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The Political Economy of Commercial Speech

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Dibadj: The Political Economy of Commercial Speech
THE POLITICAL ECONOMY OF COMMERCIAL SPEECH

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I. INTRODUCTION	913
II. A FLAWED AGENDA	915
III. ANOMALIES	925
IV. CONCLUSION	933

I. INTRODUCTION

There exists much insightful commentary on the commercial speech doctrine. Some of it debates whether the doctrine's underlying premises can be neatly theorized¹ or whether a pragmatic approach is more germane.² Other scholarship considers the merits of particular applications; for example, whether specific portions of the securities,³ consumer protection,⁴ or food and drug⁵ laws pass

* Associate Professor, University of San Francisco School of Law. I thank the editors of the *South Carolina Law Review* for the opportunity to participate in the Law Review's Symposium, "Commercial Speech in an Age of Emerging Technology and Corporate Scandal," in Columbia, South Carolina on February 16, 2007.

1. See, e.g., C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 658 (1982) [hereinafter Baker, *Realizing Self-Realization*] (discussing the differences between his view and Redish's view in terms of two theories); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 473 (1971). For a summary of the debate surrounding Grand Theory, see Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 418–25 (1992). For a general overview of different theories of the commercial speech doctrine, see Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1322–51 (1988).

2. See, e.g., Eberle, *supra* note 1, at 429 (discussing the Middle Ground perspective on First Amendment Theory); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1283 (1983) ("Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation."); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 87–88 (1999) (rejecting the notions of "mechanical tests and rigid categorization" in the context of corporate speech and the First Amendment).

3. For example, on the issue of investment advisory newsletters, see *Lowe v. SEC*, 472 U.S. 181, 203–11 (1985) (concluding a company's publications were "bona fide publications," rather than "investment advisor" publications); Carol E. Garver, Note, *Lowe v. SEC: The First Amendment Status of Investment Advice Newsletters*, 35 AM. U. L. REV. 1253, 1268–71 (1986) (describing how courts treated investment publications before *Lowe*); David B. Levant, Comment, *Financial Columnists as*

constitutional muster. Even defining commercial speech has spawned its own small cottage industry.⁶

Investment Advisers: After Lowe and Carpenter, 74 CAL. L. REV. 2061, 2076–79 (1986) (discussing the Second Circuit Court of Appeals’s and Supreme Court’s differing analyses of investment advisory publications); John D. Norquist, Case Comment, *SEC v. Lowe: The Constitutionality of Prohibiting Publication of Investment Newsletters Under the Investment Advisers Act*, 69 MINN. L. REV. 937, 953 (1985) (“*Lowe* represents an unwarranted expansion of the Supreme Court’s commercial speech doctrine.”). For information on Regulation Fair Disclosure (FD), 17 C.F.R. 243.100, see *SEC v. Siebel Systems, Inc.*, 384 F. Supp. 2d 694, 701–09 (S.D.N.Y. 2005) (addressing a claim the SEC brought alleging a company made nonpublic material statements in violation of Regulation FD); Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 33–66 (2005) (analyzing various SEC regulations in light of the First Amendment and concluding Regulation FD is unconstitutional); Adam Humes, Note, *SEC v. Siebel Systems, Inc.: Comment on the SEC’s Failed Enforcement of Regulation Fair Disclosure in Federal Court*, 32 J. CORP. L. 161, 163–66 (2006) (discussing the history and background of Regulation FD). For a discussion of proxy solicitations, see Jill A. Hornstein, Note, *Proxy Solicitation Redefined: The SEC Takes an Incremental Step Toward Effective Corporate Governance*, 71 WASH. U. L.Q. 1129, 1143–47 (1993) and Clark A. Remington, Note, *A Political Speech Exception to the Regulation of Proxy Solicitations*, 86 COLUM. L. REV. 1453, 1454–60 (1986). For a general discussion of issues various securities laws have raised concerning the First Amendment and corporate speech, see generally Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990).

4. A prominent example is the commentary that has emerged about false advertising following *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003). See, e.g., James J. Barney, Note, *The Mixed Message: The Supreme Court’s Missed Opportunity to Address the Commercial State of Confused Speech in Nike, Inc. v. Kasky?*, 37 UWLAW L. REV. 1 (2004); Ellen J. Pantaenius, Note, *To Speak or Not to Speak: The Interplay Between Unfair Trade Practice and Securities Laws Poses Challenges for Corporate Speech*, 72 UMKC L. REV. 257 (2003); Michele Sutton, Note, *Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under Kasky v. Nike*, 72 UMKC L. REV. 1159 (2004).

5. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (holding that section 127(a) of the Food and Drug Administration Act of 1997 was an “unconstitutional restriction[] on commercial speech”); I. Scott Bass et al., *Off-Label Promotion: Is FDA’s Final Guidance on Industry-Supported Scientific and Educational Programs Enforceable?*, 53 FOOD & DRUG L.J. 193, 201–12 (1998) (analyzing various First Amendment concerns regarding the FDA’s policies on scientific and educational programs).

6. The Supreme Court has at times used different definitions. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980) (“The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience.”); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973) (“The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court’s view, it did no more than propose a commercial transaction . . .”). As Ronald Cass observes, “the Supreme Court has struggled with the definition of commercial speech.” Cass, *supra* note 1, at 1373. See also Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 167 (1994) (“In light of the inherent problems in distinguishing commercial and noncommercial speech, it is not surprising that the Court has struggled with a definition.”); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1135 (1991) (“[T]he first problem with the court’s simplistic approach is the lack of a good definition of commercial speech.”); Stern, *supra* note 2, at 79–83 (discussing the various definitions of commercial speech the Court has employed); William Warner Eldridge IV, Casenote, *Just Do It: Kasky v. Nike, Inc. Illustrates that It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179, 181–83 (2003) (“Numerous United States Supreme Court decisions demonstrate that there has been difficulty

This Article takes a different approach by discussing the political economy of commercial speech. It asks whether the recent push toward broader protections for commercial speech represents a very sophisticated attempt at putting forth a deregulatory agenda through constitutional rhetoric—a role similar to that which the Due Process and Contract Clauses occupied nearly a century ago. To the extent that an overly expansive commercial speech doctrine is used to discredit agency regulation, it represents a brilliant attempt to sidestep the deference courts give regulators under *Chevron*.⁷

The argument is structured in two parts. Part II suggests that two movements, the Chicago school and public choice, have given intellectual legitimacy to the push for expanded commercial speech protections. Unfortunately, however, this agenda is flawed along two major dimensions. First, it glibly conflates commercial speech with core political speech, which is at the heart of the First Amendment. Second, it suffers from a host of facile and untenable assumptions about rational consumers, self-correcting markets, and good corporations versus bad governments. This agenda attempts to use the First Amendment to sidestep economic regulation, much like the *Lochner* era relied on Fourteenth Amendment Due Process claims.

Part III explores six curious anomalies that fuel the agenda described in Part II. These represent leaps of logic that are made seemingly without justification—puzzles that, conveniently enough, benefit those who wish to grant ever-expansive rights to commercial speech. First, there is an inconsistent willingness to attack certain regulatory regimes, but not others. Second, corporations are simply assumed to have constitutional rights. Third, the rhetoric bizarrely shifts attention away from speakers toward listeners and information. Fourth, there is a permissive attitude toward mixing political with commercial speech, thereby sidestepping even the minimal requirement that commercial speech not be false or misleading. Fifth, there is an unwillingness to ask why a government that can regulate an underlying commercial transaction might not be able to regulate speech promoting that transaction. Finally, there is a strange desire to defer to courts as frontline arbiters of economic policy, effectively sidestepping *Chevron* deference.

II. A FLAWED AGENDA

Protection for commercial speech is a new phenomenon.⁸ Up until the United

in forming a bright-line test as to what constitutes commercial speech.”). Even state courts have gotten into the game. *See, e.g., Kasky*, 45 P.3d at 256 (offering its own broad definition of commercial speech). For a proposal building on California’s definition of commercial speech in *Kasky*, see Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 371 (2006) (“I argue here that the Court should clearly state that the term ‘commercial speech’ broadly encompasses *all* speech that could be characterized as marketing or related to for-profit corporate self-promotion.”).

7. *See Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

8. *See, e.g., Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 611 (1990).

States Supreme Court's 1976 landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁹ commercial speech received no constitutional protection.¹⁰ Decisions since *Virginia State Board of Pharmacy* suggest that, if anything, protections of corporate speech are getting stronger.¹¹ Large commercial interests that benefit from expansive commercial speech rights have fueled this trend,¹² as have think tanks sympathetic to their cause.¹³

More important for our purposes, however, is to recognize that both the Chicago and public choice schools have provided the intellectual foundations of this movement. In a rare article written in 1964, one of the Chicago school's leaders, Aaron Director, claimed "a remarkable similarity between the underlying basis for complete laissez faire in the market for ideas and the market for economic goods and services."¹⁴ A decade later, Ronald Coase argued similarly: "I do not believe that this distinction between the market for goods and the market for ideas is valid. There is no fundamental difference between these two markets [for goods and for ideas] . . ."¹⁵ Obliterating the difference, of course, inexorably leads to the conclusion that commercial speech be afforded the same level of constitutional

9. 425 U.S. 748 (1976).

10. See, e.g., *Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting) ("Prior to this Court's recent decision in [*Virginia State Board of Pharmacy*], however, commercial speech was afforded no protection under the First Amendment whatsoever." (citation omitted)); Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 845–46 (1985) ("Until the mid-1970's, commercial speech was considered beyond the purview of the first amendment."); Stern, *supra* note 2, at 56 ("In 1976, the Supreme Court formally abandoned its longstanding position that commercial speech categorically falls outside the realm of First Amendment protection."). The canonical pre-1976 case is *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court declared "that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54. For a brief history of the commercial speech doctrine, see Remington, *supra* note 3, at 1456–57.

11. See, e.g., Rodney A. Smolla, Afterword, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004) ("While nominally the Supreme Court continues to apply the intermediate scrutiny standard of *Central Hudson*, examination of the actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising.").

12. See, e.g., Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 158 (2005) [hereinafter Piety, *Grounding Nike*] (observing how a company such as Nike has been able "to cast itself as a victim and draw parallels between its claims and those made by the defendants in *New York Times*, without inspiring hoots of derision"); David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 598 (2006) (noting the existence of "[c]orporate deep capture campaigns, replete with astro-turf organizing, [and] the maintenance of front groups").

13. For example, "the Liberty Fund, Inc. sponsored a conference on 'The First Amendment and Federal Securities Regulation,' . . . held at George Mason University School of Law." Henry N. Butler, *The First Amendment and Federal Securities Regulation*, 20 CONN. L. REV. 261, 262 (1988).

14. Aaron Director, *The Parity of the Economic Market Place*, 7 J. L. & ECON. 1, 3 (1964).

15. R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974). As is typical with Coase, however, he carefully qualifies his statements: "It may not be sensible to have the same legal arrangements governing the supply of soap, housing, automobiles, oil, and books. My argument is that we should use the same *approach* for all markets when deciding on public policy." *Id.*

protection as political speech.¹⁶

In a similar, although distinct vein, public choice theorists have built on George Stigler's seminal argument that government regulators are "captured" by private interests.¹⁷ Fred McChesney, for example, argues against allowing the government to cabin commercial speech on the theory that "concern for public values like truth has less to do with governmental restrictions on speech than does bestowal of benefits on private interests."¹⁸ More recently, well-known commentators such as Alex Kozinski, Henry Butler, and Larry Ribstein have argued for abolishing the distinction between commercial and noncommercial speech.¹⁹ Though not couched directly in the language of the Chicago school or public choice theory, this contemporary work reaches the same conclusions.

Although superficially seductive, these analyses are unfortunately flawed along two major dimensions: they too easily conflate political speech with commercial speech and are based on facile assumptions. The first weakness is the most intuitive and the simplest. Theorists have too easily tried to elevate commercial speech to the level of political, artistic, or scientific speech at the core of the First Amendment. Commercial speech, however, is different. As Lillian BeVier notes, it does not even appear within our constitutional framework:

Political speech can find its source of protection in the Constitution's establishment of representative democracy, a form of government unthinkable without free discussion and debate about political issues. First amendment protection of political speech is thus legitimate because it is securely anchored in the Constitution itself. Commercial speech can find no such comfort. One might define commercial speech narrowly, to encompass merely product or service advertising, which only facilitates economic transactions. Or one might define it more broadly The scope of the definition does not affect the conclusion about whether the Constitution should protect it, because the view that an intention to withdraw the power to make

16. There is little doubt that both Director and Coase recognized that "[a]t bottom, the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services." Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 2 (1979).

17. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

18. Fred S. McChesney, *A Positive Regulatory Theory of the First Amendment*, 20 CONN. L. REV. 355, 358 (1988). McChesney claims that "exclusion of commercial speech from full constitutional protection can be explained in terms of an interest-group model." *Id.* at 365. For a discussion of the public choice approach in the context of commercial speech, see Cass, *supra* note 1, at 1362.

19. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) ("It is the thesis of this Article that the commercial/noncommercial distinction makes no sense."); Butler & Ribstein, *supra* note 6, at 172 ("[P]olitical speech cannot be clearly distinguished from commercial speech."); Eldridge, *supra* note 6, at 208 ("Commercial speech should be held to the same level of protection as noncommercial speech.").

rules regarding economic transactions from the political branches can be found within the text, history and structure of the Constitution is an untenable one. Thus, if the text, history, and structure of the Constitution are the criteria of value, commercial speech would not be entitled to constitutional protection.²⁰

In fact, one might even go a step further to argue that commercial speech is antithetical to the essence of the First Amendment:

There are deeper reasons for the commercial/noncommercial distinction. These go to the values being formed, encouraged and supported by the speech. The Bill of Rights was framed fundamentally to carve out a sphere of individual liberty so that citizens could better achieve dignity, autonomy and equality. The First Amendment plays a leading role in sustaining and promoting these human values. But these human values are threatened by the American commercial market structure. Commercial America tends to promote a system of values at odds with those enshrined in the Bill of Rights. These commercial values include materialism, exploitation, hedonism and superficiality. Americans are urged to define themselves in terms of what they own or produce, not by who they are or would like to become.²¹

If anything then, one might argue that commercial speech protections should be cut back, not expanded.

To be sure, distinguished commentators will disagree, arguing, for example, that “commercial speech aids in the attainment of society’s goal of intellectual self-fulfillment and . . . helps the individual to rationally plan his life to achieve the maximum satisfaction possible within the reach of his resources.”²² A cynic might be forgiven, however, for questioning the argument that “self-realization through commerce can lead to enhanced self-realization generally.”²³ After all, as proponents of commercial speech themselves admit, “political speech does not ask hearers to enter into an exchange of money for goods, as does a commercial transaction,”²⁴ not to mention that “one searches in vain for an indication from any of the people involved with the drafting or ratifying of the first amendment that

20. Lillian R. BeVier, *A Comment on Professor Wolfson’s ‘The First Amendment and the SEC,’* 20 CONN. L. REV. 325, 327 (1988) (footnote omitted).

21. Eberle, *supra* note 1, at 466 (footnotes omitted).

22. Redish, *supra* note 1, at 472; *see also* Kozinski & Banner, *supra* note 19, at 652 (“Yet, in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of political, artistic, or religious nature.”).

23. Eberle, *supra* note 1, at 449.

24. McChesney, *supra* note 18, at 365.

they were concerned with anything besides politically oriented speech.”²⁵

At its core, commercial speech is about facilitating a monetary transaction, not serious political, artistic, or scientific discourse.²⁶ Justice Rehnquist observed the following, with some humor, in his dissent in *Virginia State Board of Pharmacy*:

It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a “‘merchant’ who goes from door to door ‘selling pots.’”²⁷

Or, as Justice White succinctly stated, “[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”²⁸

A second, more technical, flaw relates to a spate of facile economic assumptions implicit in the Chicago school and public choice ideologies. I have detailed these troubling fallacies elsewhere.²⁹ Suffice it here to outline a few problems inherent in the laissez-faire enterprise that are particularly relevant to commercial speech. The first is the implicit belief that consumers magically process

25. Kozinski & Banner, *supra* note 19, at 632. The authors seek to rebut this argument simply by noting that “[a] myopic originalist view of freedom of speech does not get us very far.” *Id.* at 633.

26. As Ed Baker observes, “the first amendment should not protect speech rooted in the dictates of the marketplace because the profit motive acts as an alien determinant of speech, thereby breaking the connection between speech and human choice.” C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 25 (1976) [hereinafter Baker, *Commercial Speech*].

27. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 787–88 (1976) (Rehnquist, J., dissenting) (quoting *Breard v. Alexandria*, 341 U.S. 622, 650 (1951) (Black, J., dissenting)); see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting) (refusing to extend First Amendment protection to “advertisements of goods and services”).

28. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting); see also Jackson & Jeffries, *supra* note 16, at 14 (“Measured in terms of traditional first amendment principles, commercial speech is remarkable for its insignificance. It neither contributes to self-government nor nurtures the realization of the individual personality.”); Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 30 (1993) (“In the commercial speech cases . . . we are dealing with low-value speech, and the risk of illegitimate motivation is small.”).

29. See REZA R. DIBADJ, *RESCUING REGULATION* 43–65 (2006).

information as rational utility maximizers. As one scholar observes, “[t]he commercial speech doctrine thus reflects and entrenches a highly dispositionist conception of human agency. The core of the Court’s jurisprudence in this area revolves around a stylized picture of a rational actor accumulating information, the better to make consumption decisions that are in her own best interest.”³⁰ Unfortunately for this perspective, behavioral economics has shown that these easy assumptions are too often wrong.³¹

Another false assumption is that of the self-correcting market. As one commentator notes, “Advocates of laissez-faire will rue the day when it becomes widely understood that what is thought to be a free market actually requires extensive and constant government support.”³² Simply put, markets need rules.³³ This is especially true where the resources are so imbalanced:

[T]he promoters of the materialist message benefit from an almost classic case of market failure. Advertisers spend some sixty billion dollars per year to disseminate their messages. Those who would oppose the materialist message must combat forces that have a massive economic advantage. Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed. The inequality of inputs is structurally based.³⁴

The usual argument that speech should be countered with more speech becomes farcical in this context.

Instead of making facile assumptions around putatively rational consumers and self-policing markets, a return to the first principles of economics would be far more illuminating. As Russell Korobkin and Thomas Ulen succinctly note, “[t]he seminal insight that economics provides to the analysis of law is that people respond to incentives”³⁵ Proper incentive-based economic analysis thus might reach precisely the opposite result that facile laissez-faire theories would suggest. Lillian BeVier observes the following in the context of the need for securities

30. Yosifon, *supra* note 12, at 559; *cf. Bates*, 433 U.S. at 375 (“If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar’s role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 765 (“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.”).

31. See DIBADI, *supra* note 29, at 73–79.

32. Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 COLUM. L. REV. 474, 487 n.51 (1992) (reviewing NICHOLAS WOLFSON, *CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC* (1990)).

33. See Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 342 (1988) (“The government’s case that the disclosure requirements reduce information costs and thus enhance the efficiency of the capital markets is very strong.”).

34. Shiffrin, *supra* note 2, at 1281 (footnote omitted).

35. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1054 (2000).

regulation:

One way to understand at least certain kinds of rules that protect political speech is to view them as means by which the law shores up what are otherwise rather fragile incentives to produce and disseminate information about government and public officials. Similarly, a way to understand the *lack* of constitutional protection for producers of information about securities is in terms of the fact that the market for such information already creates and sustains adequate incentives for producers and disseminators.³⁶

As such, “[c]onstitutional protection is required for producers of information about politics and politicians, then, not so much because society values it *more* than commercial speech or speech about securities but because consumers value it *less*.”³⁷ Strong First Amendment protection for political speech can thus be conceptualized as a “constitutional subsidy”³⁸ that commercial speech should not receive.

Beyond improper application of economic concepts, those espousing strong commercial speech protections are enamored of a simple and dangerous dichotomy: private corporations, good; governments, bad. Henry Butler and Larry Ribstein, for instance, contend that “government regulators are more likely to commit costly errors regarding restrictions on commercial speech than are private market forces,”³⁹ because “[i]f speech is truly robust, then the market itself should be able to correct errors.”⁴⁰ Another commentator worries about “official mischief,”⁴¹ conveniently leaving the analysis of “private mischief” as an exercise for the reader. One of the Chicago school’s intellectual giants, Milton Friedman, claims that “[t]he preservation of freedom is the protective reason for limiting and decentralizing government power.”⁴² Yet what about the “freedom” of a citizen not to have to withstand a barrage of commercial speech, such as manipulative advertising?⁴³ These arguments are simplistic and one-sided. Ronald Cass aptly observes:

The public choice argument can be taken to mean that all or virtually all decisions of government will be social-welfare reducing. It is difficult to accept this argument as a complete

36. BeVier, *supra* note 20, at 329.

37. *Id.* at 330–31.

38. *Id.* at 328.

39. Butler & Ribstein, *supra* note 6, at 183.

40. *Id.* at 181.

41. Lively, *supra* note 10, at 871.

42. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 3 (1962).

43. See Mayer, *supra* note 8, at 614 (“[T]he assertion of corporate commercial speech rights deprives the individual of a certain kind of freedom—the freedom to be protected from tobacco and tobacco advertising.”).

description of democratic-republican collective choice: the opportunity for political entrepreneurship, for one thing, admits an avenue for welfare-enhancing social choice. Other forces as well doubtless constrain the relentless march toward a government completely given over to distribution of private benefits at public expense.⁴⁴

Why should society fear the motives of government more than those of private corporations? Whose interests should each have at heart? Most disturbingly, the notion that “*government should not be able to regulate*. . . . propagates a facile cynicism about the structures that define society.”⁴⁵ Put bluntly, “[m]arketplace theory does not rest on confidence in the market; it rests on distrust of government.”⁴⁶

This rhetorically brilliant, yet flawed, agenda might be usefully discussed as an attempt to resurrect economic due process through the First Amendment. The crucial point to recognize here is that those who would like expansive protections for commercial speech recognize that “economic rights can be closely aligned with the traditional rights protected by the First Amendment.”⁴⁷ This is a clever rhetorical argument replete with broader ramifications:

In a society that has become suspicious of politics and a legal culture that tends to view political struggle as simply an unprincipled, unprofessional and sloppy version of courtroom procedure, the First Amendment principle of abstention has expanded beyond a program of making politics safe to become a primary vehicle in a post-New Deal attempt to reduce the scope of conscious collective control over the market. The First Amendment, understood in this way as a fundamental limitation on the scope of government, has become the locus of a new Lochnerism—or rather, a revival of the old Lochnerism under a new doctrinal label. The courts have increasingly begun to use the First Amendment to restrict economic regulation and enforce a vision of the market freed not from politics “gone bad,” but rather from all politics altogether.⁴⁸

44. Cass, *supra* note 1, at 1363 (footnotes omitted).

45. Boyer, *supra* note 32, at 496.

46. Shiffrin, *supra* note 2, at 1273.

47. Page & Yang, *supra* note 3, at 34.

48. Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661 (1999); see also Boyer, *supra* note 32, at 477 (“An expansive definition of commercial free speech, however, could frustrate legitimate regulation as thoroughly as liberty-of-contract jurisprudence undermined reform legislation at the turn of the century”); Dooley, *supra* note 33, at 353 (“It may be that the commercial speech doctrine represents an attempt by the Court to recapture some of the judicial authority it lost when it abandoned substantive due process.”).

Justice Rehnquist recognized this crucial point in his dissent in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁴⁹ in which he warned that the majority “has also, by labeling economic regulation of business conduct as a restraint on ‘free speech,’ gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson & Brother v. Banton*.”⁵⁰

It is particularly revealing that scholars who believe in elevating commercial speech to the level of political speech do not like government regulation.⁵¹ For example, Nicholas Wolfson claims that “regulation almost always restrains the free choice of groups and individuals. Therefore, it is hardly obvious that product ad regulation will invariably, or even usually, benefit the consumer or the public.”⁵² As Frederick Schauer reminds us, “economic libertarians now . . . gravitate to the First Amendment rather than to the Due Process or Contracts Clauses. . . . They have identified and seized upon the First Amendment’s rhetorical place in American political and legal argument, and have sought, hardly irrationally, to use this phenomenon in support of their causes.”⁵³ As a result, “objections to government regulation of business that were originally based on concern for economic liberty have become objections to the regulation of commercial

49. 447 U.S. 557 (1980).

50. *Id.* at 591 (Rehnquist, J., dissenting) (citing *Tyson & Brother—United Theatre Ticket Offices, Inc., v. Banton*, 273 U.S. 418, 444–45 (1927)); *see also* Jackson & Jeffries, *supra* note 16, at 30 (“Instead, economic due process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Court has tolerated for more than forty years.”); Remington, *supra* note 3, at 1462 (“Giving all [commercial communications] full protection would invalidate much regulation of commercial communication and substantiate the worst fears of those who warn that the new commercial speech doctrine is nothing more than a metamorphosis of *Lochner v. New York*.”).

51. *See, e.g.*, Butler & Ribstein, *supra* note 6, at 206 (“Constitutional constraints on mandatory federal regulation would free the capital markets of unnecessary regulation and improve the resource-allocation function of these markets.”).

52. Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 275 (1988). However, Michael Dooley suggests the following in his critique of Wolfson’s thesis:

Wolfson’s view of the first amendment is sweeping indeed, for it sweeps away not only the federal securities laws, but large portions of the United States Code, the Code of Federal Regulations and the statute books of all fifty states, the District of Columbia, Puerto Rico, and the various territories subject to United States jurisdiction.

Dooley, *supra* note 33, at 336–37; *cf.* Piety, *Grounding Nike*, *supra* note 12, at 161 (“The ascendancy of the ‘corporate free speech’ argument is of concern because, if arguments such as Nike’s win support, they will provide a basis for undermining much of the government’s power to regulate business effectively in a myriad of contexts”); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 627 (2006) (“When laws place civil or criminal penalties on certain instances of commercial speech, companies have a strong incentive to escape the ambit of those regulations by claiming political protection under the First Amendment.”).

53. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1809 (2004) (footnote omitted); *see also* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 8 (1989) (noting an argument for importing First Amendment protection “wholesale into the economic speech area as a potent weapon in the deregulation of the economy”). Citations to 55 *Brooklyn Law Review* refer to page numbers as indicated on original printed pages.

advertising.”⁵⁴

Well-known commentators pushing for expansive commercial speech rights understand this point well. Fred McChesney admits that “[w]hat constitutional lawyers call the ‘commercial speech doctrine’ is a form of what economists and other lawyers call ‘regulation.’”⁵⁵ Kozinski and Banner tellingly warn that “[t]he more things we find to be commercial speech, the more expression we can suppress under the cover of economic regulation.”⁵⁶ The flawed agenda, then, might really be about deregulating the economy: it is perhaps no coincidence that commercial speech protections were invented in the 1970s, as the deregulatory movement was gaining traction.⁵⁷ Regardless of where one stands on the regulatory debate, however, “[o]ne needn’t hold any particular hierarchy of values to think that the free speech clause is one of the oddest places the framers could have chosen to constrain governmental abridgement of economic liberty.”⁵⁸

Finally, it is important to observe how the agenda to broaden commercial speech becomes particularly important in a post-industrial economy focused on knowledge. Expansive commercial speech rights allow corporations to control the dissemination of information⁵⁹—arguably the most important commodity in a post-industrial economy. As Carl Mayer aptly notes, “it is suggested that Modern Property includes the intangible currency of the Post-Industrialist society: knowledge and information. Information in all its forms—including its use to influence public elections and referenda—is central to the modern political economy. The defense of this Modern Property is an increasingly urgent corporate concern.”⁶⁰

54. Schauer, *supra* note 53, at 1794. Justice Rehnquist has recognized this point in his various dissents to majority opinions granting expansive commercial speech rights. *See, e.g., Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting) (“I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting) (“[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”).

55. McChesney, *supra* note 18, at 357.

56. Kozinski & Banner, *supra* note 19, at 649–50; *see also* Butler, *supra* note 13, at 263 (discussing Wolfson’s argument that speech regulation can proscribe protected speech).

57. *See* John Henry Brebbia, *First Amendment Rights and the Corporation*, PUB. REL. J., Dec. 1979, at 16, 20 (“The *Chrestensen* decision [1942] was rendered during the Roosevelt age when the concept of economic regulation was in full bloom, and the *Virginia State Board* [1976] and *Bates* [1977] cases were decided in the age of deregulation.”).

58. Dooley, *supra* note 33, at 338; *see also* Greenwood, *supra* note 48, at 664–65 (noting numerous economic matters impacted by the First Amendment’s Speech Clause).

59. Indeed, the Supreme Court has justified expansive commercial speech rights based on the notion that society “may have a strong interest in the free flow of commercial information.” *Va. State Bd. of Pharmacy*, 425 U.S. at 764; *see also Central Hudson*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

60. Mayer, *supra* note 8, at 604 (footnotes omitted). “The importance of commercial speech in the modern political economy is evinced by corporations’ legal actions and by the business press’ defense of this form of communication.” *Id.* at 611; Eberle, *supra* note 1, at 448 (“Even though prosaic, commercial speech is nonetheless important because it involves the dissemination of information concerning products and services in our vast market economy where information is among the most

III. ANOMALIES

This part explores six anomalies integral to the agenda described in Part II. First, there is a desire to displace certain regulatory regimes, but not others. In particular, regimes that might constrain corporations—consumer protection, securities regulation, food and drug law, and the like—are attacked.⁶¹ Intellectual property, by contrast a regulatory regime that helps corporations, is immune. As Tamara Piety wryly notes in the context of the *Nike, Inc. v. Kasky*⁶² controversy, “[i]t seems beyond dispute that Nike’s commitment to a multitude of tongues and open debate does not extend to appropriation of the ‘swoosh.’”⁶³ To boot, courts have generally tended to defer to the existence of a comprehensive regulatory regime,⁶⁴ making the argument that the First Amendment should displace only certain regulatory structures particularly odd.

Second, courts have implicitly given corporations constitutional rights. The history of this sweeping grant is entirely unsatisfactory and dates back to two sentences preceding a Supreme Court opinion from 1886, which simply state, “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of [the] opinion that it does.”⁶⁵ Perhaps the Court did not wish to hear argument on this issue because granting corporations such rights rests on dubious grounds.⁶⁶ First, and most simply, corporations are artificial creatures of the state

valuable of resources.”).

61. See *supra* notes 3–5; see also Butler & Ribstein, *supra* note 6, at 194–205 (questioning the constitutionality of various securities regulations and antitrust laws as applied to commercial speech).

62. 539 U.S. 654 (2003).

63. Piety, *Grounding Nike*, *supra* note 12, at 199; see also *id.* at 19 (“Even more problematic, given that the subject matter is almost wholly comprised of speech or expressive content, is trademark law, including passing off and unfair competition generally, and copyright law.”).

64. See, e.g., *Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting) (“I disagree with the Court’s conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment.”); Page & Yang, *supra* note 3, at 40–41 (“However, in heavily regulated industries such as the legal profession, fruit growing, and gambling, courts hesitate to strike down regulations affecting speech because of the government’s vast authority to regulate these businesses.” (footnotes omitted)); Stern, *supra* note 2, at 112 (noting the Court had not applied “commercial speech doctrine” to regulatory schemes); cf. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (“One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small . . .”). On the intersection of regulatory regimes with the First Amendment, see generally Schauer, *supra* note 53, at 1178–82.

65. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of facts). As Justice Rehnquist noted, “[t]he Court decided at an early date, with neither argument nor discussion, that a business corporation is a ‘person’ entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (citing *Santa Clara County*, 118 U.S. at 396); see also Mayer, *supra* note 8, at 645–46 (noting several dissenting opinions of various members of the court that “publicly call into question the legitimacy of the court to create a new class of constitutionally protected actors”).

66. Cf. Brebbia, *supra* note 57, at 18 (“Generations of constitutional scholars and Supreme Court Justices have argued that corporations, having no human nature, have no human rights.”).

and only exist at the whim of the state. The state has already given them “superhuman” powers, such as limited liability and perpetual life.⁶⁷ Justice White made similar observations in his *First National Bank of Boston v. Bellotti* dissent:

Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.⁶⁸

It would defy logic to argue that the state creating this artificial entity cannot regulate its speech.

Another, more subtle, point is that while a firm is owned by shareholders, these owners have little, if any, power in determining what the corporation says. Managers make these decisions.⁶⁹ Corporations even indirectly force shareholders to contribute to speech with which they might not agree. Indeed, as Justice White noted, managers should not be able to “use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.”⁷⁰ Perhaps most dangerous

67. Carl Mayer notes the supervening irony:

The corporate drive for constitutional parity with “real” humans comes at a time when legislatures are awarding these artificial persons superhuman privileges. Besides perpetual life, corporations enjoy limited liability for industrial accidents such as nuclear power disasters, and the use of voluntary bankruptcy and other means to dodge financial obligations while remaining in business.

Mayer, *supra* note 8, at 658–59.

68. *Bellotti*, 435 U.S. 765, at 809 (White, J., dissenting); *see also id.* at 825–26 (Rehnquist, J., dissenting) (discussing the nature and source of the rights of corporations and concluding they do not need First Amendment protections to carry out their commercial purposes).

69. *See, e.g.,* Estreicher, *supra* note 3, at 275–76 (“Nevertheless, corporations are not natural beings; when a corporation ‘speaks’ it speaks through the voice of its officers and directors, who are agents exercising derivative power on behalf of their widely dispersed shareholder-principals.”); Mayer, *supra* note 8, at 656 (“Another broad objection to granting corporations Bill of Rights protections is that to do so unfairly promotes the power of corporate managers while diminishing that of shareholders, workers, and communities.”).

70. *Bellotti*, 435 U.S. at 813 (White, J., dissenting); *see also* Baker, *Realizing Self-Realization*, *supra* note 1, at 676 (“[D]emocratic theory still would not justify granting corporate executives discretionary control over the massive corporate resources, which were gathered for commercial purposes, in order to pursue their political objectives.”); *cf.* Brebbia, *supra* note 57, at 18 (“In addition to the fear that big money will buy disproportionate political influence, a second justification voiced

of all, there is little opportunity to debate these issues. As Carl Mayer observes,

Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans. Under this methodology of constitutional operationalism, the rationale for equating corporations and persons is not stated specifically, however, so it cannot be rebutted. *There is no opportunity for denial; sub silentio the corporation is legitimated as a constitutional actor.*⁷¹

The implicit assumption that First Amendment protections should extend to artificial state creations cannot simply be swept under the rug.⁷²

Notwithstanding this leap of logic, perhaps corporations are not entirely sympathetic enough as constitutional actors. To sidestep this problem, a third anomaly emerges: a shift in attention from the rights of the speaker qua speaker to those of the listener. It is essential here to note a subtle, but very important, rhetorical shift in the Court's reasoning where it has sought to expand commercial speech rights. Perhaps nowhere is this more apparent than in *Bellotti* in which the majority brilliantly managed to reconfigure the terms of the debate by stating that "[t]he proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. *Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.*"⁷³ Similarly, in *Central Hudson*, the Court seemingly casually stated that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."⁷⁴ As a result, the Court is shifting attention away from the rights of an artificial, putatively profit-seeking entity, toward those of a much more sympathetic class—the audience.⁷⁵

Needless to say, this shift conveniently benefits those who desire expansive commercial speech protections. Burt Neuborne offers a reminder:

for the ban on corporate political spending was the protection of shareholders from forced contributions to candidates other than those they voluntarily supported.").

71. Mayer, *supra* note 8, at 650 (emphasis added).

72. Mayer, for example, argues that "a constitutional amendment is needed that declares corporations are not persons and that they are only entitled to statutory protection conferred by legislatures and referendums." *Id.* at 660.

73. *Bellotti*, 435 U.S. at 776 (emphasis added).

74. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–62 (1980); *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted)).

75. *See* Mayer, *supra* note 8, at 633 ("[T]he question became not whether the party asserting the right (a corporation) was entitled to free speech protections, but whether assertion of the right furthered free and open debate.").

By liberating first amendment theory from its dependence on a speaker-centered model, the Court made possible the protection of speech, even when no toleration based speaker exists, by permitting nonqualifying speakers to borrow the interests of other participants in the speech process as a matter of *jus tertii* and to use those borrowed interests to trump attempts to censor the speech.⁷⁶

Perhaps it is no coincidence that distinguished commentators pushing commercial speech similarly deflect attention away from the speaker. Much like the majority in *Bellotti*, Kozinski and Banner claim that “[t]he commercial speech distinction cannot turn on the profit motive of the speaker; the labeling of speech as commercial has to be the result of an examination of the speech itself, not the speaker’s purpose.”⁷⁷ And Nicholas Wolfson argues that “at the very least, whatever commercial speech may be, it cannot turn on economic self-interest or commercial greed.”⁷⁸ Unfortunately, though, it is disingenuous to confound the property rights of corporations with the free speech rights of citizens.⁷⁹

A fourth concern is the permissive attitude toward mixing political with commercial speech, thereby occasionally sidestepping even the minimal requirement that commercial speech not be false or misleading. Recall that under the first prong of the canonical *Central Hudson* test, commercial speech cannot be false or misleading to enjoy constitutional protection.⁸⁰ Political speech, however, does not face this requirement for it to receive First Amendment protection. In his dissent to the denial of the writ of certiorari in *Nike, Inc. v. Kasky*,⁸¹ Justice Breyer noted this difference:

The Court, however, has added, in commercial speech cases, that the First Amendment “‘embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.’” And in

76. Neuborne, *supra* note 53, at 26.

77. Kozinski & Banner, *supra* note 19, at 640.

78. Wolfson, *supra* note 52, at 277; *see also* Barney, *supra* note 4, at 27 (“Instead of focusing in on the speaker as the current commercial speech matrix does, a new approach should be developed that solely examines the content of the speech to determine the dominant feature of the speech.”); Cynthia A. Caillavet, Comment, *From Nike v. Kasky to Martha Stewart: First Amendment Protection for Corporate Speakers’ Denials of Public Criminal Allegations*, 94 J. CRIM. L. & CRIMINOLOGY 1033, 1053 (2004) (“Though counter-intuitive, not every statement by a commercial speaker is commercial speech for the purpose of First Amendment analysis. Rather, commercial speech is defined solely by its content.” (footnote omitted)).

79. *See* Baker, *Commercial Speech*, *supra* note 26, at 56 (“This suggests an obvious basis for distinguishing personal rights from property rights.”).

80. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980) (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”); *see also* Smolla, *supra* note 11, at 1278 (“False statements are not protected under the reigning commercial speech standard established in [Central Hudson].”).

81. 539 U.S. 654 (2003).

other contexts the Court has held that speech on matters of public concern needs “‘breathing space’”—potentially incorporating certain false or misleading speech—in order to survive. This case requires us to reconcile these potentially conflicting principles.⁸²

Given this uncertainty, it behooves commercial interests to mix ostensibly political commentary with even false or misleading commercial speech and hope courts will ignore the first prong of *Central Hudson*.⁸³ Perhaps the most prominent contemporary example occurred in *Nike, Inc. v. Kasky* where “Nike argued that it could not be held liable under a California consumer fraud statute for any potentially false or misleading statements made to the press about its overseas labor policies, because those statements were part of an ongoing public debate about international labor practices.”⁸⁴ But the danger is much broader:

The richness and complexity of the content of regulated speech and the multiplicity of contexts in which deceptive speech is used and regulated in our society quickly stretch the simplistic Commercial Speech Doctrine to its breaking point. Consider a cigarette manufacturer that disputes scientific claims about tobacco or attempts to air more innocuous advertisements; an organization created by the insurance industry that takes out ads blaming high insurance premiums on a “litigation crisis”; an investment broker who discusses an investment; a birth control manufacturer that promotes family planning; a politician who intentionally lies about his or her voting record to raise more campaign funds; a lawyer who attempts to solicit or advise clients to challenge a law; and an oil company that criticizes federal international policy. Should the first amendment analysis of speech regulation begin and end by questioning whether the speech “does ‘no more than propose a commercial

82. *Id.* at 676 (Breyer, J., dissenting) (citations omitted); see also Barney, *supra* note 4, at 20.

83. See, e.g., Siebecker, *supra* note 52, at 662 (“[C]ompanies will face a strong incentive to engage in an artful alchemy of mixing any potentially fraudulent disclosures with just enough political content to evade liability. The facility with which companies could engage in that artful alchemy should cause great alarm.”); Smolla, *supra* note 11, at 1287 (“In the context of corporate speech, the ‘matters of public concern’ standard will tend to work to the benefit of corporations.”); Barney, *supra* note 4, at 20 (“The intermediate scrutiny of the *Central Hudson* and *Bolger* line of cases permitting the Court to restrict mixed speech, conflicts with the *First National Bank* and *Virginia Board of Pharmacy* line that provides First Amendment protections to speech of corporations when the speech touches on matters of public concern.”).

84. Siebecker, *supra* note 52, at 617; see also Piety, *Grounding Nike*, *supra* note 12, at 177–78 (concluding that “Nike was asking for a constitutional shield for intentional misrepresentations”); Barney, *supra* note 4, at 29 (“*Nike vs. Kasky* was essentially a case predominantly about the treatment of false or misleading speech rather than political speech or even commercial speech.”).

transaction”⁸⁵

This problem is not new, having echoes in cases such as *Bolger v. Youngs Drug Products Corp.*⁸⁶ and *Valentine v. Chrestensen*⁸⁷ and being recognized by early commentators on commercial speech.⁸⁸ But it will likely assume greater importance as corporations increasingly append political speech to commercial messages in an effort to achieve First Amendment protections for false or misleading statements.⁸⁹

The fifth and penultimate anomaly constitutes an unwillingness to ask why a government that can regulate an underlying commercial transaction should not be able to regulate speech promoting the same commercial transaction. The conventional wisdom is that the power to regulate the greater (conduct) does not include the power to regulate the lesser (speech).⁹⁰ The Supreme Court’s earlier decisions in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*⁹¹ and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*⁹² suggest, however, that the ability to regulate an underlying economic activity includes the power to regulate speech associated with the activity. To the extent that 44

85. Howard, *supra* note 6, at 1095; cf. Bass et al., *supra* note 5, at 194 (“[T]he [FDA] guidance regulates First Amendment-protected expression; that the speech at issue involves the exchange of truthful scientific information (not commercial speech), which is entitled to the strongest First Amendment protections. . . .”); Caillavet, *supra* note 78, at 1035 (“[T]his Comment concludes that a corporate entity should not be subject to liability stemming from the denial of public allegations of criminal wrongdoing, even if the denial is false or misleading.”).

86. 463 U.S. 60, 66 (1983) (“Youngs’ informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or noncommercial speech thus presents a closer question.”).

87. 316 U.S. 52, 55 (1942) (“If that evasion [printing a political protest on the reverse side of an advertising leaflet] were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”).

88. Tellingly, in 1964 the Chicago school’s Aaron Director wrote that “economic affairs are increasingly converted into political discussion and decision.” Director, *supra* note 14, at 7; see also Baker, *Commercial Speech*, *supra* note 26, at 34–40 (discussing the various pecuniary and self-interested motivations for commercial speech); Jackson & Jeffries, *supra* note 16, at 23 (lamenting “the assumed propensity of affected parties to try to evade legal restraints on commercial speech by clothing their business messages in political commentary or social debate”).

89. See Siebecker, *supra* note 52, at 621 (“The incompatibility between the Supreme Court’s First Amendment jurisprudence regarding commercial speech and corporate political speech is becoming increasingly apparent. The basic problem lies in a renewed effort by corporations to mix commercial and political speech in their public statements.”).

90. See, e.g., Estreicher, *supra* note 3, at 242–43 (“Since economic activity is almost universally regulable, this rationale would render vulnerable to proscription virtually all commercial advertising, including any truthful advertising seeking to promote activity lacking affirmative constitutional protection.”).

91. 413 U.S. 376, 389 (1973) (“Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.”).

92. 478 U.S. 328, 346 (1986) (“[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”).

*Liquormart, Inc. v. Rhode Island*⁹³ overrules this precedent, it offers little justification, contenting itself with the vague generalization that “banning speech may sometimes prove far more intrusive than banning conduct.”⁹⁴

The greater-lesser debate, at the very least, presents “an elegant question of constitutional law.”⁹⁵ More likely, however, it is difficult to justify why the state should not have the power to also regulate the lesser. As Ronald Cass reminds us, “[r]estraints on speech promoting a commercial activity constitute a useful intermediate step between inaction and restriction of the activity itself. We should not readily conclude that this step, often the only politically feasible avenue available, is constitutionally proscribed.”⁹⁶ This reasoning is especially apt in the context of commercial speech, which, as Daniel Farber observes, “is more akin to conduct than are other forms of speech. The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise.”⁹⁷ More broadly, as Farber succinctly notes, “First amendment theories based on the distinction between speech and conduct have never been very successful.”⁹⁸ Perhaps we should stop pretending that these theories are successful and, in the process, stop unnecessarily restricting the government’s ability to regulate.

The sixth and final anomaly is both simple and pervasive. It is the attempt to make courts frontline arbiters of economic policy. More specifically, trying to undermine limitations that the political branches, notably administrative agencies,⁹⁹ place on commercial speech may be conceptualized as a technique to circumvent

93. 517 U.S. 484 (1996).

94. *Id.* at 511 (Stevens, J., plurality).

95. *Posadas*, 478 U.S. at 359 (Stevens, J., dissenting); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1419 (1989) (“The central challenge for a theory of unconstitutional conditions is to explain *why* conditions on government benefits that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct’ burdens on those same rights . . .”).

96. Cass, *supra* note 1, at 1380. Cass is also careful to add the following:

The common rejoinder is that the Constitution limits the government to fighting bad speech with good speech. This is not an accurate statement of the history of the first amendment or of its judicial interpretation. Both recognize that on occasion speech generates harm that can be prevented more efficiently by deterring the harmful speech than by subsidizing contrapuntal speech.

Id. at 1380 n.255 (citation omitted); see also Jackson & Jeffries, *supra* note 16, at 34 (arguing the government has the power to ban speech where the government also has the power to ban the underlying economic activity).

97. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 389 (1979); see also *id.* at 407–08 (“Most traditional consumer protection legislation is based on the contractual nature of the speech. Misrepresentation, duress, overreaching, and unconscionability are well-known contract doctrines. When the state attacks these problems with modern regulatory tools, it can legitimately claim an interest quite distinct from the suppression of free expression.”); cf. Jackson & Jeffries, *supra* note 16, at 35–36 (“[T]he significance of ordinary business advertising lies entirely in its relation to the contemplated economic transaction.”).

98. Farber, *supra* note 97, at 406.

99. See Stern, *supra* note 2, at 85–86.

Chevron deference.¹⁰⁰ Perhaps symptomatic of the judiciary's unease in filling such a role, the commercial speech landscape is littered with examples of constitutional avoidance at the Supreme Court,¹⁰¹ appellate court,¹⁰² and district court levels.¹⁰³ This avoidance makes our current state of affairs particularly unsatisfying.¹⁰⁴

100. Cf. Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 87 (1989) ("Although protection of the first amendment seems to be established in the commercial speech area, there should be concern that the courts will become active participants in overseeing each and every regulation involving economic speech.").

101. See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) ("The writ of certiorari is dismissed as improvidently granted."); *Lowe v. SEC*, 472 U.S. 181, 211 (1985) ("We therefore conclude that petitioners' publications fall within the statutory exclusion for bona fide publications and that none of the petitioners is an 'investment adviser' as defined in the Act."). Some Justices have explicitly noted this avoidance. See, e.g., *Nike*, 539 U.S. at 663 (Stevens, J., concurring) ("The third reason why I believe this Court has appropriately decided to dismiss the writ as improvidently granted centers around the importance of the difficult First Amendment questions raised in this case."); *Lowe*, 472 U.S. at 227–28 (White, J., concurring) (chastising the majority for avoiding the question of "whether the First Amendment permits the Federal Government so to prohibit petitioner's publication of investment advice.") For discussion of the Supreme Court's constitutional avoidance in commercial speech cases, see, for example, Lively, *supra* note 10, at 843 ("Because securities regulation implicates protected expression, and its specific constitutional parameters have not been officially charted, it is disappointing that the Supreme Court bypassed a recent first amendment challenge . . ."); Wolfson, *supra* note 52, at 265 (noting the Court's decision in *Lowe* rested on "statutory interpretation, not constitutional construction"); Levant, *supra* note 3, at 2094 ("The *Lowe* majority did not directly confront the first amendment issue . . .").

102. See, e.g., *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 796 (2d Cir. 1985) (declining to address whether the First Amendment protected the activities of the defendants in the context of proxy solicitations).

103. See, e.g., *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694, 709 n.16 (S.D.N.Y. 2005) ("[T]his Court declines to opine on the constitutional challenges raised."); see also Page & Yang, *supra* note 3, at 24–25 (describing a district court's decision as "classic constitutional avoidance" (internal quotations marks omitted)); Humes, *supra* note 3, at 177 (noting that future constitutional challenges would arise in regard to the "SEC's statutory authority to regulate").

104. Cf. Dooley, *supra* note 33, at 340 ("The commercial speech doctrine raises some very troublesome questions concerning the appropriate scope of judicial review, which the Supreme Court has thus far avoided.").

IV. CONCLUSION

The commercial speech doctrine is a confusing area of First Amendment law.¹⁰⁵ This Article has sought to take a step back from its murky intricacies to argue that increased protections for commercial speech can be understood as an attempt to put forward a deregulatory agenda that circumvents *Chevron*. But this strategy runs far deeper than commercial speech or even the First Amendment. It runs to the Bill of Rights more broadly. Carl Mayer chronicles how corporations have asserted the Bill of Rights:

[C]orporations and their managers . . . successfully have used the Bill of Rights as a shield against government regulation. Businesses now wield the Bill of Rights in much the same way that the fourteenth amendment was used during the Progressive era when corporations impeded state governmental regulation with constitutional roadblocks. In this sense, the supposedly defunct doctrine of substantive due process—under which the Court imposes its own economic views to strike down regulation—retains surprising vitality. Indeed, the current era can be categorized as one of corporate due process.¹⁰⁶

Discussion can only begin if citizens are made aware of what is really going on. The time has come to expose the strategy and debate whether corporations should benefit from constitutional protections designed to protect individual liberties from majoritarian impulses. The commercial speech doctrine would be a good place to begin.

105. Kozinski and Banner observe the inconsistencies:

Thus, government cannot prohibit certain sorts of commercial billboards, but can prohibit the unauthorized use of certain words altogether. Government cannot prohibit the mailing of unsolicited contraceptive advertisements, but can prohibit advertisements for casino gambling. Government cannot require professional fundraisers to obtain licenses, but can prohibit college students from holding Tupperware parties in their dormitories.

Kozinski & Banner, *supra* note 19, at 631 (footnotes omitted); *see also* Baker, *Commercial Speech*, *supra* note 26, at 1 (“The commercial speech exception has continually eluded theoretical justification, as well as precise definition.” (footnotes omitted)); Stern, *supra* note 2, at 142 (“The Court’s ongoing delineation of a sphere of commercial speech continues to navigate between criticism of its imprecision and calls to abolish the concept altogether.”).

106. Mayer, *supra* note 8, at 577–78 (footnote omitted). Use of constitutional arguments to attack the regulation of corporations extends even beyond the Bill of Rights. *See, e.g.*, Kenneth W. Starr, *A Verdict on Sarbanes-Oxley: Unconstitutional*, WALL ST. J., Dec. 16–17, 2006, at A11 (arguing that the Public Company Accounting Oversight Board, established under the Sarbanes-Oxley Act, violates the Appointments Clause and constitutes an unconstitutional delegation of legislative power).

