

# The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love *Citizens United*

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## Introduction

Modern commercial speech doctrine was laid down in the late 1970s by the Supreme Court in the seminal *Virginia Board*<sup>1</sup> and *Central Hudson*<sup>2</sup> decisions. *Central Hudson* provides a form of intermediate scrutiny for content-based regulation of commercial speech, whereas higher scrutiny is normally required for content-based regulation of noncommercial speech.<sup>3</sup> In 1976, when the Supreme Court first announced protection for commercial speech, the question of the hour was: Why should commercial speech be

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1. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

2. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). The *Central Hudson* “intermediate scrutiny” test has four prongs, as follows: (1) to receive any First Amendment protection, commercial speech must concern lawful activity and not be misleading; (2) the asserted governmental interest to be served by the restriction on commercial speech must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest. *Id.* at 566.

3. Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The government bears a heavy burden to demonstrate a compelling justification and the lack of any less restrictive alternative. *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 814, 816 (2000).

entitled to any First Amendment<sup>4</sup> protection at all? In response, the *Virginia Board* decision echoed Justice Brandeis's dictum that the remedy for bad speech "is more speech, not enforced silence."<sup>5</sup> Today, across the chasm of four decades, commercial speech doctrine is almost universally approached from the opposite vantage point: Why should commercial speech receive less than the full protection accorded to other speech under the First Amendment?

The answer to this question is probably best answered thus: We don't know anymore. The law is accordingly in flux. While the formal framework of intermediate scrutiny remains untouched, many have observed that the practical level of judicial scrutiny appears to be rising.<sup>6</sup> There is growing recognition in the academic community that commercial speech doctrine is untenable. Some, such as Eugene Volokh, would not look to strict scrutiny as traditionally formulated, but would increase protection for commercial speech by barring content-based regulation of any kind.<sup>7</sup> Others argue that *Central Hudson* might be maintained, but that its lower standard for commercial speech regulation should be applied only when specifically connectable to the reason for constitutional disfavor of the category.<sup>8</sup>

In a larger sense, however, *Central Hudson* has never been satisfying. *Central Hudson* followed *O'Brien*<sup>9</sup> in using an intermediate scrutiny test, although the *O'Brien* test was laid down in quite a different situation concerning the constitutional treatment of a speech/conduct hybrid rather than "pure" speech.<sup>10</sup> An unsigned 2007 Note in the *Harvard Law Review* perhaps best sums up the present state of commercial speech doctrine, calling it "a doctrine in search of a theoretical justification."<sup>11</sup> Nobody really understands how to

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4. U.S. CONST. amend. I.

5. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

6. See Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2853–54 (2005); Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 789 (2007).

7. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

8. Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL'Y 663, 665 (2008).

9. *United States v. O'Brien*, 391 U.S. 367 (1968).

10. *Id.* at 377.

11. Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892, 1894 (2007).

reconcile commercial speech doctrine with the rest of First Amendment jurisprudence. This article argues that commercial speech doctrine is the last vigorous remnant of the attempt in the mid-twentieth century to incorporate a hierarchy of values into the First Amendment.<sup>12</sup> It is also the last serious remnant of a categorical approach to First Amendment law developed in that period, an approach that is now less favored than balancing tests.<sup>13</sup> In short, commercial speech doctrine is now very much out of step with the rest of First Amendment law.

That is the good news about *Citizens United v. Federal Election Commission*.<sup>14</sup> *Citizens United* radically affirmed the principle that the First Amendment must be neutral as between different speakers, holding that even corporate speech (at least on political matters) is fully protected by the First Amendment and cannot be subject to increased regulation merely because of its corporate authorship.<sup>15</sup> Although directed at political speech, *Citizens United* has broad implications for commercial speech doctrine. It means that the basis for treating commercial speech differently must be its content, not its corporate authorship.<sup>16</sup> Above all, the Court made clear that it takes seriously that the First Amendment is meant to safeguard the “marketplace of ideas” with all its “free market” connotations.<sup>17</sup> The Court also rejected as a basis for legislation the notion that the government should address the market power of large corporations within the “marketplace of ideas.”<sup>18</sup> This article argues that *Citizens United* will necessarily lead to the abandonment of commercial speech doctrine as formulated in *Central Hudson*.

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12. For a description and critique of this development, see Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 279–81 (2009), and Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 387–90 (2009) (describing that categories were established based on their distance from “core value” of the First Amendment). A classic statement of commercial speech on the values hierarchy at a time when that description was in little dispute comes from Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

13. See, e.g., Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 779–80 (2001) (Modern cases generally contain language about balancing and burdens on speech, not categories of favored or disfavored speech).

14. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

15. *Id.* at 913.

16. *Id.*

17. *Id.* at 904–07, 914.

18. *Id.* at 899.

Whatever else can be said about *Citizens United*, this result will be a good thing. The damage caused by commercial speech doctrine is not small. *Central Hudson* has resulted in protection for an astonishing array of speech regulations, in particular regulations on signage, that threatens to confine the First Amendment to the public square and confine it further within that square. The requirement of permits is such a norm in the world of commercial speech that it has, I would argue, contributed to the erosion of the protections against prior restraint for other forms of speech.

To understand the danger to be avoided, it is worth considering Vincent Blasi's "pathological perspective" on the First Amendment, viewing it as uniquely vulnerable among the rights secured by the Constitution.<sup>19</sup> Like ripping off a Band-Aid, the sooner that the Supreme Court follows up on the implications of *Citizens United* and moves toward full First Amendment protections for commercial speech, the easier it will be to contain the damage.

If we are going to prevent reinfection, however, then we need to understand more than just the doctrinal isolation of *Central Hudson*, but the policies that have supported commercial speech doctrine for so long.<sup>20</sup> I propose that the longevity of commercial speech doctrine is because it supports—albeit crudely—a set of popular policy goals concerning the restriction of commercial advertising, in particular constraints on false advertising and the location of billboards.<sup>21</sup> Part of the task of abolishing commercial speech doctrine will be locating a new constitutional framework for these policy goals without tacking

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19. See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

20. See Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 130 (1996) ("If commercial speech protection has had its supporters from left and right, it has likewise had bipartisan critics. The critics have found such protection difficult to square with standard theories justifying special protection of speech from majoritarian politics. Strikingly, however, none of these critiques seems to have moved the Court since *Virginia Board*. While *Virginia Board* maintained some distinctions between commercial and other protected speech, it and later cases expressly rejected the global arguments of its critics."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778–84 (2004) (discussing how the expected "collision" between the First Amendment and various forms of corporate speech in terms of securities and antitrust activities never took place).

21. This is not entirely a new idea. See Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383, 425 (2005) ("At the heart of the matter is the concern that without it government will be unable to regulate constitutionally certain forms of conduct, from transactions to advertisements for harmful or illegal products.").

footnotes onto the First Amendment. Then we can make a little lemonade out of *Citizens United*.

Part I of this article explains the emergence of commercial speech doctrine and how it has become a constitutional and doctrinal anomaly. The doctrine emerged out of a theory of the First Amendment that considered values to be deeply embedded within the First Amendment. Today, the Court has adopted the metaphor of a “marketplace of ideas” to describe a government and a constitution that is, by contrast, neutral between other values.

Part II explains the justifications traditionally given for commercial speech doctrine, and why those justifications no longer support the maintenance of that doctrine today without the explicit endorsement and constitutionalization of the values from which they are derived.

Finally, Part III argues that *Citizens United*, by embracing the notion that the First Amendment’s primary purpose is to protect the “marketplace of ideas,” must necessarily lead to the end of a separate commercial speech doctrine. This article argues that this development should be embraced because the existence of what is now largely just an “exception” to the First Amendment for commercial speech regulation is proving hazardous to the purposes and values embedded in the First Amendment. Commercial speech doctrine has already led to a very high level of speech regulation—much higher than most commentators acknowledge.<sup>22</sup> The better path is to pursue these policy goals concerning advertising and billboards under more traditional police power doctrines, with whatever limitations result, without trying to shoehorn them into a doctrine that functions as an erratum to the First Amendment. Doing so would be refreshing in an area of law increasingly beset by intellectual dishonesty, and also safeguard the bedrock principle of free speech for years to come.

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22. David Vladeck, for example, has argued that the *Central Hudson* “results in the virtually automatic invalidation of laws restraining truthful commercial speech.” David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1059 (2004). This conclusion is belied by the breadth of outdoor advertising regulations that usually pass beneath the academic radar. This phenomenon is probably related to the general tendency of pedagogic literature on the First Amendment to marginalize the regulation of mass or electronic media. For a useful discussion of this subject, see generally Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005). Ammori explains that because First Amendment law is primarily taught as it concerns the regulation of speech in a public forum, regulation of speech on private property is underexplored.

## I. The Origin and Anomaly of Commercial Speech Doctrine

### A. The Road Not Taken: The Public Purpose View of the First Amendment and the First Amendment as Community Right

Commercial speech doctrine can be viewed as a relict dogma that emerged out of a profoundly liberal, mid-twentieth-century vision of the First Amendment. As will be seen, this vision, particularly as expounded by Alexander Meiklejohn and his contemporaries, was dominant for a time, but now its impact is fading except with respect to a few areas, including notably commercial speech.

As originally articulated, Meiklejohn's vision of the First Amendment proceeds from the notion that: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."<sup>23</sup> Thus, Meiklejohn ties the First Amendment explicitly to the maintenance of political liberty and "self-government."<sup>24</sup> The articulation that the First Amendment is not concerned with a "private right" is almost stunning to modern ears.

The Supreme Court in *Citizens United* has dramatically confirmed that there is no longer any majority that will endorse a public-purpose interpretation of the First Amendment. While the Court in *Citizens United* confirms the importance of political speech to democracy,<sup>25</sup> it rejects the idea that regulation may be enacted to ward off the "distorting effects of immense aggregations of wealth,"<sup>26</sup> even if arguably the excessive wealth of a few interferes with self-government.

In fact, the 2009 and 2010 decisions that recognized an individual right to possess firearms in the Second Amendment indicate how much the notion of "individual rights" rather than a public-purpose interpretation dominates the modern Court's view of the entire Bill of Rights.<sup>27</sup>

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23. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

24. *Id.*

25. *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010).

26. *Id.* at 906.

27. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The First Amendment, after all, does not explicitly invoke a public purpose the way the Second Amendment does, with its preface ("A well regulated militia being necessary to the security of a free state."). Meiklejohn might have

In its time, however, Meiklejohn's view helped foster the elaboration of a hierarchy of *values* into the First Amendment, which was widely embraced.<sup>28</sup> These values became, I would argue, the bones of modern First Amendment jurisprudence. At the top of the speech hierarchy was political speech, at the bottom, unprotected at all, were obscenity and "fighting words."<sup>29</sup> Commercial speech would fall somewhere in the middle. When the Court in *Roth* held that obscenity was that which lacked any "redeeming social importance,"<sup>30</sup> this comment can best be understood in light of the elaboration of a public purpose of the First Amendment.

In the public-purpose view, commercial speech doctrine makes doctrinal sense. Indeed, the public-purpose view explains why strict scrutiny is not appropriate. The easy extension of full First Amendment protection to corporate advertising disquiets. It seems to ennoble hucksters, cheapen political discourse, or both. *Central Hudson* acknowledged these fears.<sup>31</sup>

Most notable, however, is how unfriendly the public-purpose view of the First Amendment is to the metaphor of a "marketplace of ideas." The marketplace metaphor is a particular gloss on the notion of the "negative theory" of the First Amendment.<sup>32</sup> The idea that the primary purpose of the First Amendment is to preclude government interference in the "marketplace of ideas" does not animate in the public-purpose view.

Moreover, the "marketplace of ideas" metaphor reflects precisely the *laissez-faire* ideology that mid-twentieth-century

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wished for a preamble that stated "Freedom of conscience being necessary to republican government, the right of free speech . . . shall not be infringed." If even the Second Amendment, with such a preamble, does not have a public purpose interpretation anymore, it is not surprising that such an interpretation is failing with respect to the First Amendment also.

28. See, e.g., William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

29. Meiklejohn himself actually decried a government's decision to judge certain novels obscene as a constitutional deprivation, because he found literature and the arts to be inherently of social importance, which he called a "governing" importance. Meiklejohn, *supra* note 23. However, this is best seen as solicitude for art, not obscenity.

30. *Roth v. United States*, 354 U.S. 476, 484 (1957).

31. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) ("As we stated in *Ohralik*, the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978))).

32. See Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 26–28 (2003) and accompanying notes.

liberalism eschewed. Having rejected hands-off economics in the New Deal as a practical and theoretical failure, mid-twentieth-century liberalism found no special appeal in the notion of a “free”(unregulated) market of ideas.<sup>33</sup> As Meiklejohn aptly stated, “I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. And if one had that faith, it would be hard to reconcile it with the sheer stupidity of the policies of this nation—and of other nations—now driving humanity to the very edge of final destruction.”<sup>34</sup>

In the public-purpose view, then, the aim of the First Amendment is not to allow cacophony, wherever it might lead, but to promote the education, learning, and organized exchange of ideas that would lead to better-informed citizenry and, through that, better public policy. If this view seems somewhat elitist today, it did not seem so fifty years ago. The Great Depression had discredited, in the eyes of its contemporaries, the reigning ideology of noninterventionist government in the market and, by extension, in the public square.<sup>35</sup> When compared to the ideologies of communism or fascism with which it competed, Meiklejohn’s vision of the First Amendment and democratic self-governance was liberty breathing free.

This public-purpose view of the First Amendment can be seen in the early formulations of the “fairness doctrine” of the FCC that required opposing views be given airtime.<sup>36</sup> As the D.C. Circuit explained:

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all. But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side

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33. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 345–50 (1996).

34. Meiklejohn, *supra* note 23, at 263.

35. See Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 802 (1989).

36. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).



unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.<sup>37</sup>

Reading the original public-purpose texts of the early twenty-first century, a reader can be forgiven for mild nausea at the tendency for naïve paternalism. Such visceral reactions are a certain indication that something fundamental has changed in the zeitgeist.

As can be seen, then, commercial speech doctrine emerged with Meiklejohn’s “public purpose” view of the First Amendment in that it derives from the “hierarchy of values” that was incorporated by that view into the First Amendment. Under *Virginia Board*, the primary reason for according less protection to commercial speech is that it is less valuable than political speech, but not entirely without value.<sup>38</sup> As the Court put it, “Our question is whether speech which does ‘no more than propose a commercial transaction,’ is so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection. Our answer is that it is not.”<sup>39</sup>

Such a judgment is possible to make when the First Amendment is viewed as representing a set of embedded values. When the First Amendment is viewed instead as officially neutral between various *competing* values, the honoring of any particular set of values may be viewed as tantamount to forbidden viewpoint discrimination.

For example, in *Virginia Board*, Justice Blackmun’s opinion for the Court does not articulate the “intermediate scrutiny” test that emerged four years later in *Central Hudson*, but lists the permissible regulations that set the stage for the articulation of a lower test for

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37. *Id.* at 1103.

38. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

39. *Id.* For an explication of the argument in short order, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 476 (“An audience-based perspective does better in accounting for First Amendment doctrine’s categorization of speech according to value. If the goal of a free speech system is to provide individuals (especially in their roles as citizens) with the range of opinion and information that will enable them to arrive at truth and make wise decisions, then a tiered system of speech, of the kind the Court has created, seems appropriate. Some speech does not enrich (may even impoverish) the sphere of public discourse. Other speech contributes to reasoned deliberation on matters of public import. Under the audience-based approach, it would be perverse to treat these disparate forms of speech identically. Thus emerges a multitiered system.”).

noncommercial speech.<sup>40</sup> In *Virginia Board*, citizens who wished to obtain price information about prescription drugs brought suit against the state board that prohibited pharmacists from publishing price information.<sup>41</sup> The crucial line in the opinion is the observation that most people think of price information as important—probably more important to a great many than political ideas—and they have a right to receive this information.<sup>42</sup> Justices Stewart (concurring) and Rehnquist (dissenting) objected to the “elevation”<sup>43</sup> of commercial speech or to a formulation that would protect it as strongly with “ideological” expression that “is integrally related to the exposition of thought that may shape our concepts of the whole universe of man.”<sup>44</sup>

This category-based approach to the First Amendment, based on the relative value of different kinds of speech, had its apogee under the Burger court.<sup>45</sup> However, the categorical approach to the First Amendment has increasingly given way to balancing tests.<sup>46</sup> In these balancing tests, the underlying values must be made explicit and, if possible, tethered to some objective state interest. The result for First Amendment law is doctrinal inconsistency. As Eric Freedman put it memorably:

Current free speech law resembles the Ptolemaic system of astronomy in its last days. Just as that theory grew increasingly incoherent in an attempt to incorporate new empirical observations that were inconsistent with its basic postulates, so is First Amendment doctrine disintegrating as cases reviewing restraints on speech strive to paper over the fact that analyses based on presuppositions as to the value of particular kinds of

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40. *Virginia Board*, 425 U.S. at 770; see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

41. *Virginia Board*, 425 U.S. at 771–72.

42. *Id.* at 763–64.

43. *Id.* at 781 (Rehnquist, J., dissenting).

44. *Id.* at 780 (Stewart, J., concurring).

45. For a description and critique of this development, see Stone, *supra* note 12, at 279–81, and Blocher, *supra* note 12, at 387–90 (describing that categories were established based on their distance from “core value” of the First Amendment). A classic statement of commercial speech on the values hierarchy at a time when that description was in little dispute comes from Redish, *supra* note 12, at 593–94.

46. See, e.g., Rubinfeld, *supra* note 13, at 779–80 (discussing how modern cases generally contain language about balancing and burdens on speech, not categories of favored or disfavored speech).

expression are inconsistent with the premises of the First Amendment itself.<sup>47</sup>

It is worth noting, of course, that Ptolemy was no fool. While his system is an object of derision today, to him and to a dozen generations of scholars thereafter, the Ptolemaic system not only made sense, but meaningfully expressed dearly held beliefs about the nature of the world and of humankind's place within it. Scientific revolution requires more than just new observations—it requires a new mindset and a willingness to abandon values. Legal revolutions appear to be no different.

The decline of categorization has now been well documented.<sup>48</sup> Commercial speech doctrine, however, is a survivor. Contrast commercial speech doctrine's longevity to the fate of the "fighting words" category of speech announced in *Chaplinsky*.<sup>49</sup> *R.A.V.* restricted the reach of the "fighting words" doctrine, with its protection of such incendiary speech.<sup>50</sup> But the change is even greater: Insulting a police officer today will get you invited to the White House for a beer.<sup>51</sup>

## **B. The Road We Know: The First Amendment and the Marketplace of Ideas**

In the generation after Meiklejohn, Martin Reddish declared that the purpose of the First Amendment is "individual self-realization."<sup>52</sup> A flood of commentary since then about other values served by the First Amendment has never done much to displace the

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47. Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 885 (1996).

48. See, e.g., Rubinfeld, *supra* note 13, at 779–80; Blocher, *supra* note 12, at 387–90.

49. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

50. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

51. Of course, there was more involved in Professor Gates's arrest, release, and subsequent "beer summit" at the White House than Gates's words. But, like Mr. *Chaplinsky*, there was a subtext that the arrest took place because the speaker belonged to a marginalized group (African-Americans or Jehovah's Witnesses). And it seems certain that the words uttered by Mr. *Chaplinsky* ("You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists." *Chaplinsky*, 315 U.S. at 569.) were more genteel than those of Professor Gates. "Fascist" is scarcely the worst "F-word" in common parlance today.

52. Reddish, *supra* note 12, at 593–94.

word from this formulation, or to diminish its weight and importance in our constitutional system.

Where the goal of the First Amendment is “individual self-realization,” rather than “self-government,” the focus shifts to the individual and away from the community. Yet, by itself, such a shift in First Amendment discourse might not require any change in commercial speech doctrine. Protection of commercial speech does not, after all, appear to be connected to individual self-realization in any direct or meaningful way. As Edwin Baker argued in 1976, commercial speech can be heavily regulated precisely because it lacks the “crucial connection” to self-realization.<sup>53</sup> Thomas Jackson and John Calvin Jeffries argued in the same time period that the First Amendment is about protecting certain identifiable values, both self-government and the opportunity for individual self-expression,<sup>54</sup> thus, commercial speech was not included within its ambit.

While courts never openly embraced “self-realization” as a fundamental First Amendment principle, courts nonetheless did come to endorse an individual-rights view of the First Amendment. As Justice Brennan lamented in 1979 when the court began to disavow the “public purpose” view:

Although the various senses in which the First Amendment serves democratic values will in different contexts demand distinct emphasis and development, they share the common characteristic of being instrumental to the attainment of social ends. It is a great mistake to understand this aspect of the First Amendment solely through the filter of individual rights.<sup>55</sup>

As noted above, a pure individual-rights filter has now spread to the Second Amendment as well.

Above all, the triumphant metaphor has been the “marketplace of ideas,” with the First Amendment enshrining an intellectual laissez-faire—the principle of government nonintervention. It is hard to overestimate the power of this fundamentally libertarian metaphor in our constitutional life.<sup>56</sup> There can be little doubt that this market

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53. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

54. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5–6 (1979).

55. *Herbert v. Lando*, 441 U.S. 153, 187 (1979) (Brennan, J., dissenting).

56. Ironically, the marketplace metaphor was introduced to the modern court by Justice Brennan himself, but in a context suggesting market failure. “I think the right to

metaphor welcomes commercial speech into the First Amendment's fold. The California Supreme Court in its *Gerawan* opinion explained such a view in caustic tones.<sup>57</sup>

The triumph of the marketplace metaphor is something of a political and judicial miracle. It is true that a strain of political discourse going back to the founding generation envisioned a republic of proud freeholders, beholden to no one, paying taxes only for the defense of their lives and property. But if that mythic republic ever existed, it is long since gone, both in practice and even from much of the public imagination. The typical homeowner is not a farmer or freeholder.<sup>58</sup> She likely lives on an eighth of an acre, heavily mortgaged to a bank, often in a housing development shorn by its corporate developer of its air, water, and mineral rights, on which she can neither dig nor build without a multiplicity of permits and inspections. The citizen is, in fact, as likely to rent as to own his or her dwelling, and almost certainly derives the income to pay the bank or landlord by working for someone else, not from the use of the property. In short, we are a nation of renters, debtors, and employees, not freeholders.

It is not surprising, then, that our political discourse no longer deeply connects the meaning of freedom with possessing private property, particularly real estate. For most of us, freedom means much more than noninterference with property rights. The words of Justice Kennedy come closer to the mark when he wrote that, “[a]t the heart of liberty is the right to define one’s own concept of

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receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.” *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965); see also David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 *YALE L.J.* 857, 894 (1986) (“Though it is often made to do so, Brennan’s metaphor need not carry the baggage of economic theory that Holmes expressly adopted. The marketplace of ideas, in Brennan’s figuration, conjures up the Greek ‘agora,’ the central meeting place for exchange.”).

57. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 487, 497 (2000).

58. U.S. CENSUS BUREAU, *RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE SECOND QUARTER 2010*, available at <http://www.census.gov/hhes/www/housing/hvs/qtr210/files/q210press.pdf> (showing 69.9% homeownership rate nationwide for 2010); see also U.S. CENSUS BUREAU, *MORTGAGE STATUS AND SELECTED MONTHLY OWNER COSTS – UNIVERSE: OWNER-OCCUPIED HOUSING UNITS (2008)*, available at <http://factfinder.census.gov/home/saff> (hover over “Data Sets”; then click on “American Community Survey”; then click on “Detailed Tables” with “2006-2008 American Community Survey 3-Year Estimates” highlighted; then click on “Show Result”) (showing that 51 million owner-occupied housing units of the nation’s 75 million total owner-occupied housing units are mortgaged).

existence, of meaning, of the universe, and of the mystery of human life.”<sup>59</sup>

Yet that thread of nineteenth century thought that gave us the “marketplace” metaphor won out in the end in the First Amendment, or at least has now become dominant and is inscribing itself ever deeper on our law. The earliest mention of the “marketplace” metaphor in the Supreme Court appears in a typically blistering dissent by Justice Holmes in 1919 from *Abrams v. United States*, where the Supreme Court upheld a wartime espionage conviction for distributing leaflets with “disloyal, scurrilous and abusive language about the form of Government of the United States.”<sup>60</sup> Justice Holmes wrote:

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 the 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.<sup>61</sup>

The “free market” ideology was resurrected in the 1970s with the “Chicago School.” Presently, the evidence is that the judiciary is now in terminal embrace with those ideas. The phrase “marketplace of ideas” has been used in several dozen Supreme Court opinions after the 1970s, appearing now in almost every First Amendment Case.<sup>62</sup> Today, usage of the “marketplace” metaphor is not only dominant in

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59. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Another sweeping expression of the same, connecting it with the First Amendment, was articulated in indicating the limitations of Meiklejohn’s views of liberty. “If ‘we the people’ are to be sovereigns, in any sense of the word, the government must be bound to respect the dignity and right of every citizen to rule over his or her own life.” John F. Wrenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 *FORDHAM URB. L.J.* 27, 67 (1993).

60. *Abrams v. United States*, 250 U.S. 616, 617 (1919).

61. *Id.* at 630 (Holmes, J., dissenting).

62. Since the millennium, it has appeared almost every term. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009); *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2781 (2008); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007); *Randall v. Sorrell*, 548 U.S. 230, 280 (2006); *McCreary County v. ACLU*, 545 U.S. 844, 883 (2005); *Clingman v. Beaver*, 544 U.S. 581, 621 (2005); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 575 (2005); *McConnell v. FEC*, 540 U.S. 93, 336 (2003); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 553 (2001).

the Supreme Court since the 1970s, it is frequently cited without any examination.<sup>63</sup>

The particular expression of the “marketplace of ideas” by Ronald Coase has turned out to be dominant and prescient.<sup>64</sup> Coase made the connection to commercial speech at the outset. Coase asked why, if we trusted truth to win out in the marketplace of ideas (political speech), did we not similarly expect truth to win out in the marketplace of goods (commercial speech)?<sup>65</sup> He argued that it made little sense to regulate information about the goods more heavily than information about political ideas when, if anything, “buying harmful ideas is just as bad as buying harmful drugs.”<sup>66</sup> Coase’s argument, and the metaphor it relies upon, has become the primary reason why commercial speech doctrine is under threat today. To counter those who argued that unrestricted, unregulated advertising, even misleading advertising, would distort the marketplace for goods, Coase responded that consumer tastes are determined by so many factors that advertising is unlikely to change tastes much.<sup>67</sup> The logic of these ideas presses hard for the abolition of commercial speech doctrine as we know it.<sup>68</sup>

Even those who eschew a market metaphor today nonetheless accept the centrality to the First Amendment of the metaphor’s explicit conclusion that the government must not interfere in the development and propagation of ideas, and the implicit assumption that noninterference will produce a superior result. For example, Solicitor General Elena Kagan wrote in 1996 that, in her analysis, the use of speech categories in First Amendment law (which I attribute here to an earlier strain of liberalism) is really an elaborate structure whose effect, if not necessarily by design, is to suss out “improper motives” behind regulation.<sup>69</sup> She argued that if the Court’s focus could be directed at improper motive, it “could remove the lion’s

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63. W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 40–44 (1996).

64. R. H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 7 (1977).

65. *Id.*

66. *Id.*

67. *Id.* at 9–11.

68. Richard Posner, another leading Chicago School light, surprisingly, once took the opposite view on commercial speech: if you can regulate the product, you can regulate the advertisement. Also, “the most dangerous monopoly is a monopoly on political power.” Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 9, 40 (1986).

69. See generally Kagan, *supra* note 39.

share of the First Amendment's doctrinal clutter."<sup>70</sup> Kagan's analysis presumes that the government should be neutral to all speech, equating interference with impropriety. "[T]he principle of impartiality applies not only to persons, but to ideas. In determining whether to restrict speech, the government may not rank the worth or "rightness" of messages; to do so would be to register a kind of disrespect that automatically renders the action improper."<sup>71</sup> In short, the marketplace metaphor with its neoconservative economic connotations is now dominant in the Court's First Amendment decisions.

### C. Only Mostly Dead: An Attempt to Save Commercial Speech Doctrine

The public-purpose view of the First Amendment remained a mainstay in First Amendment discourse for a long time. It remains an academic strain of discourse, which now holds that commercial speech doctrine serves the First Amendment because of the perceived need to regulate the allegedly outsized speaking power of large corporate enterprises; it equates corporate speech with commercial speech.<sup>72</sup> The modern public-purpose view of the First Amendment also involves a deliberate reaction to the "marketplace of ideas" metaphor: It posits that government should seek to remedy the pervasive "market failure" caused by the power of big corporations to drown out smaller or individual speech. There seem to be no shortage of new justifications from this left-perspective for excluding commercial speech from the full protection of the First Amendment.<sup>73</sup>

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70. *Id.* at 414, 515.

71. *Id.* at 511–12.

72. See, e.g., Ronald Collins, et al., *Corporations and Commercial Speech*, 30 SEATTLE U. L. REV. 895, 916–20 (2007) (discussing the commercial speech issue in *Nike* as a corporate speech issue); Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 867 (2008) (discussing commercial speech as primarily about institutional speech). Cf. Gary M. Bishop, *Corporate Speech and the Right of Response in the Commercial Free Zone*, 54 WAYNE L. REV. 1149, 1154–55 (2008) (arguing that corporate speech is more than just commercial speech, and vice versa).

73. See, e.g., Tamara L. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 185 (2007); Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913 (2007) (discussing how protection for commercial speech is a clever corporate attempt to make an end run around deference to administrative agencies, which is part of a corporate deregulatory agenda); Amit Schejter, *Jacob's Voice, Esau's Hands: Transparency as a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFSTRA L. REV. 1489 (2007) (arguing for a First Amendment right of "transparency" as an antidote to advertisements); Desiree A. Kennedy, *Marketing Goods, Marketing Images: The Impact of*



These discussions invoke the power of corporate money and the evils of advertising. These arguments are not altogether new in academic discourse,<sup>74</sup> but what seems new is the explicit response to a “marketplace” metaphor.

At bottom, however, this public-purpose view of the First Amendment seems motivated by antipathy to the corporate speaker. Although some wish to devalue corporate speech specifically because of the corporate identity of the speaker,<sup>75</sup> this view did not, in fact, animate commercial speech doctrine as it emerged in the 1970s. And still, as currently formulated, commercial speech doctrine is defined by content, and only incidentally determined by the speaker. Exceptions are rare, but telling. In *Bracco Diagnostics, Inc. v. Amersham Health, Inc.* for example, the district court held that scientific reports are non-commercial speech, but the same reports republished in an advertisement constitute commercial speech.<sup>76</sup>

Advocates of a new basis for existing commercial speech doctrine note that a corporation has few if any of the attributes of personhood that would be connected to having a right of free

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*Advertising on Race* RIZ. ST. L.J. 615 (2000) (arguing that First Amendment protection for commercial speech disadvantages certain groups as it is excessively individualistic); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194–224 (Oxford Univ. Press 1992) (1989); Randall P. Bezanson, , 80 IOWA L. REV. 735, 735–36 (1995) (arguing that speech without an identifiable individual author is ineligible for First Amendment protection); Vladeck, note 22, at 1059; Daniel J. H. Greenwood, 83 IOWA L. REV. 995, 1062 (1998) (arguing that free speech rights should be reserved for natural persons, not corporations, because corporate speech distorts the political process).

74. , George K. Gardner, Note , 49 HARV. L. REV. 869, 902 (1936) (suggesting that billboard advertising is an attempt to subvert individual human beings to the service of manufacturing interest).

75. Some of the broadest statements by Edwin Baker. , Edwin Baker, , 55 VAND. L. REV. 891, 902 (2002) (“Freedom to act (e.g., to speak) and to alienate (e.g., to provide another with your communication) are direct aspects of personal liberty. In contrast, market transactions are exercises of power over other people.”). Tamara R. Piety, , 41 TULSA L. REV. 715 (2006).

76. *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384 (D.N.J. 2009).

77. Tom Bennigson, Nike *ech?*, 39 Conn. L. Rev. 379, 448 (2006).

no one's expressive interests, restrictions can in principle be justified by showing that listener interests will be benefited more than they will be harmed."<sup>78</sup>

This analysis has much to recommend it. First, the First Amendment can be considered in the context of human rights, and no legal theory that values human personhood can take seriously the attribution of human rights to a fictional corporate person. To the extent that a First Amendment jurisprudence does crudely make this equation between human beings and institutions, it is troubling. Second, treating corporations as persons runs counter to a substantial body of law that does treat natural and corporate persons differently based on the obvious fact that corporations are not human beings.<sup>79</sup>

Note that the California Supreme Court and the United States Supreme Court in *Kasky v. Nike*<sup>80</sup> and *Citizens United* respectively agreed that the corporations involved were engaged in political expression.<sup>81</sup> The courts accepted at face value that the corporation is the speaker, and also easily conflated a corporation with other "associations."<sup>82</sup> But this is a fiction. While endowed with legal personhood, a corporation is not an actual person with a brain (or heart); it has no political ideas of its own. The opinions and ideas expressed are necessarily those of its owners or managers. As Justice Stevens wrote in dissent, "Like all other natural persons, every shareholder of every corporation remains entirely free . . . to do however much electioneering she pleases outside of the corporate form."<sup>83</sup>

Others argue that corporate law itself provides a sufficient basis for restraining corporate speech.<sup>84</sup> The argument from corporate law observes that a corporation differs from a club or other voluntary "association" in that it is organized exclusively for the financial benefit of its stockholders and specially chartered by the state with a grant of limited liability to the stockholders. Crucially, a stockholder

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78. *Id.*

79. Among the most obvious differences are that corporations cannot vote, serve on juries, or marry, all of which are fundamental rights guaranteed to natural persons.

80. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 947–48 (2002).

81. *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010).

82. *Id.* at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

83. *Id.* at 943.

84. Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1 (2005).

has a right to bring an action against a corporation if its managers are mismanaging it for personal gain, or using corporate resources for their own private benefit. Such personal use of corporate funds generally goes by the term “corporate waste.”<sup>85</sup>

If the corporation’s owners or managers wish to use corporate resources to engage in their *own* political speech, that is a form of corporate waste. Thus, goes the argument, “corporate” political speech is a waste of corporate resources, and can be enjoined for that reason alone.

The formulation is also persuasive in the converse. Corporate political speech might not be waste if there is a larger commercial purpose to the speech—i.e., advocating some course of action that will directly profit the enterprise. This formulation, however, throws into doubt the holding that corporate expenditures on political campaigns are ordinary speech, indistinguishable from such expenditures by natural persons. Natural persons are allowed to engage in speech for its own sake, but if it is a violation of fiduciary principles for the corporation’s managers to use corporate assets to promote their own political views, the presumption must be that a corporation making campaign expenditures has an explicit intention of receiving a financial benefit. If, to be legal “speech,” corporate political donations must be undertaken with an explicit expectation of financial reward, then corporate donations to legislators look less like free speech and a lot more like bribery.<sup>86</sup>

Similarly, because a corporation’s owners are entitled to the presumption that they are not wasting corporate assets, it makes sense to presume that any corporate speech has, as its primary purpose, the pursuit of profit. Tom Bennigson makes the same basic argument that speech by a for-profit corporation must always be considered *commercial* speech.<sup>87</sup> The common insight behind many academic arguments for limiting commercial speech has to do with what is viewed as the excessive or unbalanced power of corporate interests in their ability to dominate the “marketplace of ideas” and drown out other voices. As Jerome Barron argued forty years ago, “The ‘marketplace of ideas’ view has rested on the assumption that

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85. See *Rogers v. Hill*, 289 U.S. 582, 591 (1933).

86. This is one of the reasons why *Buckley v. Valeo* and its progeny may have missed the mark on whether corporate expenditures on political campaigns can be considered “political speech.”

87. Bennigson, *supra* note 77. See also Alex W. Cannon, *Regulating Adwords: Consumer Protection in a Market Where the Commodity Is Speech*, 39 SETON HALL L. REV. 291, 316 (2009); Greenwood, *supra* note 73, at 1065.

protecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace.”<sup>88</sup> This author has found no court that has yet endorsed this theory.<sup>89</sup>

Perhaps the most compelling literature in this vein is Eugene Volokh’s groundbreaking 1995 piece where he predicted that “cheap speech” on the internet and elsewhere will naturally correct imbalance in the “marketplace of ideas” caused by the ability of certain wealthy interests to dominate the conversation through control of media and advertising.<sup>90</sup> In other words, Volokh would have likely agreed (in 1995 anyway) that any imbalance in marketplace of ideas in favor of the rich and powerful in was an *inherent* feature of commercial speech that the First Amendment should correct. The market might prove to be self-regulating after all, at least with technological development.

Few would argue that Volokh’s early vision has been realized, at least not yet. Fifteen years later, print media is ailing badly, which may only serve to increase the power of the handful of corporate networks that are still able to make money off the news. The *deus ex agora*<sup>91</sup> is still not here.

## The Limits of Commercial Speech Doctrine

### A. The *Central Hudson* Rationales for Intermediate Scrutiny

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*Citizens United*

*Cheap Speech and What It Will Do,*

*passim*

*deus ex machina*

*What Is Commercial Speech? The Issue*

*Not Decided in*

Lines are always best drawn with reference to the underlying purposes to be served. The goal of treating commercial speech as a distinct category is to allow the government to regulate and prohibit advertising to protect consumers. From this perspective, the California Supreme Court got it exactly right: A company's false statements about its product should be regarded as commercial speech unprotected by the First Amendment.<sup>93</sup>

Chemerinsky and Fisk then recite the three specific reasons given why commercial speech should be a disfavored category under the First Amendment. First, they argue that the burden to determine the truth of commercial speech should be with the speaker because of the speaker's unique knowledge.<sup>94</sup> Second, they posit that stricter regulations on commercial speech are acceptable because commercial speech is less easily chilled than other forms of speech.<sup>95</sup> Third, they rely on the widely accepted interest in preventing "commercial harm,"<sup>96</sup> which seems to mean preventing some species of fraud—the harm to consumers from misleading consumers into spending money on particular goods or services.<sup>97</sup>

These three classic arguments have never been all that convincing. As to unique knowledge, the problem is that this is not really a characteristic of commercial speech or commercial speakers alone. Almost any speaker, when making claims about himself or herself, is in the best position to verify those claims. For example, a politician's promise, and intention of keeping it, is even more uniquely within his or her province, yet regulation of that speech is subject to the highest scrutiny.<sup>98</sup> So while unique knowledge may be a characteristic of commercial speech, it is not peculiar to commercial speech, and does not by itself justify diminished treatment for commercial speech.

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93. *Id.*

94. *Id.* at 1146.

95. *Id.*

96. *Id.* at 1146–47.

97. These rationales remain at the core of cases following *Central Hudson*. See, e.g., *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 955 (2002).

98. See *Brown v. Hartlage*, 456 U.S. 45, 54–55 (1982).

Regarding whether commercial speech is less easily “chilled” than noncommercial speech, this also appears to be mostly a conjecture. Tom Bennigson argues persuasively that speech motivated by monetary concerns alone is likely chilled much more easily than political speech.<sup>99</sup> As he notes, the speaker of “Give me liberty or give me death!” would seem less likely to be silenced by an unfriendly regulation than someone who risks busting an advertising budget with heavy fines.<sup>100</sup> Pepsi does not normally inspire martyrdom. On the other hand, when a person’s livelihood depends on commercial speech (as billboard companies do) they may be very motivated to break the law.<sup>101</sup> It is, at any rate, hard to make broad generalizations about the relative motivations of speakers of commercial or noncommercial speech. Certainly there is little empirical support offered anywhere for the proposition that commercial speech is more robust than political speech.

Finally, the need to prevent the harm caused by false or misleading commercial speech only seems persuasive if we disregard or discount the harm that we know is caused by other kinds of speech granted full protection under the First Amendment. After all, political speech can cause significant harm. Surely, for example, the Supreme Court has not decided that potential for harm from false nutritional labeling exceeds that of radical Islamist propaganda. Indeed, the 2010 decision in *Holder v. Humanitarian Law Project* endorses the principle that speech alone can be dangerous, amounting to material support of terrorism.<sup>102</sup>

There are other kinds of harmful speech that we explicitly permit. So-called “hate speech” can be very harmful to those subjected to it, but it enjoys First Amendment protection.<sup>103</sup> When the Supreme Court overturned regulations punishing a burning cross in *R.A.V.*, it was not suggesting that the burning cross caused less harm than would a false advertisement that could be more readily regulated.<sup>104</sup>

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99. Bennigson, *supra* note 77, at 391–92.

100. *Id.*

101. And they do. *See, e.g.,* *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996).

102. *Holder v. Humanitarian Law Project*, 130 S. Ct 2705, 2724 (2010).

103. *Leonard v. Nix*, 55 F.3d 370, 374 (8th Cir. 1995) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992)).

104. *See R. A.V.*, 505 U.S. at 424.

Also, we tend to think of decisions about evaluation and prevention of harm to be within the province of the legislative branch to decide. It is highly unusual to adopt a doctrine proclaiming that certain speech is more likely to be harmful than others outside of the context of upholding a specific statute.

Thus, none of these justifications for commercial speech doctrine are very persuasive outside of a preexisting assumption that commercial speech is less valuable than political speech.

Other justifications have been tried that are supposedly content neutral. For example, David Farber asked thirty years ago “Can present commercial speech doctrine be justified on the basis of some unique characteristic of commercial speech without impairing the principle of content neutrality?”<sup>105</sup> He answered that commercial speech possesses a unique characteristic, the “contractual function of the language,” that distinguishes it from other speech.<sup>106</sup> At its core, Farber’s approach is an expansive notion of fraud.

Eugene Volokh also implicitly argues that commercial speech regulation might be best understood as just a species of fraud.<sup>107</sup> Farber may be right that fraud can be expanded to reduce the requirement of showing proximate cause without violating the *due process* clause of the constitution. Perhaps it is sufficient to regulate the truth content of advertising to allow an action for fraud with presumptive rather than actual reliance.<sup>108</sup>

These, however, are the easy cases. Much harder cases are posed by the fading boundary between advertisement and other forms of commercial speech. For example, in *Kasky*, the California Supreme Court considered efforts by Nike, Inc. to defend its overseas labor practices in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents

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105. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 N.W.U. L. REV. 372, 375 (1979).

106. *Id.* at 387.

107. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1081–83 (2000).

108. At least one court may be headed in this direction, as described by David Dickinson, *An Architecture for Spam Regulation*, 57 FED. COMM. L.J. 129, 141 (2004) (discussing *Mainstream Marketing Services v. FTC*, 358 F.3d 1228 (10th Cir. 2004), where the Court of Appeals for the Tenth Circuit upheld the constitutionality of the Do-Not-Call Registry. The Tenth Circuit found that the distinction between commercial and non-commercial speech appeared to be reasonable because commercial solicitations are more likely to result in fraud, and have done more to invade individual privacy than non-commercial solicitations.).

distributed for public relations purposes.<sup>109</sup> Nike also bought full-page spaces in leading newspapers to publicize a report that GoodWorks International, LLC, had prepared under a contract with Nike.<sup>110</sup> The report was based on an investigation by a former United States Ambassador, and it stated that it found no evidence of illegal or unsafe working conditions at Nike factories.<sup>111</sup> The California Supreme Court found these to be commercial speech, reversing the lower courts who found otherwise.<sup>112</sup>

As Justice Chin noted in dissent, “With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking.”<sup>113</sup> Certainly, Farber would have had a hard time applying his “contractual nature” argument to reach this result, given the attenuation between assertions about Nike labor practices abroad and the offering of sneakers for sale at the local Foot Locker. Moreover, it was troubling to some that the same words, if spoken by someone other than Nike, would have been obviously protected under the First Amendment.<sup>114</sup> To the extent that *Kasky* relied on the identity of the speaker to determine the constitutional treatment of the message, its holding is suspect if the identity of the speaker is not a proper basis for regulation. In sum, the classic rationales for commercial speech doctrine are not compelling today.

Does the category “commercial speech” have any workable definition? If the identity of the speaker is not a sufficient basis to disfavor commercial speech under the First Amendment, the definition must be related to the commercial content. In fact, the standard definitions adopted by courts do concern the content of the speech. “Commercial speech” has been defined as speech that

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109. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 947–49 (2002).

110. *Id.*

111. *Id.* Because the Supreme Court granted certiorari, the case became a cause célèbre in First Amendment circles known by its federal nomenclature as *Nike v. Kasky*. The Supreme Court later dismissed the writ of certiorari as improvidently granted. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

112. *Kasky*, 27 Cal. 4th at 970.

113. *Id.* at 979 (2002) (Chin, J., dissenting).

114. See, e.g., Terilli, *supra* note 21, at 385 (“In this legal marshland, the commercial speech doctrine has become a linguistic quagmire for speakers with commercial interests and for speech that may or may not be deemed commercial.”).



[merely] “proposes a commercial transaction” or (*Central Hudson*) speech that is “related solely to the economic interests of the speaker and [the] audience.”<sup>115</sup> The Supreme Court’s broadest definition for commercial speech is an “expression related solely to the economic interests of the speaker and its audience.”<sup>116</sup>

The *Central Hudson* Court stated:

In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.”<sup>117</sup>

The biggest flaw with the aforementioned definitions is that they do not delimit the scope of commercial speech doctrine. For example, the speech in *Kasky* did not “solely” relate to the economic interests of the speaker and its audience. In discussing child labor and other working conditions overseas, the speech at issue plainly touched on other issues, even if it could be described as primarily about promoting Nike’s products. Similarly, commercial speech doctrine covers plenty of messages that do not propose a commercial transaction, such as the “Happy Cows Come from California” advertisements and other feel-good industry advertisements that arguably function almost as public service announcements.

Another way of looking at the problem is to ask whether we could change the title of “commercial speech” to simply “commercial advertisements.” This would not square with the sweep of *Central Hudson* (and would invite battles over the meaning of the term “advertisement”). The phrase “commercial speech” was probably intended to stave off terminological disputes over what constitutes an

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115. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562 (1980).

116. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

117. *Central Hudson*, 447 U.S. at 564 n.6 (citations omitted).

advertisement, but it has not solved the definitional problem that is central, in the end, to due process.<sup>118</sup>

Sometimes, courts seem almost to reason backwards, recognizing that speech should be regulated as commercial speech not by its own content, but by its legislative treatment.<sup>119</sup> The most obvious difference between commercial and noncommercial speech is that we permit regulation that bans “false” commercial speech.<sup>120</sup> Many courts begin their analysis of commercial speech by noting that it must be fundamentally different *because* we allow regulation of “false” commercial speech.

When it came to *Central Hudson*, Justice Powell, writing for the Court, began with the observation that “[O]ur decisions have recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”<sup>121</sup> The term “commonsense” carries with it little or no analytical rigor.

Others have tried to define commercial speech as that which causes particular harms.<sup>122</sup> Circular arguments such as these always have more to recommend them in legal practice than most legal scholars would like to admit, of course, because it is injury that brings cases to court. Still, to define commercial speech as that speech which that produces the harms complained of in *Central Hudson* has just one problem: It does not reflect the state of the law. Indeed, new questions keep arising that have nothing to do with harm. When is a weblog commercial speech?<sup>123</sup> Is the Supreme Court really going to decide that an advertising-supported newspaper is not a commercial enterprise essentially beholden to its advertisers while a blog is? Does it matter how much the sponsor insinuates itself into the content?

Is commercial speech about money? Unfortunately, any discussion about commercial speech must eventually mention Dr. Johnson’s remark that “No man but a blockhead ever wrote, except

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118. Note that the 1942 Supreme Court case that first decided commercial speech was entirely outside the First Amendment referred to it as “commercial advertising,” while the term “commercial speech” was not used. *See generally* *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

119. *See, e.g.*, *Clear Channel Outdoor, Inc. v. City of New York*, 608 F. Supp. 2d 477, 513–15 (S.D.N.Y. 2010).

120. Chemerinsky & Fisk, *supra* note 92, at 1160.

121. *Central Hudson*, 447 U.S. at 563.

122. Fischette, *supra* note 8, at 709.

123. Anthony Ciolli, *Are Blogs Commercial Speech?*, 58 S.C. L. REV. 725 (2007).

for money.”<sup>124</sup> Certainly, the fact that most newspapers and magazines are for-profit publications does nothing to diminish their First Amendment protection for them or for the authors whose works are published by them. Similarly, courts hold that “that speech that solicits funds is protected by the First Amendment.”<sup>125</sup> Obviously, then, we must note the curious fact that the test for whether speech is “commercial” is not whether the speaker intended to profit from the speech. Thus, the attempt to define “commercial speech” by reference to some neutral principle remains elusive.

In a larger sense, however, the definitional problem is the result of the shift away from the category/values based approach to the First Amendment. What the *Central Hudson* Court described as a “commonsense” distinction was little more than inscribing its values into the First Amendment; commercial speech was treated differently because it is of lower value than political speech, and it was thus defined by its lack of relation to valued political or cultural subjects.<sup>126</sup> When Justice Potter made a similar famous comment about obscenity—“I know it when I see it”—he was being honest rather than just flippant.<sup>127</sup> When a definition is based on values rather than objective principles, determining the fit within the category is a matter of values-based judging. When we reject that sort of judging, we find that we no longer understand the category. That is what has happened throughout First Amendment law.

Now that the public-purpose vision of the First Amendment and its embedded values have been written out of our free speech law, the “commercial speech” category is unmoored from its original justification and the definition of the category seems arbitrary or circular; it is simply that speech which is subject to the *Central Hudson* test.

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124. THE SAMUEL JOHNSON SOUND BITE PAGE, *available at* [www.samueljohnson.com/writing.html](http://www.samueljohnson.com/writing.html) (last visited Oct. 8, 2010). The esteemed Dr. Johnson had evidently not heard of a law review.

125. *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 628–32 (1980)).

126. *See Central Hudson*, 447 U.S. at 563–64 (defining commercial speech by its relationship to the informational content of advertising).

127. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

## ***Citizens United* and the End of Commercial Speech Doctrine**

### **A. *Citizens United***

Amendment stands against attempts to disfavor certain subjects or viewpoints. (citations omitted) Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. (citations omitted) As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.<sup>130</sup>

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128. *Citizens United v. FEC*, 130 S. Ct. 876, 883 (2010).

129. . (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000); *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 784 (1978)).

130. at 884.

As explored above, the notion that the First Amendment is “premised on mistrust of governmental power” is not a neutral or historically objective observation. That prominence of the “mistrust” idea derives from the noninterference mandate of the “marketplace of ideas.” And that is how \_\_\_\_\_ puts it, in overruling the \_\_\_\_\_ decision, “Austin interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>131</sup>

In his concurrence in \_\_\_\_\_, Chief Justice Roberts warned that the enforcement of limits on corporations just because they are corporations would cause great harm in that “First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.”<sup>132</sup> The phrase “confined to individuals” is stunning: Evidently, Chief Justice Roberts would read the First Amendment entirely as a limitation on government, largely repudiating it as an expression of human rights. The majority of the Court has not gone so far, however.

The \_\_\_\_\_ majority also indulges the historical fiction that accompanies the “marketplace” metaphor. Justice Kennedy writes that “[a]t the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.”<sup>133</sup> But the First Amendment was adopted at a time when blasphemy was illegal in every state, and prohibitions against other forms of undesirable speech, such as pornography or other lewd material, were entirely unprotected. If speech was “open” in 1789, this denotes a very limited sort of openness. By recasting the history of the First Amendment as one of openness, \_\_\_\_\_ truly forecloses the public purpose understanding of the amendment. Indeed, this passage may not be so much unhistorical as ahistorical, positing a “founding” almost out of time and space like Locke’s state of nature.<sup>134</sup>

In addition, the repeated use of the term “open” to describe the historical status of free speech suggests the Court’s mindset to view regulations of any kind as closing off some portion of the idea or speech “market.” It also suggests a natural emptiness, like a fairground when there is no fair taking place, or a sort of

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131. \_\_\_\_\_ at 921 (Roberts, C. J., concurring) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

132. \_\_\_\_\_ at 917.

133. \_\_\_\_\_, 130 S. Ct. at 906.

134. \_\_\_\_\_ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689).

on which ideas are spread for sale. This is not a necessary interpretation of the market metaphor, but clearly the dominant one today. Market regulations, however, can be viewed in other ways, as enabling or opening a market that is naturally “closed”—as many markets have been over time.

In ruling that corporate political speech (spending money) cannot be regulated differently from individual political speech, knocked down two main arguments that could support commercial speech doctrine. First, confining the holding in to political speech would reestablish the very values-based categories that the “marketplace” metaphor and the modern Court eschews. We should expect the extension of to all forms of speech in which corporations participate, granting corporations equal rights with natural persons. Thus, it will become impossible to justify lower protection for commercial speech merely because it might be speech by a corporation. This means that any justification for commercial speech doctrine must derive from some objectively measurable negative aspect of the commercial content of the speech. Such change will be sweeping, and the Court’s very broad language was noted by dissenters, who argued—correctly from history—that “it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.”<sup>135</sup>

Second, held that the government has no cognizable interest in fixing “market distortion” in the “marketplace of ideas.”<sup>136</sup> That the idea marketplace is self-regulating, or at least ultimately self-correcting, is assumed. Put another way, the ability of the marketplace of ideas to support and sustain democratic self-government is presumed to be organic. We must now ask with Ronald Coase, if we trust truth to win out in the marketplace of ideas (political speech), why do we not similarly expect truth to win out in the marketplace of goods (commercial speech)? Inevitably, courts must respond to these forces by restricting the “false advertising” doctrine towards the neighborhood of traditional fraudulent representations, leaving aside all manner of puffery or debatable opinion.

In other words, the Supreme Court will have to consider whether it can continue to maintain a purely categorical approach to commercial speech the embedded values that supported it.

<sup>135</sup>. , 130 S. Ct. at 946 (Stevens, J., dissenting).

<sup>136</sup>. at 904–07 (majority opinion).

We can, I believe, safely expect the “marketplace” metaphor to expand from the political realm back to the marketplace.<sup>137</sup>

Likely, Martin Redish’s predictions will prove prescient. Redish wrote in 2007:

[T]o all too great an extent, all three forms of criticism of commercial speech suffer from the same fundamental flaw: each either constitutes, facilitates, or, at the very least, comes dangerously close to a constitutionally destructive form of viewpoint-based regulation. As such, each gives rise, ironically in the name of the First Amendment, to the most universally condemned threat to the foundations of free expression—suppression based on the regulators’ subjective disagreement.<sup>138</sup>

He argued that commercial speech would ultimately come to be seen as forbidden viewpoint discrimination. points us squarely down that path.

Thus, we have seen that is not a radical departure from the current direction of the Supreme Court, but is an extension of the “marketplace metaphor” that has come to dominate First Amendment cases over the past few decades. In that sense,

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137. In this light, the endorsement of disclosure requirements for corporate “speakers” (donors) is in line with a view of the efficient market having information.

It is worth noting that Justice Thomas did not join the majority opinion when it came to disclosures. So Justice Thomas rejected disclosure requirements entirely, citing the pressure put on opponents of same-sex marriage in California by those in favor, in particular the economic boycott of a restaurant (“And a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after she gave \$100, because ‘throng[s] of [angry] protesters’ repeatedly arrived at the restaurant and ‘shout[ed] “shame on you” at customers.’” , 130 S. Ct. at 981 (Thomas, J., concurring)). Justice Thomas would not explicitly bar the protestors, but he would deprive the protestors of the information they need to protest—the information about who was donating to the opposing cause. Thus, Justice Thomas is not really behind the notion that government may not structure rules to redress imbalances in the “marketplace of ideas”—he just has different ideas of what the rules should be.

Of course, once we equate spending money with speech, the question of disclosure should be straightforward. If even corporate campaign donations are speech, what sense does it make for the to seek to keep their “speech” a secret? Was not the woman who donated \$100 speaking? If so, how do we understand a right to be heard? If speaking is about expression or communication, it is clear that the interest in anonymous, secret donations is not about speech at all.

There is a definite political bent to that I am obscuring in this article to poke at the metaphors that underlie the majority view. Nonetheless, I do not dismiss in any way the criticism that the decision was intended by some of its participants, despite its ultimate libertarian expression, to skew public debate in a particular direction.

138. Martin H. Redish,

, 41 LOY. L.A. L. REV. 67, 69 (2007).

is probably more problematic from a policy perspective than from a philosophical or doctrinal point of view. removes campaign finance rules that are incompatible with the direction the “marketplace metaphor” was going to take the Court. In doing so, it breathed a sense of intellectual honesty into an area of speech regulation that needed it, particularly following the incomprehensible 2003 decision in *McConnell v. Federal Election Commission*.<sup>139</sup>

“Here’s the big deal. This is the way Constitutional rights are lost. Not in the thunder of a tyrant’s edict, but in the soft judicial whispers of deference.”<sup>140</sup>

The *Citizens United* decision should finally break the back of commercial speech doctrine, which will be a reason to rejoice. The *Central Hudson* Court understood some of the practical realities of extending First Amendment protection to commercial speech. It confronted a history of substantial regulation of commercial speech, much of it in reaction to unwanted billboard advertising,<sup>141</sup> and feared what would happen if it were swept away with the stroke of a pen. Rather than find a way to contain restrictions on advertising within a First Amendment framework, the *Central Hudson* Court preferred to retain existing rules and sweep them into a safe constitutional category.

The *Central Hudson* Court also, correctly, feared that the failure to distinguish between commercial and noncommercial speech could lead to the same kinds of regulations being adopted for noncommercial speech that are permissible for commercial speech.<sup>142</sup> As a result, it sought to categorize and wall off commercial speech from full First Amendment protection even while acknowledging that it was “speech,” and as such entitled to some protection.

This was the wrong solution to a real problem, with unfortunate side effects. Vincent Blasi argues that the First Amendment should

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139. *McConnell v. FEC*, 540 U.S. 93 (2003).

140. *Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 460 (Ct. App. 2004) (Sills, J., dissenting).

141. See generally Darrel Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 221 (2010).

142. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–57 (1978)).



be equipped for the “worst of times” when the government is likely to stifle dissent systematically.<sup>143</sup> He posits that the First Amendment is always under threat and needs to be defended, perhaps by extraordinary measures.<sup>144</sup> Blasi self-deprecatingly refers to this as the “pathological approach” to the First Amendment.<sup>145</sup> This view, if it has merit, suggests that the First Amendment is uniquely vulnerable to the diffusion of pernicious doctrines.

With respect to commercial speech, Blasi argued that by asking judges to routinely assess the potential of commercial speech to mislead, modern commercial speech doctrine weakens the taboo against evaluation of the truth of unpopular political expression.<sup>146</sup> The fear was that an “exception” for commercial speech would, in effect, spread to lower protection for other areas of speech:

Again, the exception to this principle could be confined to the realm of commercial speech; there are some features of commercial speech that distinguish it from all other types of communication. But a court operating in pathological times that views the dangers generated by an unpopular speaker’s message as “substantial” and “disproportionate” to the value of the message might be sorely tempted to carve out a second exception to the principle against message balancing.<sup>147</sup>

He is not hostile to commercial speech doctrine, urging as a practical matter that the “middle-of-the-road” approach be used rather than use the First Amendment simply to bar the popular policy goals of controlling advertising.<sup>148</sup>

In making this suggestion, Blasi’s work is a mirror of the somewhat different fear expressed in \_\_\_\_\_ that if commercial speech were accorded full protection, the natural inclination of courts to regulate commercial speech more heavily would invite dilution of First Amendment protections for political speech.

While Blasi’s “pathological approach” may have its critics, its assumption of political hostility makes it a useful approach where such hostility is manifest. Moreover, in the twenty-five years since

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143. Blasi, \_\_\_\_\_ note 19, at 486–88.

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146. \_\_\_\_\_ at 484–85.

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148. \_\_\_\_\_ at 486.

Blasi first made these suggestions, the fear of harm has proven to prophetic, but it has come from itself, which has turned out to be the very “exception” he feared, not much of a “middle-of-the-road” approach at all.

Between both advertising regulations and zoning regulations, has allowed the elaboration of intricate sign codes across the United States, regulating signage and aesthetic expression in almost awesome detail.

A good example of a highly detailed sign ordinance addressed by the Supreme Court is the 1994 case of *City of LaDue v. Gilleo* where a homeowner was prosecuted by the city of LaDue, Missouri, for erecting a sign at her home that read “For Peace in the Gulf.”<sup>149</sup>

Under any other form of analysis, we would have regarded sections 35-2 and 35-3 of the ordinance, under which the suit was brought, a formal prior restraint: “No sign shall be erected [or] maintained” in the City except in conformity with the ordinance and further authorized the City to remove nonconforming signs.<sup>150</sup>

More importantly was the detail of the ordinance. Section 35-1 of the *LaDue* ordinance defined “sign” as:

A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word “sign” shall also include “banners”, “pennants”, “insignia”, “bulletin boards”, “ground signs”, “billboard”, “poster billboards”, “illuminated signs”, “projecting signs”, “temporary signs”, “marquees”, “roof signs”, “yard signs”, “electric signs”, “wall signs”, and “window signs”, [sic] wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.<sup>151</sup>

The rule then had a series of equally picayune exceptions. As the Court put it, “The full catalog of exceptions, each subject to special size limitations, is as follows: “[M]unicipal signs”; “[s]ubdivision and residence identification” signs; “[r]oad signs and driveway signs for danger, direction, or identification”; “[h]ealth

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149. *City of LaDue v. Gilleo*, 512 U.S. 43, 45 (1994).

150. at 43 n.5 (citations omitted).

151.

inspection signs”; “[s]igns for churches, religious institutions, and schools” (subject to regulations set forth in § 35-5); “identification signs” for other not-for-profit organizations; signs “identifying the location of public transportation stops”; “[g]round signs advertising the sale or rental of real property,” subject to the conditions, set forth in § 35-10, that such signs may “not be attached to any tree, fence or utility pole” and may contain only the fact of proposed sale or rental and the seller or agent’s name and address or telephone number; “[c]ommercial signs in commercially zoned or industrial zoned districts,” subject to restrictions set out elsewhere in the ordinance; and signs that “identif[y] safety hazards.”<sup>152</sup> It is notable that almost all of these regulatory categories are arguably content based.

This is not an exceptional ordinance, although it is one of few that has had an airing in the high Court. Detailed sign codes such as this occur across the country. Los Angeles, for example, has separate regulations for the following types of signs: Identification Sign, Illuminated Architectural Canopy Sign, Information Sign, Monument Sign, Mural Sign, On-Site Signs, Off-Site Signs, “Time and Temperature” signs, Supergraphic Sign, Temporary Sign, Wall Sign, and Window Signs.<sup>153</sup>

The First Amendment concern arises from the elaborate nature of what is forbidden or permitted, as well as the frequent use of content in definitions. Taken individually, each might pass the test, each regulation related to some governmental interest. Taken together, they become complete schemes thoroughly regulating almost all expression through the medium of signage through prior permitting requirements.

The Court in \_\_\_\_\_ confronted a scenario that many of us today consider unimaginable—barring a private person from putting a small political sign at her house. But it happened. The elaborate nature of the sign ordinance there, I suggest, is not a coincidence. Worse, these elaborate ordinances encourage deference by the judiciary because they smack of expertise.<sup>154</sup>

Finally, the pernicious effect of such rules has to be understood with their promulgation, hand-in-hand, with zoning regulations. Although some rules are upheld merely as content neutral “time,

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152. \_\_\_\_\_ at 43 n.6 (citation omitted).

153. LOS ANGELES, CAL., MUN. CODE ch. 1, art. 4.4 (2009) (sign regulation).

154. For a description of how perceived expertise can lead to deference, Robert F. Bauer, \_\_\_\_\_ McConnell’s Buckley, 153 U. PA. L. REV. 5 (2004).

place, and manner” regulations rather than under the practical effect is a low level of scrutiny.

The result of such detailed regulation of expression in private and public space is an erosion of right of political expression in the public square. There is a direct practical line that can be drawn from these elaborate sign codes and zoning rules to the “free speech zones” that now severely curtail the right of free expression during major international events. The free speech zones take the “bubble” rules of <sup>155</sup> and turn them inside out. We are all too accustomed to a regime of prior permits and restrictions for speech, to ensure that business is free of disruption.

As much as \_\_\_\_\_ may seem to some to be purely about enhancing corporate power, it does promise to create some a doctrinal consistency in an area that badly needs it. This author believes that a robust First Amendment, even if so established in the first instance for the benefit of large corporations, is better off than if allowed to degenerate into a rule riddled with exceptions. Yes, the “marketplace” metaphor may lead us to places we do not wish to go, but it also has the ability to put the First Amendment on a surer footing than it has been while merely between metaphors.

The reason for concern is contained in the premise underlying the “pathological perspective.” The problem free speech advocates face is that the First Amendment is generally held to protect more speech than the democratic majority would normally allow, and the success of the First Amendment in protecting the less popular aspects of its reach depends on the willingness of courts and democratic majorities to respect the whole framework of the First Amendment, taking the sweet with the bitter, the noble and the profane together. This role of the greatly enhanced if the First Amendment is treated by Courts as an almost “sacred” principle. It is worth noting that both the public-purpose vision and the “marketplace” vision place an extreme importance on the First Amendment.

We do not need a special regime for commercial speech. There are ways to save most sign regulations and truth-in-advertising laws. The latter must be tied more closely to fraud protection. In a case where corporations or other individuals tell falsehoods about their business practices, the proper plaintiffs will be those who can

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155. Hill v. Colorado, 530 U.S. 703 (2000).

demonstrate some reliance on those statements. Sign regulation will have to be directed more closely to the size, shape, configuration, and quantity of signs, without regard to commercial content.

Accordingly, the First Amendment is sounder and safer if premised on some principle that is consistently respected and applied, so that is available for use when the least hardy sort of speech is under threat.

with its determined application of the marketplace metaphor, signals a desire and willingness to take the marketplace metaphor to its logical conclusions and embed these deep within the First Amendment. It should lead to the abolition of commercial speech doctrine, ending the “somewhat” protection for commercial speech, as the California Supreme Court dubbed earlier this century. This process will, I believe, actually shore up the First Amendment for years to come.

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