not justify the total suppression of advertising concerning contraceptives.’”<sup>484</sup> For Powell, “[t]his holding left open the possibility that the state could implement more carefully drawn restrictions.”<sup>485</sup> It appears then, that “the four-part analysis” that has developed over three terms worth of commercial speech cases is derived as much from what was not said in those cases as from what was. For Justice Blackmun, the majority’s interpretation of past commercial speech cases, and its introduction of a balancing test based on that interpretation, was a departure from the rationale the justified commercial speech protection in the first place.

Blackmun concurred in judgment only and said

the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.<sup>486</sup>

Blackmun argues that the Court’s intermediate level test is appropriate for false or misleading speech or for time, place and manner restrictions, but that it is improper

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<sup>483</sup> These cases include *Virginia Pharmacy* (1976), *Bates* (1977), *Bellotti* (1978), *Carey v. Population Services International*, 431 U.S. 678 (1977) and *In re Primus*, 435 U.S. 412, 438 (1978).

<sup>484</sup> 447 U.S. 557 (1980) at 566.

<sup>485</sup> *Id.* at 566.

<sup>486</sup> 447 U.S. 557 (1980) at 573 (Blackmun, J. concurring).

to apply it to a regulation that “seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.”<sup>487</sup> Such attempts to dampen demand by regulating commercial information “strikes at the heart of the First Amendment” because

it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.<sup>488</sup>

According to Blackmun, the rationale of *Central Hudson* was unlike that of any of the Court’s previous commercial speech cases. For example, Blackmun says the *Virginia Pharmacy* Court did not examine the state’s interest to see if they were substantial. If they did, Blackmun writes, they would have found “legitimate and important state goals.”<sup>489</sup> Nor did the *Virginia Pharmacy* Court apply or ask questions even remotely close to those addressed in *Central Hudson*; rather, the Court “held that the State ‘may not [pursue its goals] by keeping the public in ignorance.’”<sup>490</sup> Up until *Central Hudson*, Blackmun writes, “this principle has governed.”<sup>491</sup>

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<sup>487</sup> *Id.* at 573 (Blackmun, J. concurring).

<sup>488</sup> *Id.* at 574-575 (Blackmun, J. concurring).

<sup>489</sup> *Id.* at 576 (Blackmun, J. concurring).

<sup>490</sup> *Id.* at 576 (Blackmun, J. concurring).

<sup>491</sup> *Id.* at 577 (Blackmun, J. concurring). Blackmun also attacks the basis of the Court’s rationale, the “common-sense” distinction between commercial and other types of protected speech: “We have not suggested that the ‘common-sense’ differences between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech [...] No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.”

Some critics agree with Blackmun that the *Central Hudson* test signaled a departure from the governing principles of *Virginia Pharmacy*; that the rationale for protecting commercial speech was replaced by a test that balanced the state's interests against the First Amendment interest in the free flow of information.<sup>492</sup> According to Costello, when the *Central Hudson* majority neglected "to explore why commercial speech deserve[d] protection" and instead showed "how that protection should be applied," it left the Supreme Court and the lower courts "with a test that could be manipulated to come to whatever result a judge or court desired."<sup>493</sup> For this reason, commercial speech cases in which the Court showed deference to government regulations that had nothing to do with ensuring a fair bargaining process, such as *Posadas* and *Edge*, can be seen as natural outgrowths of *Central Hudson*.

Predictably then, by *Posadas* and later *Edge*, the original rationale for protecting commercial speech seemed completely forgotten and was replaced by *Central Hudson* analysis.<sup>494</sup> *Central Hudson* was a departure not only from the rationale of *Virginia Pharmacy* but, as Costello points out, a departure from any theory justifying protection for commercial speech: "after *Central Hudson*, [...] it was as if the Court felt there was no need to state the reasons for its doctrine once it had a

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<sup>492</sup> See, e.g., Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. 681 (2000).

<sup>493</sup> *Id.* at 700.

<sup>494</sup> For example, in *Posadas* the only rationale other than the test is the greater-includes-the-lesser rationale used to distinguish between the ad at issue in the present case and the ad in *Bigelow*.

ready-made test in hand for disposing of the cases coming before it.”<sup>495</sup> This remained the pattern until the commercial speech doctrine underwent another change in direction in the mid-1990s.

It was shown earlier that in the 1990s “vice” cases,<sup>496</sup> *Rubin v. Coors*,<sup>44</sup> *Liquormart*, and *Greater New Orleans Broadcasting*, that *Central Hudson* analysis was strengthened and became a formidable challenge to regulations on commercial speech. It was also recognized that these cases reversed the earlier trend, seen in *Posadas* and *Edge*, toward deference to state governments and their asserted interests. Although *Central Hudson* was upheld and continued to be used in the “vice” cases, Justices Stevens and Thomas expressed varying degrees of dissatisfaction with the test and in doing so called for a return to the self-governance rationale of *Virginia Pharmacy*.

The first sign of the attack on *Central Hudson* came from Justice Stevens’ concurrence in *Rubin v. Coors*. As was seen earlier, Stevens said the Court’s reliance on *Central Hudson* was a “misguided” approach that made the “case appear more difficult than it” was.<sup>497</sup> Stevens then noted the difference between *Central Hudson* and the reasons for allowing more regulation of commercial speech than other speech as set forth in *Virginia Pharmacy*. The only reasons the *Virginia Pharmacy* Court allowed greater restriction was to ensure that consumers were not

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<sup>495</sup> See Costello, *supra* note 492, at 740-741.

<sup>496</sup> See, e.g., Langvardt, *supra* note 74 (arguing that these cases represent the incremental strengthening of First Amendment protection for commercial speech).

<sup>497</sup> 514 U.S. 476 (1995) at 493 (Stevens, J. concurring).

mislead and because commercial speech was more verifiable than political speech.<sup>498</sup> Regulations therefore should only be aimed at false and misleading speech; any other motives tend toward the paternalistic and are therefore not in the spirit of *Virginia Pharmacy*.<sup>499</sup> In language reminiscent of Blackmun’s *Central Hudson* concurrence, Steven’s writes,

[a]ny “interest” in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.”<sup>500</sup>

Stevens suggests that commercial speech bans intended to further substantial state interests such as curbing gambling or alcohol consumption are illegitimate; and that if the speech in question is factual commercial information, it “should be subjected to the same stringent review as any other content-based abridgment of protected speech.”<sup>501</sup>

In *44 Liquormart* decided the following term, Stevens, writing the Court’s principal opinion, continued to redirect the commercial speech doctrine back to the rationale of *Virginia Pharmacy*. The format of Stevens’ opinion even departs from those dominated by *Central Hudson* analysis. He begins by outlining the

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<sup>498</sup> *Id.* at 494 (Stevens, J. concurring).

<sup>499</sup> *Id.* at 497 (Stevens, J. concurring).

<sup>500</sup> *Id.* at 497 (Stevens, J. concurring).

<sup>501</sup> *Id.* at 497 (Stevens, J. concurring).

importance of advertising in American cultural life beginning in the colonial era.<sup>502</sup>

He then describes the development of the Court's commercial speech doctrine, citing and quoting liberally from *Virginia Pharmacy*.

As Costello points out, Stevens builds on Blackmun's *Virginia Pharmacy* rationale and his *Central Hudson* concurrence.<sup>503</sup> In particular, Stevens echoes Blackmun's sentiment that commercial speech bans on truthful non-misleading speech "not only hinder consumer choice, but also impede debate over central issues of public policy."<sup>504</sup> They do so because they often "obscure an 'underlying government policy' that could be implemented without regulating speech."<sup>505</sup> What Stevens suggests is that the speech ban hides the machinery of government from public view. The policy, or government interest in, for example, dampening demand for liquor, remains unknown to the public because this information is shielded by the ban. The public is therefore unable to participate in important policy decisions. This strikes at the heart of self-governance theory. Or, as Costello puts it, such bans "serve to impede the very speech that the First Amendment was designed to protect and promote: the discussion and criticism of government policies."<sup>506</sup> In this way, Stevens not only returns to the rationale of

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<sup>502</sup> 517 U.S. 484,489 (1996) at 495.

<sup>503</sup> See Costello, *supra* note 492, at 742.

<sup>504</sup> 517 U.S. 484,489 (1996) at 503 (citing Blackmun, J. concurring in *Central Hudson* at 575).

<sup>505</sup> *Id.* at 503 (quoting *Central Hudson* at 566 n.9).

<sup>506</sup> See Costello, *supra* note 492, at 742 (quoting from Amicus Brief of Associate of National Advertisers in Support of Petitioner, *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1995) No. 94-1140, Costello writes that "'since, in politics, as in baseball, you can't hit what you can't see, [total bans on truthful speech] strike[] at the heart of a citizen's right to know in its mostly deeply political

his commercial speech mentor Blackmun, but expands his thinking and shows how information such as liquor prices can implicate the political process. Although Stevens scaled back his attack on *Central Hudson* in the next commercial speech case, *Greater New Orleans Broadcasting*, he applied a more rigorous version of the test, one strengthened by the rationale of *Virginia Pharmacy*.

Justice Thomas' "radical concurrence"<sup>507</sup> in *44 Liquormart* also urged a return to the Blackmun rationale. He suggests abandoning the *Central Hudson* test altogether (which he applied in *Coors*) and applying the same level of judicial scrutiny and First Amendment protection to truthful commercial speech as that applied to political speech. Such a strategy, according to Thomas, would

adhere to the doctrine adopted in *Virginia Bd. of Pharmacy* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.<sup>508</sup>

Thomas notes that the *Central Hudson* test is difficult to apply with any degree of "uniformity" because of the "inherently nondeterminative nature of a case-by-case balancing 'test.'" Such a test leaves far too much to the preferences of individual judges and courts. "Rather than continue to apply a test that makes no sense to me when the asserted state interest is of the type involved here," Thomas writes, "I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*."<sup>509</sup> Justice

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sense.' By 'regulating prices indirectly through censorship...legislators...avoid both a clear statement and an open debate on the issues'").

<sup>507</sup> *Id.* at 717.

<sup>508</sup> 517 U.S. 484,489 (1996) at 526 (Thomas, J. concurring).

<sup>509</sup> *Id.* at 528 (Thomas, J. concurring).

Thomas echoed these sentiments in his *Greater New Orleans Broadcasting* concurrence.<sup>510</sup>

The evolution of the commercial speech doctrine from *Virginia Pharmacy* to the present seems in some ways to have come full circle and to have been strengthened by the journey. Behind the circuitous route, is the consistent voice of Justice Blackmun. In the beginning, he spoke for the majority. But with the advent of *Central Hudson*, he began to occupy the minority position from which he reminded his colleagues just how far they strayed from the commercial speech doctrine's founding rationale. But, as we have seen, in the years following his retirement in 1994, the Blackmun rationale for protecting commercial speech has been taken up by other Justices on the Court. As Ross wrote in 2001, "[i]n the past five years, the minority language of Justice Blackmun has come to dominate and direct commercial speech jurisprudence."<sup>511</sup>

This return to the Blackmun rationale of *Virginia Pharmacy* has, as one critic put it, "reinvigorated" commercial speech protection.<sup>512</sup> According to Langvardt, the 1990s "vice" cases signified "that the intermediate level of First Amendment protection for commercial speech indeed means and will continue to mean something substantial."<sup>513</sup> Others see the possibility that the Court could abandon

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<sup>510</sup> 527 U.S. 173 (1999) at 197.

<sup>511</sup> See Ross, *supra* note 6, at 746.

<sup>512</sup> See Langvardt, *supra* note 74, at 610.

<sup>513</sup> *Id.* at 640.



“intermediate scrutiny under the *Central Hudson* analysis” altogether in cases where the government attempts to regulate truthful, non-misleading commercial speech.<sup>514</sup>

If as Hoefges and Rivera-Sanchez suggest, truthful commercial speech after the 1990s “vice” cases was elevated “to its highest level, approaching that of fully protected political and social speech,”<sup>515</sup> then corporations such as Nike have nothing to fear unless their speech is false or misleading. Nike’s aggressive attempts to protect its corporate statements by placing it under the rubric of political speech, suggests a thinly veiled attempt to immunize false and misleading speech by attaching it to an issue of public importance.<sup>516</sup> Piety arrives at the same conclusion, stating that Nike’s attempts to get the Court to apply the *Sullivan* actual malice standard to its speech, “was asking for a constitutional right to lie.”<sup>517</sup> This seems only necessary if Nike was indeed lying. There is nothing in commercial speech jurisprudence that would protect false and misleading commercial speech.

As Chemerinsky and Fisk point out:

The commercial speech doctrine is premised on the Court’s longstanding belief that the truth about a company’s products and

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<sup>514</sup> See Hoefges and Rivera-Sanchez, *supra* note 8, at 388-389 (writing that “four of the current justices—Stevens, Kennedy, Ginsburg, and Thomas—have expressed their support for abandoning intermediate scrutiny under the *Central Hudson* analysis when government restricts truthful, non-deceptive advertising in order to manipulate lawful consumer choices in the marketplace”).

<sup>515</sup> *Id.* at 349.

<sup>516</sup> In *Bolger*, the Court justified its exclusion of false commercial speech from full First Amendment protection by stating that companies already have “the full panoply of protection available.” The Court was also fearful that companies might attempt to immunize “false or misleading product information from government regulation simply by including references to public issues” 463 U.S. 60 (1983) at 68.

<sup>517</sup> See Piety, *supra* note 290, at 153.

facilities will not emerge if the seller can lie about it. Consumers do not have access to the seller's facility and do not have the time to investigate the truth of the dozens or hundreds of claims they read or hear about products every day.<sup>518</sup>

Indeed, this is the one area of the commercial speech doctrine where the court has been consistent.

In his *Coors* concurrence, Justice Stevens followed Blackmun's assertion that the state should ensure "that the stream of commercial information flows cleanly as well as freely."<sup>519</sup> Stevens said false commercial speech "lacks the value that sometimes inheres in false or misleading political speech."<sup>520</sup> Not only does it lack value, but "the consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised."<sup>521</sup> Stevens continues:

The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more government regulation of this speech than of most other speech.<sup>522</sup>

This suggests that corporations such as Nike can and should make sure that the factual statements it makes about its own products and business practices, whether

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<sup>518</sup> See Chemerinsky and Fisk, *supra* note 25, at 1152-1153.

<sup>519</sup> 425 U.S. 748 (1976) at 772.

<sup>520</sup> 514 U.S. 476 (1995) at 496 (Stevens, J. concurring).

<sup>521</sup> *Id.* at 496 (Stevens, J. concurring).

<sup>522</sup> *Id.* at 496 (Stevens, J. concurring).

in an editorial directly responding to critics or in an advertisement, are truthful.

After all, as Blackmun writes in *Virginia Pharmacy*, corporate information is “more easily verifiable by its disseminator than” other types of protected speech.<sup>523</sup>

In deciding *Kasky v. Nike*, the California Supreme Court did nothing less than attempt to ensure the clean flow of commercial speech. In doing so, it left ample room for corporations to speak on public issues. The majority made clear that not all corporate statements could be classified as factual assertions; that corporations were perfectly within their rights to issue opinions on matters of public importance. But when a corporation such as Nike “makes factual representations about its own products or its own operations, it must speak truthfully.”<sup>524</sup> After all, the Court reasoned echoing Blackmun in *Virginia Pharmacy*, the corporate speaker is in the best “position to readily verify the truth of any factual assertions made.”<sup>525</sup>

The difference between a factual statement and an opinion can simply be expressed as follows. Nike is free to say “globalization is good.” This is an opinion, not a descriptive factual statement. It is not true or false, but right or wrong depending on one’s point of view. However, when Nike makes the statement “we pay our foreign workers a living wage” they venture into the arena of factual representation. The truth or falsity of this claim is ascertainable: find out what constitutes a living wage in that part of the world and compare it to Nike’s wages. What the California Supreme Court said was that Nike was accountable for

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<sup>523</sup> 425 U.S. 748 (1976) at footnote 24.

<sup>524</sup> 27 CAL. 4<sup>th</sup> 939 (2002) at 946.

<sup>525</sup> *Id.* at 965-966.

such statements. This, I argue, is perfectly in line with the Supreme Court's modern commercial speech doctrine.

Unfortunately, this does not entirely solve the central issue presented by a case such as *Nike v. Kasky*, namely, the definition of commercial speech. However, if, in the spirit of Blackmun, the Court adopts a strict scrutiny approach to regulations on truthful, non-misleading commercial speech, then only two questions remain. First, is the speech commercial? Second, is it truthful? To answer the first question, I suggest adopting the California Supreme Court's limited purpose test. Recall that the test was designed only for cases that examine regulations intended to ensure a fair bargaining process.<sup>526</sup> Under these circumstances, and given the particular "evils" of false commercial speech, the test seems appropriate. Once the speech has been classified as commercial, it may then be necessary, especially in mixed speech cases, to separate the facts from the opinions.

Critics of the test fear that it handicaps one side of a public debate<sup>527</sup> and potentially chills important corporate speech.<sup>528</sup> Some fear that the test is too broad; that it tends to "label as commercial any speech made by a corporate actor."<sup>529</sup> These critics talk as if corporate communication is a fragile flower, easily destroyed by the frost of regulation. Yet, Blackmun assures us these fears are unfounded. Corporate communication in any form is "durable" and "hardy." Since

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<sup>526</sup> 27 CAL. 4<sup>th</sup> 939 (2002) at 960.

<sup>527</sup> *Id.* at 970-971 (Chin, J. dissenting).

<sup>528</sup> *Id.* at 984 (Brown, J. dissenting).

<sup>529</sup> *See Barney, supra* note 349, at 22.

such communication “is the *sine qua non* of commercial profits,” Blackmun writes, “there is little likelihood of its being chilled by proper regulation and foregone entirely.”<sup>530</sup> By following recent developments in the Supreme Court’s commercial speech doctrine, especially its return to the Blackmun rationale, the California Supreme Court properly handled the commercial speech problems presented by *Kasky v. Nike*.

The democratic self-governance rationale of *Sullivan* has been influential in the evolution of the modern commercial speech doctrine. The Court needs to continue to follow the direction it has taken in more recent decisions. If it continues to do so, truthful, non-misleading commercial information will enjoy uninhibited entry into the public arena. But the Court must also continue to ensure that this information flows cleanly. Returning to the rationale of *Virginia Pharmacy* is a step in the right direction.

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<sup>530</sup> 425 U.S. 748 (1976) at footnote 24 (writing that “[a]ttributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive”).

## CHAPTER 8

### CONCLUSION

The predominant rationale of *Sullivan*, that speech on matters of public interest should enjoy free, uninhibited entry into the public arena, can be seen at work at key points in the development of the commercial speech doctrine. Commercial speech was introduced under the aegis of the First Amendment because the Court concluded that the free flow of truthful commercial information was vital to the decision-making public and therefore warranted First Amendment protection. Although the Court strayed from this rationale when it introduced the *Central Hudson* balancing test, it returned to it in the 1990s when it strengthened First Amendment protection for commercial speech.

The story, however, does not end here. The Court has some way to go before all is well with the doctrine. As *Nike v. Kasky* evinces, the Court will eventually wrestle with the tough problems presented by the growing sophistication of public relations campaigns. Yet, the Court could go some way toward shoring up these potential problems by consistently applying the founding rationale of the commercial speech doctrine—the belief that truthful commercial speech is a social good.

As we have seen, in the early commercial speech cases, it is not the speaker's interests that are being protected; rather commercial speech is protected because it serves a social utility. But as Justice Blackmun recognized in *Virginia Pharmacy*, this interest is not served by false or misleading commercial speech. This point

seems to have been lost on those who insist that commercial speech receive the same level of protection as political speech or those who championed the free speech rights of Nike. Take, for example, Justice Chin’s remarks in *Kasky v. Nike* in which he said Nike provided “relevant information” that “gave the public insight and perspective into the debate.”<sup>531</sup> From *Virginia Pharmacy* through *Central Hudson* to the 1990s “vice” cases, the Supreme Court has maintained that the relevance of commercial information depends entirely on its truthfulness. For this reason and because *Nike v. Kasky* settled out of court before it reached the discovery phase, no one is in a position to assess the relevance of Nike’s speech.

However, Justice Chin is right to recognize that commercial speech is protected for reasons that serve the community. In the early commercial speech cases, Blackmun highlighted the informational value of truthful commercial speech. In *Bigelow* he said such speech is valuable if it contributes to a “free and general discussion of public matters.”<sup>532</sup> In *Virginia Pharmacy*, Blackmun emphasized the listener’s interest in truthful commercial speech.<sup>533</sup> For Blackmun, the free flow of truthful commercial speech served the social interests in a better informed citizenry.

The belief that accurate commercial information serves the social good has led to significant protection for commercial speech. But the equally valid belief that inaccurate or false commercial speech is an “evil” that can have devastating consequences for society, is the reason it does not receive the same level of protection afforded political speech. In addition, it seems consistent with the

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<sup>531</sup> 27 CAL. 4<sup>th</sup> 939 (2002) at 976-977 (Chin, J. dissenting).

<sup>532</sup> 421 U.S. 809 (1975) at 829 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130,150 (1967)).

<sup>533</sup> 425 U.S. 748 (1976) at 756.

rationale of *Sullivan* that only certain types of speech (i.e. core political speech) should enjoy free, uninhibited entry into the arena of public debate.

The Court recognized early on that commercial speech is not the same fragile flower, easily chilled by the frost of regulation or potential litigation, as most types of political speech. Those engaged in pure, not for profit, political speech for the most part simply do not have the same resources that a large corporation such as Nike has at its disposal. In contrast to the speakers in *Sullivan*, corporations such as Nike have the financial incentive, power and money to ensure that its voice is heard. For this reason, the success or failure of the Court in its future commercial speech cases may depend entirely on its adherence to some form of the Blackmun rationale that recognizes this power imbalance.

The Court may be some ways from satisfactorily solving the problems presented by the modern commercial speech doctrine. But returning to the self-governance rationale of *Bigelow* and *Virginia Pharmacy* will continue to provide commercial speech with significant protection while at the same time ensuring that commercial information flows cleanly as well as freely.