

*On the Wings of Nike: A Streamlined Approach to the Commercial Speech Doctrine.*

Anne Cunningham, Ph.D.  
Craig Freeman, J.D.  
Louisiana State University  
Manship School of Mass Communication

**Abstract**

With increasing regularity, the Supreme Court's commercial speech doctrine has been challenged as unrealistic, unworkable, and outdated. Both consumers and advertisers require a system that provides some stability and predictability. The solution to the problem may be solved within the current framework of the commercial speech doctrine. As we will explain, the *Bolger* analysis, which courts rely on to distinguish commercial from non-commercial speech, fails to do the job. Rather the courts should assume that all speech originating from a commercial entity is commercial. This allows courts to progress to the more workable and predictable *Central Hudson* test to determine if the speech can be regulated. The elimination of the *Bolger* analysis also would allow courts to return the commercial speech doctrine to the original dicta laid out in *Virginia Board of Pharmacy* – regulation of commercial speech should be limited to: 1) time, place and manner; and 2) false or misleading content.

**Anne Cunningham and Craig Freeman are Assistant Professors in the Manship School of Mass Communication at Louisiana State University, Baton Rouge, LA.**

The commercial speech doctrine, in its current form, fails to account for the realities of a modern world – a world in which personal, political, and commercial arenas no longer have sharply defined boundaries.<sup>1</sup>

With increasing regularity, the Supreme Court’s commercial speech doctrine has been challenged as unrealistic, unworkable, and outdated.<sup>2</sup> Lower courts remain constrained to follow the dictates of the doctrine, despite the fact that even some Supreme Court Justices find it unwieldy.<sup>3</sup> One central problem – how to identify commercial speech? While commentators have questioned the workability of the commercial speech doctrine, none has specifically addressed the problems created by the *Bolger* precedent used to determine when speech is commercial. Nor has anyone suggested, as we will, that the Court should presume that all public corporate communication is commercial speech. The elimination of the *Bolger* analysis leads courts directly to the more predictable *Central Hudson* analysis, granting clarity before advertising is produced as well as after it is “consumed.”

---

<sup>1</sup> *Kasky v. Nike*, 45 P.3d 243, 249 (Cal. 2002)

<sup>2</sup> See e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (Kozinski and Banner argue for the complete abandonment of the commercial speech doctrine); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine With a Tort-Based Rational Framework*, 41 CASE W. RES. 1093 (1991) (Howard suggests replacing the commercial speech doctrine with a tort-based approach to analyzing deceptive commercial speech); Daniel Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 142 (1999) (Troy notes that “the Supreme Court’s recent approach to commercial speech has been neither principled or consistent.”); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (Post argues that flaws in the commercial speech doctrine are the result of inconsistencies in the fundamental principles it is meant to promote); Nicholas Consula, *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Ass’n v. United States*, 28 PEPP. L. REV. 353 (2001) (Consula writes that though the commercial speech doctrine is not likely to disappear, *Greater New Orleans* does foreshadow some weakening of its ability to regulate truthful, non-deceptive advertising.).

<sup>3</sup> See, e.g., 44 *Liquormart v. Rhode Island*, 517 US 484, 527 (1996) (Thomas, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring).

As decision after decision is heaped on the shaky foundation of the doctrine's two-step approach, the time has come to determine an analysis that will yield a degree of surety for advertisers, while at the same time protecting consumers. The Supreme Court had an opportunity to address the issue in deciding on Nike's appeal to the California Supreme court's decision on *Kasky v. Nike, Inc.* The court noted that "[t]his case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance."<sup>4</sup> Unfortunately the Court declined to weigh in on this novel issue, returning *Kasky* to the state court.<sup>5</sup> After hearing oral arguments and reviewing the 34 briefs filed on the issue, the Supreme Court dismissed its writ of certiorari as improvidently granted. This is unfortunate because *Kasky* had the potential to become a landmark decision but, because Nike recently settled,<sup>6</sup> the case will not make its way back to the Supreme Court. It seems the Supreme Court has merely postponed the inevitable; a ruling on how public relations will fit into the framework of the commercial speech doctrine. We offer a solution to remedy the current confusion in deciding this problematic issue in the law. Our solution exists within the framework of the existing commercial speech doctrine: eliminate the initial assessment of commercial content – kill *Bolger*.

### **A Brief History of the Commercial Speech Doctrine**

Historically, the Supreme Court has adhered to a "two level" theory of free expression under the First Amendment. "Speech is either 'protected' or 'unprotected' by

---

<sup>4</sup> Nike, Inc., et al v. Kasky, 123 S.Ct. 2554 (2003).

<sup>5</sup> *Id.*

<sup>6</sup> Adam Liptak, Nike Move Ends Case Over Firms' Free Speech, N.Y. TIMES, September 13, 2003, at A8.

the first amendment according to the court's assessment of its relative 'value.'"<sup>7</sup> The Court considers some speech to be of little or no value regardless of the message it conveys – noisy speech near a hospital, for example – while other speech loses its value because of its content.<sup>8</sup> This theory is rooted in the dictum of *Chaplinsky v. New Hampshire*, which states, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”<sup>9</sup> Since 1942 the Court has considered commercial communication to fall into the category of “low value” speech.<sup>10</sup>

Having determined that some classes of speech are more valuable than others, the Court has applied different standards in reviewing regulations placed on speech. The standard applied has been based on the nature of the speech. Any regulation that limits fully protected speech such as political speech and the press receives strict scrutiny – the highest level of protection under the Constitution. Regulations on commercial and other “low value” speech regulations, on the other hand, receive less review.<sup>11</sup>

---

<sup>7</sup> GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1149 (3<sup>rd</sup> ed. 1996).

<sup>8</sup> *Id.* at 1086-1087.

<sup>9</sup> 315 U.S. 568, 571 (1942).

<sup>10</sup> *Valentine v. Chrestensen*, 316 US 52, 54 (1942).

<sup>11</sup> *See, e.g.*, G. Sidney Buchanan, *A Very Practical Court*, 30 HOUS. L. REV. 1509, 1525 (1993). The author explains the Court's varying treatment of speech by writing, “The Court would apply heightened scrutiny to governmental action using certain classifications or affecting certain personal, non-economic rights and very deferential rational-basis scrutiny to governmental action affecting economic rights.” Buchanan further contends that the late 19<sup>th</sup> century saw a significant shift in the Court's attitude toward corporations. Corporations came to be seen, and more importantly treated under the Due Process Clause of the Fourteenth Amendment, as persons. These two points will become important to our analysis insofar as we will argue that corporations are not like individuals who can weigh in on political and social issues because of personally held beliefs. Rather, corporations exist to earn profits for their owners and shareholders. While corporate leaders and representatives may have strongly held attitudes regarding public affairs issues, and may even use the corporation to advance their goals, this is not the reason that corporations are legally sanctioned. Therefore, corporate speech should not receive the same constitutional treatment as individual speech.

As the line between editorial and commercial is blurred, courts have faced the challenge of deciding what level of protection should be granted to hybrid speech, such as public relations, advertising that references social and political issues, and corporate commentary on social and public issues. The current formulation of the commercial speech doctrine has given advertisers an incentive to cloak their commercial messages in non-commercial clothing. If successful in passing the message off as non-commercial, any attempt to regulate the speech would have to pass strict scrutiny.

The merger of commercial and non-commercial speech is nothing new, but the sophistication of the merger has increasingly confounded courts. Take as an early example, *Valentine v. Chrestensen*,<sup>12</sup> which marks the Court's first dismissal of commercial speech's value and foreshadowed later attempts by advertisers to shield commercial messages with political speech. This case dealt with a violation of New York City Sanitation Codes, which forbade "distribution in the streets of commercial and business advertising matter."<sup>13</sup> The defendant distributed handbills advertising admission to his US Navy submarine. On the other side of the handbills was a protest against the city's refusal to allow him to dock his submarine at the city pier. Based on the inclusion of this message, the defendant claimed the speech was political and deserving of First Amendment refuge. The Court, however, concluded that the speech was "purely commercial" and as such its regulation created no Constitutional conflict.

In reaching its decision, the Court applied the most lenient form of regulatory review, rational basis. Rational basis review first seeks to determine the goal the

---

<sup>12</sup> *Valentine*, 316 U.S. at 54.

<sup>13</sup> *Id.* at 53.

government is pursuing in regulating the speech and then asks if the regulation achieves that goal.<sup>14</sup> Scholars have argued that, in its most lenient form, a rational basis analysis allows courts to lean over backwards to hypothesize a rational governmental goal, and a rational link between that goal and the means government has employed. As a result, there are few speech regulations the Court cannot justify.<sup>15</sup>

After more than 30 years of rational basis review for commercial speech regulations, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>16</sup> set the high water mark for commercial speech protection. The US Supreme Court determined that advertisers have a right to provide information and, more importantly, consumers have a right to receive it. As Justice Blackmun explained, “Even an individual advertisement, though entirely ‘commercial,’ may be of general public interest.”<sup>17</sup> In this case the Court found that society had a strong interest in the free flow of information related to drug prices. *Virginia Board* established that the government could regulate the time, place and manner of a commercial message but could not restrict its content unless the content was found to be misleading or coercive. In the absence of false or misleading content, any attempts to regulate commercial speech beyond its time, place and manner of dissemination should receive strict scrutiny just as non-commercial speech does.<sup>18</sup>

Having moved away from rational basis review but still refusing to grant all commercial speech strict scrutiny, the Court sought ways to define the bounds proscribing

---

<sup>14</sup> Buchanan, *supra* note 8, at 1518-1519.

<sup>15</sup> *Id.* at 1576-1577.

<sup>16</sup> 425 U.S. 748 (1976).

<sup>17</sup> *Id.* at 764.

<sup>18</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993).

commercial speech. In *Central Hudson Gas & Elec. v. Public Serv. Comm'n*,<sup>19</sup> the Court detailed a four-part, intermediate test to determine when a regulation prohibiting commercial speech passes Constitutional muster. The *Central Hudson* Court asked whether: 1) the speech is entitled to First Amendment protection – the expression must be for a legal activity and not misleading; 2) the asserted governmental interest in regulating the speech is substantial; 3) the regulation directly advances the asserted government interest; and 4) the regulation is not more extensive than necessary to serve the government's interest.<sup>20</sup> The *Central Hudson* test takes commercial speech to a higher level of scrutiny than rational basis insofar as the government's interest must be "substantial" and the regulation must "directly" advance that interest without being "more extensive than necessary."

Still a problem remains. Before courts can apply the *Central Hudson* test they must determine that the speech in question is commercial. While the *Virginia Board* Court saw value in commercial speech it still found it to be different from and of lower value than non-commercial speech. Justice Blackmun, in writing the majority decision in *Virginia Pharmacy*, warned:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiated from other forms. There are **commonsense differences** between speech that does 'no more than propose a commercial transaction' and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure

---

<sup>19</sup> 447 U.S. 557 (1980).

<sup>20</sup> *Id.*

that the flow of truthful and legitimate commercial information is unimpaired.<sup>21</sup>

Herein lies one of the major problems with the commercial speech doctrine. The Court has found it far easier to determine what commercial speech *is not* than to clearly articulate these commonsense differences between it and other forms of speech.<sup>22</sup>

When dealing with false or misleading statements, this determination is even more important. Protection for false statements flies in the face of traditional notions of the scope of Constitutional protection. While the First Amendment undoubtedly protects issue or political speech, false speech should fall within the “well defined” classes of speech outside the scope of First Amendment protection. In *Gertz v. Welch*,<sup>23</sup> the Court expressly found that “there is no constitutional value in false statements of fact.”<sup>24</sup> Citing both *New York Times v. Sullivan* and *Chaplinsky*, the *Gertz* Court went on to note:

Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues. They belong to that category of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’<sup>25</sup>

In reality, the Court has been reluctant to stifle free expression by regulating false non-commercial speech. The *Kasky* majority openly questioned the propriety of imposing

---

<sup>21</sup> Virginia Board of Pharmacy, 425 U.S. at note 24 (emphasis added).

<sup>22</sup> See e.g., Kozinski & Banner, *supra* note 2, at 638-64. (The authors detail the various factors the Supreme Court has determined do not define commercial speech: “it is not speech that money is spent to project [or] ... on a commercial subject. ... [Furthermore] the commercial speech distinction cannot turn on the profit motive of the speaker; the labeling of the speech as commercial has to be the result of an examination of the speech itself, not the speaker’s purpose.”)

<sup>23</sup> 418 U.S. 323 (1974).

<sup>24</sup> *Id.* at 340.

<sup>25</sup> *Id.*

liability on false statements, noting that the *Gertz* Court's statement was potentially overbroad.<sup>26</sup>

Prior to applying *Central Hudson*, however, each court must first determine if an expression is commercial. *Bolger v. Youngs Drug Products Corp.*<sup>27</sup> established criteria for determining *when* speech is commercial, thereby triggering *Central Hudson's* intermediate review. As we will demonstrate, it is the Court's prefatory application of *Bolger's* criteria that has allowed companies to circumvent commercial speech regulations and thereby disseminate false and misleading company/product information.

### ***Bolger v. Youngs Drug's* Problematic Precedent**

*Bolger* dealt with the unsolicited mailing of pamphlets promoting condoms produced by Youngs Drug. Youngs was charged with violating Title 39 U.S.C. §3001(e)(2), which criminalizes the mailing of unsolicited contraceptive advertising. Youngs Drugs admitted the pamphlets advertised condoms but also argued that because the pamphlets contained information about venereal diseases and family planning, they "constitute[d] 'fully protected' speech...."<sup>28</sup> The Court, affirming the U.S. District Court for the District of Columbia's ruling, found that the pamphlets were commercial speech and thus subject to limited First Amendment protection. The Court's ruling states:

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into

---

<sup>26</sup> Nike, Inc., et al. v. Kasky, 123 S.Ct. at 2559.

<sup>27</sup> 463 U.S. 60 (1983).

<sup>28</sup> *Id.* at 66.

commercial speech. The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.<sup>29</sup>

In past decisions the Court has determined that none of these factors alone is sufficient grounds for classifying speech as commercial,<sup>30</sup> yet here the Court's logic amounts to three rights making a wrong. This confluence of facts was sufficient for the Court to determine that the pamphlets were in fact commercial speech.

In a footnote, Justice Marshall alluded to the fact that the analysis in *Bolger* examined the totality of the circumstances. He wrote:

Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.<sup>31</sup>

Scholars have reached similar conclusions about the difficulty of defining advertising based on a single set of characteristics.<sup>32</sup> In a *UCLA Law Review* article, Post writes, "The evaluations of 'commonsense' are complex, contextual, and ultimately inarticulate; the Court's appeal to commonsense acknowledges that the achievement of Constitutional

---

<sup>29</sup> *Id.* at 66-67 (internal citations omitted).

<sup>30</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (conceded to be advertising); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzberg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (economic motivation).

<sup>31</sup> *Bolger*, 463 U.S. note 14.

<sup>32</sup> See e.g., Post, *supra* note 2, at 5-7; Kozinski & Banner, *supra* note 2; Rodney Smolla, *Information, Imagery, and the First Amendment: A Case For Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 800 (1993) (Smolla explains that because ads mix factual and non-factual content, it is "extremely difficult to regulate on the basis of the characteristics of any one communicative strain."); Leo Bogart, *Freedom To Know Or Freedom To Say?*, 71 TEX. L. REV. 815, 816 (1993) (Bogart states that one cannot separate the information functions of advertising from its image-building aspects.) See generally, MICHAEL SCHUDSON, *ADVERTISING: THE UNEASY PERSUASION* (1984); Videotape: *Advertising & The End of the World* (Sut Jhally 1998) ( on file with the University of Tennessee library). (These authors discuss advertising's complex function as a cultural informant and shaper.)

purposes cannot be reduced to any simple rule or determinate criteria.”<sup>33</sup> Courts following *Bolger*, unfortunately, have ignored a full examination of each situation. Instead, courts have followed lockstep *Bolger*’s three-part analysis to determine whether advertising is commercial or non-commercial speech.

We contend that the application of the *Bolger* standard adds a layer of review unnecessary for an analysis of the regulation of commercial speech. The *Bolger* test yields “false positives” – protection for speech outside the bounds of the Constitutional umbrella – that have a deleterious effect on both advertisers and consumers. Consumers may be subject to misleading or deceptive advertising. Advertisers must “roll the dice” on certain advertising campaigns, creating ads without any surety that the ads are protected speech. The best solution is to eliminate the use of the *Bolger* test altogether. By presuming that all speech from corporate speakers is commercial, courts can prevent heightened protection for false or misleading speech. By starting the analysis with the *Central Hudson* test, courts will afford heightened scrutiny only to commercial speech that is neither false nor misleading.

#### **Similar Problems. Different Solutions.**

The effectiveness of the commercial speech doctrine is hotly debated. On one side are those who say its strength resides in its flexibility, while detractors like us have suggested a number of reforms. In the following section we will examine three post-*Bolger* cases that illustrate the ineffectiveness of the *Bolger* analysis. We conclude by detailing our suggestion that *Bolger* be eliminated from the analysis of commercial speech

---

<sup>33</sup> Post, *supra* note 2, at 18.

cases. Before reaching our conclusion, however, it is important to acknowledge other approaches to the problematic commercial speech doctrine.

Eberle<sup>34</sup> discusses the foundational values contained in the First Amendment and realized through its application to commercial speech. Such core values include self-actualization, individual liberty, self-governance. Eberle argues that none of these grand theories is sufficient to explain past or guide future application of the First Amendment. Instead, he suggests the need for a more unifying Middle Ground theory. He explains:

the Middle Ground does not recognize that any one value may be the only true value underlying the First Amendment. Instead, a better way of viewing a value like self-actualization is as one of “a web of mutually reinforcing values.” In other words, self-realization supports other important values, like democracy and free speech; but the converse is also true, democracy supports free speech and self-realization, and free speech supports self-realization and democracy, and so on.<sup>35</sup>

This Middle Ground is achieved through “practical reasoning.” This method of analysis functions much like moral reasoning that seeks to identify core values, develop principles that engender those values, then reach the most morally justifiable conclusion through an equitable balancing of principles and values.<sup>36</sup> “Practical reasoning is principled yet flexible.”<sup>37</sup>

The author suggests a set of rules to be followed to achieve the most advantageous balancing of values in commercial speech cases. The rules proposed by Eberle are:

---

<sup>34</sup> Edward J. Eberle, *Practical Reason: The Commercial Speech Doctrine*. 42 CASE W. RES. 411 (1992).

<sup>35</sup> *Id.* at 429-30. (internal citation omitted)

<sup>36</sup> RALPH B. POTTER, *The Logic of Moral Argument*, in TOWARD A DISCIPLINE OF SOCIAL ETHICS (Paul Deats, ed. 1972).

<sup>37</sup> Eberle, *supra* note 33, at 432.

*Rule 1:* Truthful, nondeceptive, noncoercive speech may not be regulated except in the face of truly compelling governmental interests.

*Rule 2:* Truthful speech that contains elements of, or is disseminated in a manner that causes deception, coercion, duress or harassment may be regulated. To regulate such speech, government bears the burden of proving (1) the presence of a substantial interest, (2) that the regulation directly advances the asserted interest, and (3) that the restriction on speech is no greater than necessary to serve the interest.

*Rule 3:* False information may be regulated.<sup>38</sup>

While we agree with Eberle's rules and the emphasis placed on regulating false or misleading content, he fails to tackle the key issue raised here – the determination of when speech is commercial. Eberle is absolutely right in his contention that:

A rule barring regulation of truthful commercial speech is correct because truthful, nondeceptive, noncoercive commercial speech is indistinguishable in its material aspects from truthful noncommercial speech, which receives strong protection under the First Amendment.<sup>39</sup>

Unfortunately, as our analysis of the following cases will demonstrate, even misleading and false commercial speech can mask itself as non-commercial. The courts, in placing emphasis on determining the speech's commercial status, have failed to reach the far more important *Central Hudson* test. The same undoubtedly would happen were they to apply Eberle's rules.

A *Columbia Law Review* article<sup>40</sup> raises another interesting, though tangential issue. Tananbaum acknowledges that false statements of fact receive no First Amendment protection. The problem, as he sees it, is, "Because misstatements are inevitable when

---

<sup>38</sup> *Id.* at 476

<sup>39</sup> *Id.* at 477.

people and institutions communicate with one another, a rule allowing prohibition of any speech containing them would be unnecessarily harsh.”<sup>41</sup> Tananbaum is particularly concerned with the possibility of state, local or administrative agencies enforcing a prior restraint on speech that is deemed commercial and false. He therefore suggests that when evaluating the Constitutionality of false commercial speech regulations, the Court should implement the same procedural safeguards used in obscenity cases. The *Freedman*<sup>42</sup> safeguards for obscenity require:

First, a judge must make a final determination whether the speech in question is obscene before an otherwise valid prior restraint can go into effect. Second, the burden of seeking judicial review of an administrative determination of obscenity must rest with the government. Third, the agency must make its findings promptly and must seek such review in a timely manner. Fourth, “[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.” Finally, the burden of proof that the materials are obscene must rest on the government at the administrative level. Absent these safeguards, the statute imposes an unconstitutional prior restraint.<sup>43</sup>

Tananbaum contends these safeguards applied to commercial speech would protect three types of speech – corporate speech and advertising, campaign solicitations, and charitable contribution solicitations – from over-censure simply because a portion of their content was deemed false or misleading. The *Freedman* test, however, adds no

---

<sup>40</sup> Allan Tananbaum, *New and Improved: Procedural Safeguards For Distinguishing Commercial From Noncommercial Speech*. 88 COLUM. L. REV. 1821 (1988).

<sup>41</sup> *Id.* at 1833.

<sup>42</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965). The court found that, when dealing with the issue of obscenity, there should be a judicial determination of the speech’s nature prior to the final restraint of speech.

<sup>43</sup> *Id.* at 1823 (internal citations omitted).

clarity to the distinction between commercial and non-commercial speech. Rather, it simply requires that any attempt at regulation by agencies such as the Federal Trade Commission would face judicial review because, presumably, such agencies are not qualified to differentiate commercial from non-commercial speech. In reality, just as the Court has found it nearly impossible to clearly define obscenity, it has not shown itself to be any more adept at drawing a workable commercial/non-commercial speech distinction. Tananbaum worries that non-commercial speech may be unnecessarily restricted; however, as the following cases demonstrate, in placing emphasis on the commercial/non-commercial distinction, the Court often fails to consider the factual quality of the speech. The greater concern should be the failure to restrict false speech.

At least one scholar has suggested the complete abandonment of the Commercial Speech Doctrine. Alan Howard suggests, “Courts need a more sophisticated analytical framework than the procrustean Commercial Speech Doctrine.”<sup>44</sup> Howard suggests a review that examines the following three analytical elements:

- (1) the extent to which the regulation impinges upon protected speech,
- (2) the nature of the protected speech, and
- (3) the justification for protection in terms of the relationship between the speaker and the listener, and the allocation of the truth burden between them.<sup>45</sup>

Howard notes, “Where the impact on commercial speech is great, and the justification for its protection is weak, the regulation may violate the first amendment.”<sup>46</sup>

On its face, the tort-based relational framework seems fair, yet in practice, the system yields even greater potential for arbitrary and inconsistent decisions that both

---

<sup>44</sup> Howard, *supra* note 2, at 1095.

<sup>45</sup> *Id.* at 1096.

consumers and advertisers hope to eschew. Advertisers, whom Howard classifies as “hardy” speakers less likely to be chilled by government regulation,<sup>47</sup> ostensibly get the short end of the analysis. Since government regulation has little impact on hardy speakers, Howard reasons, they will continue to search for ways to spread their messages despite arduous government regulations.<sup>48</sup> While advertisers may indeed have substantial economic motivation to find new messages, few advertisers have the resources to use the legal system to test the limits of governmental regulation. Howard’s proposal will force many advertisers to censor themselves, a problem that Howard admits flies in the face of Constitutional safeguards.<sup>49</sup>

While punishing advertisers, Howard’s regulation does little to help the average consumer. The third prong of the tort-based relational approach examines a listener’s reliance on the speech in question. By examining the speaker, the listener, and the message, Howard’s system provides the potential for differing decisions based on the targeted audience. Assume, for example, a regulation aimed at preventing misleading advertising for prescription medicine. An advertisement for the prescription drug Viagra™ may run afoul of the regulation, depending on the perceived audience for the advertisement. If the target audience is physicians, then the government has little justification for a regulation concerning deceptive advertising. Doctors have a duty to investigate the qualities of a drug before prescribing it, so the government has a minimal interest in protecting doctors from deceptive commercial messages. On the other hand, if

---

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

<sup>47</sup> *Id.* at 1104.

<sup>48</sup> *Id.* at 1104-1105.

<sup>49</sup> *Id.* at note 3. (citing *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

the target audience is end-users of Viagra, there is a greater governmental interest in regulating misleading advertisements. The problem is, who decides the target for an advertisement under Howard's plan? More importantly, is there a difference in the analysis if the audience is younger, more jaded viewers as opposed to older, more trusting viewers? The possible difference may lead to a different outcome based on the age or level of sophistication of the intended audience.

While we agree “the multiplicity of contexts in which deceptive speech is used and regulated in our society quickly stretch the simplistic Commercial Speech Doctrine,”<sup>50</sup> the solution cannot be an analysis that lacks the consistency to predict results. Instead, both consumers and advertisers require a system that provides some stability and predictability. The solution to the problem may be solved within the current framework of the commercial speech doctrine. As we will explain in the following section, the *Bolger* analysis, which courts rely on to distinguish commercial from non-commercial speech, fails to do the job. Rather the courts should assume that all speech originating from a commercial entity is commercial. This allows courts to progress to the more workable and predictable *Central Hudson* test to determine if the speech can be regulated. The elimination of the *Bolger* analysis also would allow courts to return the commercial speech doctrine to the original dicta laid out in *Virginia Board of Pharmacy* – regulation of commercial speech should be limited to: 1) time, place and manner; and 2) false or misleading content.

### **Post-*Bolger*: The Good, the Bad and the Ugly**

---

<sup>50</sup> *Id.* at 1095.

The Court's varying application of the *Bolger* standard has yielded a mélange of decisions that can be roughly grouped into three categories: the good (though only in outcome not means), the bad, and the truly ugly. When good, the application of the *Bolger* standard does no more than add a layer of analysis unnecessary for the adjudication of the issue. When bad, *Bolger* yields decisions that fail to provide clear boundaries for consumers or advertising professionals. When ugly, *Bolger* equates deceptive advertising with political speech, and affords false speech the highest level of protection under the Constitution. Fortunately, rather than progressing from good to truly ugly, the Court's decisions in recent years show a move from bad to good.

*The Bad.* The decision in *Securities & Exchange Commission v. Wall Street Publishing Institute, Inc.*<sup>51</sup> shows how the misapplication of *Bolger* can fail to sensibly differentiate commercial from non-commercial speech. As a result, consumers may falsely trust the objectivity of "articles" that originated from corporations with a vested interest in sales of the products discussed. In this case, the SEC filed suit against Wall Street Publishing Institute contending that its publication, *Stock Market Magazine*, violated section 17(b) of the Securities Act of 1933.<sup>52</sup>

In addition to columns on finance and politics, *Stock Market Magazine* offered several feature articles profiling individual firms. Plaintiffs claimed the "articles uniformly portray the subject firm as an appealing investment prospect -- indeed, the articles describe the featured companies in unabashedly glowing terms."<sup>53</sup> According to

---

<sup>51</sup> 851 F.2d 365 (D.C. Cir. 1988).

<sup>52</sup> *Id.* at 367. Section 17(b) of the Securities Act of 1933 prohibits publishing a description of a security in exchange for undisclosed consideration.

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

the SEC, the articles generally were written by the featured companies, public relations firms employed by the companies, or WSPI writers hired by the companies as freelancers. The magazine, however, characterized the material as ““based on thorough research and first-hand interviews with company officials, economists, security analysts, and other experts.””<sup>54</sup> In addition, the SEC claimed, “featured companies regularly purchase article reprints, which are available only through the magazine, and advertising space, which [the Managing Editor] encourages them to place in issues other than the one in which the company article appears, to avoid “unseemliness.””<sup>55</sup> Thus each “article” generated additional revenue for WSPI.

*WSPI* ostensibly dealt with the government’s authority to regulate business practices under the Securities Act, but at its heart was the question of whether *Stock Market Magazine* was constitutionally protected speech. The Court’s ruling explained:

the SEC characterizes the company articles as commercial speech, and as such entitled only to the limited protection that the First Amendment extends to such communications. WSPI contends, on the other hand, that the articles cannot be separated from speech that lies at the core of First Amendment interests.<sup>56</sup>

Relying on *Bolger*, the Court determined that:

speech that is *concededly* an advertisement, refers to a specific product, and is motivated by economic interest may properly be characterized as commercial speech. Under the broader formulation of *Youngs Drug*, we are not convinced that the feature articles under consideration here are commercial speech. The articles are not “concededly” to be

---

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

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

<sup>56</sup> *Id.* at 371.

advertisements, and in fact, are not in an advertisement format.<sup>57</sup>

To avoid regulation of the message, all WSPI had to do was deny that its publication was advertising. This case suggests that the distinction between commercial speech and protected speech may rest on the speaker's characterization of its own speech. So long as a speaker denies that the message is commercial, the speaker is entitled to strict scrutiny protection under the Constitution. Courts cede the power of characterization to the speaker itself. What speaker would not choose a characterization that affords the greatest protection for speech under the Constitution?

While the Court determined the "articles" should receive heightened protection under the Constitution, in the end, they were regulated pursuant to the broad scope of authority granted the SEC. The problem with the *WSPI* decision is that it leaves the door open for future unscrupulous advertising. The articles published in *Stock Market Magazine* did not offer false information. The formatting of the material as editorial content rather than paid advertising, however, may mislead readers as to the objectivity of the reviews. Were it not for the additional power granted the SEC to regulate financial communications, such misleading content would have received heightened Constitutional protection.

*The Truly Ugly*. The potential harm to consumers is even greater when organizations disseminate false information under the guise of non-commercial commentary on public issues. The heightened protection afforded to false statements issued by corporate actors is illustrated by the decision in *New York Public Interest*

---

<sup>57</sup> *Id.* at 372.

*Research Group, Inc., et al v. Insurance Information Institute.*<sup>58</sup> The Insurance Information Institute (“the Institute”) produced a multi-media advertising campaign that addressed the “lawsuit crisis.” The advertising asserted that the quality of every American’s life was threatened by the existence of a lawsuit crisis, namely huge numbers of people suing doctors, pharmaceutical companies, municipalities and others for personal injuries. In support of its argument, one television commercial claimed, “Money needed for firefighters, police and other services is being used to pay the price of The Lawsuit Crisis.”<sup>59</sup> Another commercial stated:

The future of high school sports is unclear. Today, schools are thinking about canceling football and other major sports. What are the reasons? Lawsuits are costing more and more. Insurance costs are rising. Some officials think it just isn’t worth it.<sup>60</sup>

The advertisements insinuated that high jury awards were forcing insurance companies to raise their premiums for liability insurance.

The New York Public Interest Research Group (NYPIRG) claimed the advertisements were deceptive under New York law. NYPIRG documented several misstatements or overstatements in the Institute’s campaign. Plaintiffs claimed the Institute “carefully concealed the distinction between claims filed and actual damage awards” to mislead the general public.<sup>61</sup> According to the plaintiffs, the Institute’s commercials also asserted that the American judicial system was choked with personal injury litigation, while records from the National Center for State Courts showed that civil

---

<sup>58</sup> 531 N.Y.S. 2d 1002 (N.Y. Sup. Ct. 1988), *aff’d* by 554 N.Y.S. 2d 590 (N.Y. App. Div. 1<sup>st</sup> Dep’t. 1990).

<sup>59</sup> *Id.* at 1012.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1007

filings actually decreased for the time in question.<sup>62</sup> The trial court specifically acknowledged that “if plaintiffs’ claims are true, defendants ads are ‘misleading in a material respect’, and violate General Business Law §350.”<sup>63</sup>

Ignoring the alleged misstatements, the Court found that the advertisements at issue were not primarily commercial speech. The Court, following the tenets of *Bolger*, characterized the issue as follows:

If, within a commonsense reading, an advertisement is obviously intended to promote sales, it is commercial speech. If a public message or discussion is incorporated, it is still commercial speech. If, however, the advertisement is a direct comment on a public issue, unrelated to proposing any particular commercial transaction, it is protected.<sup>64</sup>

Because the advertisements did not propose a commercial transaction and were not directed to potential buyers, they fell outside of the scope of commercial speech according to the Court.<sup>65</sup> As commentary on a matter of public interest, the Court determined the ads were subject to the full protection of the First Amendment and here ended the analysis without ever considering the truthfulness of the claims.

The Court opined at least three major reasons for the Institute’s advertising campaign: 1) to influence the public to encourage legislative action; 2) to encourage viewers, as potential jurors, to decrease plaintiffs’ recoveries; and 3) to generally improve

---

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

<sup>63</sup> *Id.* On appeal, the Appellate Division noted that due to the constitutional protection on the commercials, General Business Law §§ 349 and 350 were not applicable. 554 N.Y.S. 2d at 591-2. §350 specifically proscribes “false advertising in the conduct of any business, trade or commerce ...”. *Id.* at 591. The fact that the Appellate Division ignored §350 further illustrates the problems courts have with “editorial” from commercial speakers. By ignoring §350, the Appellate Division affords heightened protection for misleading advertising.

<sup>64</sup> *Id.* at 1011.

<sup>65</sup> *Id.* at 1012.

the image of the insurance industry.<sup>66</sup> Despite the fact that all three reasons “inure to the economic benefit of the insurance industry,” the Court focused its attention on commercial content instead of economic motivation.<sup>67</sup> The Court noted, “it is not economic motivation, but commercial content which deprives potentially untruthful speech of full First Amendment Protection.”<sup>68</sup> The advertisements were not directed to potential *buyers* of the insurance products, so the commercials failed to “propose a commercial transaction” in the eyes of the Court. Ignoring the economic benefit to the insurance industry, the Court reasoned that the ads were entitled to full protection under the Constitution – and therefore beyond the reach of New York’s consumer protection laws – because of their lack of commercial content. In fact, the Court noted that the “debate-influencing” advertisements produced by the Institute were precisely the sort of protected advertising anticipated in *Central Hudson*.<sup>69</sup> The Appellate Division of the Supreme Court agreed, noting, “the critical factor in determining if particular speech may be regulated or barred by government is whether it proposes a commercial transaction.”<sup>70</sup>

The *NYPIRG* Court’s application of *Bolger* turns the commercial speech doctrine on its head. As previously discussed, courts have long held that there is no Constitutional protection for false or misleading speech, particularly false advertising.<sup>71</sup> Under *NYPIRG*’s rationale, however, all advertising that avoids specific references to products will be entitled to strict scrutiny protection under the law. The whole arena of affective

---

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

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

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

<sup>69</sup> *Id.* at n. 15.

<sup>70</sup> *NYPIRG*, 161 A.D.2d at 206.

<sup>71</sup> See *Gertz v. Welch*, 418 U.S. 232, note 20 (1974).

message strategies<sup>72</sup> and image advertising<sup>73</sup> emerges as a loophole in the law. An advertisement that is designed to encourage favorable legislative action, decrease jury verdicts, and improve the image of an industry is not subject to regulation, even if false or misleading. The *Bolger* standard creates an exception to the regulation of deceptive advertising. While the Court has expressly stated that misleading speech is not entitled to *any* protection, the application of *Bolger* can yield strict scrutiny protection for misleading and even false speech.

*The Good.* A 2002 decision of the California Supreme Court illustrates that a broad interpretation of *Bolger* can eliminate the Constitutional safe harbor for false or misleading commercial messages. While we agree with the outcome of the California Supreme Court's decision in *Kasky v. Nike, Inc.*,<sup>74</sup> we still take issue with the use of *Bolger* or any other laundry list of criteria used to differentiate commercial from non-commercial speech. We, like many others, had hoped the US Supreme Court would take the opportunity in hearing Nike's appeal of the California Supreme Court's decision to address the constitutional question and thereby establish a more workable and predictable means of differentiating commercial from non-commercial speech. Instead the US Supreme Court punted. The Court cited three independently sufficient reasons for dismissing the writ, namely: "1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. §1257; (2) neither party has standing to

---

<sup>72</sup> See DEAN M. KRUGMAN, ET AL. ADVERTISING: ITS ROLE IN MODERN MARKETING, 284 (8<sup>th</sup> Ed. 1994). (The authors defined affective message strategies as advertising that "attempts to provoke involvement or emotion through ambiguity, humor, or the like, without a strong selling emphasis.")

<sup>73</sup> *Id.* at 544. ("Image advertising seeks to show that the corporation has a human side.... Image advertising is designed to create a favorable climate of opinion for an organization by building name recognition,

invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.”<sup>75</sup> We, however, agree with Justices Breyer and O’Connor in dissenting on these three points. It seems this is an issue ripe, if not well overdue, for decision. Nike has since settled, offering to pay \$1.5 million to a workers’ rights group,<sup>76</sup> but the debate this case inspired simply highlights still unresolved problems with the commercial speech doctrine.

In *Kasky*, the plaintiff accused Nike of deceptive advertising regarding the corporation’s labor practices overseas. Nike received harsh criticism in the mid-’90s for reports on working conditions in its Asian factories.<sup>77</sup> A disgruntled employee leaked an accounting firm’s audit, which reported widespread violations of local laws.<sup>78</sup> “These reports put Nike under an unusual degree of public scrutiny as a company exemplifying a perceived social evil associated with economic globalization – the exploitation of young female workers in poor countries.”<sup>79</sup> To combat the reports, Nike countered with a public relations campaign that defended the benefits of Asian factories. Specifically, Nike issued press releases dealing with sweatshop allegations, women’s issues, and the company’s code of conduct.<sup>80</sup> Nike also commissioned an investigation into working conditions at its factories. Nike bought full-page advertisements in leading newspapers to publicize the

---

associating the sponsor with positive values, and producing favorable public awareness of the organization’s interests and activities.”)

<sup>74</sup> *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002).

<sup>75</sup> *Kasky*, 123 S.Ct. at 2555.

<sup>76</sup> Adam Liptak, Nike Move Ends Case Over Firms’ Free Speech, N.Y. TIMES, September 13, 2003, at A8.

<sup>77</sup> 93 Cal. Rptr. 2d 854 (Cal. Ct. App. 1<sup>st</sup> Dist. 2000). *Note*: Much of the factual background for this case is found in the decision of the California Court of Appeals. That opinion was de-published pursuant to California Rules of Court 976 and 977, and has been superceded by the California Supreme Court decision.

<sup>78</sup> *Id.* at 856.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 857.

findings of the investigation, which found no evidence of illegal or unsafe working conditions at Nike factories.<sup>81</sup>

Marc Kasky brought a private attorney general action against Nike claiming numerous violations of the California Business and Professions Code, including negligent misrepresentation, intentional or reckless misrepresentation, and false advertising.<sup>82</sup> The plaintiffs alleged at least six misrepresentations concerning Nike's labor practices, including claims that: 1) Nike products were made in accordance with applicable laws and regulations governing health and safety conditions;<sup>83</sup> 2) Nike products were made in accordance with applicable governmental laws and regulations governing wages and hours;<sup>84</sup> and 3) Nike paid the average line-workers double-the-minimum wage in Southeastern Asia.<sup>85</sup> Despite these allegedly false statements, the trial court sustained Nike's demurrer. The ruling of the trial court was affirmed by the court of appeals, which found the public relations campaign was Constitutionally immune from California laws proscribing deceptive corporate speech.

---

<sup>81</sup> Kasky v. Nike, 45 P.3d at 248.

<sup>82</sup> Both the majority and dissenting justices in the Supreme Court found California's statute problematic. The majority used the lack of an injury in fact as grounds for the dismissal of the writ. The dissenters identified the burden that the private attorney general action would place on speech, noting:

“The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm.

Kasky, 123 S.Ct. at 2567 (*internal citations omitted*).

<sup>83</sup> Kasky, 93 Cal. Rptr. 2d. at 856. (The accounting report leaked to the press indicated that atmospheric pollution caused respiratory problems in 77 percent of workers.).

<sup>84</sup> *Id.* The Hong Kong Christian Industrial Committee released an extensively documented study of several Chinese factories, including three used by Nike, which reported 11- to 12-hour work days, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.

The appellate court found the speech at issue was “intended to promote a favorable corporate image so as to induce consumers to buy its line of products.”<sup>86</sup> This distinction between promoting image and conveying information or representations about *specific* characteristics of goods entitled Nike’s public relations campaign to the full protection of the First Amendment. The court reasoned that Nike’s aim of promoting “a favorable corporate image through press releases and letters takes them outside two of the three characteristics of commercial speech noted in the *Bolger* decision – advertising format and reference to specific product.”<sup>87</sup> Because Nike’s “strong corporate image and widespread consumer market” placed its labor practices within “the context of a broader debate about the social implications of employing low-cost foreign labor,” comments about its labor practices were “part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment.”<sup>88</sup> Based on this circular reasoning, Nike received protection for falsehoods promulgated through its marketing campaign because of the prominence derived from its marketing campaign.

The California Supreme Court rejected the circular reasoning of the court of appeals. While referencing the *Bolger* decision, the California Supreme Court articulated a different three-part analysis to determine whether speech is commercial:

*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the*

---

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

<sup>86</sup> *Id.* at 860.

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

<sup>88</sup> *Id.* at 863.

speaker, the intended audience, and the content of the message.<sup>89</sup>

The California Supreme Court found that Nike was engaged in commerce, its campaign was aimed at an audience of consumers, and its representations of fact were commercial in nature. Because of this confluence of fact, the Court determined that Nike's speech was commercial.

### ***Kasky: Right But For the Wrong Reasons***

We believe that the California Supreme Court could not have been more right, but for the wrong reasons. By creating a standard dependent on the identity of the speaker, the intent of the speaker, and the nature of its message, the California Supreme Court replaced the subjective *Bolger* test with another test that does little to provide notice of Constitutional protection for consumers or advertisers. In her dissent, Justice Brown highlights several problems with the majority's new analysis. Justice Brown complains that "the majority ... creates an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech"<sup>90</sup> The Justice's complaint should be taken as the beginning, not the end, of the analysis. Presuming that speech is commercial because it is corporate does not end the constitutional analysis. Under *Central Hudson*, courts must then determine whether the speech is entitled to protection under the Constitution. Justice Brown skips a step – the most important step – by presuming that Nike would be guilty of violating California laws if the speech was determined to be commercial. The Nike action was appealed at the demurrer stage. Mr. Kasky must still prove a breach of the other components of California business law before Nike can be liable for its actions.

---

<sup>89</sup> Kasky, 45 P.3d at 256. (Italics in original)

The *Bolger* segment of the commercial speech doctrine leads courts to mirror Justice Brown's leap. Reluctant to discover a constitutional defect following discovery, courts are prone to end the analysis quickly by determining that the speech is not commercial. This leap adversely affects consumers, who lack resources outside the law to combat the false or misleading speech of corporate giants. Taking the plaintiff's allegations as correct, Nike's ads are not truthful. Nike tries to avoid liability for false advertising by hiding behind the Constitution, but the Constitution does not sanction lies and deceit. If the trial court denies the demurrer, Mr. Kasky still has to show that 1) Nike knew the facts were false and 2) the false statements materially affected consumers. While Nike may be forced to respond to discovery, California law does not impose liability without fault.

The two federal district court cases cited by Justice Brown illustrate the need to hold corporate speakers responsible for their commercial speech. Justice Brown complains that the *Kasky* decision conflicts with the decision in *Gordon & Breach Science Publishers v. AIP*,<sup>91</sup> which granted Constitutional protection to a company that published articles touting its publications as "both less expensive and more scientifically important" than its competitors. The Justice also complains that the majority decision conflicts with *Oxycal Laboratories, Inc. v. Jeffers*,<sup>92</sup> which granted Constitutional protection to another publisher denigrating the publications of its competitor. Both cases illustrate another ugly application of *Bolger*, granting Constitutional protection for barbs aimed at competitors. We believe these cases should, at the very least, survive peremptory attacks and be

---

<sup>90</sup> *Id.* at 272.

<sup>91</sup> 859 F. Supp. 1521 (S.D.N.Y. 1994).

decided on the merits of the action. Surely, the Constitution was not designed as a shield for commercial speech. While the test used by the majority in *Kasky* may run afoul of Constitutional mandates, the court's holding fits squarely with the intended progression of the commercial speech doctrine: "when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."<sup>93</sup>

Justice Brown's complaint also highlights a sub-issue within the commercial speech doctrine. Both *Gordon & Breach Publishers* and *Oxycal Laboratories, Inc.* involved speech from media outlets. In both instances, the speech was attacked on unfair trade practice grounds. While we believe that both cases should have survived the peremptory Constitutional attack, we also believe an action sounding in defamation may more clearly resolve the issues of media outlet speech. The more troubling issue becomes how to resolve issues when a corporate speaker is also a media outlet. Does the Constitution allow a court to distinguish between an advertisement produced by AOL Time Warner supporting broadcast deregulation and an editorial on CNN (which is owned by AOL Time Warner) discussing the same topic? Obviously, the Constitution protects freedom of the press. How can the presumption of commerciality survive Constitutional protection for free speech?

We believe that the presumption that corporate speech is commercial speech can be rebutted in situations where the corporate speaker is also a media outlet. When a commentator on CNN supports deregulation, AOL Time Warner can rebut the

---

<sup>92</sup> 909 F.Supp. 719 (S.D. Cal. 1995).

<sup>93</sup> *Kasky*, 45 P.3d at 247.

commercial presumption by showing that the speaker lacked the authority to speak on the corporation's behalf. There is no connection between editorial comment on CNN and the corporate communications of AOL Time Warner, so AOL Time Warner can rebut the presumption of commerciality. While deregulation may also be a political issue, the commercial speech may still be subject to an analysis under *Central Hudson*. As long as the speech is not misleading, it should easily satisfy the elements of the *Central Hudson* analysis.

### **Life Without *Bolger* – An All-Or-Nothing Conception of Commercial Speech**

The commercial speech doctrine, in its current form, does not work. The commonsense differences proposed by the Court in *Virginia Board of Pharmacy* simply do not exist. In its effort to find them, courts have actually opened a loophole that invites deceptive practices from advertisers. As the post-*Bolger*, pre-*Kasky* cases presented in this paper illustrate, this loophole left the commercial speech doctrine powerless to protect consumers from false corporate/commercial communications. While the California Supreme Court's decision in *Kasky* is a move in the right direction, the doctrine remains too vague for current marketing and business practices. As corporations continue to create advertising campaigns focused more on defining an image than on detailing the features and functions of a specific product, the danger of this legal loophole may become even more pronounced. With the protection of the First Amendment, corporate messages may be immune to the penalties imposed by state and federal statutes proscribing misrepresentations and false advertising as corporate image speech receives unparalleled

protection under the Constitution. As a result the courts may actually be encouraging advertisers to disguise their product advertising as social dialogue.

Given the failure of the commercial speech doctrine, perhaps the best solution would be to eliminate altogether the absurd distinction between commercial and non-commercial speech, thereby evaluating the regulation of speech solely on the truthfulness of its content. If the courts were to eliminate the commercial/non-commercial difference, advertising that truly is political in nature would receive the full protection of the First Amendment. Advertising, like any other form of speech, that fails to meet this high threshold could be sanctioned if it is false, misleading or deceptive. As Daniel Troy argues, “the historical evidence suggests that the generation of the Framers had in mind a dichotomy not between commercial and noncommercial speech, but instead between truth and falsity.”<sup>94</sup> Troy goes on to explain that the regulation of false speech would in no way jeopardize political speech, in so far as only statements of fact could be regulated. “Under the First Amendment, there is no such thing as a false idea,” and the inability to test and prove whether a political idea is “true” would ensure that such speech remains Constitutionally protected.”<sup>95</sup>

The commercial speech doctrine is not likely to disappear, but it at least can be tightened and tidied by eliminating *Bolger* from its analysis. Rather than considering all speech on the merits of its truthfulness with no consideration of a commercial/non-commercial distinction, the answer, we believe, is to consider all public corporate communication commercial. Justice Brown has argued that speech regulations cannot or

---

<sup>94</sup> Troy, *supra* note 2, at 143.

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

should not be based on the nature of the speaker. We disagree. Corporations are not persons and do not function as such; they therefore have always received special consideration under the law. Business ethicists have carefully considered the role of corporations in society. One such scholar, Thomas Donaldson,<sup>96</sup> expanded on the idea of a social contract between government and its citizens to argue that businesses have a social contract with the public which requires businesses to act not just to maximize profits but generally to benefit society. In pointing out that corporations are merely creations of the government, former Texas Commissioner of Agriculture Jim Hightower explains that corporations are accountable to the public.<sup>97</sup> “The Supreme Court ruled in 1906 that ‘The corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public.’ When it ceases to be a benefit – declaring itself above common good – then we can cease to sanction incorporation”<sup>98</sup> Similarly, when corporate speech ceases to be truthful and non-deceptive, the Courts have a significant interest in regulating such speech.

What would life be like without *Bolger*? Surprisingly, it would not be a whole lot different, but it would be a lot more predictable. For example, if the *Kasky* court presumed that speech from Nike was commercial, then the court would have to use *Central Hudson* to determine whether the California law censoring speech was Constitutional. The first part of the analysis – is the speech eligible for First Amendment protection? – is answered in the negative because the speech is alleged to be misleading. Nike would lose on its demurrer, and discovery would proceed – essentially the same result as *Kasky*. This places

---

<sup>96</sup> THOMAS DONALDSON, *CORPORATIONS & MORALITY* (1982) at 36-58.

<sup>97</sup> Jim Hightower, *Chomp!*. UNTE READER, (March/April 1998) at 104.

the crux of the speech regulation where it belongs – on the regulation of false speech without special consideration given to the fact that it touches upon a social issue.

“Bad” cases like *WSPI* may survive the first prong of the *Central Hudson* analysis because the speech was not overtly false but rather misleading in format. While we contend that the speech would be labeled commercial based on the fact that it originates from the securities companies, the question of how misleading it is would still warrant debate. The government’s interest in regulating speech that may have a material effect on stock prices is substantial enough to survive the second prong of *Central Hudson*. Considering the broad regulatory power afforded the SEC, the third and fourth elements of *Central Hudson* should also be satisfied. Therefore, the government regulation of the misleading ads is constitutional, mirroring the ultimate decision in *WPSI*.

For “truly ugly” cases like *NYPIRG*, however, the result changes. Because the Insurance Information Institute’s claims were false, the speech is not eligible for First Amendment protection. The state may regulate the speech as long as there is a rational basis for the regulation. Whereas the regulation of merely misleading communications warrants debate, the government always has a substantial interest in regulating truly false speech.

By skipping the *Bolger* analysis, courts can get to the heart of the problem – the need to regulate false and misleading information. Some may fear that characterizing all public corporate communications as commercial would lead to the over-regulation of commercial speech. We do not think so. *Virginia Pharmacy* has already established the

---

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

value of commercial speech in adding to the marketplace of commercial information. Consumers have a right to and need for product information. This is not to say that image advertising should be avoided or regulated. Consumers attach a great deal of meaning to the brands they buy, and advertising helps create and reinforce those meanings. The need to regulate advertising should arise only when the substantive product/company information is false or misleading.

Others may suggest that our formulation and application of the commercial speech doctrine will have a chilling effect on both commercial and non-commercial speech. Again, we say not. In addition to protecting consumers, the elimination of the *Bolger* analysis will place corporations and industry organizations on notice – false communications will not be sanctioned. This does no more than reinforce existing state and federal laws against false and misleading advertising. As for a corporation’s ability to weigh in on political issues, where a company offers only company-sanctioned opinions, there would be no grounds for regulating the speech even though it would be characterized as commercial based on the nature of the speaker. However, should the company state facts, such speech could be regulated if those facts are determined to be false or misleading.

Some commentators argue that advertising should receive full Constitutional protection. While ultimately that may be the best solution, the Supreme Court seems unlikely to reach this result.<sup>99</sup> Instead, the *Central Hudson* test provides heightened protection for advertising. The *Central Hudson* test requires a direct advance of a

---

<sup>99</sup> See *Consula*, *supra* note 2, at 379.

substantial government interest. While not full protection, it is much greater than the rational basis protection offered in *Valentine v. Chrestenson*. The benefits of proscribing misleading speech outweigh the minimal intrusion on truthful advertising.

In conclusion, we return to the words of the *Gertz* court:

Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'<sup>100</sup>

The commercial speech doctrine should not be a shield behind which false or misleading communication can hide. *Bolger* created just such a defense. A move towards classifying all speech from corporations as commercial will remove the *Bolger* safeguard, moving the courts forward to the *Central Hudson* analysis where the true merits of the regulation on speech will be evaluated.

---

<sup>100</sup> *Gertz*, 418 U.S. at 340.