

The Corporate First Amendment

Why Protection for Commercial and
Corporate Speech Does Not Advance First
Amendment Values

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About the Author

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About the Corporate Reform Coalition

The Corporate Reform Coalition is made up of more than 75 organizations and individuals from good governance groups, environmental groups and organized labor, and includes elected officials and socially responsible investors. The coalition seeks to promote corporate governance solutions to combat undisclosed money in elections. For more information, please visit www.CorporateReformCoalition.org.

Corporate Reform Coalition
Democracy through Accountability

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Executive Summary

Since *Citizens United*¹ the legal fiction of the “corporate person” has been in the spotlight. Corporate personhood is not new; but it has never been interpreted as literally as it seems to be today when corporations successfully assert claims to rights once thought to belong only to human beings.

"The resources in the treasury of a business corporation...are not an indication of popular support for the corporation's political ideas."

- JUSTICE THURGOOD MARSHALL
Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990), reversed by *Citizens United*, 538 U.S. 310 (2010)

The origins of this new, stronger form of corporate personhood are traceable to a case called *Virginia State Board of Pharmacy*,² decided in 1976, in which the Supreme Court extended the First Amendment to cover commercial speech. The commercial speech doctrine announced in *Virginia Pharmacy* later contributed to the decision to extend First Amendment protection to corporations for political speech. Once business corporations were deemed legitimate political speakers, the foundation was laid for a new commercial speech doctrine, one that relied more on the notion that regulation of commerce and corporate speakers is discriminatory,* than on the consumer protection rationale which originally justified granting limited protection to commercial speech.†

* Just recently a representative for the United States Chamber of Commerce explained the Chamber's lobbying against tobacco regulation as predicated on its opposition to “singling out certain industries for discriminatory treatment.” Danny Hakim, *CVS Health Quits US Chamber Over Stance on Smoking*, N.Y. TIMES JULY 7, 2015.

† The Court has never offered a satisfactory definition of “commercial speech,” but most agree that at a minimum it covers advertising. See Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided by Nike v. Kasky*, 54 CASE WES. RES. L. REV. 1142 (2004), and there is case law which suggests that “commercial speech” covers more than advertising. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

The antidiscrimination approach appeals to an idea that has almost universal appeal – that discrimination is bad. That rhetorical appeal probably contributes to its success and it has made the First Amendment the weapon of choice for corporate plaintiffs wanting to attack regulation. This is because the First Amendment is a trump card. A successful First Amendment claim can override any law or regulation; it is an extremely powerful weapon, especially when wielded by already powerful individuals and institutions to a Supreme Court that is receptive to such claims.

This new First Amendment jurisprudence casts a constitutional shadow on the entire regulatory structure in the United States, a structure that has been well-settled since at least the New Deal. It potentially unsettles state, local and federal laws dating even farther back to the Progressive Era, to enactments such as the Pure Food and Drug Act of 1906, because almost any business activity can now be reframed as an expressive activity protected by the First Amendment. If regulation of commercial speakers or speech is “discriminatory,” then opponents of regulation, in particular campaign finance regulation, can argue that almost any regulation of commerce or commercial speakers, even one that is narrowly tailored, is unconstitutional. This development threatens the regulatory balance between Congress and the courts and between government and private business which has been in place for decades.

This essay describes how we got this new First Amendment and why it is in conflict with previous understandings of what the First Amendment is intended to protect: autonomy, the search for truth, democracy, and the promotion of social stability.³ Robust First Amendment protection for commercial and corporate speech advances virtually none of these goals. And although the expansion of corporate rights has been halting, with the Court occasionally issuing a seemingly inconsistent opinion,⁴ the general direction has been toward more protection for business corporations rather than less. That is disturbing.

Although some lower courts may not be willing to go as far as the Supreme Court precedent would seem to permit; until the Court offers different guidance, business will continue to use the First Amendment as a weapon against regulation—thereby putting much public health and welfare regulation at risk of being declared unconstitutional.

When the Court strikes down validly passed laws on behalf of the powerful it exercises what is called its “counter-majoritar-

ian” power – that is, the power to override the will of the majority as expressed through the Legislative Branch. This power, to declare validly passed laws unconstitutional, can be intensely controversial even when it is exercised on behalf of the relatively powerless, those whose access to political power suggests that they cannot hope to remedy encroachments on their fundamental rights through the ballot box. The gay marriage decision is an example. In such cases, however, the Court is acting as the champion of the dispossessed and as defender of the principle of equality for all human beings. The opposite is true when it strikes down a law on behalf of the powerful. Corporations are not a vulnerable minority. Indeed, the whole point of much election law regulation, for example, is to restrain the powerful to ensure the democratic legitimacy of the electoral process. When the Supreme Court uses its counter-majoritarian power on behalf of already powerful institutions, it limits government’s ability to restrain private exploitation.

The new First Amendment allows large institutions to influence elections, to lobby for favorable legislation, to use their superior market power and access to media to manipulate and misinform consumers, to manipulate public opinion and to drown out other speakers and, most importantly, the new First Amendment permits these institutions to have laws struck down which are intended to curb these and other abuses. Such intervention undermines democratic legitimacy and the relative influence of voters. And it makes the remaining laws requiring disclosures – of political contributions, of ingredients in a product or of production processes, of notifications to investors about how their money is being used, or to consumers about how their data is being collected – more important than ever. The requirement of disclosures was one thing even the *Citizens United* Court – majority and dissenters – agreed upon. But in the current environment even disclosures are being attacked as “compelled speech.” When commercial and corporate speech wins, voters and the public loses.

Introduction: The New First Amendment and the “Corporate Civil Rights Movement”

In 2014 Pro-Football, Inc. filed a lawsuit⁵ claiming that its First Amendment rights were violated when the Trademark Trial and Appeal Board [TTAB], an arm of the U.S. Patent and Trademark Office [PTO], canceled the registration of several trademarks of the Washington Redskins.

The system of trademark registration administered by the PTO is intended to allow companies to reap the benefits of their investments in their brand names and identity by allowing the owners to prohibit others from using the mark. Although a trademark need not be registered to have some legal protection, registration confers on the owners various significant evidentiary and procedural legal advantages. With the cancellation of its registration, Pro-Football was not prohibited from using the word “Redskins” – it just would have a harder time stopping anybody else from using it as well.

The cancellation decision was the result of the latest lawsuit filed in a decades-long effort by several Native Americans to invalidate the “Redskins” trademark on the grounds that it violated the law because it was disparaging to Native Americans. Previous efforts had foundered for various reasons, but in 2014 the

TTAB cancelled the trademarks on the grounds that use of the term “Redskins” violated section 2(a) of the Lanham Act⁶ which prohibits registration for any mark which “[c]onsists of or comprises ...matter which may disparage ...persons, living or dead, ...or bring them into contempt, or disrepute.”⁷ Native American individuals and organizations had long argued the term “Redskins” was disparaging and now the government agreed.

Pro-Football’s 2014 lawsuit argued that this decision violated its First Amendment rights because it “single[d] out Pro-Football, Inc. [] for disfavored treatment based solely on the content of its protected speech, interfering with the ongoing public discourse over the Redskin’s name by choosing sides and cutting off the debate.” Thus, Pro-Football cast itself as an embattled minority speaker, struggling to be heard. As difficult as it may be to see the multi-billion dollar Pro-Football as a disadvantaged minority, it might be even harder to reconcile its invocation of protection for freedom of speech with its claim to trademark protection, the most salient feature of which is to exclude others from using your mark – in other words, to suppress speech. So far, the first court to hear this claim has rebuffed it;⁸ but it is significant that Pro-Football even made this argument.

It takes a special kind of chutzpah to invoke the First Amendment in defense of a governmentally established program of rights that allows owners *to suppress* others’ speech for profit. But as incredible as this sounds, Pro-Football’s attempt to have its cake and eat it too is a predictable consequence of the Supreme Court’s recent First Amendment decisions.

In the last decade or so, but particularly since the *Citizens United* decision, the First Amendment has emerged as the weapon of choice for the powerful to attack laws of all kinds—from the more controversial laws, such as campaign finance or health care, to those less controversial (and previously thought to be well-settled), such as laws involving food and drug labeling or licensing requirements. Although initially confined to free speech claims, this new First Amendment approach has broadened to include free exercise and equal protection claims.

What all these claims have in common is the argument that distinctions made on the basis of corporate status, commercial purpose or identity are discriminatory. This claim is one that threatens the ability of government to regulate commerce generally. To understand why we must examine some basic concepts around the First Amendment, why we protect freedom of expres-

sion and how protection for commercial and corporate speech threatens the government's regulatory powers to the detriment of the public welfare and perhaps, more fundamentally, to democracy.

Foundational Concepts

By way of introduction we must first try to define what sorts of communication we are talking about. At a minimum commercial speech must be marketing.

It is difficult to over-estimate how pervasive marketing and promotion is in American culture. Everywhere you turn you find advertising: it is in all the expected places – movies, television, billboards, direct mail, telemarketing and other practices which are easily identified as marketing. But it also appears in many forms that are less expected and less transparent: it can appear as product placement in movies, television and even books; ads can be found in school books, in the doctor’s office, as pop-ups in video games or as the games themselves, in viral videos on Facebook, at the bottom of a golf cup. It is a huge cultural force, but one that often is overlooked or trivialized.

That oversight is curious given advertising’s ubiquity and the amounts spent on it. Advertising is a multibillion dollar business. According to one source, in 2013 companies spent \$ 171.01 billion in the U.S. on paid advertising,⁹ a figure which includes digital, radio, television, print and outdoor. And this sort of traditional advertising identifiable as such barely begins to scratch the surface of the various ways in which marketing takes place. It does not include direct mail, telemarketing, the vast sums poured into the development and defense of trademarks and resulting package design and logos (themselves a form of promotion) viral marketing, native advertising, paid posts, coupons, rebates, point-of-sale displays, product placement, and on and on. Promotional activities are woven deeply into the fabric of American life, not just in the ads themselves, but also in news and entertainment, in social media, in schools, museums, even churches. It has af-

fects the way we think. For example, we are repeatedly encouraged to think of ourselves and every institution as a “brand” and whole careers often seemed founded on little more than self-promotion.


Marketing’s ubiquity and scope is an important consideration as we evaluate what it would mean to have all of this communication with the public, which is intended to sell things, be essentially unregulated. At present a good deal of it is already unregulated, or practically so, since although false advertising is nominally prohibited, in most cases the harms generated by any single instance of false advertising are too small to make it worth a consumer’s while to pursue a law suit. This is the familiar collective action problem that class actions were meant to solve. But class actions have their own problems, and in any case, have been severely cut back by the courts in the last few years. Instead, consumers have to rely on the enforcement efforts of agencies like the Federal Trade Commission. But the funding and staffs dedicated to agencies like the FTC make it unrealistic to suppose that the FTC, or other agencies, can do much more than prosecute some of the worst offenders. As a consequence, a good deal of commercial speech is false and misleading.

The First Amendment

The First Amendment protects freedom of expression. Because the Constitution in the United States, unlike some other countries, is law,¹⁰ what the Constitution says trumps any law that Congress might pass. However, the Constitution is couched in very broad, general terms. The First Amendment reads: “Congress shall make no law ... abridging the freedom of speech, or of the press....” The document itself offers little guidance as to what the words “freedom” or “speech” or “press” might mean. So in order for these words to have meaning, judicial review – interpretation by the courts – is critical to the Constitution’s operation as law rather than as mere hortatory rhetoric.

Although from time to time jurists and commentators have claimed to be First Amendment “absolutists” in favor of a literal interpretation of its protections and an unwavering commitment to invalidate any law impinging on speech, in practice no jurist has acted as a First Amendment absolutist. It would be impossible to prosecute perjury or conspiracy, to enforce contracts, or to recover damages for trademark infringement or false advertis-

**"Congress shall
make no law ...
abridging the
freedom of speech,
or of the press...."**



ing if the words of the First Amendment were taken literally to forbid any burden on activities which had a speech or expressive component. Even the most committed First Amendment absolutists have not doubted that the government can regulate false advertising, enforce contracts, and punish perjury.

First Amendment interpretation has thus taken what Stanley Fish has called a “consequentialist”¹¹ approach; that is, courts look to the values the First Amendment is intended to protect to decide what is within the scope of its protection and, by the same process, when a law can be said to encroach on those values in a manner inimical to the First Amendment. Therefore, a great deal of First Amendment law is about describing the Amendment’s boundaries—what is in and what is outside of its protection.

Another important fact about the First Amendment is that most of what we now identify as the jurisprudence of the First Amendment is of fairly modern vintage, dating from the 20th century. The Framers apparently did not devote a great deal of attention to explaining what they intended with respect to this amendment. And because the technologies of communication and the principal form of business organization, the corporation, have undergone dramatic changes since the founding period, extrapolating from the historical understanding of the amendment’s purpose is of limited use. Thus, the consequentialist has very little in the way of history or precedent to draw on.

Lacking these materials judges have tended to rely on the theories advanced by legal academics, philosophers and other judges concerning what values the First Amendment is meant to further. There are many theories. Obviously, from the outset, we can see that by its terms, “Congress shall make no law...,” the First Amendment reflects concern about governmental interference or overreaching. Some have argued that this “checking value”¹² is its most salient feature. But even if everyone agrees that the First Amendment must be understood as a check on government, we still need to decide what is protected and what is not.

Some scholars have argued that only political speech qualifies for First Amendment protection.¹³ Others have argued that the First Amendment’s protection is rooted in concerns about personal autonomy and dignity and therefore the First Amendment must protect art and entertainment as well as political speech.¹⁴ Still others have argued that the First Amendment is intended to protect the generation of useful, truthful knowledge. This is often referred to as the “marketplace of ideas” theory. And some

scholars have put forward theories that combined all of these concerns and more.

One of the scholars who most ably summarized these various threads while adding something of his own—the theory that the First Amendment provides a social safety valve because expression is cathartic and defuses conflict—is Thomas Emerson.¹⁵ In his view no single value animates the First Amendment. Rather, a general theory of the First Amendment must encompass all of these values in varying degrees depending on the facts.

Emerson’s theory is a useful lens through which to assess whether First Amendment protection for commercial and corporate speech advances these values. The critical questions for our purposes are whether the First Amendment was intended to protect communications incident to promotional activity in commerce and whether the ordinary business corporation, one not part of the institutional press,[‡] should be viewed as a protected speaker under the First Amendment.

Since the late 1970s the answers to these questions have been a qualified “yes.” Both would receive protection; but it would not have been the full scope of protection afforded to traditionally protected speech and speakers. Thus, some protection could co-exist with a great deal of regulation. But recently, the qualifications have been dropping away and it increasingly appears that the Supreme Court is inclined to treat commercial speech and commercial speakers as fully protected by the First Amendment.

The Commercial Speech Doctrine

The Supreme Court introduced what today is identified as the commercial speech doctrine in 1976, in the *Virginia State Board of Pharmacy* case. *Virginia Pharmacy* involved a statute that prohibited pharmacists from advertising prices. The state’s position was that price advertising might degenerate into destructive price wars to the detriment of service. Because critical health issues could be tied pharmacies’ quality of service, the

‡ Media and newspaper businesses are obviously corporations. And there is some warrant for concluding that any exclusion of business corporations from the coverage of the First Amendment may nevertheless provide an exemption for the press since the First Amendment guarantees freedom of the press as well. Unfortunately, the Supreme Court has tended to collapse the guarantees of freedom of speech and freedom of the press and treat them as the same. Several scholars have argued that the press clause needs to be reinvigorated, in part to provide a basis for freedom of the press if advocates are successful in obtaining restrictions on corporate speech..

state prohibited price advertising.

A group of consumers, represented by lawyers at Public Citizen, brought an action challenging this statute arguing that the ban on price advertising made comparison shopping difficult and ultimately hurt the poor and elderly who were a substantial portion of the population served by pharmacies and who most needed to get the best price.¹⁶ They argued that the state's ban on price advertising was unjustified by any concern about consumer welfare or professionalism.

The Supreme Court agreed. It was paternalistic, the majority declared, to keep people in the dark about a piece of truthful information like price.

There is, of course, an alternative to this highly paternalistic approach. That approach is to assume that this information is not in itself harmful, that the people will perceive their own interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.¹⁷

The Court did not find Virginia's rationales for the price advertising prohibition persuasive. Balancing the concerns about what harms might arise from the dissemination of truthful information was, the Court said, "precisely" the sort of choice that "the First Amendment makes for us."¹⁸ Virginia was not free to pursue its legitimate goal of supporting professionalism and service "by keeping the public in ignorance."¹⁹

However, this new doctrine did not apply to *all* commercial speech, only to a subset of it—truthful, non-misleading speech about a lawful product. The Court noted that "[i]n concluding that commercial speech, like other varieties, is protected we, of course, do not hold that it can never be regulated in any way."²⁰ There were, the Court said, "commonsense differences" between commercial speech and those "other varieties," differences that called for a "different degree of protection ... to insure that the flow of truthful and legitimate commercial information is unimpaired."²¹

As a result, this new doctrine would not (by in large) implicate existing and extensive regulatory regimes such as that administered by the Securities and Exchange Commission, the Food and Drug Administration, the Federal Trade Commission, the National Labor Relations Board, and many others. These and many other agencies supervise regulatory regimes that in-

"In concluding that commercial speech, like other varieties, is protected we, of course, do not hold that it can never be regulated in any way."

- VA. STATE BD. OF PHARMACY
(1976)

clude some sort of limitation on speech, and all manner of state licensing laws regulating trades like hairdressers, architects, lawyers, tour guides, and particular businesses such as liquor stores, restaurants, pawn shops. The many laws associated with these various agencies and businesses were assumed to be largely left intact.

Justice Rehnquist, in his dissent, was not so sanguine as the majority of the Court.[§] He saw in this new doctrine a potential conflict with existing labor law and regulation of other professions. And he believed this new doctrine threatened to revive the discredited *Lochner*-era tendency of courts to substitute their judgment for that of the legislature with respect to the regulation of commerce. “Nothing in the United States Constitution ... requires the Virginia legislature to hew to the teaching of Adam Smith in its decisions regulating the pharmaceutical profession.”²² Justice Rehnquist foresaw that this new doctrine might make it impossible for the government to regulate the promotion of pharmaceuticals on television—a proposition he apparently thought was beyond the pale but is routine today, thus paving the way to patients pressuring their doctors to prescribe a particular drug. Justice Rehnquist expressed concern that while prescription drugs had an indispensable role in “medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants and tooth pastes.”²³ In an era of widespread direct-to-consumer marketing of drugs this seems both prescient and quaint.

Despite Justice Rehnquist’s reservations, the majority coalition did not see protecting commercial speech as a threat to government regulation generally. Nor did it prove to be — at first. Rather, the Court continued to develop and refine the doctrine, filling in some of the details and giving the courts below more

"Nothing in the United States Constitution ... requires the Virginia legislature to hew to the teaching of Adam Smith in its decisions regulating the pharmaceutical profession."

- CHIEF JUSTICE REHNQUIST,
dissenting in *Virginia Pharmacy*

§ The decision was 7 to 1. Justice Stevens did not participate. *See Va Pharmacy*, 425 U.S. at 773. Justices Burger and Stewart each wrote concurring opinions: Chief Justice Burger wanted to emphasize that in his view this decision would not invalidate the Court’s many previous rulings upholding laws regulating the professions of law and medicine, *id.* at 773, and Justice Stewart wanted to emphasize why he believed that the decision did not call into question all of the laws prohibiting false advertising. *Id.* at 775. His observation there is particularly pertinent here: “[S]ince it is a cardinal principle of the First Amendment that government has no power to restrict expression because of its ...content, the Court’s decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today’s decision does not preclude such governmental regulation. *Id.* at 776 (emphasis added) (internal citations and quotations omitted).

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information....So long as we preserve a predominantly free enterprise economy ...the free flow of commercial information is indispensable."

- VIRGINIA PHARMACY (1976)

guidance, but without announcing any major regulatory overhaul. And in 1980 the Court decided a case called *Central Hudson*²⁴ setting out the 4-part test which to this day, at least in theory, is the controlling test for the constitutionality of regulations of commercial speech challenged under the First Amendment: (1) the speech be truthful and concern a lawful product; (2) the regulation concern a substantial state interest; (3) the restriction of speech must directly advance that interest; and (4) it must do so without being more extensive than necessary to accomplish the state interest.²⁵

Although the *Virginia Pharmacy* Court acknowledged that the social merits of advertising were debatable, it thought advertising generally was nevertheless an important source of information for consumers.

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.²⁶

The principal safeguards against this new protection for commercial speech undermining the government's ability to regulate commercial activities more generally were that it only extended to truthful, non-misleading speech and that regulation only had to meet this lower, intermediate scrutiny test, rather than the more difficult to satisfy (some would say impossible to satisfy) strict scrutiny test which normally applied to protected speech, in order to be constitutional. "The Constitution ...affords a lesser protection to commercial speech than to other constitutionally guaranteed expression," wrote Justice Powell for the majority in *Central Hudson*.²⁷ But a decision in a different case, one issued two years before *Central Hudson* and two years after *Virginia Pharmacy*, would lay the foundation for questioning that confident declaration.

Corporate Speech

One of the distinctive things about *Virginia Pharmacy* was the degree to which the Court’s analysis is almost completely focused on the listeners’ interests. This is not surprising since it was consumers who brought the case. The Court had previously held that the interests of listeners, as well as speakers, may be protected by the First Amendment.

Nevertheless, the speaker is usually the most natural object of First Amendment concern, and in *Virginia Pharmacy* the speaker is virtually absent. Moreover, it was not at all clear in 1976 that the commercial speakers, in that case pharmacists, *had* a First Amendment right to advertise prices or anything else. Although the Court had found some advertisements protected in some previous cases, those cases tended to involve political subject matter.

In 1942, in *Valentine v. Chrestensen*, the Court had unceremoniously rejected the proposition that the First Amendment protected commercial advertisers.²⁸ This earlier case presented something of a challenge for the plaintiffs in *Virginia Pharmacy*: if *the pharmacists* did not have a First Amendment interest in advertising, how could the listeners have one? Without a constitutionally protected interest, the consumers had no standing[¶] to raise a First Amendment challenge to the Virginia law. This issue, the consumers’ standing, took up the first part of the majority opinion.

The *Virginia Pharmacy* Court noted that “[i]f there is a right to advertise, there is a reciprocal right to receive advertising.”²⁹ But this was the question: was there a right to advertise? It was not at all clear there was. In this case, the Court said, unlike the recent precedent which had cast doubt on its earlier rejection of First Amendment protection for commercial speech, the question of whether commercial speech was “wholly outside the protection of the First Amendment”³⁰ was “squarely before”³¹ the Court.

¶ “Standing” is a legal concept which requires litigants to have a “cognizable” legal claim, that is, the right to raise the issue because they are concretely harmed or implicated in some way. Typically people may not sue just because they see something they believe is a wrong that needs to be righted, although there are some exceptions. The Court obviously thought it needed to find that the pharmacists were protected before it could find the consumers were protected. This may not necessarily be true. Perhaps there is a right to receive information even where the speaker doesn’t want to speak. Typically, however, such cases are decided under the compelled commercial speech doctrine as a matter of the rationality of the government’s regulation, not as a right of the listener.

Yet, in order to find that commercial speech was not “wholly outside” the First Amendment the Court only discussed the interests of the listeners and of the public more generally. It said almost nothing about the speaker’s interest in speaking except to note that it could not be the case that the speaker’s obvious financial interest in speaking disqualified it from protection. This is important because *Virginia Pharmacy*, unlike many of today’s commercial speech cases, was one where the interests of the speaker and the listeners were in theory aligned: both the pharmacist and the customers presumably were interested in price advertising.

However, in many cases there is a conflict between the speaker/advertiser and the listener. Very often the advertiser wants to say something the consumer does *not* want to hear. Or the consumer wants information the advertiser does not want to provide. Indeed, these sorts of conflicts may be the rule rather than the exception in commercial speech cases. So it is not clear that a case like *Virginia Pharmacy*, which is based on the presumption that consumers want to receive the speech in question, should have any application where listeners do *not* want to hear the speech. Where there is a conflict, in order to find a regulation invalid you would need a theory about why the commercial *speaker* should have First Amendment protection. That was completely absent from *Virginia Pharmacy*.

Although *Virginia Pharmacy* and its new commercial speech doctrine did not offer any speaker-centered justifications for protecting commercial speech, another decision did provide something that *looked* like a speaker-centered justification. This justification emerged two years later in a completely different type of case, one that involved political, not commercial, speech: *First National Bank of Boston v. Bellotti*.³² In *Bellotti* the Court held that corporations have a First Amendment right to engage in political speech. *Bellotti* articulated what became known as the corporate speech doctrine. *Citizens United* is a product of the principle announced in *Bellotti*: that laws which cast business corporations into a sort of “disfavored” speaker status are unconstitutional. This discrimination meme would later migrate back to the commercial speech doctrine.

In *Bellotti* the Court confronted a claim that a Massachusetts law, which forbade business corporations from engaging in political advocacy on matters which did not “materially affect[] any of the property, business or assets of the corporation,”³³ was un-

constitutional. The bank wanted to advocate against a personal income tax proposal. Bellotti, the Attorney General of Massachusetts, believed the bank's ad violated the law. As framed by the lower court the issue presented was "*whether and to what extent Corporations have First Amendment rights.*"³⁴ This, Justice Powell writing for the majority said, was "the wrong question."

The proper question...is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with natural persons. *Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect.* We hold that it does.³⁵

Note that the Court dismissed the question of whether corporations and human beings had identical rights under the First Amendment (or indeed whether the corporation had any First Amendment rights at all) and focused instead on the content of the speech. The speech here was political speech, and political speech has always been protected the Court argued, therefore it must be protected when a corporation engages in it as well.

But this reasoning begs the question. Such speech had *not* always been protected when the speaker was a business corporation. But rather than dealing with the question of whether the corporate speaker was a proper rights bearing subject and why, once again the Court focused on the listeners and suggested that the Massachusetts law, by subjecting corporations to distinct rules, was engaging in some sort of illegitimate, invidious discrimination.

*If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.*³⁶

One can only wonder whether the Court would have found the speech of foreign banks like Credit Suisse or Barclays similarly "indispensable." This question illustrates the issue the Court assumed away: are banks (or any business corporations) legitimate participants in the political speech arena? Powell as-

"The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."

- BELLOTTI (1978)

sumes they are because he says they can inform the public. And in the focus on “informing the public” we see echoes of *Virginia Pharmacy’s* emphasis on “informing” consumers.

Indeed, in *Bellotti* the Court cites its commercial speech cases, saying they stand for the proposition that “the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”³⁷ This makes it sound like the Bank’s political ads are a public service! And that the State, rather than trying to prevent corporate executives from using the corporate funds to further a political agenda with which the shareholders might not agree, or preventing corruption of the democratic process by powerful interests, is attempting to prevent people from making informed decisions.

Framing Government as a “censor” trying to deprive the public of “information” and regulation as “discrimination” as the Court did in *Bellotti* are moves which would appear again and again in subsequent years. Today they have moved center stage. With this sleight-of-hand the Court conferred First Amendment rights on corporations without really confronting the question of whether business corporations, or at least ordinary business corporations outside of the press, are good candidates for expressive rights. Instead of exploring the question of whether protecting corporations as speakers would further any interests the First Amendment was intended to protect, again the Court fell back on the interests of listeners. And once again, as in *Virginia Pharmacy*, Justice Rehnquist expressed some skepticism.

*Although the Court has never explicitly recognized a corporation’s right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation. It cannot so readily be concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.*³⁸

To the contrary, he wrote, “[i]t might be reasonably concluded that those properties so beneficial in the economic sphere pose special dangers in the political sphere.”³⁹ “Furthermore,” he wrote, “it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which states permit commercial corporations to exist.”⁴⁰

An important and often overlooked aspect of Rehnquist’s dis-

sent was his observation that in *Virginia Pharmacy* the Court had not actually, *explicitly* accorded corporate speakers any First Amendment rights. Such rights seemed to be implied. Likewise, in *Bellotti*, rather than an explicit pronouncement that the corporation *as such* was a protected speaker, the Court announced this quasi-anti-discrimination principle: speech was no less valuable because the speaker was a corporation.

This was a proposition which would become increasingly important as time went on. It migrated from the political speech context in *Bellotti* back to the commercial speech context so that regulation of commercial speech could be likewise described as discriminatory for “singling out” marketing for distinctive treatment. With that development a doctrine which started out its life as a species of consumer protection, intended to protect consumers’ right to receive truthful information, was turned on its head to offer commercial speakers a freestanding argument for invalidating regulation intended to protect consumers from unwanted, harmful or even deceptive speech.** This perverts the original grant of limited protection to commercial speech in *Virginia Pharmacy*, and it does so without any extended discussion of what interests protection of freedom of expression was meant further and whether protection for corporate and commercial expression is consistent with those interests. An examination of the theories underlying the First Amendment suggests that it is not.

Why Protect Speech? Autonomy, Truth, Democracy and Stability

There are many theories about what these words — “freedom of speech” —mean but one thing they *can’t* mean is that anything that is “speech” is automatically covered. In fact, a great deal of speech doesn’t have any First Amendment protection at all. Because the First Amendment says “Congress shall make no law,” the First Amendment is generally understood by lawyers and courts as a restraint on *government* suppression of speech, not private suppression. Private parties can restrict expression

** A similar notion, that taking account of corporate status is somehow discriminatory, provided the basis in *Hobby Lobby* for the Court’s decision that a corporation could refuse to provide employees with a benefit because the law allegedly interfered with the corporation’s free exercise of its religion.

as much as they want, or very nearly.^{††} So the common public perception, that the First Amendment guarantees freedom of speech generally, is wrong. The First Amendment principally applies only on governmental suppression or punishment of speech.

Even so there are numerous exceptions to this seemingly blanket prohibition. Speech may be regulated for time, place and manner. And when the government is acting as an employer it may have more latitude.⁴¹ The administrators of institutions like prisons, the military and schools are also given more latitude for regulating speech. Speech that is libelous, defamatory, some speech that is threatening, conspiracy, perjury, fraud and a host of other activities which involve words, can be punished. And of course, as is most pertinent to this discussion, Congress has, since the early 20th century, extensively regulated all sorts of speech relating to commerce – whether promotional or simply incident to the conduct of business.

So, in fact, the type of speech that is protected by the First Amendment is (and always has been) somewhat limited. The question then is what kind of speech is protected and why? The “why” is often critical to the “what.”

One of the most common justifications for protecting freedom of speech is to ensure the discovery of truth. The idea is that we need to protect all voices to make sure that all ideas are heard because some of those ideas might be the right ones. The most well-known expression of this sentiment is reflected in Justice Oliver Wendell Holmes’ dissent in *United States v. Abrams*⁴² in which he wrote:

[W]hen 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 the free trade in ideas—*that the best test of truth is the power of the thought to get 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.⁴³

This famous quote is often referred to as the “marketplace of

^{††} One of the most obvious and important areas where this is true is on the job. Private employers have a great deal of freedom to fire employees for speech they dislike or disagree with. *See, e.g.*, BRUCE BERRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE (2007).

ideas” justification (even though Holmes himself didn’t use that phrase).

Although the marketplace of ideas rationale is probably the most familiar justification for protecting speech, perhaps equally familiar is the idea that the First Amendment protects speech because self-expression is an important aspect of being human. This is known as the autonomy rationale. It is through self-expression and through reading and evaluating the expression of others that we form our ideas. Education to a large extent depends on strong protection for speech.^{‡‡}

A third rationale for protecting freedom of expression is for its contribution to a democratic government. While this view is not inconsistent with either the marketplace of ideas or the autonomy rationales, the latter two would protect more than political expression. But several scholars have argued that *only* political truths and political self-expression ought to be covered by the First Amendment. Such speech is often referred to as “core” speech. However, although everyone agrees that political speech is in some sense “core speech,” the Supreme Court has never agreed to such a narrow definition of protected speech. Indeed, some of the most famous First Amendment cases of the 20th century involve attempted government censorship of works of literature such as James Joyce’s “Ulysses” and works of art such as Andres Serrano’s “Piss Christ.” So while this third theory has been influential, it has never carried the day.

Finally, Thomas Emerson argued that robust protection for freedom of speech contributes to social stability. According to Emerson, allowing people to blow off steam means they are less likely to foment rebellions. Pushing dissent underground, on the other hand, may serve to strengthen opposition to government. Simply speaking one’s mind discharges some of the energy which might otherwise be used to engage in serious, social disruption or even overthrow of government. This theory is one that sees freedom of expression as cathartic.

So what does this mean for the regulation of commercial speech and corporate speech? Does this speech support any of these interests? When we ask this question it is increasingly clear that the answer is mostly no. To the extent there are some

^{‡‡} Although, as Yale Law School Dean Robert Post has argued, it also depends on academic expertise and protection for that expertise via academic freedom. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

positive contributions to these interests those positives seem outweighed by commercial and corporate speech's drawbacks. In the next section we look at these four interests reflected in First Amendment theory and discover why, for the most part, protecting commercial and corporate speech does very little to advance any of these interests and in fact may do much to interfere with them.

The Autonomy and Truth Interests

Autonomy and the Corporate Person

One of the most influential theories for why we protect speech is that freedom of speech is something all human beings need for what Thomas Emerson called “self-fulfillment.”⁴⁴ Emerson’s conception of self-fulfillment was that it included autonomy, freedom, self-expression and self-actualization. This, he argued, was “the widely accepted premise of Western thought, that the proper end of man is the realization of his character and potentialities as a human being.”⁴⁵ “Maintenance of a system of free expression is necessary [to] assuring individual self-fulfillment.”⁴⁶ Emerson’s view corresponds to Justice Brandeis’ view that the purpose of government was “to make men free to develop their faculties.”⁴⁷

“Autonomy” is a complicated term and may encompass several interests: the right to be free from interference, in this case, governmental interference; freedom of choice; self-actualization or self-fulfillment or any combination of these. Autonomy could also be more than freedom to make one’s own choices, but also a dignity interest that stems from personhood. And, according to at least one scholar, this is precisely the concern that animates the Supreme Court’s First Amendment jurisprudence. A close “examination of the structure of the Court’s free speech jurisprudence, [] reveals ...a... more complex concept of autonomy [than mere freedom from restraint]—*one based on the rights and responsibilities of personhood*....Autonomy is not about atomistic individuals but about social creatures entitled to equal dignity.”⁴⁸ This definition of autonomy stems from the Kantian view that human beings are moral subjects rather than means to an end. In this view one needs autonomy to be a person.⁴⁹ “Kant equates autonomy and personhood.”⁵⁰

"The final end of the State [is] to make men free to develop their faculties."

- JUSTICE BRANDEIS,
Whitney v. California (1927)

A corporation, of course, is not that kind of person, a moral subject. It is a legal fiction, a tool for organizing property and for accomplishing some given legal purpose. A corporation does not need to overcome its phenomenological self or its biology to claim autonomy. Corporations operate in the world (or at least some of them do; many corporations have no corporeal existence at all beyond the files of some lawyer) and are real in that sense, but the legal entity itself is not a thing in the physical world but rather a legal construct.

And although for human beings finding a purpose may be a life's work, people do not owe their existence to their purpose. For a corporation, the purpose is what defines its legal existence. Corporation law is necessarily very formalistic. It matters quite a bit what organizational purpose – for-profit or not-for-profit – is chosen for it. For-profit companies are organized to conduct a business. Non-profit corporations may be organized for a wide diversity of projects. But these are distinct categories, with distinct legal consequences, in particular distinct tax consequences.

It might be possible to analogize corporate, organizational purpose to “self-actualization”; but it is more difficult to say that corporations have any intrinsic need for “self-expression.” They don't. They aren't human. To be sure, some sorts of communication is necessary to any entity in order for it to accomplish its stated purpose. But there would seem to be very significant differences, the same sorts of differences human rights law is meant to capture, between artificial entities and human beings. Indeed, some observers argue that the current anthropomorphizing of corporations is in tension with a great of corporate law.⁵¹ So it is not clear that the autonomy/self-actualization interest is applicable to corporations as such.

Yet this does not exhaust thinking about the autonomy interest. If the right to autonomy means, among other things, the right to make up one's own mind, perhaps that should include the right to *receive* information from which to do so. Moreover, marketing and advertising communications make up a great deal of our cultural capital. It could be said that it provides people with the raw materials from which to craft personal identities and to engage in self-expression. If so, perhaps First Amendment protection for commercial and corporate speech is justified to further the autonomy of *listeners* not speakers.

And indeed this is the theory advanced in *Virginia Pharmacy* for deciding that truthful commercial speech should receive

limited First Amendment protection.⁵² However, that protection *only* extended to *truthful* speech; and even then such protection was (in theory) more easily set aside by a legitimate governmental regulatory interest. This makes sense when we consider that the regulation of commerce may often involve regulating some sort of speech. So a test for regulation which was hard to satisfy would make regulation extremely difficult.

Of course, a lot of people would say less regulation is desirable. They would not see encumbering regulation of commerce as a detriment. However, if we go back to the substance of the justification— protection for commercial speech is in the interest of protecting consumer autonomy – it is clear that in many cases regulation may actually contribute *to* consumer autonomy if, for example, it requires sellers disclose truthful information, forbids some kinds of manipulative practices, or even blocks advertising consumers indicate they don't want to receive it..

Advertising that is truthful, informative and does not contribute to self-harming behaviors probably presents the strongest case for saying that protecting it contributes to listeners' autonomy. But, of course, a great deal of advertising is *not* truthful. And according to critics, a lot of it does contribute to self-harming behavior like overeating, drinking, smoking, over-spending, bulimia, etc.

A similar pattern of negative and positive social costs accompany the public interest argument for protecting advertising. Advertising may contribute to violence, excessive materialism, social anxiety, environmental degradation, decline in spiritual values, poor self-esteem, stereotypes, visual clutter and a host of other ills that at one time or another various critics have attributed to commercial culture. Against these charges are the arguments that advertising makes the culture more vibrant, that it is entertaining and informative, that advertising drives sales which in turn drive an economy which provides a wealth of goods and services contributing to human well-being. It is probably impossible to resolve whether the net effect of commercial speech, looked at as a whole, is positive or negative for the listener, but at best it seems like a draw as to truthful speech. False commercial speech is a different matter. Because of the unmistakable potential for harm from *false* advertising, the *Virginia Pharmacy* decision to limit protection to truthful commercial speech seems calculated to protect only that speech which benefits listeners and to offer little grounds for thinking its rationale also extended

to protecting speakers. In short, protecting the speech of corporations does not implicate the autonomy or dignity of corporations because they are not human beings with the expressive needs of human beings. And even though there is an argument that *some* commercial and corporate speech may *sometimes* contribute to listener autonomy, that contribution is, at best, limited to truthful, informative speech. Even that sort of speech may undermine listener autonomy if the listener would prefer not to hear promotional pitches but is powerless to block them. And, as anyone who has lived in this culture can attest, a great deal of commercial and corporate speech is not truthful. Even that which is truthful is often designed to be manipulative. Manipulation is a kind of deception and is inconsistent with listener autonomy. Manipulation hijacks and misdirects the will of the listener by circumventing his reason and inspiring actions which may even be counter to his will. Manipulation and deception are also relevant to the second aim of the First Amendment — protecting the search for truth.

The Marketplace of Ideas, Brands and Consumer “Education”

The second-most popular justification for protecting expression is that it is necessary to the production of true knowledge. John Stuart Mill, the philosopher whose work is most often cited for this proposition, argued that “every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.”⁵³ Examples drawn from science and medicine are often used to illustrate this point. The idea is that in order to be sure that the truth will be known we have to create conditions of freedom so that truth may be produced. This is often referred to as the “marketplace of ideas” justification for freedom of speech. This rationale has appeared in numerous judicial opinions, most famously Justice Oliver Wendell Holmes’ dissent in the *Abrams*⁵⁴ case mentioned earlier.

In terms of the marketplace of ideas, the First Amendment’s focus has traditionally been in those areas which might be viewed as “opinion” and thus not subject to verification by empirical study; in contrast, facts, especially commercial facts, have traditionally been viewed as more appropriately subject to regulation, although again with some caveats. With respect to polit-

ical speech, little distinction is made between fact and opinion; the First Amendment offers very strong protection to both facts and opinion in the political context, especially where the speech involves public figures and matters of public concern. And with respect to literature and art there is likewise no attempt to regulate for truth. Indeed, such an attempt would be viewed inimical to a free society.

One of the most important concepts for political speech and the truth function is the idea, articulated by Justice Brennan in the famous *New York Times v. Sullivan* case, that because “erroneous statement is inevitable in free debate,” expression needs a certain amount of “breathing room” in order for it to be truly free.⁵⁵ What that “breathing room” means in practice is freedom from legal consequences. While that may have been appropriate in context of the political issues in *Sullivan*,⁵⁶ it hardly seems like the right standard to apply to commercial speech. Can it be the case that advertising needs “breathing room” for false claims? Offering legal “breathing room” for false commercial speech seems like a spectacularly bad idea, one unlikely to advance knowledge or consumer information..

A great deal of commercial regulation involves regulating factual claims – truth-in-lending, truth-in-advertising, truthful labeling – or regulating other speech related to the transaction, most notably disclosures. Securities law, food and drug law, banking and many other sectors require certain facts be disclosed in various contexts. It is probably no exaggeration to say that the bulk of regulation of commercial speech is regulation of factual claims or regulations requiring some sort of disclosure. Although the *Virginia Pharmacy* Court described advertising as “information,” one of the dilemmas of applying the commercial speech doctrine is that a great deal of advertising makes no factual claim at all.

Advertisers like to describe what they do as “educating” the consumer. But this does not always involve providing a straightforward piece of information like price as in *Virginia Pharmacy*. That is “information” in the dictionary sense: “knowledge obtained from investigation, study or instruction.”⁵⁶ Instead, when advertisers speak of “information” they often mean using com-

§§ *Sullivan* involved a lawsuit for damages arising from inaccuracies in a political ad taken out by supporters of Dr. Martin Luther King about the clashes in the South between civil rights marchers and police. The plaintiff was an official who believed that some minor factual errors in the ad injured his reputation..

munication to imbue their product or brand with an aura that suggests something about it or about the consumer who chooses it, something that will inspire the consumer to buy its product over any number of virtually identical products. And when they speak of “consumer education” what advertisers often mean is something rather more like indoctrination or psychological conditioning.

Because so many products are identical in all but the trademark, trade dress and small differences like fragrance or color, a great deal of advertising is parity advertising. This is advertising intended “to make consumers prefer one brand over another.”⁵⁷ In order to do that advertisers have long relied on emotional appeals and vivid imagery. And they have not viewed consumers as particularly astute. Beginning in the early 20th century “advertising practitioners increasingly subscribed to the notion that most consumers were of low intelligence and that advertising copy, in order to have appeal, needed to address consumers’ emotions rather than their intellect.”⁵⁸ In other words, advertisers believed they could manipulate consumers.

Advertising, Manipulation and Tough Love Paternalism

Manipulation does not contribute to consumer autonomy. People who are being manipulated are not acting as fully free, autonomous agents. Yet a good deal, perhaps most, of what advertising does or attempts to do is to manipulate consumers by influencing them at a subconscious level. This picture was almost entirely absent from the *Virginia Pharmacy* Court’s characterization of the consumer as a rational chooser who gathers information on which to make choices.

Although the *Virginia Pharmacy* Court thought it self-evident that advertising was “information,” it is a stretch to describe much of advertising as informative. Most advertising is what its earliest practitioners described as “special pleading.” As a consequence, everyone expects advertising to be exaggerated. Indeed, a distinct legal doctrine, the puffing doctrine, grew up around the practice of advertising. The puffing doctrine reflected the common understanding that a good deal of advertising was unreliable exaggeration if not outright lies. So many courts found that what a seller says to promote its product is “puffery.” The puffing doctrine denied recovery for injuries or losses incurred because of a buyer’s reliance on sales talk that, according to the

courts, no rational person should have believed.⁵⁹

More foundational still, most advertising and a great deal of marketing generally, is intended to evoke an emotional reaction. Pictures of babies, nature, beautiful people, beautiful settings – advertising often portrays an idealized, aspirational world in which everyone is perpetually ecstatic over laundry detergent and toothpaste. “An ideal corporate brand creates a powerful corporate myth that is deeply anchored in the consumer’s life-world, capable of turning ordinary consumption into a quasi-religious activity.”⁶⁰ Marketers strive to create emotional connections between consumers and their brands so that consumers will love these brands “beyond reason.”⁶¹

As psychologist Robert Cialdini, author of *Influence: The Psychology of Persuasion*,⁶² has described, some of the tools sellers use to persuade involve activating social norms about reciprocity, psychological needs for commitment and consistency, social proof, liking, deference to authority, and the psychological response to the perception of scarcity or exclusivity.⁶³ So, for example, giving people a “free gift” often inspires people to reciprocate by making a purchase or giving a donation; asking people for a commitment increases the likelihood that the person will take the promised action because it taps into people’s self-image as someone who honors commitments; offering proof that “everyone has one” or everyone is doing something taps into some people’s desire for social approval and conformity; engendering positive emotions, even if they are not about the product or service, can have spillover benefits; using authority figures like doctors or even celebrities activates some people’s tendency to defer to authority and creating artificial scarcity or a sense of exclusivity can make something desirable. All are familiar persuasion tactics.

These tactics are used in many different contexts but they are regularly encountered in marketing. And paying attention to these actions (assuming that you are even aware of them) and trying to guard against their influence is effortful. In many cases may not even work since knowledge of a particular technique does not ensure ability to marshal resistance to it.

The appeal to emotion in advertising is well-known, and perhaps an artifact of sexism (since early on advertisers realized that they were often speaking to women and as a consequence believed that the pitches had to be correspondingly modified to appeal less to reason and more to emotion because of the

"An ideal corporate brand creates a powerful corporate myth that is deeply anchored in the consumer's life-world, capable of turning ordinary consumption into a quasi-religious activity."

- GUIDO PALAZZO & KUNAL BASU, *The Ethical Backlash of Corporate Branding*

"It is a well known fact that teenagers like sweet products. Honey might be considered."

- MARKETING REPORT TO
BROWN & WILLIAMSON

then-prevalent attitudes towards women). Most people seem to believe that advertising has no effect on them. "Yes, most advertising is puffing and lies and relies on blatant emotional appeals, but I am immune to that nonsense," seems to be a common feeling. *Advertisers know this and exploit it.* In their advertising they pander to the audience's self-conception by direct and indirect suggestions that they know consumers are too savvy to be affected by it.^{¶¶} This perception is, however, mostly wrong.

Nobody wants to admit that they're in the least affected by advertising! They'll typically claim that they don't pay any attention to advertising despite the fact that a glance at their pantry or closet, kitchen or garage reveals nothing but heavily advertised name-brand consumer goods⁶⁴

If you regularly read the trade journals and marketing literature you will encounter discussions of consumers and of advertising practices like the above that are startling in their frankness. In his 1957 bestseller *Hidden Persuaders*, journalist Vance Packard quotes one marketing executive as saying:

[I]f you expect to be in business for any length of time, think of what it can mean to your firm in profits if you can condition a million or ten million children who will grow up into adults trained to buy your product as soldiers are trained to advance when they hear the trigger words "forward march."⁶⁵

By 1973 tobacco companies were considering that while 'pre-smokers' and 'learners' start smoking for psychological reasons (fitting in with the crowd, self-image, boredom relief), once the 'learning' period is over, the physical effects become of overriding importance and desirability to the confirmed smoker, and the psychological effects, except for the tension-relieving effect, largely wane in importance or disappear.⁶⁶

Tobacco companies also sent some 1,000 pamphlets to school children claiming "scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking"⁶⁷ in order to seed that potential market with doubt. Meanwhile, in their offices they were mulling over what flavors to add to ciga-

¶¶ Like appealing to the idea of control, ("take control of ____" is a ubiquitous pitch), lots of ads repeat some version of the Ditech "Consumers are smart" pitch.

rettes so as to appeal to teenagers. “It is a well known fact that teenagers like sweet products. Honey might be considered.”⁶⁸

Little has changed in the intervening years. Advertisers continue to view consumers, even children, as a resource to be mined. Thus, Lucy Hughes, an advertising executive interviewed for Joel Bakan’s *The Corporation*⁶⁹ admits in discussing “the nag factor” she helped discover that parents say they do not want their children to nag them for products, but that marketers can use marketing to get kids to nag their parents for products they want such as fast food. Parental dislike of nagging she says is just a “general attitude” that they have. It doesn’t mean they act on it. “*You can manipulate consumers into wanting your product,*” she says beaming.

Whether it is ethical to manipulate children this way is a question Ms. Hughes leaves to others. But the research she describes which went into identifying the “nag factor” is typical of marketing research. And research like this has been going on for decades, all without much regulation.

Since the 1960s a great deal of research, much of it conducted by marketers themselves, has revealed that human beings are susceptible to rational gaps (at least as rationality was commonly understood by economists). People are subject to various predictable irrational mistakes:⁷⁰ they often anchor a price estimate around an “irrational” number, they may have difficulty rounding or calculating the true cost of credit. Things that are more salient may skew memory (so flying seems dangerous because plane crashes are more salient and vivid but car crashes are more common.) People often rationalize decisions that are made on the basis of emotional belief, and indeed emotions play a critical role in enabling decision-making, but that role may obscure the real drivers of behavior and make some survey research unreliable. People also have time inconsistent preferences. They would like to save money but also want to buy that car today. They want to lose weight but eat the ice cream today. Will power is a common problem for autonomous persons.

These and many other cognitive biases have been reported on by researchers such as Daniel Kahneman,⁷¹ Dan Ariely⁷² and others. As we would expect, since in many cases marketers *discovered* these vulnerabilities, they have long exploited them for profit.^{***} Indeed, marketing is heavily data driven. “Today com-

*** One of the simplest examples is the common practice of shaving a penny off of the price of something so that instead of being \$2.00 it is \$1.99. The latter is often “read” as \$1.00 even though the actual price is effectively \$2.00.

panies spend hundreds of millions of dollars studying our behavior—asking us questions, dispatching corporate ethnographers to scrutinize us in our kitchens.”⁷³

All this research means that marketers know a great deal more about consumer motivations than the consumers themselves do. And it goes without saying that sellers know a great deal more about their products than buyers do. So the field is quite imbalanced. What consumers *do* know, however, is that the best defense against this marketing barrage is to avoid it. Avoidance is completely consistent with, indeed supportive of individual autonomy.

For example, if you are on a diet you might want to avoid having cookies in the house. And to support your decision to avoid having cookies in the house you might want to avoid advertising that tempts you to buy cookies. Although this could be analogized to Odysseus's request to his men that they tie him to the mast of his ship so he could hear the sirens' song but not act on it, it is more like the actions taken by his men to stuff their ears so they wouldn't hear the song. Either way, both acts are fully consistent with autonomous persons.⁷⁴

But defenders of *laissez-faire* and First Amendment protection for advertising suggest that people *ought to be forced to listen to advertising they do not want to hear* because of the educational opportunities it affords them to exercise their willpower and the social benefits which accrue to society from advertising, like advertiser supported media.

Yet proponents of First Amendment protection for commercial and corporate speech invariably claim that governmental regulation is “paternalistic.” Regulation, these critics say, interferes with the consumers’ ability to learn which advertising to trust by making that determination for him. A critical aspect of autonomy, they say, is to learn by trial and error. Let that sink in for a bit. Defenders of First Amendment protection for commercial speech would like to force consumers to hear speech they avowedly would like to avoid because defenders think it is good for them.

Contrary to the musings of legal theorists, it appears that many consumers would just as soon *not* devote many hours of their day trying to decide what advertising claims to trust or working out which manufacturer has the best bargains. Consumers express a preference for less advertising and more reliable advertising. “Consumers hate spam. They hate pop-up ads,

junk faxes, and telemarketing. Pick any marketing method, and consumers probably say they hate it.”⁷⁵

And the research suggests they are correct in their intuition that the best defense against persuasion attempts is to avoid them rather than to reason them out. Trying to remember that \$1.99 is actually \$2.00 is effortful. Once we consider the thousands of commercial persuasion pitches to which the average consumer is exposed everyday it is clear that a good deal of mental energy must be expended on trying to sort through them or to shut them out. Cognitive loads can increase the difficulty in attending to resolutions – for example to eat healthier foods.⁷⁶ And in fact it appears that even without persuasion attempts, the mere proliferation of “choice” may itself be stressful.⁷⁷ It is easy to understand why consumers might want less stress.

Not surprisingly then, as noted above, advertising is universally distrusted and disliked. So a great deal of governmental regulation of commercial speech falls into one of more of these categories: (1) providing for blocking or filtering of unwanted commercial appeals; (2) information on process issues such as source, labor practices, pesticide use, animal testing and the like; and (3) disclosures of important information like how long it will take to pay off a debt, the health risks associated with use of the product, limited warranties, privacy policies and many other types of information which the seller might otherwise, in the absence of a disclosure requirement, prefer not to disclose. With respect to all of these categories regulation actually enhances listener autonomy.

One of the most popular examples is the FTC’s do-not-call list which allows consumers to place their phone numbers on a list which requires marketers to take their names off of telemarketing lists. The registry does not include charitable and political telemarketing, only commercial marketing. It was developed in response to widespread public demand. Nevertheless, affected marketers challenged the law claiming it violated the First Amendment. The 10th Circuit upheld the law writing:

Just as a consumer can avoid door-to-door peddlers by placing a “No Solicitation “ sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so. We are convinced that the First Amendment does not prevent the government from giving consumers

this option.⁷⁸

Yet, today, 11 years later, this ruling may be in jeopardy because one of the grounds on which it was based, that the do-not-call registry was narrowly tailored because it did not include charitable and political telephone solicitations, may now conceivably be the basis for its vulnerability to challenge; this distinction could be characterized as “discriminating” against marketing.⁷⁹ This was a law which prohibited sale of prescriber-identifiable information from pharmacies to data miners to be used for marketing purposes. The Court found that the exemptions for research and for law enforcement indicated that the Vermont law singled out marketing for “disfavored” treatment and that violated the First Amendment. It is difficult not to conclude that the same may be said of the do-not-call registry.

And indeed, at present, almost any regulation of commerce that some entity objects to is being attacked, sometimes successfully, as a violation of the First Amendment rights of the business in question, or carrying the discrimination analogy further, as a violation of Equal Protection.

In Seattle an ordinance to raise the minimum wage which did not exempt franchisees from the small business exception was attacked as discriminating against franchisees’ First Amendment rights;⁸⁰ in Ohio a licensing law for dealers in precious metals meant to regulate pawn shops was attacked as violating the First Amendment;⁸¹ in the District of Columbia a law requiring tour guides to pass a test of their knowledge of D.C. landmarks was ruled unconstitutional as a violation of the First Amendment, as was a law attempting to require disclosure of minerals filed with the SEC,⁸² a regulation requiring employers to post a notice informing employees about their right to unionize,⁸³ a successful challenge to a proposal in Missouri for a ballot initiative requiring St Louis to refuse tax breaks to unsustainable energy companies,⁸⁴ and on and on. Many of these challenges have failed, but some of them have succeeded. Many of the challenged laws, like the Ohio licensing law, have been on the books for decades or fall within previously uncontroversial regulatory powers

The new corporate civil rights movement is challenging the ability of government to regulate on behalf of the people and this may raise very serious challenges to the public welfare with respect to basic health and safety regulations, the sort of regulations that arose in response to the perilous working conditions and the free market free-for all that industrialization brought in

its wake in the early Industrial Age. This new jurisprudence would seem to return us to the market not of the 1990s but of the 1890s.

Public Health Safety and Welfare

Much of the early political impetus to regulate commerce as it related to consumer products arose from the patent medicine trade. In the late 19th and early 20th century various patent medicines were sold as curatives to every conceivable ill – mental and physical. The active ingredient in most was alcohol, but many also contained cocaine, opiates, and other psychotropic ingredients. Most troubling of all, some contained arsenic, and other substances which were unambiguously poisonous. The push to pass food and drug safety laws coincided with the expressed desire for regulation of advertising. Both were aims of the consumer movement which began in the early 20th century and began to be a significant political force in the 1930s.⁸⁵

Thus, one group of regulations that is immediately and adversely affected by the new First Amendment jurisprudence is the group of laws regulating labeling of food and drugs, not only pharmaceutical drugs, but also alcohol, tobacco and, increasingly, as states legalize its use, marijuana. The most visible example of this threat is the striking down of the FDA's graphic warning labels for tobacco as unconstitutional.⁸⁶

Graphic warning labels were intended to make the health warnings that had long been required on cigarette labels more salient by rendering them in visual terms which would compete with sales messages at the same level as the advertising works – visually, viscerally, and emotionally. These labels were backed up by solid science; indeed, it was in some sense merely an inversion of the advertising industry's long-standing practice of trying to generate emotional reactions in consumers with ads. In this case the government wanted to generate aversion because tobacco is a product for which there is no safe use. Reducing the number of smokers would reduce health care costs, not to mention the savings in life and health and reduction of pain and suffering and loss to smokers and their families occasioned by tobacco-related deaths and disabilities.

Predictably, cigarette companies argued that such warnings went beyond factual information and were intended to persuade. And several courts have agreed, finding that these graphic warning labels constitute persuasion attempts and that the govern-

"I have recently been persuaded that I can safely keep on smoking if I change to a cigarette that is advertised to have less tar and nicotine than the brand I previously smoked."

- VERN COUNTRYMAN, LAW PROFESSOR

ment should not be permitted to use the seller's package as a platform for its antismoking "message."^{†††} In some sense it is true that the graphic warning labels are intended to "persuade" if by "persuade" you mean "fully understand the implications of the textual warning." Yet in another sense there aren't any "sides" and there is no "debate" with respect to smoking. Smoking is unequivocally harmful to your health. There is no "other side." By characterizing the decision to sell and to consume cigarettes as a "debate" the tobacco companies invoke the language of the First Amendment to suggest that this is an issue in the "marketplace of ideas" in order to legitimize the application of the First Amendment to the labeling regulations.

Recall that the tobacco companies are the ones who popularized the tactic of creating doubt and controversy around health warnings. And they industriously attempted to suggest to smokers who were worried about the health effects of smoking, through the colors on the package and terms such as "light," that light cigarettes were less damaging to their health. And they were successful.

In 1976 Harvard Law professor Vern Countryman proclaimed, "I have recently been persuaded that I can safely keep on smoking if I change to a cigarette that is advertised to have less tar and nicotine than the brand I previously smoked."⁸⁷ Professor Countryman was, ironically, offering this fact as evidence of advertising's supposed beneficial informational function, apparently as yet unaware, as many people were because of the tobacco companies' successful suppression efforts, that lower tar and nicotine conferred no benefits.

Because the existing warning labels are rendered in black and white and "reason why" copy instead of in the vivid imagery with which the cigarettes are promoted, the law requiring graphic warning labels was an attempt to render the warning in the same emotional register as the sales pitch. The government was trying to use the insights marketers have used for years about what makes information salient and memorable, how to frame information to make it stick, etc.

Some legal academics and economists who identify themselves with behavioral economics, urged that insights such as

^{†††} Note this is the same pitch made by Pro-Football in the Washington football team case, that by canceling the trademark the government is taking sides in a matter of public concern.

these should be used to help generate better outcomes for consumers. Chief among this group were economist Richard Thaler and law professor Cass Sunstein who wrote a book called *Nudge*,⁸⁸ arguing that government should exploit these cognitive biases and mental rules of thumb for the benefit of consumers. This, they argued, would both preserve freedom of choice and generate better outcomes for the individuals and for society as a whole.

Predictably opponents called nudging “paternalistic” and described Sunstein and Thaler’s “libertarian paternalism” as oxymoronic. Indeed, some argued that libertarian paternalism was worse than the old-fashioned kind because, unlike with overtly paternalistic laws like those requiring a seat belt, with “nudging” the consumer might not even realize that his decision was being influenced. As to the cigarette warning labels, the critics won and the D.C. court found that they violated the tobacco companies’ First Amendment rights because the graphic warning labels were not sufficiently fact-based but rather were persuasion attempts.

The government’s warning labels were not meant to be read literally – that the *specific things* depicted, a diseased lung, death, children who are ill, would *necessarily* befall the smoker. Rather, the idea was to make the risk real. But by characterizing this information as pertaining to a “debate” or a “controversy” the tobacco companies successfully persuaded courts that the warning labels were unconstitutional, despite the loss of life and suffering attributable to smoking and despite the lower costs to the public if more people quit. This does not seem to be a result consistent with good government.

There are many more such issues which a democratic government could rationally want to regulate. For example, should we allow persons who have been through personal bankruptcy to stop direct mail offers for credit cards? Should it be legal to target people for these offers based on their financial distress as happens now? Should marketers be allowed to advertise to children at school? On their cell phones? Should they be able to target children to sell unhealthy food with advertising cartoon characters? Where marijuana is legal, should it be marketed like alcohol? Should the state be in the business of advertising lotteries as fun and rewarding? Should there be any limitations on the promotion of casino gambling?

For now, the answer to these and many other questions seems to be that the First Amendment forbids this sort of regulation. But it seems clear that much advertising, rather than respecting consumers’ autonomy instead treats consumers as prey, so regu-

lation is appropriate. In advertising and marketing consumers are a resource to be mined and strong First Amendment protection for all these activities limits consumers' ability to seek redress or protection through collective action, that is, government. That result does not seem consistent with democratic principles.

Democratic Participation and Social Stability

The third and fourth interests Emerson identified as justifying protection for expression were democratic participation and social stability.

As the *Bellotti* decision reflected, political speech is viewed as “core speech” protected by the First Amendment. The idea is that if the First Amendment protects anything it must protect the political speech that contributes to participation in a democracy – the expression of voters to their representatives and to the public, the speech of candidates to the voters, testimony before Congress and editorializing in the press – all of this and more is said to be critical to the operation of a democracy. Some theorists have gone so far as to say that the *only* speech covered by the First Amendment is political speech.

However, although the courts have repeatedly suggested that political speech is the most protected of protected speech, they have not, for the most part, adopted this most austere and limited vision of what the First Amendment protects and have held that art, literature, educational materials, film and even porn, nude dancing and video games are protected by the First Amendment. Nevertheless, political speech has continued to be identified as “core” First Amendment speech.

By contrast, the fourth interest –social stability or what Emerson called a “safety valve”— is one that has gotten less recognition from the courts and from other legal scholars. Yet it seems likely that no one would dispute that social stability is a legitimate governmental and social goal. Stability, whether of the economy, the built environment, the natural environment, public

health, the roads or a myriad of other networks in the society, obviously contributes to the general welfare. While a complete absence of innovation or a stultification of a society is also not good, instability may contribute to anxiety, economic loss, suffering, even death. Emerson's idea was that by protecting freedom of expression, forces which might otherwise contribute to societal instability would lose some force and the impetus to change would be muted in part simply because people could freely express their dissatisfactions.

Robust protection for commercial and corporate speech does not contribute to either of these interests. Protection for corporate speech permits large, for-profit entities to have a great deal of input into the democratic process by influencing who is elected and what they do once they are elected. And this disparate influence may be one of the factors contributing to income inequality and to a public perception that elected officials are not responsive to the voters or captured by "special interests." Promotional activities played an important role in the instability of the financial sector during the securitization crisis as home equity loans, subprime mortgages and other risky investments were heavily promoted. And promotional activities play an enormous role in the consumption practices which contribute to environmental harms, including global climate change. Protecting commercial speech hampers regulatory efforts to provide consumers with better information. And perhaps more ominously, protecting corporate speech may contribute to the sort of political speech which has made issues of scientific consensus issues to be debated.

Commercial Speech and Economic Stability

For those born in the early 20th century one of the more striking cultural changes from the midcentury to the present has been the enormous expansion of and comfort with debt. Widespread use of credit cards is a phenomenon of the 20th century. And the notion that if your home was paid off that you might want to re-mortgage it in order to travel or buy clothes is an idea that might have shocked most people. Paying off your mortgage was a big deal and owing money was often associated with shame and failure. By the end of the century this had all changed with an ever-expanding consumer credit market with multiple layers: unsecured lines credit in the form of credit card, secured credit cards, car loans, payday loans and, of course, mortgages. And

all of these loans, in particular a category introduced late in the century, “subprime loans” were themselves bundled and sold and traded as securities. Until the bottom fell out.

One of the factors leading to the financial crash of 2008 was relentless promotional activity around credit, in particular home mortgages, reverse mortgages and home equity lines of credit. And many in the industry said as much. “As marketers, we keep selling potential before things have been around long enough to gauge any real information on their real value.”⁸⁹

The promotion of credit was paralleled by tremendous hype around creative investment products, the risks of which may not have been adequately understood,⁹⁰ even by the supposedly sophisticated investors of Wall Street. If customers had any equity at all in their homes (and perhaps even if they didn’t) banks aggressively steered them toward home equity loans. Reverse mortgages were relentlessly promoted to the elderly.

The fallout from the crash of 2008, with its numerous large companies like Lehman Brothers and Chrysler either failing or threatening to fail and the ensuing bailouts, included a bill intended to work a comprehensive reform of the financial sector: Dodd-Frank. But like the health care reform which would follow, one of the problems with Dodd-Frank was its passage was influenced by lobbyists for the very industries it was intended to regulate. And after its passage, these same entities continue to relentlessly challenge its provisions.⁹¹ One of the tools they used to attack it (and other laws related to consumer financial protection) is the First Amendment.

Lawsuits brought against the bond ratings companies like Standard & Poor and Moody’s, for the high ratings they gave some of the financial products which proved to be unsound, were similarly defended on the grounds that the bond ratings were “opinions” and thus were protected speech. Yet the consistently high ratings given to doubtful investments may have contributed to the 2008 financial collapse.

Many people say little has changed since then to give us much confidence that the banking and investment sectors are any more secure than they were before the 2008 crash. And indeed if we look at some of the spectacular business failures like Enron which took place well before that crash, what is striking is how much of their success relies on public relations hype.⁹² For example, Enron executives took reporters on a tour of a new facility that turned out to be something of a Potemkin village, that

"Good old marketing has convinced people that they should spend a lot of money on bottled water."

- NYC Official quoted in *Mother Jones*

is, it wasn't really what it was portrayed to be. Yet these sorts of staged events are apparently, much like "reality" TV, fairly common tactics in the PR playbook.

Properly functioning markets depend on good information. But when everyone is engaged in promotion, it is hard to distinguish between reliable information and "puff." To the extent that the securities market is as vulnerable to fads and inflationary rhetoric as the consumer product market, that seems to guarantee that the economy will be subject to a cycle of shocks and market corrections. To the extent that it is dependent on high levels of consumption (which President Bush's injunction to the public after 9/11 to get out and shop seems to indicate), it is necessarily dependent on either ever higher wages or expanding credit. It is abundantly clear that consumption is not being sustained on higher real wages.

There is some evidence from the aggressive lending tactics leading up to the 2008 crash and the fact that marketing of credit continues to be fairly aggressive, that the consumption economy is sustained by expansive credit policies. But consuming tomorrow's income today is ultimately an unstable practice. At any given moment in time it may make sense for an individual to do this, perhaps particularly the very young and the very old. Eventually the ledger must be balanced but almost everyone involved has an interest in putting off that day – the borrower who cannot pay, the bank that knows it cannot collect and does not want to write off the "asset", and the host of ancillary industries, including marketing, that help keep it going.

Of course, marketing alone does not sustain this cycle; but it contributes to it. In the meantime, millions of people are vulnerable to being caught in ruinous cycles of debt because they could not adequately assess the costs of the financial products they bought, investors may lose money and retirees their pensions in the next bust, elderly people are trapped in homes that they cannot afford to leave because of reverse mortgages that mean they cannot sell – yet any legislation intended to help stave off such results may have to face a First Amendment challenge.

Commercial Speech and Environmental Stability

If there is any system that may be more critical to social stability than a stable economy it may a stable natural environment. Long term, the health of the environment – which includes such

factors as clean water, breathable air, uncontaminated land, and temperatures and sea levels which are not inimical to human life – is probably even more important to social stability and welfare than a stable financial sector. Of course the predictions of catastrophic consequences arising from global climate change are some years in the future (although perhaps not as many as some people think), but good stewardship of the environment is an issue many consumers care about today, regardless of whether the worst predictions come true.

Yet the economy produced by ceaseless promotion, of planned obsolescence, of artificial needs, etc. is hard on the environment. It produces mountains of waste which creates multiple disposal and short-term and long-term environmental problems. Toxics may leach into the soil or foul the water with negative consequences for wildlife or for human consumption.⁹³ Many products are made of plastic or other material for which fossil fuels are a component, thereby bolstering the demand for fossil fuels.

The poster child for this phenomenon is bottled water, a product which was virtually unknown in its current form as late as the 1970s. The enthusiasm for bottled water began with the promotion in the U.S. of Perrier, but then the development of plastic bottles which made single servings more convenient, along with marketing, and later a turn away from sodas, led to a booming market in a commodity that can be obtained from the tap for free. “Good old marketing has convinced people that they should spend a lot of money on bottled water.”⁹⁴

It is not surprising then that many people would like to recycle, would like to know whether the company that manufactures a particular product that they buy manufactures it in an environmentally responsible way (whatever that might mean). The largest companies also report that adopting better environmental policies helps with recruiting the best young people as this is an issue that many of them care deeply about.

Concern for the environment also generates a less salutary development: greenwashing. Greenwashing is the practice of clothing your product or service in some sort of environmental mantle, or more to the point, the suggestion of an environmental program, often by doing something no more substantive than employing a lot of green in the trade dress or logo. In 2008 J. Thomas Rosch of the Federal Trade Commission observed that “green” marketing was “ubiquitous.”⁹⁵ “[A]pplications [to the US Patent and Trademark Office] with the word ‘green’ more than

"The First Amendment confirms the freedom to think for ourselves,"

- CITIZENS UNITED (2010)

doubled from 2006 to 2007,' Rosch said, "while applications with the words 'clean,' 'eco,' 'environment,' 'earth,' 'planet,' and 'organic' also jumped."⁹⁶ "Green is the new black!" many marketing people cry.

It is open to question whether it is possible to consume your way out of a problem that is largely consumption-driven. The idea that you can may be illusory. But assuming that it is possible to consume "responsibly," it is axiomatic that in order for that to be true all this green marketing must be truthful. Consumers need to be able to rely on the labels that indicate that something is "local" or "organic" or "recycled" etc. for it to make sense for any manufacturer to invest in the extra trouble or expense.⁹⁷ Otherwise any seller could simply adopt the labeling without going to the trouble of actually doing anything differently.

Sadly, consumers cannot rely on labeling or marketing of a product to accurately reflect these "process" concerns. The FTC has only issued green marketing "guidelines" which are not enforceable law. And although there are some regulatory regimes at the state level and/or with respect to specific products, for the most part label information is confined to disclosure of contents and warnings related to health concerns. There are only a very few labeling requirements related to process practices.

Green marketing then is what marketers like best – wide open, anything goes. That means a lot of it is just green "noise" – that is, static that actually *reduces* consumer information in the marketplace (not just the marketplace of ideas) and decreases welfare, both individually and globally. And noise means sellers have no incentive to invest in anything but green marketing. Perhaps worst of all, greenwashing contributes to the false impression that consumers are doing something for the environment by buying particular products. So whatever contribution marketing *generally* makes to environmental degradation, green marketing reinforces it by contributing to the impression that there is a consumption solution.

Commercial Democracy

Of course the issue that has most captured public attention

⁹⁷ Although it is worth noting that sometimes it may actually be money-saving to adopt energy efficient manufacturing processes, to recycle or to engage in other "green" efforts. Much depends on the details and context. We should not assume that it is invariably more expensive to adopt these processes.

is the participation of corporations in political speech. This is a tremendously important issue on democratic legitimacy grounds even if, as other regulations of money in politics also fall,⁹⁷ corporate money cannot be identified as the sole corrupting force in elections. Political speech continues to be considered “core” speech and thus the impact on democracy of robust First Amendment protection for commercial and corporate speech is of paramount importance.

Political speech is termed “core” speech for First Amendment purposes and thus the subject of special solicitude. The *Citizens United* Court called political speech “central to the meaning and purpose of the First Amendment.”⁹⁹ The *Bellotti* Court likewise described political speech as “at the heart”¹⁰⁰ of the speech protected by the First Amendment. Both Courts emphasized that the reason for this special solicitude is because political speech is intimately related to the practice of self-governance.

Of course, corporations are not voters. So it is not clear they are legitimate participants in the process of “self-governance.” But once again, we encounter here the argument that what corporations want to say is a positive benefit to voters to hear and that government regulation serves to cut off voters from the information they need, or at a minimum, may be interested in. The *Bellotti* Court claimed that the Bank’s proposed political ad was the sort of speech which is “indispensable to decision making in a democracy”¹⁰¹ and that, because it is the people who should be the judge of the value of the speech, the government could not suppress it.¹⁰² The *Citizens United* Court likewise called political speech “an essential mechanism of democracy”¹⁰³ and suggested that the ban on corporate speech amounted to “censorship.”¹⁰⁴ “*The First Amendment confirms the freedom to think for ourselves*,”¹⁰⁵ Justice Kennedy wrote in the majority opinion in *Citizens United*.

Whatever one thinks of the merits of this claim, it seems clear that if it applies to the regulation of corporations’ participation in the political process that it would undermine the electorate’s ability to rein in corporate participation in that process, even if the voters determined that it was a corrupting force. It is perhaps no accident that the same year the Court extended some protection to commercial speech it also determined, in *Buckley v. Valeo*, that money was speech.

Of course, the largest corporations have access to a great deal of money. Once a corporation’s political speech is protected it is

easy to see why many people might be concerned about limiting corporate participation in politics. As Justice Thurgood Marshall remarked in the case which upheld corporate limits (but which was overruled by *Citizens United*), “The resources in the treasury of a business corporation...are not an indication of popular support for the corporation’s political ideas.”¹⁰⁷ The fear is that corporations, with so much money at their disposal, may drown out the speech of others. As legal philosopher Ronald Dworkin said:

Monopolies and near monopolies are just as destructive to the marketplace of ideas as they are to any other market. A public debate about climate change, for instance, would not do much to improve the understanding of its audience if speaking time were auctioned so that energy companies were able to buy vastly more time than academic scientists.¹⁰⁸

Even before the *Citizens United* decision, corporations in various industries have banded together to create trade groups or front groups to generate favorable research. The most notorious example of this practice is the tobacco industry with the Tobacco Research Council and its aim of obfuscating, not clarifying the debate as was reflected in one insider’s much repeated statement – “Doubt is our product.”¹⁰⁹ But such groups continue to proliferate, as they have since the 1930s, to the detriment of public information and decisionmaking about important issues like climate change¹¹⁰ or childhood obesity.

Again, in assessing the claim that what corporations contribute to public discourse is valuable it is important to remember that there is no requirement for individuals, or for political parties to meet a value test. Indeed, much of what they say may misinform the public. But their right to participate is predicated on their status as voters or the representatives of voters. Corporations cannot claim a similarly legitimate role. And as many scholars have observed, money in politics, particularly corporate money, has contributed to distrust of the electoral process and diminished faith in its representativeness. The participation by big business in politics can appear as “democracy working in reverse.”¹¹¹ “The one-way flow of communication and business’s ability to set the parameters for legitimate debate [does] not empower the public to form opinions,” according to one critic of industry’s propaganda efforts to legitimize advertising.

So the democratic participation rationale for protecting freedom of expression seems to offer at best a weak grounds for protecting commercial and corporate speech. At worst it totally subverts democracy's legitimacy.

Conclusion

Corporations, their lobbyists and think tanks, have succeeded in convincing the Supreme Court and a good deal of the press and academia that they are legitimate players in the political sphere and that a commitment to freedom of expression necessarily includes robust protection for their core speech – commercial advertising and marketing.

They have managed to align their claims for freedom of speech to the civil rights movement, borrowing the rhetoric of equality and claiming that ordinary regulation of commerce is “discriminatory” and that giving corporations fewer rights than human beings involves singling them out as “disfavored speakers,” as if the world’s largest corporations were powerless, political protestors.

This comparison is, of course, absurd. Taken to its logical extreme, if the regulation of marketing constitutes “singling out” for discriminatory treatment then the entire commercial speech doctrine, along with the lower standard of review that made this grant of limited protection to commercial speech consistent with the existing regulatory apparatus, is unconstitutional since the *commercial* speech doctrine necessarily involves a form of content “discrimination.” But that casts a shadow of potential unconstitutionality on all manner of regulation—truth-in-lending, labeling, truth-in-advertising, securities regulations, pharmaceutical marketing regulation, professional licensing and a host of other regulations of commerce.

In short, most of the gains of the 20th century with respect to

consumer protection and safety are at risk. In some cases, laws that have been thought constitutional for 100 years or more are being challenged. And if corporations are legitimate speakers in politics then we can expect to see their influence become ever more significant.

Yet calls for agencies like the SEC to regulate political spending by corporations¹¹² are likely to meet substantial obstacles in the First Amendment. Though *Citizens United* was explicit, by a vote of eight to one, that disclosure about the source of corporate political spending was constitutional, opponents of disclosure like James Bopp are unwilling to concede this point and continue to argue that even disclosure laws violate the First Amendment.

Of course, the full, deregulatory potential of this new First Amendment may well not materialize precisely *because* such a sweeping reorganization of the existing understanding of the scope of the government's regulatory power and an unsettling of long settled law may strike many judges as beyond the pale. We already see some indication that this may be the case. Despite the devastating potential of the *Sorrell* decision in 2012 to make a great deal of ordinary regulation unconstitutional, many courts, when confronted with claims that a law that had long been in force was unconstitutional, have rejected this claim.

However, we should not conclude from this observation that the dangers the new First Amendment poses are trivial. Because the Supreme Court precedent authorizes, and indeed even seems to *compel* the conclusion that any regulation of marketing speech is unconstitutional content discrimination, the status of much law remains uncertain, and because many of the courts which *have* rejected this most expansive version of the *Sorrell* precedent have done so without distinguishing *Sorrell*, the constitutionality of any particular law may be subject to the vagaries of the personality and politics of individual judges. That promises an uneven and chaotic development of First Amendment law in this area, something which is inimical to good government. It suggests that government's power regulate, not just to promote public health and safety, but to respond to the voters' desire for some countering force to the power of private institutions in their lives, will be greatly diminished. Most fundamentally, it threatens the ability to counter the pernicious effects of corporate money in politics through disclosure requirements. A decision predicated on preserving the rights of consumers to receive truthful information should not be used to empower corporations.

Corporations are not people. They are most certainly not voters. The notion that regulation of corporations represents invidious discrimination against them is a perversion of the justification for extending some protection to commercial speech and threatens to protect exploitation. If the government cannot regulate commercial speech it cannot regulate commerce. And if it cannot require that corporations be held to disclosure requirements to combat the appearance of corruption that comes from corporate participation in government, it undermines the sovereignty of the people. Freedom for commercial and corporate speech likely diminishes freedom for everyone else.

Endnotes

- ¹ Citizens United v. FEC, 558 U.S. 310, 130 S. Ct. 876 (2010).
- ² Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).
- ³ For a more detailed explanation see TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL SPEECH IN AMERICA (2012).
- ⁴ FCC v. AT&T, 562 U.S. ___, 131 S. Ct. 1177 (2011) (ruling that a corporate does not have a personal privacy right for purposes of the Freedom of Information Act [FOIA]).
- ⁵ Pro-Football, Inc. v. Amanda Blackhorse, *et. al.*, 1:14-cv-01043-GBL-IDD.
- ⁶ 15 U.S.C. § 1052(a).
- ⁷ *Id.* (emphasis added).
- ⁸ Pro-Football, Inc. v. Blackhorse, Case No. 1:14-CV-01043-GBL-IDD Memorandum Order and Opinion, July 8, 2015.
- ⁹ *U.S. Total Media Ad Spend Inches Up, Pushed by Digital*, eMARKETER, Aug. 22, 2013 <http://www.emarketer.com/Article/US-Total-Media-Ad-Spend-Inches-Up-Pushed-by-Digital/1010154>.
- ¹⁰ CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY, 9-10 (1960).
- ¹¹ STANLEY FISH, THERE IS NO SUCH THING AS FREE SPEECH AND IT IS A GOOD THING, 14-15 (1994).
- ¹² Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOCIAL INQUIRY 521 (1977). Fred Schauer makes a similar point in his argument that the First Amendment represents a special suspicion of governmental bias. Frederick Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983).
- ¹³ *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
- ¹⁴ Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982).
- ¹⁵ Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L. J. 877 (1963). This article was subsequently republished as a book, a fact which creates a fair amount of confusion in the citation. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). Emerson made a further effort to analyze subsequent developments from his first article in a later book. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). The interests he identified in both books continue to inform First Amendment jurisprudence today, although the outcomes are often different illustrating the plasticity of the principles he said the First Amendment reflected. From the standpoint of the present-day his analysis of specific disputes often looks dated and anachronistic however. Perhaps most telling was that he devoted almost no time to the problems of commercial speech indicating that at the time, the late 60's/early 70's, First Amendment protection for commercial speech was not on most people's radar.
- ¹⁶ For an account of the origins of the case from one of the lawyers involved in the case on behalf of the consumers see Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE WEST. RES. L. REV. 1189 (2004).
- ¹⁷ *Va Pharmacy*, 425 U.S. at 770.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.* at 771 n. 24.
- ²² *Id.* at 784 (Rehnquist J. dissenting).
- ²³ *Id.* at 788.

²⁴ 447 U.S. 557 (1980).

²⁵ *Id.* at 566.

²⁶ *Va. Pharmacy*, at 776 (emphasis added).

²⁷ *Id.* at 562-63.

²⁸ *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (“We are ...clear that the constitution imposes no such restraint on government as respects purely commercial advertising.”).

²⁹ *Va. Pharmacy*, 425 U.S. at 757.

³⁰ *Id.* at 761.

³¹ *Id.* at 760-61.

³² 435 U.S. 765 (1978).

³³ *Id.* at 768.

³⁴ *Id.* at 775-76 (emphasis added).

³⁵ *Id.* at 776 (emphasis added).

³⁶ *Id.* at 777 (emphasis added).

³⁷ *Id.* at 783 (emphasis added).

³⁸ *Id.* at 825 (Rehnquist, J. dissenting) (emphasis added).

³⁹ *Id.* at 825-26 (emphasis added).

⁴⁰ *Id.* at 826 (emphasis added).

⁴¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁴² *United States v. Abrams*, 250 U.S. 616, 624 (1919) (Holmes, J. dissenting).

⁴³ *Id.* at 630 (emphasis added).

⁴⁴ EMERSON, *TOWARD A GENERAL THEORY* (book) at 3.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.*

⁴⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. Concurring).

⁴⁸ Christina Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 161(1997) (emphasis added). Professor Wells is careful, however, to caution that the Court does not *explicitly* rely on the Kantian notion of autonomy she discusses in this article. *Id.* at 171. In fact, she observes, some Justices have explicitly rejected Kant’s philosophy. *Id.* at 171-72. Moreover, there are cases which diverge from her theory, and she notes, it may not be possible for any single theory to explain all of the First Amendment cases. *Id.* at 172. Many scholars have made the same observation that no “general theory” can, or perhaps even *should*, account for all of the case law. *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 212 (1983). This is undoubtedly correct. Still, it is worth noting that although Emerson entitled his book “Toward a General Theory of the First Amendment,” he actually did not express an allegiance to a single theory either.

⁴⁹ *Id.* at 165.

⁵⁰ *Id.*

⁵¹ Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 Cornell L. Rev. 335, 390 (2015).

⁵² The theorists who promoted freedom for commercial speech relied on arguments from autonomy for consumers. *See generally* Martin Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 1189 (1971). Professor Redish of Northwestern is the undisputed intellectual architect of the commercial speech doctrine and has been very influential in the development of protection for corporate speech as well.

⁵³ JOHN STUART MILL, *ON LIBERTY* 33 (1859).

⁵⁴ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

⁵⁵ *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (internal quotations and

citation omitted).

⁵⁶ Merriam Webster on-line 2(a)(1).

⁵⁷ INGER L. STOLE, ADVERTISING ON TRIAL, 4 (2007).

⁵⁸ *Id.* at 16.

⁵⁹ Vulcan Metals Co., Inc. v. Simmons Mfg. Co., 248 F. 853 (1918) “There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity.”).

⁶⁰ Guido Palazzo & Kunal Basu, *The Ethical Backlash of Corporate Branding*, 73 J. BUS. ETHICS 333, 337 (2007).

⁶¹ KEVIN ROBERTS, LOVEMARKS (2005) (Roberts was formerly the head of the advertising firm Saatchi & Saatchi and more than one online reviewer of his book has indicated that the book is intended to promote his agency).

⁶² ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION, rev. ed. (2007).

⁶³ Mya Frazier, *This Ad Will Give you a Headache, But It Sells*, ADVERTISING AGE (Sept. 24, 2007) (obnoxious Head-On ads apparently work).

⁶⁴ ROBERT B. SETTLE & PAMELA L. ALRECK WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 38 (1986).

⁶⁵ VANCE PACKARD, THE HIDDEN PERSUADERS 154 (1957) (quoting Clyde Miller, *The Process of Persuasion* (1946)).

⁶⁶ *Some Thoughts About New Brands of Cigarettes for the Youth Market*, RJ Reynold’s internal memorandum (1973) quoted in *United States v. Philip Morris USA, Inc.*, 449 F. Supp.2d 1, 234 (D.D.C. 2006), *aff’d* 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010). Consider that these ruminations were going on long after it was clear to the tobacco companies (if not to the rest of the world) that cigarettes presented very serious health risks for smokers.

⁶⁷ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2nd at 202 (2006).

⁶⁸ Report of Marketing Innovations, Inc. to Brown & Williamson Tobacco Corp. in conjunction with Youth Cigarette—New Concepts project (Sept. 1972) <http://legacy.library.ucsf.edu/tid/ons56b00/pdf>

⁶⁹ Mark Achbar, Jennifer Abbott & Joel Bakan, *The Corporation*, Basic Training (2003) <https://www.youtube.com/watch?v=Hi63rXnuWbw> . <http://www.thecorporation.com/film/about-film>.

⁷⁰ DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

⁷¹ One of the seminal works in the field is DANIEL KAHNEMAN, PAUL SLOVICK & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982). Since that time Kahneman has published a book on the same research, albeit much updated, entitled “Thinking Fast and Slow.” DANIEL KAHNEMAN, THINK FAST AND SLOW (2011).

⁷² DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

⁷³ ROB WALKER, BUYING IN: THE SECRET DIALOG BETWEEN WHAT WE BUY AND WHO WE ARE 6 (2008).

⁷⁴ *See, e.g.*, GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY (1998).

⁷⁵ Eric Goldman, *A Cosean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1152-53 (2006) (citations omitted) Goldman later argues that despite this expressed dislike, other data suggests consumers like advertising or are at least ambivalent. *Id.* at 1154. For more arguments that consumers have conflicting attitudes towards advertising see JOHN E. CALFEE, FEAR OF PERSUASION, (1997). Ironically, one of Calfee’s arguments is for the information function of advertising and the example he uses is the lower tar and nicotine. But he also argues, more compellingly, that it was the government’s ban on health claims which, paradoxically, allowed the health issue to be downplayed and thus allowed smokers to forget that smoking was bad for your health.

⁷⁶ Frederick J. Zimmerman & Sandhya V. Shimoga, *The Effects of Food Advertising and Cognitive Load on Food Choices*, 14 BMC PUBLIC HEALTH 342 (2014) <http://www.biomedcentral.com/content/pdf/1471-2458-14-342.pdf>.

⁷⁷ BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (2004); SHEENA IYENGAR, *THE ART OF CHOOSING* (2010).

⁷⁸ *Mainstream Mkg. Services, Inc. v. FTC*, 358 F.3d 1228, 1233 (10th Cir. 2004).

⁷⁹ In *Sorrell v. IMS Health, Inc.* the Supreme Court ruled that a Vermont law that forbade the sale of data about a doctor's prescription drug practices unless the doctor agreed that her data could be sold this way was unconstitutional precisely because it only banned such sales for marketing purposes but allowed sales or disclosures of the same information for marketing purposes. *Sorrell v. IMS Health Inc.*, 131 S. C. 2653, 2663 (2011).

⁸⁰ Plaintiffs' Motion for a Preliminary Injunction. *International Franchise Assoc., Inc. v. City of Seattle*, Case No 2:14-CV-00848-RAJ. For a summary of the case and supporting briefs from the U.S. Chamber of Commerce see <http://www.chamberlitigation.com/international-franchise-association-inc-et-al-v-city-seattle>. (raising equal protection claim on challenge to Seattle law raising minimum wage for fast food workers which excluded franchisees from small business exception).

⁸¹ *Liberty Coins, LLC v. Goodman*, 2014 WL 1357041 (6th Cir. 2014) (rejecting a First Amendment challenge to state licensing requirement for dealers in precious metals).

⁸² *Nat'l Assoc. of Mfrs v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

⁸³ *Nat'l Ass'n of Mfrs v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

⁸⁴ *Mary Elin Noel v. Bd of Elec. Commissioners, Memorandum and Order* (on request for preliminary injunction), No. 1422-CC00249. For more on this case including a link to the final order see <http://www.freespeechforpeople.com/node/684>. (raising equal protection argument to ballot proposal for law to deny tax breaks to unsustainable energy producers).

⁸⁵ LIZABETH COHEN, *A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POST-WAR AMERICA* (2003); INGER L. STOLE, *ADVERTISING ON TRIAL* (2007).

⁸⁶ See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) *overruled in part by* *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).

⁸⁷ Vern Countryman, *Advertising is Speech* in *ADVERTISING AND FREE SPEECH*, ED. ALLEN HYMAN & BRUCE JOHNSON (1977) (speech given at a conference at the university of Miami on the First Amendment and commercial speech and offered as evidence of advertising's beneficial informational function).

⁸⁸ Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008). For an account of Sunstein's work in government attempting to implement these insights, with mixed results, see Luiza Ch. Savage, Cass Sunstein and the Power of Nudge, OIRA News, MacClean's (Aug 9, 2013) http://www.thecre.com/oira_news/?p=3364. For the MacClean's link see <http://www.maccleans.ca/news/world/mr-moneyball-goes-to-washington/>.

⁸⁹ Michael J. Brown, Letter to the Editor, Marketing Helped Make This Mess, *Advertising Age*, (July 13, 2009) at 14. See also, Rance Crain, Marketing Must Take Its Share of Blame for the Economic Crisis, *Advertising Age*, (June 29, 2009) at 11.

⁹⁰ Oren Bar-Gill, *Seduction by Plastic*, 98 *Nw. U.L. Rev.* 173 (2004).

⁹¹ See, e.g., Haley Sweetland Edwards, He Who Makes the Rules, *Washington Monthly* (March/April 2013) describing the work lobbyists have done in undermining the effectiveness of Dodd-Frank).

⁹² See, e.g., Bethany McLean & Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (2004).

⁹³ See, e.g., Donovan Hohn, *Sea of Trash*, *N.Y. Times (Mag.)*, 41-45 (June 22, 2008); Elizabeth Royte, *Garbage Land: The Secret Trail of Trash* (2005).

⁹⁴ AP, *Water Becomes America's Favorite Drink Again* (March 11, 2013) (quoting NYC water department official) <http://www.usatoday.com/story/news/nation/2013/03/11/water-americas-favorite-drink/1978959/> See also Anna Lenzer, *Fiji Water: Spin the Bottle*, *Mother Jones*, Sept/Oct. (2009).

⁹⁵ J. Thomas Rosch, *Responsible Green Marketing*, FTC, 2008 WL 2557919 (2008) (remarks at the American Conference Institute's Regulatory Summit for Advertisers and Marketers, Washington, D.C., June 18, 2008).

⁹⁶ *Id.*

⁹⁷ *See, e.g.,* *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2012) (invalidating aggregate limits for individual contributors).

⁹⁸ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁹⁹ *Citizens United v. FEC* 558 U.S. 310 (2010).

¹⁰⁰ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

¹⁰¹ *Bellotti*, at 777.

¹⁰² *Id.* at 791-92.

¹⁰³ *Citizens United* at 23.

¹⁰⁴ *Id.* at 40.

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰⁷ *Austin v. Michigan Chamber of Comm.*, 414 U.S. 652, 659 (1990).

¹⁰⁸ Ronald Dworkin, *The Decision that Threatens Democracy*, *NEW YORK REVIEW OF BOOKS* (May 13, 2010) <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

¹⁰⁹ *See* "Smoking and Health" memorandum of meeting of Brown & Williamson executives. <http://industrydocuments.library.ucsf.edu/tobacco/doc/psdwo147> at p. 4. For more details of this campaign and the long pattern of concealment of health consequences of smoking as well as attempts to market to children, to exploit consumer vulnerabilities and wishful thinking re cigarettes see *United States v. Philip Morris USA, Inc.*, 449 F. Supp.2d 1 (D.D.C. 2006), *aff'd* 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010).

¹¹⁰ Naomi Oreskes & Erick Conway, *Merchants of Doubt* (2011).

¹¹¹ Inger L. Stole, *Advertising On Trial* (2007) at 107 (quoting Robert S. Lynd in the 1930s).

¹¹² Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to play: A Model Explaining Why the SEC Regulates Money in Politics*, 12 *Conn. Pub. Int. L. J.* 361 (2013).