The Journal of Business, Entrepreneurship & the Law

Volume 1 | Issue 2 Article 2

4-20-2008

Baby Boomers' and the Branding of Political Speech: An Unintended Consequence of Bono's Red Campaign

Robert Koulish

'BABY BOOMERS' AND THE BRANDING OF POLITICAL SPEECH: AN UNINTENDED CONSEQUENCE OF BONO'S RED CAMPAIGN

ROBERT KOULISH, PH.D.*

I.Introduction 263
II.Branding Commercial Speech 266
III.Cause-Related Marketing 268
IV.Product Red 271
V.The Difference between Commercial and Political Speech 273
VI.Commercial Speech 275
VII.Commercial Speech 'Against Interest' 282
VIII.Conclusion 287

I. INTRODUCTION

Al Gore surprised some people in June 2007 when he went to Cannes, France, as the featured speaker at the Lions International Advertising Festival.[1] Mr. Gore's message, warmly received, told advertisers to get behind Live Earth by integrating eco-friendly, cause related marketing (CRM) into the core of what they do. The audience was receptive. According to the New York Times, "The embrace of Mr. Gore shows how 'green' advertising has galvanized the marketing community."[2] Gore's visit to Cannes was arranged by Young & Rubicam, the advertising agency that helps Gore develop and disseminate his message in the Save Our Selves (SOS) campaign for environmental awareness.[3]

Gore's speech in Cannes has come at a time when consumers and advertisers are looking to use social awareness as an effective marketing strategy. Cause-related marketing (CRM) is the name given to this strategy. Gore's efforts come on the heels of the Red Campaign, launched in 2006 by the rock musicians Bono and Bobby Shriver.[4] The Red Campaign embraces the idea of building social awareness of AIDS through conspicuous consumption.[5] It is intended to augment

*Philadelphia University. The author would like to thank the following people for their assistance and support: Joel Grossman, Andrea Giampetro-Meyer, Michael Cross-Barnett, and Stephanie Flores-Koulish

[1] *See* Eric Pfanner, *Gore To Bring Talk of Green to Ad Festival*, N.Y. TIMES, June 18, 2007.

[2] *Id.*

[3] *See* Robert Koulish, *Turning to Corporate America to Save the World*, BAL. SUN, July 22, 2007.

[4] Daniel Ben-Ami, *Why the new Amex Card makes Me See RED,* Sept. 28, 2006, http://www.spiked-online.com/index.php?/site/article/1723/ (last visited March 30, 2008).

[5] *Ron Nixon, Bono's (RED) Campaign Sees Red Over Shortcomings,* N.Y. Times, Feb, 6, 2008.

the amount of funds going to the Global Fund To Fight AIDS, Tuberculosis and Maleria.[6] Nike, the GAP, Motorola and other iconic corporations were early Red Campaign participants.[7]

Although it seems unimaginable for anybody, including Gore and Bono, "to organize an event on the scale of Live Earth without turning to corporate America," Gore and Bono "see an opportunity to leverage big business to address complex social issues. What advertisers see is an ability to leverage desired demographics (18-49 year olds) in furtherance of commercial advertising."[8]

Some say "it does not matter who is using whom as long as important issues such as AIDS and global warming are being addressed."[9] But more is at stake than these two key social issues.[10] The CRM techniques jeopardize the future of the Supreme Court's commercial speech doctrine.[11] The demise of commercial speech could render moot or unreliable many important disclosure obligations for corporations.

Bono's efforts to privatize the AIDS-prevention message offers a window on how this phenomenon is transforming political speech. [12] "Sponsors of the Red Campaign", for example, "take Bono's message, produce surreal versions of it, infuse it into products and then market it back to consumers."[13] Consider a current Gap Red Campaign advertisement: "Can a T-shirt save the world? This one can! . . . 20,000 The number of women and children in Africa who can receive AIDS treatment for a year thanks to the contributions from your purchases of GAP Product RED." [14] "Is the ad commercial or political? Does it propose a commercial transaction? Is it misleading?"[15] Does it matter?

"Advertising in the 21st century is less [propositional] and more about constructing identities around corporate brands."[16] It is fitted less for objective truth claims and more for subjective opinion. Such messages seem to fit "more closely with political than commercial speech."[17] The First Amendment free speech clause "protects the sort of political dialogue Mr. Gore and Bono are promoting and prevents the government from regulating such dialogue without some [compelling] reason.[18] Problem is, Bono's campaign runs on a business model, which would not exist if the commercial ventures were not profitable.[19] The Campaign's messages, therefore, seem like commercial speech, which,

---

[6] Ben-Ami, *supra* note 4.

[7] *See www.theglobalfund.org.*

[8] Ben-Ami, *supra* note 4.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Koulish, *supra* note 3.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Koulish, *supra* note 3.

[19] *See id.*

according to law, the government can regulate in order to "protect consumers from misleading product information."[20] Here is the question: Should Product RED advertisements be subjected to a political speech or commercial speech analysis?

Like a surrealist drawing, the commercial speech doctrine expands or dissolves based upon one's way of framing the relevant issues. For over sixty years, commercial speech was well guarded by courts and government regulators.[21] This is because of the Court's recognition since 1937 of the perceived need for government regulation of the market. Recently, however, the Court has become more critical of government regulation,[22] and as a result, commercial speech borders have begun dissolving into political speech, causing a surreal deregulatory scenario of oil and pharmaceutical companies "hiding behind political speech safeguards and finding protection from government regulators."[23]

Were the border between commercial and political speech really to dissolve, commercial speech would be reframed as political speech, and consumers would be denied the right to non-misleading commercial information.[24] Corporations would become society's leading agenda setters for global warming or HIV/AIDS, which Bono and Gore would support but potential remedies would likely be limited to profitable corporations, which they probably would not find to Bono and Gore's liking.[25] Such a scenario creates a dilemma for Gore and Bono because Live Earth and the Red Campaign "advocates favor government regulations—for example—of carbon dioxide gas omissions or of the price of anti-HIV/AIDS pharmaceuticals even [when it threatens a] corporate bottom line."[26]

This article analyzes the free speech right of commercial advertisers as it pertains to a fairly recent phenomenon of corporations branding themselves with social causes. This CRM phenomenon presents a challenge for commercial speech, and raises questions about the government being able to regulate speech that combines socially aware messages within commercial marketing campaigns.[27]

The key issue examined in the article is whether commercial speech ought to remain a salient discourse distinct from political speech. The logic of commercial speech suggests that its borders should be policed to protect consumers from misleading and fraudulent information. The problem facing the commercial speech doctrine is that the realities of advertising have long ago exceeded the 'propositional' nature of the commercial speech definition. Government regulators are hamstrung by the anachronism. The article will argue that the definition of commercial speech must expand to include the realities of post-modern advertising which has revolutionized the trade.

The article will discuss postmodern advertising in terms of two phenomena: branding and CRM. Branding represents the colonization of discourse by

---

[20] *Id* (internal footnotes added).

[21] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

[22] *See* Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[23] Koulish, *supra* note 3.

[24] *See id.*

[25] *Id.*

[26] *Id.*

[27] *See id.*

commercial interests.[28] It consists of advertisers claiming to sell an idea rather than a product. Branding symbolizes the post-modern assault on the commercial—noncommercial speech boundary because of its non-propositional and non-product-based nature. Through the extension of advertising into the realm of social awareness, CRM creates an even more tenuous boundary between commercial and noncommercial speech by embedding political discourse within advertising, thus potentially endangering consumer health and safety; public trust in the commercial sphere; and constitutional principles of political speech.

Part II will examine the background of branding and cause-related-marketing. Part III will examine the development of the commercial speech doctrine. Part IV will examine the problems CRM poses for commercial speech and highlight the weaknesses of the commercial speech doctrine as it pertains to CRM. Part V will propose a template for reexamining CRM in light of my critique of the commercial speech doctrine.

II. BRANDING COMMERCIAL SPEECH

According to Sut Jhalley, marketing relies on techniques that disorient the consumer, get the consumer to accept as true "magical feats of enchantments and transformations—and no basis is offered to support the claims except of the anonymous sacraments of the producers themselves."[29] This section argues further that branding disorients the consumer by replacing products with logos and propositional language with noncommercial discourse.

Since its origins, the commercial speech doctrine has faced serious challenges. An important premise of the commercial speech doctrine regards non-misleading information, while modern advertising was designed to mislead and manipulate consumers into buying products they do not need.[30] During the period of modern advertising from the 1920s-1960s, the purpose of advertising supported the plentiful outputs of mass production. Advertising coincided with a developing manufacturing sector that sought to expand production and lower production costs. The advertising industry sought to intensify demand for these massed produced goods and services by creating an illusion that compelled consumers to purchase goods they did not need, and to purchase one product over another even assuming rough parity. The ideology of corporate advertising got consumers to think of conspicuous consumption as normal, universal, inevitable, even patriotic, and thus it has become a way of thinking and acting that is largely beyond criticism.[31]

Faced with the challenge of analyzing manipulative commercial speech with a standard of non-manipulation, the Court narrowed the definition of commercial speech to propositional language regarding an economic transaction. The problem here is that the narrow definition excludes a great deal of advertising, marketing

---

[28]

[29] *See* Sut Jhally, THE CODES OF ADVERTISING: FETISHISM AND THE POLITICAL ECONOMY OF MEANING IN THE CONSUMER SOCIETY 198 (Francis Pinter 1987) [hereinafter Jhally].

[30] *See id.*

[31] *See* Joe L. Kincheloe, THE SIGN OF THE BURGER: MCDONALDS AND THE CULTURE OF POWER (Temple University Press 2002) [hereinafter Kincheloe].

and public relations, comprising noncommercial speech that carried either no First Amendment safeguards or the full panoply of First Amendment safeguards.

According to Naomi Klein, the postmodern revolution in advertising occurred during the 1980s. I contend this revolution turned the commercial speech doctrine into an anachronism. Since the 1980s, the life span of CRM, in addition to selling products, commercial enterprises have also sold their brand name, a process than emphasized inculcating brand loyalties rather that selling products. Such also is the function of CRM marketing. "The search for the true meaning of brands—or the "brand essence," as it was often called—gradually took the agencies away from the individual products and their attributes and towards a psychological/anthropological examination of what brands mean to the culture and to people's lives."[32]

While advertising used to be about marketing differences among nearly identical products, branding is about marketing feel-good identities for consumers and their friends around the brand. While advertising used to be about products, branding ostensibly is about the consumer. At issue is the "quality" and desirability of the consumer who associates with the brand. Are you cool enough to buy our brand? You buy into the philosophy of the brand.

Klein traces the moment when branding hit critical mass as a new marketing phenomenon (branding a logo) to when Philip Morris bought the Kraft logo—not the Kraft Company—for $12.6 billion dollars, six times what the company was ostensibly worth on paper.[33] As Klein remarks "[o]f course Wall Street was aware that decades of marketing and brand bolstering added value to assets and total annual sales. But with the Kraft purchase, a huge dollar value had been assigned to something that had previously been abstract and unquantifiable—a brand name."[34] The sale of the Kraft company logo, Klein informs us, transformed the modern era of mass product production into a postmodern paradigm of image production. Suddenly, companies were saying they did not make products anymore; they just made brands, which produce images and words associated with social identities. Along the way, the traditional advertising formula, which the Supreme Court happens to rely upon in its commercial speech doctrine, had suddenly become irrelevant. In fact, according to some analyses, this was the moment advertising no longer could be contained by the commercial speech doctrine. The moment when branding colonized the advertising industry is also when the commercial speech discourse began its slippery slope slide into the public sphere.

The impact on commercial speech was substantial because marketing campaigns could credibly claim to advertise ideas rather than products, and thus could mislead with impunity. Consider the following observations of Nike:[35]

Here's a funny story: I went to an advertising convention a couple of

---

[32] *See* Klein, NO LOGO: NO SPACE, NO CHOICE, NO JOBS 9 (2002).

[33] *See* Matthew Sharp, *The Logo as Fetish*, *at* http://www.clogic.eserver.org/2003/sharp.html (2003).

[34] *See* Klein, *supra* note 32, at 8.

[35] *See* Nike v. Kasky, 539 U.S. 1 (2002).

> months ago and they had people from Nike's advertising agency who were getting a prize for an ad campaign they'd done. These people got up and talked about where the campaign had come from and how they'd come up with it. The problem had been not that Nike's sales had suffered too much, but that there are bad public perceptions of Nike. The answer was not to address the problem—deal with labor issues—but to fix their public image by hooking Nike up with an "authenticity" that no one could deny. So, they sent ad people all over the country looking for the most authentic sport they could find. It turned out to be high school girls basketball because it's the most unpolluted. . . .[36]

Not so funny. Nike went to the Supreme Court in 2002 not to protect its rights to public speech, but to preserve market value, which it contended would increase if the Court dissolved the commercial-noncommercial speech distinction, and allowed it to mislead consumers. Its financial bottom line depended on the Court validating its right to disseminate information that would conceal abuse.

The moment the Kraft logo sold for more than the value of the Kraft corporation, commercial speech expanded beyond the bounds of traditional advertising to include speech, logo and images associated with promoting a brand as well as merely selling a product. Suddenly, advertising included noncommercial speech, and would lay claim to noncommercial free speech safeguards.

The modernist paradigm was inverted: Rather than using logos to advertise running shoes, the industry now treated running shoes as if they were advertisements for the Nike or Gap logo. The logo sewn on the back of the running shoe is more important to company stock than sales of the shoe itself. Product production has been subordinated to the production of symbols and images. Further, greater sums of money started to be devoted to branding than to production. Accordingly, having people wear the logo in public is more important than having the shoe fit right or be produced under non-abusive work conditions.

Given such realities of the advertising market, the Court's commercial speech doctrine has been an anachronism almost since its inception until 2002, when the Court heard oral arguments in *Nike v Kasky*.[37] As discussed below, the Court's failure to issue an opinion in this case furthered the existing confusion about the status of commercial speech in constitutional law.

III. CAUSE-RELATED MARKETING

Cause-related marketing is a "commercial activity by which a business with a product, service or image to market builds a relationship with a cause or a number of causes for mutual benefit."[38] It involves merchandising deals where the charity licenses to a manufacturer the right to use its name or logo when marketing

---

[36] *See Voice in the Neon Wilderness: Thomas Frank on Liberation Marketing*, MediaChannel.org, *at* http://www.mediachannel.org/views/interviews/frank.shlml.

[37] Nike v. Kasky, 539 U.S. 1 (2002).

[38] *See* Sue Adkins, CAUSE RELATE MARKETING: WHO CARES WINS 11 (Butterworth Heinemann Press 1999).

products in campaigns that run the gamut of advertising, sales promotion, public relations, direct marketing, sponsorship, and so forth. Since 2006, according to the Cone Report, CRM has enticed "charities into seeking deals with corporations to create products bearing the charity's name."

Author Sue Adkins notes there is nothing really new about CRM. Her research finds early examples during the 1890s.[39] The contemporary corporate social awareness industry is a capitalist and late capitalist phenomenon. It began about twenty-five years ago when corporations were facing a difficult time getting their advertising though the marketing clutter. By integrating social awareness into commercial marketing, CRM appealed to guilt-ridden baby-boomers who are "accessing more disposable income as children leave the nest, and retirement leaves time for the increasingly popular 'Act II' career or business venture."[40] CRM is a way for nostalgic baby boomers to hang on to the social consciousness they had raised during the '60s, without interfering with their ability to do well financially.

Perhaps even more sought after than baby boomers are their offspring, the 18-25 market, which has a great deal of disposable income (their own and their baby-boomer parents') and is likely to pursue marketing fads. According to the 2004 Cone Corporate Citizenship Study, this demographic is significantly more likely to consider a company's citizenship practices when making purchasing, employment and investment decisions.[41] According to Carol Cone, head of Cone Inc.,

> Today's young adults have learned to become savvy consumers and have recognized the importance of a company standing for something that they believe in. Our research shows that cause-related activities will influence not only their buying habits, but also gain their loyalty and trust. Aligning with a cause is a significant strategy for companies to attract consumers and a future workforce at an early age and gain a long term, sustainable competitive advantage.[42]

The boomers responded positively to early CRM efforts featuring the Statue of Liberty restoration and Benetton ads, helping CRM to morph into an industry that now spends billions annually. The CRM event that first caught the nation's attention was the early 1980s campaign to refurbish the Statute of Liberty.[43] In 1983, American Express trademarked the CRM term and launched a marketing campaign around the Statue of Liberty Restoration Project. American Express ran a $4 million advertising campaign, "to increase card use and new card applications and at the same time raise money, awareness, and support for the nonprofit

---

[39] *Id.*

[40] *See* Amy Belanger and Jay Levinson, GUERILLA MARKETING ON THE FRONT LINES (2005) [hereinafter BELANGER AND LEVINSON].

[41] *See 2004 Cone Corporate Citizenship Study Results*, Cause Marketing Forum.

[42] *See 2004 Cone Corporate Citizenship Study Results*, Cause Marketing Forum, *at* http://causemarketingforum.com/page.asp?ID=330 (December 8, 2004).

[43] *See* Jocelyn Daw, CAUSE MARKETING FOR NONPROFITS (Wiley Press 2006).

Restoration Fund. "[It] donated one cent for every card transaction and one dollar for every new card application."[44] As a result, American Express collected $1.7 million for the restoration effort, and documented a 28% increase in the use of their credit cards during this time.

Other businesses quickly adopted the successful CRM strategy. For example, CRM was responsible for $9 million McDonald's gathered for the Ronald McDonald House in 1994; and is the engine through which Avon has generated over $300 million to fight breast cancer. In 2004, Target and the American Red Cross entered into a partnership to work through disaster relief. Target designed and sells disaster relief kits with $10 on each purchase going to the Red Cross.[45] Indeed, since 1983, CRM has become a major industry. PRwatch.com projects CRM spending for 2007 at $1.34 billion, outpacing sports sponsorships. [46] Approximately 500 companies big and small are involved with CRM. It notes also that large nonprofits are spending upwards of about $7.6 billion per year on marketing and PR.[47]

Problem is, the social revolution of the '60s, had by the '80s been reduced to commercial marketing opportunities, with a philanthropy elixir. Commercial marketers devoured the young urban professional (yuppie) generation, by appealing to guilt and remaining pangs of social consciousness. According to Amy Belanger, addressing businesses in *Guerilla Marketing on the Front Lines*,

> If you're looking for reasons for people to buy from you, let them help you aid a social cause. If they patronize your business, they'll gain all the benefits you offer—plus they can help save the environment, or stop AIDS in its tracks, or cure multiple sclerosis, or save whales.[48]

Appeals to social consciousness are the key to the success of the CRM effort. "As a tax-deductible expense for business, this form of brand leveraging seeks to connect with the consuming public beyond traditional point of purchasing and to form long-lasting and emotional ties with consumers."[49] Gone are the politics of collective action, and in its place is an individualizing politics that appeals to feel good emotions and economic self-interest.

CRM espouses a way of seeing politics that is inherently conservative, market driven and undemocratic. It was inspired during the 1970's and 80's era of neo-liberalism, and is the cultural stepchild of the country's pre-New Deal reliance upon the private sector to address massive social problems. Its political salience comes from the fact that since the Reagan era, the government has drawn back

---

[44] *See id.* at 4.

[45] *See* Nicole Smith, *Target Goes Beyond Bottom Line with Red Cross Partnership*, DM NEWS, July 17, 2006.

[46] *See* BELANGER AND LEVINSON, *supra* note 40.

[47] *Id.*

[48] *See* Amy Belanger and Jay Levinson, GUERILLA MARKETING ON THE FRONT LINES (2005).

[49] *See* Inger Stole, *Cause-Related Marketing: Why Social Change and Corporate Profits Don't Mix*, Center for Media and Democracy, *available at* http://prwatch.org/node/4965.

from funding social programs, which has left a "widening social welfare gap" between the needs of society's distressed communities and funded government programs. Since the 1980s, the chasm has been filled with corporate "social awareness" campaigns. According to George Monbiot, "[a]s companies appear(ed) to fill the gaps they have helped to create, they . . . present(ed) themselves as indispensable vehicles for social provision."[50] As they came to replace government as society's most reliable social provider, CRM has increasingly colonized public sphere organizations programs.[51] Naomi Klein notes a

> strange conflation of several large human-rights groups and the corporate sector. In 1999, some of the most maligned multinationals on the planet—Doe Chemical, Nestle, Rio Tinto, Unocal—rushed into partnership with human rights groups and the United Nations Development Programme. Together they formed brand-new umbrella organizations with names like the Business Humanitarian Forum, Partners in Development and the Global Sustainable Development Facility, which proposed to "improve communications and cooperation between global corporations and humanitarian organizations." Multinational and human-rights groups, they claimed, actually have the same goals; human rights are good for business—they are the 'third bottom line.[52]

Once corporations initiate partnerships with nonprofit organizations, they do what they do best, which is to colonize and commodify such complex social problems as HIV/AIDS, global warming, health care and so forth, and market them to niche demographics. CRM frames conspicuous consumption, which depicts the phenomenon where consumers purchase goods they don't need and come to think of this practice, as normal, inevitable, and thus also beyond criticism.[53]

The branding of social awareness subsumes public issues within larger advertising campaigns for product brands.[54] Public issues are instrumental to conspicuous consumption, offering a one size fits all cookie cutter way of looking at the social world. As an outcome, the individual is meeting the needs of the system while thinking s/he is pursuing her own individual desires.

IV. PRODUCT RED

If Product Red had its way, corporations would assume the mantle globally of raising consciousness about HIV/AIDS in Africa, and in the process, the African

---

[50] *See* George Monbiot, *Privatizing our Minds*, Monbiot.com, *available at* monbiot.com/archives/2001/07/31/privatizing-our-minds.

[51] According to Matt Soar, creator of *Brand Hype*, "(A)dvertising is colonizing all kinds of new spaces, public and private, in an effort to find new, fresh ways to reach us as consumers." Although advertising has been around through the ages, the colonization of public space is a recent phenomenon, putting the public sphere under duress like no time in the history of democracy.

[52] *See* Klein, *supra* note 32.

[53] *See generally* Kincheloe, *supra* note 31.

[54] *See* Douglas Kellner, *Theorizing/Resisting McDonaldization: A Multi-Perpsectivist Approach*, ILLUMINATIONS.

continent would be considered "sexy" and consumers would adorn chic clothes while listening to cool MP3 players. The RED Campaign, launched in 2005 by boomers Bono and Bobby Shriver, chairman of DATA (Debt, Aids, Trade, Africa), has quickly become an exemplar of cause related marketing.[55] It brands both products and ideas, promotes a for-profit business model and philanthropy, and links corporations with nasty human rights legacies and social awareness. It also markets social awareness and conspicuous consumption, where actual products serve as little more than 3-D advertisements for the iconic brand.

Product Red generates a version of politics that is part Oprah and part shopping at the mall, and/or listening to an I-pod. Instead of calls to become engaged in collective action, consumers absorb messages embedded in comprehensive cross and viral-marketing campaigns[56] through email, blogs, social networking sites like MySpace.com and corporate websites like Oprah.com.

The Product Red mission is to raise funds for the "Global Fund to Fight AIDS, Tuberculosis, and Malaria"[57] while also enhancing profits for Nike, GAP, Apple, and other iconic corporations, which in turn contribute a portion of their proceeds from Red products to the Global Fund.

The Global Fund is the creation of the leaders of the world's wealthiest countries, rather than a grassroots movement.[58] The idea originated at the G-8 Conference in July 2000. At a special summit of the Organization of African Unity (OAU) in April 2001, UN Secretary-General Kofi Anan proposed the creation of a "war chest" that would centralize the collection, management, and disbursement of resources on a global level to fight these three diseases. The "war chest" quickly turned into the Global Fund.[59] In July 2001, at a meeting of the G-8, leaders of the world's wealthiest countries pledged founding contributions of $1.3 billion to the Fund.

The Global Fund is a private foundation established in 2002.[60] It is a funding mechanism to collect public and private contributions to finance grants for the prevention and treatment of aids, TB and malaria.[61] By design it leverages the private sector to help fund crucial public health problems, as a partnership between governments, civil society, the private sector and affected communities, the Global Fund represents an innovative approach to international health financing.

Not to overestimate the impact of Product Red, it only contributes about 5%

---

[55] CRM consists of advertising, public relations, sponsorship and direct marketing. It includes product sales, promotions, and program-driven collaborations between companies and nonprofit causes.

[56] Viral marketing is the web based marketing technique that describes any strategy that encourages individuals to pass on a marketing message to others.

[57] http://www.joinred.com/red/principles.asp.

[58] *See* Ben-Ami, *supra* note 4.

[59] As Kofi Anan announced, "I propose the creation of a Global Fund, dedicated to the battle against HIV/AIDS and other infectious diseases. This Fund must be structured in such a way as to ensure that it responds to the needs of the affected countries and people. And it must be able to count on the advice of the best experts in the world-- whether they are found in the United Nations system, in governments, in civil society organizations, or among those who live with HIV/AIDS or are directly affected by it."

[60] http://www.theglobalfund.org/en/.

[61] *Id.*

of the Global Fund Budget.[62] Still, as the largest CRM of its type, it remains unique for its business model, among other things. As its website says:

> As first world consumers, we have tremendous power. What we collectively chose to buy, or not to buy, can change the course of life and history on this planet. . . (RED) is not a charity. It is simply a business model. You buy (RED) stuff, we get the money, buy the pills and distribute them. They take the pills, stay alive, and continue to take care of their families and contribute socially and economically in their communities. If they don't get the pills, they die. We don't want them to die. We want to give them the pills. And we can. And you can. And it's easy. All you have to do is upgrade your choice.[63]

For all the good that Product Red intends, according to the Chicago Tribune, "The key to Product Red is that it's not just a cause, it's a brand. Combining style with an altruistic message gives immediate status to a product especially when it's endorsed by stars." Product Red reports that companies are vying for its logo, and as an outcome selectively recruits only a few select iconic corporate brands (Nike; Gap; Armani).

Curiously enough, the Red Campaign creates a "halo brand" for many companies that have long suffered from the negative PR effects of exploitative social relations. The branding process gets consumers and stockholders to forget workplace abuses in Asian assembly plants and focus instead on the travails of HIV/AIDS sufferers in Africa. Now, the global discussion against HIV/AIDS, malaria and tuberculosis in the African continent is going to be littered with references to the Product Red Brand, and its sponsoring corporations under the Product Red Logo. Moreover, these and other corporations gain nearly unfettered discretion to frame the way the public gets introduced to such complex problems. The frame is instrumental and rigs public understanding of social issues around the logic of capitalism.

V. THE DIFFERENCE BETWEEN COMMERCIAL AND POLITICAL SPEECH

Although CRM has further blurred the distinction between political and commercial speech, the difference between these two discourses remains significant and noticeable.

Although commercial speech is recognized as deserving First Amendment protection, it resides at one of the lowest rungs of protected speech precisely because it does not engage in public discourse. This is because of the sense among justices that commercial speech deserves less protection than political speech. Coming as it did only a few years after the end of Lochner, the *Valentine* decision etched in Court lore a commitment to government regulation of the market.

Political speech rests upon the ideal that it promotes collective political

---

[62] About 96% of its funds come from governments, but since 2006, an increasing amount has come from the private sector, notably $500 million from the Gates Foundation and $19 million from the Red Campaign, a small percentage of the $180 million the corporations spent on their advertising campaigns. *Id.*

[63] *Id.*

deliberation.[64] According to Owen Fiss, political speech infers a rational deliberative discourse that improves the collective self-determination of citizens to reach political decisions. [65] Such discourse is supposed to be autonomous and nonhierarchical; accessible to all people and protected against government regulation of content. It assumes an iterative dialogic process, a back and forth exchange of viewpoints, where any one point of view is of no greater significance than any other. This of course includes speech that people do not like. In fact, dissent plays a fundamental role in deliberative discourse. "If there is a bedrock principle underlying the First Amendment, it is, the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[66] According to the Court, "the First Amendment denies the state 'the power to prohibit discrimination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequences.'" [67]

Such dissenting voices in a polity advance the idea of constitutional checks and balances. According to Vincent Blasi, dissenting voices in a democracy provide a vital check on potentially abusive state power.[68] Dissenting voices also serve as a check on false information. Because of dissenting voices among the citizenry, the government does not have to identify some political ideas as "false" or to create cause of action to allow some ideas to be penalized.[69] *Gertz v. Welch* says, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas."[70] Thus, statements we might disagree with, as well as those that are flat out false, are "inevitable in free debate."[71] The theory of accountability here is that such falsehoods will be fact checked within the cacophony of dissenting voices.

Accountability and truthfulness are also important to commercial speech. According to civil libertarian Burt Neuborne, the purpose of commercial speech is to assure the flow of accurate information to consumers necessary to the functioning of efficient markets.[72] Keith Whittington adds that "[e]conomic activity or commercial speech would receive heightened protection only to the extent that it fed useful information into the political sphere."[73]

The problem is that commercial speech serves the ends of corporate profit,

---

[64] *See* Owen Fiss, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 18 (1996).

[65] *Id.*

[66] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[67] Whitney v. Cal., 274 U.S. 357, 374 (1927).

[68] Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

[69] *See* Nat'al Socialist Party of Am. v. Village of Skokie, 434 U.S. 1327 (1977).

[70] *See* Gertz v. Robert Welch, Inc., 323 U.S. 418 (1974).

[71] *See id.* at 341.

[72] *See* Ronald Bayer, *Tobacco, Commercial Speech and Libertarian Values*, 92 AM. J. OF PUB. HEALTH 356 (1998).

[73] *See* Keith E. Whittington, *A Note on Commercial Speech in the Era of Late Capitalism*, 14 THE GOOD SOC'Y 40 (2005).

creating a dynamic where truth and accountability are often sacrificed in the race to secure the bottom line; a point borne out by the history of advertising.

While the premise of a self-policing polity is relatively uncontroversial, there is serious concern about the ability of the market to self-police itself. In the market neither boards of directors nor shareholders provide reliable checks on management. Nor is the market itself a reliable check on the accuracy of commercial speech. Unlike the polity, the market is susceptible to cartelization and monopolization; these prevent dissenting voices from being heard, and thus, accountability from being achieved. In order to ensure that a firm's speech is "neither misleading nor related to unlawful activity"[74] the court has long insisted that market accountability demands government regulation.

Given the instrumental position of commercial speech in a democratic polity, government regulation of even non-misleading speech is appropriate when it advances a substantial government interest and is crafted so that it is not "more extensive than necessary."[75]

Even with their markedly different trajectories, the commercial and political speech boundaries are blurred because post-modern advertising far exceeds the sort of propositional exchanges that the court focuses on below.[76] The instrumental use of political discourse, in CRM for example,[77] strains the commercial speech analysis. At issue is whether the failure of the commercial speech doctrine to address post-modern realities of advertising and marketing is sufficient cause for the commercial speech doctrine's demise.

VI. COMMERCIAL SPEECH

In 1942, the Court first recognized a distinction between commercial speech and political speech[78] seeing the former as outside the scope of protection afforded to the latter. Since the mid 1970s, commercial speech has received some First Amendment protection, but considerably less than political speech.[79]"[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."[80]

Statements that are not misleading are subjected to an intermediate scrutiny test, which means the government may regulate speech if the regulation involves

---

[74] Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 334 n. 87 (2004) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

[75] *See* Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creaive Ramifications of Product Placements*, 11 UCLA ENT. L. REV 331, 344 (2004).

[76] *See, e.g., infra* notes 53-54 and accompany text.

[77] *Othralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

[78] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

[79] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council Inc., 425 U.S. 748 (1976); *see* Bigelow v. Va., 421 U.S. 809 (1975).

[80] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

important government interests that are furthered by substantially related means.[81] The intermediate scrutiny test falls between strict scrutiny and a rational basis review that is reserved for speech that receives no First Amendment protection at all.[82]

In this regard, the commercial speech doctrine represents a blurry subsection of First Amendment free speech rights. Before 1973, the Court believed that the government could regulate commercial speech with impunity, so long as there was a rational basis.[83] The current trend, however, is moving in the opposite direction as several scholars, judges and justices seem protective of commercial speech and appreciative of its underlying politics.

The politics of deregulation provokes a nostalgic look at the Lochner Era, a jurisprudential era of economic due process that ended just prior to the *Valentine* decision.[84] By the time *Valentine* was decided, the courts deliberately welcomed the regulation of the market and commercial speech.[85]

In 1942, Mr. F.J. Chrestensen moored his submarine at a dock on New York's East River and, anticipating wartime interest in his property, opened it to the public for an admission charge of 25 cents.[86] To drum up interest, Chrestensen printed and distributed handbills advertising the exhibition, in violation of section 318 of the city sanitation code, an anti-littering ordinance. Ever the entrepreneur, Chrestensen, reprinted the handbill with the same advertisement on one side,[87] adding a personal political protest against the city on the other side. Although Chrestensen contended the handbill was no longer "purely commercial," he was still charged with violating the anti-loitering ordinance.[88]

In deciding this case, the Supreme Court issued its first commercial speech decision. It recognized something called commercial speech, and discerned it in terms of the motivation of speaker.[89] In this case, for example, Chrestensen added political content to the handbill he distributed only "to evade the ordinance regulating handbills."[90] Once categorizing Chrestensen's speech as commercial, the Court then excluded commercial speech from categories of speech that enjoys First Amendment protection. Justice Roberts, speaking for a unanimous Court, claimed: "[w]e are. . .clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[91] The Court's evaluation of this blend of commercial and political speech remains relevant to the current

---

[81] *See* Craig v. Boren, 429 U.S. 190 (1976).

[82] *See* Employment Div. of Oregon v. Smith, 494 U.S. 872 (1990).

[83] *See*, e.g. Valentine, 316 U.S. 52.

[84] *See* Lochner v. N.Y., 198 U.S. 45 (1905).

[85] *Valentine*, 316 U.S. 52.

[86] *Id.*

[87] *Id.*

[88] *See id.*

[89] *Id* at 54.

[90] Robert L. Kerr (A), *From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case be Subverted to Immunize False Advertising?*, 9 COMM. L. & POL'Y 525, 534 (2004) (quoting Sullivan, 376 U.S. at 266).

[91] *See Valentine*, 316 U.S. 52.

discussion.[92]

In 1960, the New York Times ran a paid advertisement titled, "Heed Their Rising Voices."[93] The advertisement was paid for by supporters of the NAACP and was written to raise concerns about and mobilize a public response to severe police abuses then taking place in Montgomery, Alabama.[94] L.B. Sullivan, who supervised the Montgomery police and fire departments, sued the Times for libel.[95] Although the abuses mentioned in the ad were quite real, the ad contained some factual inaccuracies.[96] Sullivan contended the advertisement was commercial speech under *Valentine*, and that he had been libeled.[97]

The Court disagreed and opined that advertising alone could not bar the speech involved from First Amendment protection. Unlike the ad in *Valentine* which did no more than propose a "purely commercial' transaction, with an political portion immaterial, in this instance, the message "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."[98] As scholar Robert Kerr suggests, the purpose was not to evade a law but for the NAACP to advance a social cause.[99] Just because it came in the form of an advertisement did not disqualify it from being political speech.

An important consideration, the Court noted, was the speaker's motivation in relation to the civil rights movement."[100] Given the context, the Court concluded the ad was an example of political speech and was published with no reckless disregard for the truth, thus it was protected under the First Amendment.[101]

By the 1970s, the Court began to recognize that consumers should only receive non-misleading commercial speech. It followed that advertising would comprise a subgroup of speech despite its commercial purpose. In *Pittsburg Press* in 1973 the Court began to carve out a protected niche for advertising.[102]

In October 1969, the National Organization for Women ("NOW") filed a grievance with the Pittsburgh Commission on Human Relations ("PCHR") claiming that the Pittsburg Press violated a PCHR ordinance that proscribes the newspaper from separating job ads on the basis of gender in its help wanted section.[103]

Such help wanted ads, the Court concluded, contain no statements on "whether, as a matter of social policy, certain positions ought to be filled by

---

[92] *See* Kerr, From Sullivan to Nike, *supra*, at 540.

[93] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

[94] *Id.*

[95] *Id.*

[96] *See* Sullivan, 376 U.S. 254.

[97] *Id.*

[98] *See* 376 U.S. 254. at 266.

[99] *See* Kerr (A), From Sullivan to Nike, *supra* note 52, at 534.

[100] *See* 376 U.S. 254 at 266.

[101] *See* Kerr, From Sullivan to Nike, *supra* note 52., at 540

[102] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[103] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa.Cmwlth. 448 (1972).

members of one or the other sex . . . is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech."[104] The Court implicitly referred to Chrestensen and acknowledged, "(e)ven if it does no more than propose a transaction," such speech may merit First Amendment protection.

In February 1971, the Virginia Weekly in Charlottesville, Virginia, a university town, ran an advertisement titled, "Unwanted Pregnancy Let Us Help You."[105]

The Court held in the ensuing action that it was an error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas.[106] In declaring the state statute barring such advertisements unconstitutional, the case opened the spigot for commercial speech. In recognizing the "diverse motives, means and messages" that might comprise commercial speech,[107] the Court insisted that speech appearing in paid commercials "is not stripped of First Amendment protection merely because it appears in that form."[108] The idea here seemed to be that commercials contain information that "did more than simply propose a commercial transaction."[109] By declaring the First Amendment relevant, the Court however declined to delineate "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the state may legitimately regulate or even prohibit."[110]

Also in Virginia during the early 1970s, consumer groups filed suit against a state law that prohibited pharmacists from advertising prescription drug prices. In 1976, *Virginia State Board of Pharmacy v. Consumer Council*, effectively overturned *Valentine*, and announced limited First Amendment protection for commercial speech.[111] It expanded *Bigelow* to hold the state's blanket ban on advertising the price of prescription drugs violated the First Amendment.[112] At issue was whether communicating a pure transaction comprised commercial speech.[113] The Court responded that the First Amendment is relevant and applies to speech "that does no more than propose a commercial transaction."[114] Its inquiry focused on the content of the message, as opposed to the speaker's motivations in Valentine, and whether the speech "does no more than propose a commercial transaction."

The purpose of the commercial speech doctrine, the Court emphasized, is to protect the public's interest in receiving accurate commercial information.

---

[104] *Pittsburgh Press Co.*, 413 U.S. 376.

[105] Bigelow v. Va., 421 U.S. 809 (1975).

[106] *Bigelow*, 421 U.S. at 826.

[107] *Id* at 809.

[108] *See id* at 818.

[109] *See id.* at 822.

[110] *See id* at 824-825.

[111] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[112] *See id.*

[113] *See id.*

[114] *See id.*

> 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. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[115]

As the Court inferred, the larger purpose is to "preserve a predominately free enterprise economy."[116] In a footnote, the Court said that "common sense" differences between commercial speech and noncommercial speech "suggest a different degree of protection is necessary."[117] As important as *Virginia Pharmacy Bd.* was to the development of the commercial speech doctrine, the Court still failed to exact a real difference between commercial and noncommercial speech.

In 1980, *Central Hudson* provided what remains of the controlling four-part test for state regulations to be challenged under the commercial speech doctrine:

> In commercial speech cases . . . we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[118]

Once again, the Court continued, "commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[119] In addition, the *Central Hudson* court added yet a third line of inquiry for discerning commercial speech by classifying speech based on the speaker's interests. Although the Court's reasoning seems closer here to *Valentine* than to *Virginia State Pharmacy*, *Central Hudson*'s interests are more structural and objective whereas *Valentine's* motivations are individual and subjective.

Further, even if it is non-misleading, the state could still regulate commercial speech when its interest is greater than the speaker's interest. With this test, the Court established an intermediate standard of review for lawful, non-misleading, informational, commercial speech. The threshold is whether the speech concerns lawful activity and is not misleading. Because constitutional safeguards are based on the informational function of advertising, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[120] In attempting to define commercial speech,

---

[115] *See id.* at 765.

[116] *See* 425 U.S. 748.

[117] *See* Kozinski & Banner, at 639.

[118] Cent Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[119] *Id.* at 561-62.

[120] *Id.* at 563.

the Court referred to an "expression related solely to the economic interests of the speaker and its audience."[121]

In 1983, in *Bolger v. Young's Drug Products Corp.*, the Court ruled that a statute prohibiting mailing unsolicited advertisements for contraceptives was unconstitutional, and referred to three factors to help distinguish commercial and noncommercial speech. First, pamphlets are considered to be advertisements; second, references must be made to a specific product; and third, the company mailing them has a clear economic motive. According to the Court, "the combination of *all* these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech."[122]

Bolger also advanced two criteria for determining whether commercial speech enjoys First Amendment protection: are the statements illegal, or deceptive; and, it suggested, a substantial governmental interest must be served by the government's regulation.[123]

Finally, *Bolger* emphasized that advertisements did not become political speech merely because they mentioned health issues. Advertisements that "link a product to a current public debate" are not "thereby entitled to the constitutional protection afforded noncommercial speech."[124] Rather, the Court also emphasized advertisers' ability to separate commercial and noncommercial speech. "A company has the full panoply of protections available[125] to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."[126]

In Board of Trustees of the State University of New York v. Fox, the Court faced the issue of the inextricable intertwining of commercial and noncommercial speech.

> There, of course, the commercial speech (if it was that) was "inextricably intertwined" because the state law required it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell house wares without teaching home economics, or to teach home economics without selling house wares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.[127]

In 2002, the California Supreme Court placed strong restrictions on commercial speech, setting up a possible showdown with the Supreme Court. In

---

[121] *Id.* at 579.

[122] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

[123] See *id.*

[124] *See id.* at 67-68.

[125] *See id.* at 68.

[126] *See id.*

[127] Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989).

2002, Nike was in the midst of an extraordinary image-enhancement war against the damaging effects of its own abuses in offshore assembly plants.[128] For several years, Nike had generated a public relations campaign to counter criticism of work conditions in its plants for its overseas workers. The campaign included advertisements in newspapers and letters to major universities.[129] At issue before the California Supreme Court was whether this PR, which goes beyond the somewhat narrow parameters of advertising—regarding factory conditions and not Nike products, their quality, availability or prices—constituted commercial speech.[130]

The debate had to do with what was going on in Nike's offshore shoe companies, particularly in terms of workplace conditions. Respondent Kasky claimed that Nike had misled the public in its statements saying it was in compliance with the laws with respect to health and safety, wages and overtime and environmental standards. The material inaccurately stated that no evidence of illegal or unsafe working conditions was found in Nike factories.[131]

Kasky alleged that Nike's factual representations were false and misleading and were made with knowledge of falsity or reckless disregard for California's laws prohibiting such statements.[132] Kasky was right as Nike Chairman Phil Knight conceded in a 1998 speech to the National Press Club.[133]

One of the important issues was whether Nike's promotional statements were in fact examples of commercial speech. Nike insisted they comprised political speech, while Kasky argued that Nike was making a representation to consumers about its own practices for the purpose of convincing consumers that they should buy the company's product, which makes it commercial speech.[134] Kasky distinguished this speech from speech that might have instead talked about globalization and general labor conditions in the third world, which would have been political speech.[135]

The importance of whether Nike's speech was commercial or political is key to the case and to the larger issue. If it is commercial speech, then California had the right to regulate the speech, and if it comprised political speech, then Nike's insistence on its own innocence would have been taken as just one more contribution into the marketplace of ideas.

An awful lot of consumers, particularly those who also would be interested

---

[128] *See* Kasky v. Nike, Inc., 45 P.3d 243 (2002).

[129] *Id.* at 317.

[130] *Id.*

[131] *Id.* at 302.

[132] *See* Robert L. Kerr, *From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case be Subverted to Immunize False Advertising?*, 9 COMM. L. & POL'Y 525, 551 (2004) [hereinafter Kerr (A), *From Sullivan*].

[133] "The Nike product has been synonymous with slave wages, forced overtime, and arbitrary abuse." Knight was referring to underpaid Nike workers in Indonesia, child labor in Cambodia and Pakistan, and poor working conditions in China and Vietnam, all part of a complex set of production alliances with manufacturers. Speech to the National Press Club, May 12, 1998, quoted in "Hitting the Wall: Nike and International Labor Practices," HBS Case #9-700-047.

[134] Kasky v. Nike, Inc., 45 P.3d at 251.

[135] *Id.*.

in CRM, might well be swayed by news that Nike fails to ensure the human rights of its workers.

The ironic thing here is that if CRM is political speech, Nike would be able to hide behind the First Amendment and mislead consumers about its workplace conditions.

The California Supreme Court agreed with Kasky and concluded the statements in the promotional materials did constitute commercial speech. Where there is a commercial speaker, an intended commercial audience and commercial content in the message, the Court suggested, the speech is commercial.[136] The Court held that Nike's statements constituted commercial speech because: 1) Nike, because it is engaged in commerce, is a commercial speaker; 2) Nike's statements were addressed directly to actual and potential purchasers of its products (a commercial audience); and 3) Nike's representations of fact were of a commercial nature because it described its own labor policies and the practices and working conditions in factories where its products are made.[137]

Although the Supreme Court heard oral arguments in the case, it failed to deliver an opinion.[138] Still, scholars and court commentators make a compelling argument that the Court was tending towards Nike's position.

Kasky raised a number of issues that are relevant to finding the line between commercial and political speech and thus important to the CRM debate.[139]

The question Justice Breyer raised during oral arguments in *Nike* is: what is the Court to do when a promotional campaign is both commercial speech AND political speech, when a company is trying to sell a product and trying to make a statement that is relevant to a public debate? Breyer made the point that the Court hasn't yet figured this out, but needs to.

VII. COMMERCIAL SPEECH 'AGAINST INTEREST'

The commercial speech scenario frames advertising in terms of branding, which subordinates products and sales to images and social identities. The frame commercializes social awareness as part of larger commercial campaigns and further dissolves the distinction between commercial and political speech. As an outcome, it renders the Supreme Court's *Bolger* definition of commercial speech nearly irrelevant because postmodern advertising rarely adheres to a propositional format. At the least, postmodern advertising pushes the Court to expand the borders surrounding commercial speech. The question then turns on where the new boundaries would be set, keeping in mind that the distinction between commercial and noncommercial speech is in many ways blurred beyond recognition.

The new scenario also brings into question the *Virginia Board of Pharmacy* distinction between misleading and non-misleading commercial speech. What to

---

[136] *Id.* at 258.

[137] *Id.*

[138] *See* Nike v. Kasky, 539 U.S. 1 (2002).

[139] *See id.*

do if all commercial advertising were misleading? A great deal of postmodern advertising avoids "truth" statements altogether or refers to such statements with irony, sarcasm, or some other trope which is sometimes difficult to decipher. As part of the same Red Campaign, for example, a recent American Express advertisement shows a picture pairing supermodel Gisele Bundchen and Masai Warrior Keseme Ole Parsapaet. Parsapaet is dressed in traditional warrior's dress. Under Gisele are the words, "My Card"; under the Masai it says "My Life."[140] Still other ads offer purely "subjective" "fact" statements, such as "the best coffee ever!" which is a statement that cannot be proven.[141]

In 1993, Justice Blackman's concurring opinion in *Discovery Network* provided a glimpse into the shift in the Court's thinking about commercial speech.[142] Justice Blackman supported replacing the *Central Hudson* analysis, and recommended it be replaced by "one that affords full protection for truthful, non-coercive commercial speech about lawful activities."[143] Justice Blackman's concurrence set the standard for other cases during the '90s.[144] Justice Stevens' opinion in *Liquormart* refers to Kozinski and Banner's article, as it required greater protection for commercial speech than the intermediate scrutiny required in *Central Hudson.*[145] *Liquormart* struck down a statute that prohibited any advertising of prices of alcoholic beverages except "for price tags or signs displayed with the merchandise within licensed premises and not visible from the street."[146] Stevens suggested a bifurcated analysis where strict scrutiny would apply to regulations that prohibit "the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process."[147]

Although the Court has edged closer to noncommercial (political) speech, with a strong exception for misleading and deceitful commercial speech,[148] some justices, particularly Thomas, have also questioned the *Central Hudson* test with regards to non-misleading commercial speech.[149]

A CRM case could give the Court the excuse some justices desire: to do away with the *Central Hudson* test, and allow the court to deregulate the market.

The issue of dissolving borders surrounding the commercial speech doctrine could easily give the Court the excuse it wants to do away with the commercial speech doctrine. The problem, intentionally or not, is that efforts to do away with the commercial speech doctrine are as political as efforts were in 1942 to create a

---

[140] *See* Ben-Ami, *supra* note 4.

[141] http://www.bestcoffee.com.

[142] Cincinnati v. Discovery Network, 507 U.S.410 (1993).

[143] *See* Cincinnati v. Discovery Network, 507 U.S. 410, 438 (1993) (Blackman concurring).

[144] It is important to note that Justice Blackmun's foremost concern in commercial speech cases was to protect consumer rights. Thus his approach to deregulation maintains an instrumental approach to commercial speech. Subsequent Justices were less concerned about consumers and more interested in the politics of deregulating corporate markets.

[145] *See* Liquormart v. Rhode Is., 517 U.S. 484 (1996).

[146] *See id.*

[147] *Id.*

[148] *See* Kerr (A), *From Sullivan*, *supra* note 123.

[149] *Id.*

commercial speech doctrine. Judge Kozinski is correct in suggesting the commercial speech doctrine was constructed out of whole cloth.[150] And Justice Douglas characterized commercial speech doctrine as "almost offhand" and incapable of "surviving reflection."[151]

It seems obvious that the commercial speech doctrine was influenced by an activist court's concern over unregulated markets. Noncommercial speech during the *Valentine* era received no First Amendment protection at all, a far cry from the present, where activist Justices Thomas, Alito and Roberts have all suggested that commercial speech deserves full-fledged political speech protection.

Indeed, the current scenario of giving political speech protections to commercial speech infers that corporations would be treated as if they were persons under the Constitution, which raises several questions about the relationship between corporations and people in the public sphere. Corporations would share with persons the protection of the Bill of Rights, while also being able to wield virtually unchecked powers greater than many governments, a lethal combination for any democracy. With First Amendment rights, corporations would enjoy freedoms reserved only for persons under the constitution. Corporate personhood is a legal fiction that changes the relationship between people and corporations and corporations and government.[152] As creations of law, corporations are subjects of government; as persons they must be analogous to creators of government, and participants in the social contract.

Of course corporations are not human beings. Unlike people, corporations have unlimited life[153] and limited liability[154] and generate stocks and bonds.[155] The novelty of the corporation is suggested by the combination of the following characteristics: free incorporation, joint stock, and limited liability, which courts and legislatures brought together historically, by the early 20th century under the conceptual umbrella of a "legal personality," or "personhood." In theory, these three legal concepts appear as natural and unavoidable. In reality, these three facets construct the current context for corporate power by decreasing responsibility for corporate mismanagement, inefficiency and instability. Such coalescence of power and right would give corporations license to avoid responsibility on a wide array of powers that they wield over individuals.

At issue here is that corporations would be allowed to operate in a manner that is not only unaccountable but at odds with the basic structure of constitutional governance which relies on checks and balances and the separation of powers.

---

[150] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*,76 VA. L. REV. 627 (1990) [hereinafter Kozinski & Banner (B)].

[151] *See* Cammarano v. US, 358 U.S. 498, 514 (1959).

[152] *See* William Meyers, *The Santa Clara Blues: Corporate Personhood versus Democracy*, III Publishing, *available at* http://www. Mcn.org/e/iii/afd/santaclara.html.

[153] A corporation does not terminate with the death of its human founders or members.

[154] A member of a company cannot be made personally liable for the debts of the company beyond the capital invested, or, in general, beyond a certain amount.

[155] Known as the "joint stock principle" whereby small, distinct, contributions of capital may be combined under s single management, to finance a scheme beyond the financial resources of any one contributor, while retaining the advantage that unitary control of the joint fund may be as flexible and efficient as each contributor might be expected to be in managing its own capital.

Here corporations are allowed to garner the rights and powers that historically apply only to persons along with the coercive powers historically delegated only to government. Not since *Lochner* have corporations enjoyed such unchecked powers over persons. Consider that the Court recently invalidated laws regulating commercial speech pertaining to such activities as food and drug laws that have long histories of regulation. This combination of rights and power sans responsibility/accountability is unprecedented in a democracy.

The challenge for the Court is immense. How might it grant noncommercial speech rights while also ensuring consumers that they are not being misled and manipulated by advertising cartels and monopolies?

The Court in *Kasky*, and several commercial speech scholars, have endeavored to respond to this question with an assortment of suggestions. Matthew Savare and Steven Snyder[156] attempt to analyze commercial speech in terms of product placement in movies and television shows.[157] Reeza Dibadj places commercial speech within a larger political economy context,[158] and Michael Siebecker examines commercial speech in terms of securities regulation.[159]

An approach that corresponds with literature on providing checks on corporate power[160] is the "approach taken in the realm of political speech by theorists who think First Amendment doctrine should be informed by the societal value of having speakers available to dissent from and "check" existing customs, habits, traditions, institutions, and authorities," particularly when they are related to dominant cultural power hierarchies."[161]

This approach addresses the many challenges confronting commercial speech which include the following: defining commercial speech beyond the advertising anachronism of propositional language, distinguishing commercial from noncommercial speech and figuring out what a substantial government interest consists of in terms of regulating commercial speech.

The important idea here is that commercial speakers have an added incentive—the profit motive and monopoly control of the market— to mislead consumers when they are not held accountable for their speech. As noted in a recent Harvard Law Review (HLR), the presence of dissenting voices would indeed "discourag(e) the abuses of power and inefficiencies that result from

---

[156] *See* Steven L. Snyder, *Movies and Product Placement: is Hollywood Turning Films into Commercial Speech?* 1992 U. ILL. L. REV 301 (1992).

[157] *See* Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331 (2004).

[158] *See* Reza R. Dibadj, *Symposium: Commercial Speech in an Age of Emerging Technology and Corporate Scandal: Theory & Criticism: The Political Economy of Commercial Speech*, 58 S. CAROLINA L. REV. 913 (2007) [hereinafter Dibadj].

[159] *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WILLIAM & MARY L. REV. 613 [hereinafter Siebecker].

[160] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES.J. 521 (1977).

[161] *See* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 HARVARD L. REV. 1892, 1900 (2007) [hereinafter *Note HLR*].

monopolistic speech markets."[162] The realities of the market, driven by monopoly power, exclude such needed dissenting voices that might otherwise challenge misinformation and manipulation in the marketplace.

The weakness in the HLR Note's *dissent theory* approach is that it calls upon the Court to analyze whether the speech in question originates in a cartel/ monopoly or free market situation, the former assumes the absence of dissent, the latter assumes its presence.[163] The HLR approach doesn't contend, however, with the all too familiar experience of a firm's position in the market changing over short periods of time (think of Google's market position five years ago before it went public and now).[164] Further, it also doesn't contend with the social realities of globalized markets that provide disincentives for dissenting voices even in the absence of monopolies or cartels.

If one's real concern is with the structural and manipulative bias in commercial speech, then I recommend an alternative (against interest) approach that would provide an incentive for firms to engage in non-misleading speech. The *against interest* test would provide greater scrutiny of self-interested speech and less scrutiny of speech that goes against interest. It would make use of a strict scrutiny test for regulating commercial speech that goes against a corporation's financial interests and, the intermediate scrutiny test of regulations that endeavor to constrain self-interested speech. This test assumes that self interested speech is less likely to be in the public interest than non-self-interested speech. It also assumes that self- interested commercial speech is more likely to mislead and manipulate.

The *against interest test* incorporates ideas associated with the federal rules of evidence exceptions to the hearsay testimony rule, namely Federal Rule of Evidence 804(b)(3)(a)'s admission of statements against a declarant's interests.[165] The logic of this rule applies to the commercial speech scenario as follows. The Rule seeks to identify statements that are likely to be true. It contemplates that if a reasonable person makes a statement against interests, the statement is unlikely to be a fabrication and thus retain substantial reliability.[166]

As applied to commercial speech, the Rule would give corporations greater leeway in instances where companies take action in the public interest and at a cost to their own bottom line. Thus, strict scrutiny would apply to CRM advertising for charitable campaigns but would not apply to Product Red's instrumental use of heightening HIV/AIDS awareness for the purpose of increasing profits. The business model at the center of Product Red, which places profits over philanthropy, qualifies Product Red as commercial speech. Given the overriding laudable goals of Bono and Bobby Shriver, however, it would be hard pressed to imagine a substantial government interest in curtailing product-red-like campaigns.

Of greater salience is that when the profit motive overtly steps into the public

---

[162] *Id.*

[163] *See Note HLR*, *supra* note 151.

[164] *Id.*

[165] *See* John J. Capowski, *Statements Against Interests, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV 471 (1997).

[166] *Id.*

sphere, it must bear responsibility in keeping with the spirit of the constitution, to include mandates against misleading consumers. Thus, it is in everyone's interest to see a situation where the growing powers of corporations are held accountable to the rule of law. It is also of interest to ensure that the First Amendment does not become seen as a postmodern reincarnate of Lochner.[167]

VIII. CONCLUSION

Al Gore was quoted in a recent New York Times column by Nicholas Kristoff, saying he does not understand "why there aren't rings of young people blocking bulldozers and preventing them constructing new coal-fired power plants," given the effect of coal generated CO2 on the atmosphere. Gore fails to recognize that the CRM logic he embraces convinces "activists" of a much easier way to make a difference. It is important here to emphasize that CRM alone is not responsible for dramatic change in the public sphere. Rather, it shines light on new patterns of control over the economy.

CRM and the potential demise of the commercial speech doctrine could transform politics. Gore's lament is very real and salient here because global warming and myriads of other social problems demand real time human dialogue and action. The looming alternative is that social change becomes just another cool marketing gimmick.

[167] *Id.*