BUSINESSES AND BLOGS: FREE SPEECH AND COMMERCIAL SPEECH IN THE BLOGOSPHERE

by

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Introduction

This paper analyzes free speech rights applied to businesses in light of the rise in popularity and influence of "blogs" (Internet Web logs). A substantial amount of business-related dialogue is beginning to occur on blogs, plus businesses have begun to sponsor their own blogs. The law, however, is not clear whether the content of these blogs is protected under traditional free speech rights or limited under the commercial speech doctrine. This paper reviews the evolution and current state of the U.S. commercial speech doctrine, including the analytical framework developed by the U.S. Supreme Court to apply the doctrine. Due to the problems, as discussed below, in categorizing speech as commercial or noncommercial, this paper proposes a modification to the commercial speech doctrine analytical framework to better suit the new climate of business communications through blogs. This paper also includes a summary listing of the major U.S. Supreme Court commercial speech decisions in an Appendix following the main body of this paper.

The Evolution and Growth of Blogs

Internet Web logs (referred to generally and hereinafter as "blogs") are a particular type of Web site in which the author (or authors) publishes ("posts") messages in reverse chronological order. Blogs originated as personal diaries in which their authors shared their thoughts and opinions with the online community. The earliest blogs appeared almost simultaneously with the World Wide Web.[1] By 1999, services began providing blog tools to mainstream Internet users.[2] An early article discussing blogs described them as "personal Web sites operated by individuals who compile chronological lists of links to stuff that interests them, interspersed with information, editorializing and personal asides."[3] The "links" on blogs are hypertext links to the World Wide Web which can be to other Web sites, specific articles or documents stored on a Web site, other blogs, or to specific entries in other blogs. The hypertext linking capability creates a viral community, in which blogs link to other blogs (through what are called "permalinks"), allowing information and opinions to be shared world-wide across the Internet. Hence the creation of a grassroots ecosystem known as the "blogosphere."[4]

By early 2005, there were an estimated eight to nine million blogs on the Internet,[5] with an estimated 40,000 new blogs created each day.[6] According to a recent survey, 32 million Americans are blog readers.[7] While many blogs retain their personal feel, they also have become more interactive, often allowing readers to post comments to blog entries.[8] In addition, new technology, known as "RSS" (Really Simple Syndication) scans multiple Web sites and blogs based on parameters selected by users, aggregating postings and allowing users to review entries from the scanned Web sites and blogs.[9] Adding to the continuing growth of the number of blogs, major Internet service companies such as Yahoo!, Google, and Microsoft have either begun offering or are planning to offer blog services to the public.[10]

As the number and popularity of blogs have grown, so has their influence in (at least) American society.[11] In particular, political blogs were considered to have played a significant role in the 2004 presidential election.[12] Bloggers (blog authors) were provided media credentials at the 2004 Democratic National Convention,[13] and a blogger was recently given a White House press pass.[14] In addition, blogs have been given partial (or indirect) credit for the resignation of Dan Rather as CBS News anchor,[15] as well as the resignation of a CNN news executive.[16] The recent controversy surrounding the University of Colorado professor Ward Churchill has been, in part, driven by blogs.[17] Even university presidents are beginning to learn that small incidents can become large controversies thanks to blogs and e-mail.[18]

The blogosphere is not without its critics. Blogs evolved as independent, personal, participatory publications—and that culture pervades the blogosphere. Blogs originated in an environment of a "one-person operation[] with no editorial hierarchy or institution to say 'no' or impose a house style…."[19] The then president-elect of the American Library Association described blogs as a "species of interactive electronic diary by means of which the unpublishable, untrammeled by editors or the rules of grammar, can communicate their thoughts via the web[,]" noting the blog name "sounds like something you would find stuck in a drain…."[20] And, in respect to blogs criticizing the mainstream media, blogs are being seen by some as a "growing power of rampant, unedited dialogue."[21]

Businesses and Blogs

The reach and influence of blogs has also impacted businesses.[22] Businesses must be aware that they may be the subject of blog dialogues.

> [I]t's difficult to take the phenomenon seriously when most blogs involve kids talking about their dates, people posting pictures of their cats, or lefties raging about the right (and vice versa). But whatever the

> topic, the discussion of business isn't usually too far behind: from bad experiences with a product to good customer service somewhere else. Suddenly everyone's a publisher and everyone's a critic.[23]

Consider what happened to Kryptonite, the bicycle lock manufacturer. Someone posted on a blog a video of a Kryptonite lock easily being picked with a Bic ballpoint pen. Soon, bloggers were writing about the issue and linking to the video. Prompted by the blog postings, the *New York Times* and *Associated Press* wrote stories on the problem, prompting even more blog postings. Ultimately, it was estimated that within one week just under two million people read postings about the problem. Kryptonite then agreed to replace the locks free, at an estimated cost of $10 million.[24]

Rather than fear blogs, however, businesses are beginning to recognize that blogs can serve as advertising and public relations tools. Indeed, *BusinessWeek* magazine recently proclaimed blogs as nothing short of a revolution in business communications.[25] In its "Breakthrough Ideas for 2005," the *Harvard Business Review* recognized that blogs are "gaining the power to influence what people think, do, and buy."[26] One of the earliest and most successful business blogs is the GM FastLane blog authored by Bob Lutz, Vice-Chairman of General Motors.[27] Information about the FastLane blog states:

> The FastLane blog is where you can come to read the latest, greatest musings of GM leaders on topics relevant to the company, the industry and the global economy, and—most of all—to our customers and other car enthusiasts. We look forward to an open exchange of viewpoints and welcome your ideas and feedback throughout 2005.[28]

Another example of a successful business-related blog is Robert Scoble's at Microsoft.[29] Mr. Scoble was hired by Microsoft as a "technology evangelist" and to specifically maintain a personal blog, in which Mr. Scoble not only talks about such subjects as his wife becoming an American citizen or how to win a cheese contest, but also the good and the bad about working at Microsoft.[30] Microsoft has reportedly benefited by the "street creditability" of Mr. Scoble because of his "frank and uncensored musings about the company" on his blog.[31]

At present, there are no reliable figures on the number of blogs sponsored directly by businesses.[32] But the business press, to varying degrees, is extolling the virtues and necessity of business blogs.[33] As businesses embrace blogs and blogs become more "mainstream," it is important to keep in mind their underlying culture.

> The blogosphere's rules are very different from those of traditional media or dot-coms. In the blogosphere … social recognition matters more than financial gain. Bloggers are driven by a desire to share their ideas and opinions with anyone who cares to tune in. That enhances their credibility, making them more attractive to marketers. But it is also likely to make bloggers more cautious about tainting their reputations by trafficking with corporations. Traditional media and dot-coms need marketers as much as—often more than—marketers need them. The same can't be said of blogs.[34]

Authenticity is a critical factor in the blogosphere.[35] For example, Mazda recently created a blog supposedly run by a 22-year-old named "Kid Halloween" who included in a posting links to three videos purportedly recorded off public-access TV, two of which showed Mazda automobiles trying to break dance or drive off a ramp like a skateboard.[36] Other bloggers detected the phoniness of the blog and Mazda was quickly reviled for its insulting and clumsy attempt to use a blog for marketing purposes.[37] Likewise, Microsoft was recently criticized for recruiting bloggers to promote its new version of Windows (called "Longhorn").[38] As an industry analyst stated, "'Blogs could be a highly effective way of evangelizing Longhorn, but I wouldn't recommend creating an orchestrated team of outsiders, presumably bloggers, as evangelists…. The best evangelism will occur naturally, from people truly excited about the software.'"[39]

Finally, businesses must remember that the blogosphere is a participatory communications medium.

> Corporate marketers must deal with bloggers differently from the way they deal with traditional media. First, they must realize that the blogosphere is not just a place in which to advertise; it is a medium in which to participate. Marketers can join the conversation on influential blogs related to their products or companies—or, even better, they can become bloggers in their own right by hosting blogs for customers. Most radically, they can host independent bloggers on their Web sites, essentially trading exposure for reach and credibility.[40]

The growth of business blogs, coupled with the unique cultural aspects of the blogosphere, pose a number of possible, and, as yet, unresolved, legal issues. Specifically, is the dialogue in which a company participates on a blog always commercial speech, subject to laws prohibiting false or deceptive advertising or other government regulation? The deceptive trade practices standards are quite low, generally only requiring a material representation or omission that is *likely* to mislead the customer.[41] Ultimately, the determining factor is whether or not the speech in question will be classified as commercial.

The Commercial Speech Doctrine

As noted above, blog content, even originating from businesses, is not always advertising in the traditional sense.[42] Perhaps because the recent rise in popularity of blogs originated from political-content blogs,[43] the underlying blogosphere culture is based on the notion of free dialogue and collaboration.[44] Indeed, General Motor's FastLane blog promises, in part, to "tell the truth."[45] In theory, by allowing opinions to be expressed, ideas to be debated, and disagreements to be presented, the truth will ultimately be discerned. In other words, there is no need for oversight, particularly by the government. As

Justice Holmes stated, "the best test of truth is the power of the thought to get itself accepted in the competition of the market …."[46]

> The core idea here is that in *all* areas of decision making—including not only whether to support a particular political candidate but also whether to … buy a Saab…—the "best" way for individuals to reach the best decisions for themselves is for them to consider all competing ideas, opinions, and perspectives, without government interference.[47]

But, of course, not all speech is completely "free." Insurrection, contempt, advocacy of unlawful acts, breach of the peace, and obscenity are forms of speech not protected by the First Amendment.[48] Commercial speech, on the other hand, is entitled to at least some constitutional protection. "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[49] However, "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest."[50]

The critical issue for business blogs is whether the content is advertising; whether it is commercial speech at all. If a company states in its own blog that it too, as a concerned citizen, supports efforts to minimize global warming, is that commercial speech? If an employee posts a message on a company-sponsored blog that the company does not support sweat shop labor and that its products are not made in sweat shops, is that commercial speech? If a company "product evangelist" posts comments on various blogs that her company's latest product outperforms the competitions' products in specific ways, is that commercial speech? Should the regulated marketplace of products or of services, rather than the unregulated marketplace of ideas, be the arbiter of the truth of these blog comments? If these example comments are considered commercial speech, then the companies can be subject to scrutiny under laws relating to false advertising or deceptive trade practices, as well as other potential government regulations.[51] In the cultural environment of the blogosphere that thrives on unbridled and honest commentary, in which companies seek to communicate with the public as much as, or more than, to promote a product or service, the distinction between commercial and noncommercial speech may be quite difficult to identify.

Evolution of the Commercial Speech Doctrine

Whether, and to what extent, commercial speech should be constitutionally protected has challenged the Supreme Court for the past thirty years. Indeed, how to classify speech as commercial is still subject to debate. Justice Blackmun explained the policy issues underlying the protection of commercial speech:

> If commercial speech is to be distinguished, it "must be distinguished by its content." But a consideration of competing interests reinforced our view that such speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.[52]

But commercial speech is not entitled to the same level of protection as noncommercial speech. While government may not ban "the flow of truthful and legitimate commercial information,"[53] commercial speech nevertheless "[enjoys] a limited measure of protection…."[54] The extent of protection currently provided to commercial speech was summarized by the U.S. Supreme Court in *In re R.M.J.*:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.
>
> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.[55]

Prior to 1975, the U.S. Supreme Court generally upheld prohibitions against various types of advertising.[56] For example, in *Valentine v. Crestensen* the Court upheld a local ordinance prohibiting the distribution in the streets of "commercial and business advertising matter…."[57] The Court ruled:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its

> employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*[58]

The Court's ruling was initially interpreted as holding there was no constitutional protection at all for commercial speech.[59]

Valentine is perhaps one of the first cases involving a mix of commercial content and social commentary, as the respondent had attempted to avoid the distribution ban by including in his handbills, in addition to advertising his product, a protest of a decision by a local authority.[60] The court rejected the argument that the "protest" portion of the handbill removed the entire handbill from the context of commercial speech:

> [T]he stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion 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.[61]

In *Bigelow v. Virginia* the Supreme Court expressly stated that "speech is not stripped of First Amendment protection merely because it appears in [the] form[]" of paid commercial advertisements.[62] The Court held:

> The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," or because appellant was paid for printing it, or because appellant's motive or the motive of the advertiser may have involved financial gain. The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."[63]

As with the *Valentine* facts, the speech in *Bigelow* was not exclusively commercial (though the noncommercial speech in *Bigelow* was not apparently included merely as an attempt to avoid application of a prohibiting statute, as was the case in *Valentine*). "The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"[64] While the Supreme Court reversed the Virginia courts' holdings that advertising was entitled to no First Amendment protection, it declined to decide in *Bigelow* "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."[65]

With *Bigelow*, we see the beginnings of the struggle by the Court to define and classify commercial speech. In his dissent, Justice Rehnquist expressed concern that the majority was willing to elevate the level of constitutional protection for the advertisement in question because "it conveyed information of value to those interested in the 'subject matter or the law of another State and its development' and to those 'seeking reform in Virginia[]'…."[66] Justice Rehnquist considered the advertisement at issue as nothing more than a proposal to furnish services on a commercial basis, and

> since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws.[67]

Shortly after the *Bigelow* decision, the Supreme Court ruled in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* that a state prohibition against advertising the prices of prescription drugs violated both the First and Fourteenth Amendments to the U.S. Constitution.[68] In contrast to *Bigelow*, in which some speech beyond the purely commercial was involved, the *Virginia State Bd. of Pharmacy* Court agreed that "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us."[69]

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.[70]

The Court first summarized the state of protection, so far, for commercial types of speech:

> It is clear … that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is "sold" for profit [(e.g., books; motion pictures; religious literature)], and even though it may involve a solicitation to purchase or otherwise pay or contribute money.[71]

The fact that speech is commercial does not, alone, deprive it of constitutional protection. "If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject."[72] The Court concluded: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative."[73]

Perhaps anticipating future concerns over distinguishing commercial speech over other forms of speech, the *Virginia State Bd. of Pharmacy* Court apparently believed such a distinction should not be too difficult to make: "In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties."[74]

Justice Rehnquist, in his dissent to the *Virginia State Bd. of Pharmacy* decision, maintained his primary concerns about elevating commercial speech to First Amendment protection:

> The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. 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.'"[75]

While the U.S. Supreme Court declined in *Bigelow* to decide the extent to which commercial speech may be regulated, it directly addressed the issue in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*[76] Preliminarily, the Court noted the importance of commercial speech: "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[77] In particular,

> [t]he First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity….[78]

However, "[i]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest."[79]

On this basis the *Central Hudson* Court enunciated a four-step analysis to determine the scope of proper regulation of commercial speech:

> In commercial speech cases …, we must [1] determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[80]

This *Central Hudson* test established an intermediate standard of review for lawful, non-misleading commercial speech.[81] In addition, the government bears the burden of identifying the substantial interest and justifying the challenged restriction.[82] Although, as acknowledged by Justice Stevens, the "four parts of the *Central Hudson* test are not entirely discrete[,]…"[83] one aspect of the test is clear: there need only be a reasonable fit between the government interest and the regulation imposed to accomplish that regulation—while the government is not required to employ the least restrictive means conceivable, it must at least demonstrate narrow tailoring of the challenged regulation to the asserted interest.[84] However, as Justice Blackmun has pointed out, the regulation can be more extensive than is necessary, so long as it is not unreasonably so.[85] Indeed, Justice Blackmun questions the justification for treating "truthful commercial speech as a class that is less 'valuable' than noncommercial speech."[86]

Justice Rehnquist expressed a stronger concern; that the four-step analysis "adopted by the Court … elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech."[87] Indeed, Justice Rehnquist expressed the view that "the Court unlocked a Pandora's Box when it 'elevated' commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board.*"[88] Justice Rehnquist rejected the theory that the free flow of information in the "marketplace of ideas" applies in a business context:

> For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and

representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

> The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "*caveat emptor*."[89]

The U.S. Supreme Court restated the foundation for the *Central Hudson* test in *In re R.M.J.*[90] While misleading advertising may be prohibited entirely,

> [e]ven when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.[91]

Regulation of commercial speech is a content-based restriction because it is the content of the speech which determines whether or not it is commercial in nature. This is not problematic according to the U.S. Supreme Court's decision in *Bolger v. Youngs Drug Promotion Corp.*:

> [A]s a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. [For example, libel, obscenity, or fighting words.] By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible.[92]

A content-based restriction requires, however, a classification scheme that can properly identify the actual speech that may be restricted.

Classifying Speech as Commercial

The *Central Hudson* test applies only to commercial speech. Therefore, a threshold determination must be made as to whether the speech in question is commercial or noncommercial. Most of the U.S. Supreme Court cases analyzing the extent to which commercial speech is entitled to constitutional protection have assumed the speech in question is commercial in nature. Although the Court has generally described what it considers to be commercial speech, it has yet to definitively define commercial speech—and it is questionable as to whether commercial speech can be fully defined for all situations.

While the core description of commercial speech as speech that does no more than propose a commercial transaction describes most advertising, it does not encompass all types of speech by business concerns. Although, as noted above, advertisers have (unsuccessfully) tried to skirt the commercial speech classification by adding some form of noncommercial speech to their advertisements,[93] the Court has recognized that the content of some commercial speech is not always entirely commercial.[94] But when statements by a business entity contain more than "I will sell you X product at Y price,"[95] there is no clear classification scheme to determine whether those statements are commercial speech, and therefore afforded a lower level of constitutional protection.

For example, the *Central Hudson* Court first described commercial speech as "expression related *solely* to the economic interests of the speaker and its audience."[96] Yet the Court then recognized 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."[97] Finally, the Court implied a hesitancy to regulate commercial speech: "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[98] Despite these varying approaches to commercial speech, the Court still endorsed the "'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[99]

In his concurrence, Justice Brennan expressed concern that he was unable to determine whether a ban on all "promotional" advertising, in contrast to "institutional and informational" advertising, encompassed more than commercial speech, but he was inclined to agree with the Court's decision that the state ban in question "prohibits more than mere proposals to engage in certain kinds of commercial transactions," and therefore agreed with the conclusion that the ban violated the First and Fourteenth Amendments.[100] And in his concurrence, Justice Stevens warned that "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed."[101] Justice Stevens considered the Court's initial definition of commercial speech (as expression related solely to the economic interests of the speaker and its audience) as too broad: "the economic motivation of a speaker [should not] qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."[102] And Justice Stevens considered the Court's second definition of commercial speech (as speech proposing a commercial transaction) as too narrow:

> A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended

> to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising."[103]

The Court did directly address whether or not the speech in question should be characterized as commercial in *Bolger v. Youngs Drug Products Corp.*, in which the appellee, manufacturer of Trojan condoms, sought to send three types of mass mailings (which the Postal Service deemed to be in violation of federal law): (1) flyers promoting a large variety of products available at a drug store, including prophylactics; (2) flyers exclusively or substantially devoted to promoting prophylactics; and (3) informational pamphlets discussing the desirability and availability of prophylactics in general or the appellee's products in particular.[104] Although the court concluded that most of the appellee's mailings fell within the core notion of commercial speech (i.e., speech which does no more than propose a commercial transaction), it believed that the informational pamphlets could not be characterized merely as proposals to engage in commercial transactions.[105]

The Court first noted elements contained within the pamphlets which do not automatically compel a classification of commercial speech:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that [appellee] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.[106]

The Court concluded, however, that "[t]he combination of *all* these characteristics … provides strong support for the … conclusion that the informational pamphlets are properly characterized as commercial speech."[107]

> A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.[108]

Justice Stevens took some issue with this conclusion:

> Even if it may not intend to do so, the Court's opinion creates the impression that "commercial speech" is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted. Moreover, as I have previously suggested, we must be wary of unnecessary insistence on rigid classifications, lest speech entitled to "constitutional protection be inadvertently suppressed."[109]

Justice Stevens recognized that "advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation; conversely, the commercial element does not necessarily provide a valid basis for noncommercial censorship."[110] Justice Stevens viewed the pamphlet the Court considered to be commercial speech as a prime example of the difficulty of classifying commercial speech:

> On the one hand, the pamphlet includes statements that implicitly extol the quality of the appellee's products. A law that protects the public from suffering commercial harm as a result of such statements would appropriately be evaluated as a regulation of commercial speech. On the other hand, most of the pamphlet is devoted to a discussion of the symptoms, significant risks, and possibility of treatment for venereal disease. That discussion does not appear to endanger any commercial interest whatsoever; it serves only to inform the public about a medical issue of regrettably great significance.[111]

Justice Stevens suggested, as an alternative, rather than focus on the content of the speech, focus on the nature of the challenged regulation:

> Because significant speech so often comprises both commercial and noncommercial elements, it may be more fruitful to focus on the nature of the challenged regulation rather than the proper label for the communication. The statute at issue in this case prohibits the mailing of "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception." Any legitimate interests the statute may serve are unrelated to the prevention of harm to participants in commercial exchanges. Thus, because it restricts speech by the appellee that has a significant noncommercial component, I have scrutinized this statute in the same manner as I would scrutinize a prohibition on unsolicited mailings by an organization with absolutely no commercial interest in the subject.[112]

The "intertwining" of commercial and noncommercial speech has continued to be a source of contention before the U.S. Supreme Court. In *Riley v. Nat'l Fed'n of the Blind*, the Court stated that it did "not believe that … speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[113] However, the Court later clarified its *Riley* statement in *Bd. of Trustees of the State Univ. v. Fox*, in which students sued because the university prohibited their hosting "Tupperware parties" in their dorm rooms. Acknowledging that the parties were held to "propose a commercial transaction," the students nonetheless argued they were not a form of commercial speech because the parties also

contained educational elements of how to be financially responsible and how to run an efficient home.[114] Relying on *Riley*, the students argued that "here pure speech and commercial speech are 'inextricably intertwined,' and that the entirety must therefore be classified as noncommercial."[115] The Court disagreed. It distinguished *Riley* on the basis that "the commercial speech (if it was that) was 'inextricably intertwined' because the state law *required* it to be included. By contrast, there is nothing whatever 'inextricable' about the noncommercial aspects of these presentations."[116]

> Including these home economics elements no more converted [the Tupperware parties] into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger*, communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues…. We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[117]

On the one hand, the Court has expressed the belief that there can be some element of noncommercial speech by a business, yet its only example to date has been where the commercial aspect of the speech was compelled by state law.[118] There has not been a clear example from the Court of a for-profit business entity engaged in non-commercial speech.[119] Even if it were to exist, can it be identified? Justice Stevens recently expressed his concern that the "borders of the commercial speech category are not nearly as clear as the Court has assumed…."[120] In the context of the speech at issue (whether the Federal Alcohol Administration Act could constitutionally prohibit beer labels from displaying alcohol content), Justice Stevens explained his concern:

> The case before us aptly demonstrates the artificiality of a rigid commercial/noncommercial distinction. The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein. This, the majority finds, is "commercial speech." The majority does not explain why the words "4.73% alcohol by volume" are commercial. Presumably, if a nonprofit consumer protection group were to publish the identical statement, "Coors beer has 4.73% alcohol by volume," on the cover of a magazine, the Court would not label the speech "commercial." It thus appears, from the facts of this case, that whether or not speech is "commercial" has no necessary relationship to its content. If the Coors label is commercial speech, then, I suppose it must be because (as in *Central Hudson*) the motivation of the speaker is to sell a product, or because the speech tends to induce consumers to buy a product. Yet, economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged. Neither can the value of speech be diminished solely because of its placement on the label of a product. Surely a piece of newsworthy information on the cover of a magazine, or a book review on the back of a book's dust jacket, is entitled to full constitutional protection.[121]

According to Justice Stevens, "[a]s a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead."[122]

The U.S. Supreme Court recently had the opportunity to again directly address the classification of commercial speech in the case of *Kasky v. Nike, Inc.*[123] In *Kasky*, Nike, Inc. had engaged in a public relations campaign to counter growing criticism of the working conditions of overseas workers who produced Nike's goods (namely, that the working conditions amounted to sweatshops), by placing ads in newspapers and sending letters to athletic directors at major universities. Kasky, a private California citizen, sued Nike under California's unfair competition (UCL) and false advertising laws.[124] California's unfair competition law also contains a "public prosecutor" provision, allowing any person acting for the interests of the general public to bring an action for relief under the act.[125] "[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived."[126]

Nike successfully moved to have Kasky's claims dismissed on the basis that Nike's statements were not commercial speech; therefore they were fully protected under the U.S. and California constitutions and not subject to the state's unfair competition and false advertising laws. The California superior court agreed, dismissing Kasky's complaint without leave to amend, and the California Court of Appeal affirmed.[127] The California Supreme Court accepted Kasky's petition for review to address precisely whether Nike's statements—not directly relating to its products, their quality, availability, or prices, but dealing with Nike's overseas manufacturing practices—constituted commercial speech.

Noting that the U.S. Supreme Court "has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment," the California Supreme Court declined to do likewise.[128] The California Supreme Court did, however, fashion a limited-purpose test (as to whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception) that evaluates three elements: the speaker, the intended audience, and the content of the message.[129] More specifically, where there is a commercial speaker, an intended commercial audience, and commercial content in the message, the speech is commercial. The California Supreme Court held that Nike's statements constituted commercial speech because: (1) Nike, since it is engaged in commerce, is a commercial speaker; (2) Nike's statements were addressed directly to actual and potential purchaser's of its products (a commercial

audience); and (3) Nike's representations of fact were of a commercial nature since it described its own labor policies, and the practices and working conditions in factories where its products are made.[130]

The California Supreme Court did recognize that Nike's commercial speech was intermingled with what would otherwise be constitutionally protected noncommercial speech (a public discussion of globalization and varying working conditions around the world). Citing *Bolger*, however, the California Supreme Court held that Nike could not immunize itself simply by including references to public issues—particularly where the alleged false and misleading statements all related to the commercial portions of the speech in question.[131] Likewise, the California Supreme Court rejected the argument that the commercial elements in Nike's statements were "inextricably intertwined" with the noncommercial social commentary. Citing *Bd. of Trustees of the State Univ.*, the California Supreme Court noted that "[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization…."[132]

Although the U.S. Supreme Court initially granted the writ of *certiorari* for *Kasky*, it subsequently dismissed the writ as improvidently granted.[133] The case was subsequently settled by the parties.[134] As a result, an opportunity was missed to address two critical issues related to commercial speech: (1) are statements made by a commercial enterprise which do not directly promote a product or service, but instead comment on social issues and general business practices, commercial speech; and (2) if they are commercial speech, would these statements, which contain no direct product promotion, be subject to California's unfair competition and false advertising laws after application of the *Central Hudson* test?

Commercial Speech, Blogs, and a Modified Analytical Framework

As discussed above, blogs are a participatory medium. The blogosphere is regarded as a culture of open dialogue—anything and everything is considered to be open for discussion. Within this atmosphere of dialogue, business blogs represent what may potentially be a significant growth in more subtle forms of promotion. With few exceptions, the U.S. Supreme Court dealt with commercial speech in the form of traditional advertising (I offer to sell you product X for price Y). In fact, the Supreme Court believed (and still believes) there is a "commonsense distinction between speech proposing a commercial transaction" and other forms of speech.[135] But as *Kasky* illustrated, and the California Supreme Court and at least one U.S. Supreme Court Justice has noted, the demarcation between commercial and noncommercial speech is not always clear. Indeed, one fears that we are approaching the dilemma faced by Justice Stewart regarding obscene material: I may not be able to define it, but I know it when I see it.[136]

Today's business professionals take a much broader view of marketing than simply advertising the availability or characteristics of a product or service and its price. "Today there is a movement toward viewing communications as the *management of the customer buying process over time*, during the preselling, selling, consuming, and postconsuming stages."[137] Public relations, promoting a company's image, is recognized as just one element in the mix of marketing communications companies should utilize. While "advertising" is designed to be repetitive, persuasive, and focused on specific products or services,[138] public relations generally have a higher level of credibility, as the message generally gets through to potential customers as "news" rather than as "advertisements."[139]

The next iteration moving away from "traditional" advertising is word-of-mouth marketing. Recommendations by a friend or social contact are generally considered more influential than advertisements. "Many companies are becoming acutely aware of the power of the 'talk factor' or 'word-of-mouth' coming from expert and social channels in generating new business. They are seeking ways to stimulate these channels to provide recommendations for their products and services."[140] And the next iteration yet is viral marketing. For example, on blogs and other web sites, individuals post messages recommending or commenting on a company or its products or services. Of course, readers of the messages may not necessarily know whether the author of the messages works for the talked-about company, or, indeed, if the company actually sponsors the blog where the comments are posted.[141] Finally, some of the comments posted by a business on its own blog may contain more social commentary than product information—recall that the stated purpose of GM's FastLane blog includes "musings" by GM leaders on the auto industry and the global economy, in addition to topics relevant to the company.[142]

Consider the following scenarios:[143]

1. An individual hired by Wal-Mart to monitor blog postings related to Wal-Mart's business, in response to blog postings accusing Wal-Mart of paying its employees low wages and not providing sufficient health benefits, posts statistics indicating average Wal-Mart employee wages and the percentage of employees with health benefits are much higher than generally reported in the press.

2. An apparel manufacturers' association posts on its own blog messages endorsing the U.S. government imposing import quotas and tariffs on Chinese apparel, on the basis that such quotas and tariffs will preserve American jobs.

3. On its FastLane blog, GM Vice-Chairman Bob Lutz posts a message stating that based upon his analysis there are adequate oil supplies to last well into this century and that the current gasoline prices are the result of a temporary spike in oil prices.

These three scenarios all have the following characteristics: (1) they are authored by a business (through an agent); (2) although none of them mention any specific product or service, they all ultimately promote the business of the business;

and (3) they address an issue of public interest (i.e., contain social commentary). Although none of these messages promote a commercial transaction, it can easily be argued they all relate to the economic interest of the speaker and the audience and therefore constitute commercial speech. In the first scenario, Wal-Mart is attempting to counteract negative publicity about its operations. By presenting itself in a positive light it is less likely to lose customers who might otherwise be inclined to avoid Wal-Mart in response to perceived bad business practices (see *Kasky* above). In the second scenario, preserving American jobs means the manufacturers are selling their products at the same or higher levels as a result of the proposed quotas and tariffs.[144] In the third scenario, General Motors' profit margins and market position are currently dependent on SUV's, which use more gasoline than smaller, lighter vehicles. If potential customers believe gasoline prices may decline soon, they may be more inclined to buy an SUV.[145]

Despite the lack of a direct product or service promotion in the above three scenarios and despite the fact the messages constitute social commentary, they are all arguably subject to only limited constitutional protection. Arguable, but not certain. That constitutional protection rests first on the notion that commercial speech can never be false or misleading. If so, it is unprotected speech and directly within the purview of deceptive trade practices and false advertising regulations. But even if the statements are true and not misleading, they are still *potentially* subject to government regulation under an intermediate scrutiny test.

Under the current commercial speech doctrine, individuals who may criticize a business' products or services or business practices, enjoy a much higher level speech protection than the businesses they discuss. With the growth of blogs, customers, and non-customers alike, have an ever expanding universe, both in size and influence, in which to publish their messages—and with near immunity. As the U.S. Supreme Court stated in *Gertz v. Welch*, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[146] And while false statements of fact do not deserve constitutional protection, the Supreme Court recognizes they are nevertheless inevitable in free debate.[147] "The First Amendment requires that we protect some falsehood in order to protect speech that matters."[148]

Within this context businesses are joining the debate in the blogosphere. Much the same as Nike defended itself against sweatshop charges in letters and paid advertisements, businesses are dialoguing with the public (who may or may not be customers of those businesses) on issues that range beyond just products and services. Under the current commercial speech doctrine, blog postings by businesses either are or are not commercial speech—i.e., the messages are either fully protected by the first amendment or they are subject to regulation. Yet, there is no clear classification scheme that effectively delineates commercial speech from noncommercial speech. In effect, anytime a business communicates through a blog it is at risk of being sued on the basis that the public is likely to be deceived.[149] This has the potential to chill speech by businesses and limit their ability to communicate with their customers using a technology which is rapidly becoming an influential medium.[150]

As discussed above, the U.S. Supreme Court has had difficulty fashioning a clear distinction between commercial and noncommercial speech. Although the analytical approach in *Central Hudson* has been criticized,[151] it is still the Court's preferred analytical framework.[152] In the proposed modified analytical framework discussed below the *Central Hudson* test remains primarily intact. Although the modified analytical framework ultimately looks at the content of the speech in question to determine its level of constitutional protection, it eliminates the need to use the contents of the message to determine whether or not it is commercial speech.

Businesses exist for one purpose—to sell their product or service.[153] Any message a business distributes contains an element of commercial speech—it will always ultimately relate to the sale of the product(s) it produces or the service(s) it offers. Even Nike acknowledges this fact: "Nor was Nike's own motivation for speaking 'solely' economic—except in the sense that virtually everything a company does is ultimately intended to improve its financial bottom line."[154] This also includes charitable giving and volunteer work for a non-profit business, for it ultimately presents the image of the company in a favorable light, which arguably promotes its underlying business.[155]

The most effective approach is to stop trying to categorize statements by business as either commercial or noncommercial speech. Initially, focus on the context. If the speech originates from a business entity, for whatever purpose, it should be classified as commercial speech. The content of the commercial speech, though, can easily be separated into three distinct categories:

1. "Traditional Advertising"—directly promoting specific goods and/or services of the business.

2. "Public Relations"—promoting the image of the business and/or indirectly promoting goods and/or services of the business.

3. "Social Commentary"—speaking out on issues of public interest that, at most, only indirectly involve practices or operations of the business.

Statements made by businesses may include any one of these categories, as well as include any combination of some or all of them. The content of the commercial speech can then be used to determine the level of constitutional protection:

		Statements Alleged to be False or Misleading	Statements Not False or Misleading
Level of Protection/Scrutiny	**Strict Scrutiny**		**Social Commentary Only**
	Actual Malice Standard	**Social Commentary Only**	
	Intermediate Scrutiny		**Traditional Advertising and/or Public Relations**
	None	**Traditional Advertising and/or Public Relations**	

On a sliding scale, commercial speech moves from predominantly fact-based ("traditional advertising"; category 1-type speech) to predominately opinion-based ("social commentary"; category 3-type speech), with "public relations" (category 2-type speech) in the middle with a mixture of fact-based and opinion-based speech. Within this modified analytical framework, social commentary is effectively removed from the *Central Hudson* test. Traditional advertising and public relations remain within the *Central Hudson* test because of their higher level of fact-based speech—precisely the type of information the business is more likely, and expected, to know and have (potentially exclusive) access to. Since a business has a higher level of control over these first two types of information it should not be protected if that information is false or misleading. Likewise, government may have a substantial interest in regulating this type of promotional information.[156] Therefore, false and misleading statements of fact, whether contained in traditional advertising, public relations, or a combination of both, continue to receive no protection. Traditional advertising, public relations, or a combination of both, which is not false or misleading continues to be subject to regulations evaluated under the standard of intermediate scrutiny.

However, business statements which contain exclusively social commentary are removed from the *Central Hudson* test and are subject to liability under an actual malice standard or regulation under a standard of strict scrutiny. In other words, a business could not be liable for making false or deceptive social commentary statements unless the business knew the content was false or made the statement with reckless disregard for the truth.[157] This allows a business the privilege of engaging in debates involving issues of public interest without concern for whether its comments will be continually scrutinized as potentially misleading. Businesses will enjoy essentially the same protection as individuals for submitting "false ideas" relative to public issues. Similarly, businesses will enjoy a similar level of free speech protection if their commercial social commentary is subject to other government regulation only if the government has a compelling, rather than a substantial, interest and the regulation is narrowly tailored to serve that interest.[158]

Although Chief Justice Rehnquist is opposed to granting First Amendment protection to merchants "selling pots,"[159] the reality is that businesses do engage in speech that doesn't always directly relate to selling their goods and services. The U.S. Supreme Court has recognized that businesses may engage in noncommercial speech which would be fully protected under the First Amendment.[160] However, the Court has not provided a clear example what that type of speech might look like, though in a case potentially dealing with just that type of business speech, i.e., *Kasky*, the California Supreme Court classified it as commercial speech and the U.S. Supreme Court declined to review that holding. The modified approach presented in this paper addresses Justice Stevens' concern that misclassification of the speech in question as commercial could inadvertently suppress constitutionally protected speech.[161] Rather than focus on an artificial classification scheme, the modified analytical framework focuses on the content of the speech—moving away from a context-based doctrine to a content-based analysis.

Conclusion

Although commercial speech is afforded First Amendment protection, it is a limited amount of protection. This doctrine is based on the notion that advertisements to sell products and services, while of some social significance, are not worthy of the full protections granted to other varieties of speech. Modern business practices, as well as technology, are opening avenues of discussion by businesses beyond just encouraging customers to "buy shampoo." But there is no clear delineation of what is or is not commercial speech, so that if a business elects to engage in a debate on important social issues, it has no way to know the level of constitutional protection that speech will receive. This issue is becoming especially important as businesses join the blogosphere, an environment of open debate and dialogue. This paper has suggested modifying the current analytical approach to classifying commercial speech and determining the extent to which it may be

regulated. Accepting that all speech by businesses is commercial shifts the focus from a context-based classification scheme to a content-based analytical framework—allowing the opportunity for businesses to engage in social commentary confident that its speech is accorded full constitutional protection.

Appendix

This Appendix contains a (chronological) summary listing of the major U.S. Supreme Court cases (plus two additional non-Supreme Court cases at the end) addressing commercial speech. A brief synopsis of the significant commercial speech-related holding of each case is provided, as well as a summary of the Court's approach to defining or describing commercial speech.

Case	Synopsis	Commercial Speech Definition
Thornhill v. Alabama, 310 U.S. 88 (1940)	Struck down Alabama statute prohibiting picketing at business establishments.	"Commercial speech" not directly addressed. Case has later been used to support argument that speech about issues of public importance or controversy must be considered noncommercial speech (*see*, e.g., *Kasky v. Nike, Inc.*, *supra*).
Valentine v. Chrestensen, 316 U.S. 52 (1942)	Upheld New York statute prohibiting ban on distribution of handbills.	No First Amendment protection for commercial advertising. Adding statement protesting government action did not remove handbills from "commercial advertising" status.
Breard v. Alexandria, 341 U.S. 622 (1951)	Upheld Alexandria, LA city ordinance prohibiting door-to-door soliciting.	"We think those communities that have found [door-to-door solicitations] obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	Freedom of expression on issues of public concern related to public officials are protected by the First Amendment. Libel actions brought by public officials subject to actual malice standard.	Fact that statements were made through a paid advertisement does not diminish First Amendment protection (distinguishing between "commercial" vs. "editorial" advertisements).
Bigelow v. Virginia, 421 U.S. 809 (1975)	Struck down Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. Specifically rejected notion that advertising is entitled to no First Amendment protection. Advertising may be subject to reasonable regulation, however; Court did not decide extent of permissible regulation.	Advertisement in question did more than simply propose a commercial transaction, it also contained factual material of a clear public interest. But it was commercial speech nonetheless.
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	Struck down Virginia statute declaring it unprofessional conduct to advertise the price of pharmaceuticals. Commercial motive of speaker does not disqualify him from First Amendment protection. States may not completely suppress dissemination of truthful information about entirely lawful activity.	Advertisements in question were definitely "commercial speech." They contained no editorializing. They simply offered to sell X prescription drug at Y price. Advertisement did "no more than propose a commercial transaction."
Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977)	Struck down township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs.	Real estate "For Sale" and "Sold" signs presumed to be a form of commercial speech.

Case	Synopsis	Commercial Speech Definition
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	Attorney's advertisement was not misleading and fell within the scope of First Amendment protection. Ruling limited to advertisements of routine services and prices; acknowledged state may have an overriding concern regarding advertisement of quality.	Attorney advertisements of routine services available and at what prices presumed to be a form of commercial speech.
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	Upheld attorney's suspension by state bar association based on personal solicitation of accident victims by attorney. Commercial and noncommercial speech do not require an equal level of protection under the First Amendment. "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."	In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component.
In re Primus, 436 U.S. 412 (1978)	Reversed disciplinary action against non-profit organization and attorney for solicitation of prospective litigants where litigation was a form of political expression and association.	Speech not specifically classified as commercial vs. noncommercial. Solicitations for litigants motivated by political activism, not pecuniary gain.
Friedman v. Rogers, 440 U.S. 1 (1979)	Upheld Texas statute prohibiting the practice of optometry under a trade name. Use of trade names may be regulated since there is a significant possibility they will be used to mislead the public (there are ill-defined associations of trade names with price and quality information that can be manipulated by the users of trade names).	A trade name can be used as part of a proposal of a commercial transaction. ("Once a trade name has been in use for some time, it may serve to identify an optometrical practice and also to convey information about the type, price, and quality of services offered for sale in that practice.") "The use of trade names in connection with optometrical practice is a form of commercial speech and nothing more."
Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)	Struck down New York state regulation banning promotional advertising by public utilities. Developed four-part test to determine validity of regulations of commercial speech.	Described commercial speech as expression related solely to the economic interests of the speaker and its audience.
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981)	Struck down San Diego, CA city ordinance prohibiting commercial billboards while permitting noncommercial billboards.	Court never addressed what might constitute a commercial billboard vs. a noncommercial billboard.
In re R.M.J., 455 U.S. 191 (1982)	Struck down Missouri attorney practice rule prohibiting deviation from a precise list of categories of information allowed in attorney advertisements. States may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive.	Mailed announcement cards and paid advertisements were considered, without discussion, commercial speech.
Hoffman Estates v. Flipside, 455 U.S. 489 (1982)	Upheld city ordinance prohibiting the sale of drug-related paraphernalia without a license.	Scope of the ordinance did not embrace noncommercial speech, rather it regulated the commercial marketing of items that the labels reveal may be used for an illicit purpose. Insofar as any commercial speech interest is implicated, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires.

Case	Synopsis	Commercial Speech Definition
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	Struck down federal statute prohibiting the mailing of unsolicited ads for contraceptives. Where a speaker desires to convey truthful information relevant to important social issues the First Amendment interest served by such speech is paramount. Government's interest in prohibiting this particular speech was not so substantial to justify its complete ban.	Although individual aspects of contested pamphlets (conceded to be advertisements, referred to a specific product, and sender had an economic motivation), by themselves, did not constitute commercial speech, taken together the pamphlets were commercial speech.
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	Reversed Ohio attorney's discipline action insofar as it related to soliciting certain types of clients.	Advertisements by an attorney of his services as an attorney are commercial speech, even though they contain statements regarding the legal rights of persons that, in another context, would be fully protected speech.
Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)	Upheld Puerto Rico statute restricting advertising of casino gambling aimed at the residents of Puerto Rico, concluding the statute and regulations at issue pass muster under each prong of the *Central Hudson* test.	Advertisements in question represented pure commercial speech which does no more than propose a commercial transaction.
Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)	Struck down Kentucky attorney practice rule prohibiting the mailing or delivery of written advertisements precipitated by a specific event involving the addressee, as distinct from the general public. Merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech.	Lawyer advertising is in the category of constitutionally protected commercial speech.
Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)	Struck down North Carolina statutes regulating the solicitation of charitable contributions that required, in part, that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity.	It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," it is not necessarily true that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.
Bd. of Trustees of the State Univ. v. Fox, 492 U.S. 469 (1989)	Remanded case involving university regulations prohibiting certain commercial activities on school property. Rejected "least-restrictive-means" standard for fourth prong of *Central Hudson* test; instead adopted standard of reasonable fit between the regulation's ends and the means chosen to accomplish those ends.	"Tupperware parties" propose a commercial transaction and are therefore commercial speech, despite added content during parties such as financial responsibility and how to run an efficient home. Commercial and noncommercial speech are not "inextricably intertwined" (as in *Riley, supra*). ("No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.")
Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)	Struck down Illinois attorney practice rule prohibiting attorney from holding himself out as a specialist other than in selected fields.	Case determined on basis that attorney's letterhead constituted commercial speech.

Case	Synopsis	Commercial Speech Definition
Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)	Struck down Cincinnati, OH ordinance banning newsracks containing commercial handbills, while permitting newsracks containing newspapers. "Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests [(esthetics)] that the city has asserted."	Handbills conceded to constitute commercial speech, but Court noted the "absence of a categorical definition," both in the city's ordinance as well as the Court's decisions, of the difference between newspapers and commercial handbills.
Edenfield v. Fane, 507 U.S. 761 (1993)	Struck down Florida state ban on direct, in–person, uninvited solicitation by CPA to perform public accounting services. Florida Board of Accountancy failed to demonstrate that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way.	"[I]t is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply."
Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994)	Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. Reference to valid certifications held by attorney not false or misleading.	Use by attorney/certified public accountant/certified financial planner of CPA and CFA designations in letterhead and advertisements constituted commercial speech.
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)	Struck down federal statute prohibiting beer labels from displaying alcohol content. Statute failed to meet *Central Hudson* test in that it did not directly advance the asserted government interest and it was more extensive than necessary.	Conceded that information on beer labels (such as alcohol content) constitutes commercial speech.
Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)	Upheld Florida attorney practice rule prohibiting direct solicitations of personal injury victims by lawyers in the period 30 days following their injuries. Florida rule met *Central Hudson* test, particularly in that rule was a reasonable fit between the ends sought and the means to accomplish the ends.	Lawyer advertising is commercial speech.
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).	Struck down Rhode Island statutes prohibiting price advertising for alcoholic beverages. When a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands; this type of commercial speech regulation will be reviewed more carefully.	Price advertising for alcoholic beverages is commercial speech.

Case	Synopsis	Commercial Speech Definition
Greater New Orleans Broad. Ass'n, Inc. v. U.S., 527 U.S. 173 (1999)	Struck down federal statute prohibiting gambling advertising in states where gambling was legal. Fourth element of *Central Hudson* test does not require that the speech restriction is not more extensive than necessary to serve the interests that support it, but the government must demonstrate narrow tailoring of the challenged regulation to the asserted interest.	Advertisements for legal gambling is commercial speech.
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	State regulations restricting sale, promotion, and labeling of tobacco products upheld in part and struck down in part. Reaffirmed *Central Hudson* test.	Tobacco products advertising is commercial speech.
Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002)	Struck down federal statute requiring prescriptions for compounded drugs be unsolicited and prohibiting the advertisement of compounded drugs. Reaffirmed *Central Hudson* test.	Advertising and soliciting of compounded drugs constitute commercial speech.
Nat'l Comm'n on Egg Nutrition v. F.T.C., 570 F.2d 157 (1977)	Enforced FTC order prohibiting false and misleading advertising by egg industry trade association concerning the relationship between cholesterol, eggs, and heart disease. The nature of the communication is not changed when a group of sellers joins in advertising their common product.	Argument rejected that advertisements were not commercial speech because they did not propose a commercial transaction but rather were expressions of opinion on an important and controversial public issue. Court ruled that statements, rather than being expressed as opinion, categorically and falsely denied the existence of evidence that in fact exists and were made for the purpose of persuading the people who read them to buy eggs. Court considered scope of the Supreme Court's expressions on the subject of commercial speech were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but to extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product.
Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002)	California Supreme Court held that statements made by apparel manufacturer regarding labor policies, practices, and conditions where its apparel was manufactured constituted commercial speech and was therefore subject to state's unfair competition and false advertising laws. Manufacturer was engaged in commercial speech because, in making the statements in question, it was acting as a commercial speaker, its intended audience was primarily the buyers of its products, and the statements consisted of factual representations about its own business operations.	Court developed three-prong test to determine whether speech is commercial: (1) a commercial speaker; (2) an intended commercial audience; and (3) representations of fact of a commercial nature.

Footnotes

* Assistant Professor, University of Wyoming, Laramie, WY. The author thanks Michael Thatcher, J.D., University of Wyoming, 2006, for his excellent assistance in performing research for this paper and for assisting with developing the analytical framework discussed within.

[1] *See* Dave Winer, *The History of Weblogs*, WEBLOGS.COM, *at* http://newhome.weblogs.com/historyOfWeblogs (May 17, 2002).

[2] *See Timeline of Early Blogs*, BLOCKSTAR.COM, *at* http://www.blockstar.com/blog/blog_timeline.html (last visited May 10, 2005).

[3] Scott Rosenberg, *Fear of Links*, SALON.COM, *at* http://www.salon.com/tech/col/rose/1999/05/28/weblogs (May 28, 1999). *See* http://riverbendblog.blogspot.com for an example of a personal diary blog, authored by a young woman in Iraq.

[4] *See generally The HBR List: Breakthrough Ideas for 2005*, HARV. BUS. REV., February 2005, at 39. *See also* David Kirkpatrick & Daniel Roth, *Why There's No Escaping the Blog*, FORTUNE, *available at* http://www.fortune.com/fortune/technology/articles/0,15114,1011763,00.html (December 27, 2004).

[5] *See* Lee Rainie, *The State of Blogging*, Pew Internet & American Life Project, *at* http://www.pewinternet.org/PPF/r/144/report_display.asp (January 2005); Stephen Baker & Heather Green, *Blogs Will Change Your Business*, BUSINESSWEEK, May 2, 2005, at 57. *See also*, Carl Bialik, *Measuring the Impact of Blogs Requires More Than Counting*, WALL ST. J., May 26, 2005, *available at* http://www.wsj.com (noting that one source estimated the number of *active* blogs—those with a posting in the past 30 days—was 3.5 million in May 2005).

[6] Baker & Green, *supra*.

[7] Rainie, *supra* note 5. However, the majority of Internet users still do not know what a blog is. *Id*. "What's that?", Paris Hilton is reported to have responded when asked if she reads blogs. *See also* Bialik, *supra* note 5, noting "there are very few individual blogs that have a significant number of readers."

[8] *See, e.g.*, http://wingsandvodka.blogs.com.

[9] *See* Walter S. Mossberg, *A Guide to Using RSS, Which Helps You Scan Vast Array of Web Sites*, WALL ST. J., May 5, 2005, at B1.

[10] *See* http://360.yahoo.com; Cathleen Moore, *Google Unleashes Updated Blogger*, PC WORLD, *at* http://www.pcworld.com/news/article/0,aid,116086,00.asp (May 11, 2004); and http://spaces.msn.com.

[11] The influence of blogs is also growing in other countries. *See, e.g.*, Nicholas D. Kristof, *Death by a Thousand Blogs*, N.Y. TIMES, May 24, 2005, *available at* http://www.nytimes.com (discussing the growing influence of blogs in China).

[12] Rainie, *supra* note 5, reporting that approximately 10 million Americans read political blogs "frequently" or "sometimes" during the 2004 campaign.

[13] Brian Faler, *Parties to Allow Bloggers to Cover Conventions for First Time*, WASH. POST, *available at* http://www.washingtonpost.com/wp-dyn/articles/A29588-2004Jul5.html (July 6, 2004).

[14] *See A Blogging First at White House*, MSNBC NEWS, *at* http://www.msnbc.msn.com/id/7117260/ (March 8, 2005); *see also* http://www.mediabistro.com/fishbowldc (the blog of the blogger who received the press pass). In another sign of the growing influence of blogs, bloggers were partially credited with exposing another press credentialed "journalist," Jeff Gannon, as an employee of a conservative activist, also revealing that he had ties with an online male escort service. *See generally* Howard Kurtz, *Online Nude Photos Are Latest Chapter In Jeff Gannon Saga*, WASH. POST, *available at* http://www.washingtonpost.com/wp-dyn/articles/A27730-2005Feb15.html (February 16, 2005); *See also* Katherine Q. Seelye, *Resignation at CNN Shows the Growing Influence of Blogs*, N. Y. TIMES, *available at* http://www.nytimes.com (February 14, 2005).

[15] Kirkpatrick & Roth, *supra* note 4, noting that within a half hour of Dan Rather's "60 Minutes" broadcast in which memos were produced questioning President Bush's Texas National Guard service, "bloggers started questioning the authenticity of the memos." *See also* Seelye, *supra*.

[16] *See* Seelye, *supra* note 14. Eason Jordan, the chief news executive at CNN resigned after bloggers reported that Mr. Jordan had stated at the World Economic Forum in Davos, Switzerland in January 2005 that he believed the U.S. military had aimed at journalists and killed 12 of them. *Id*.

[17] Scott Smallwood, *Inside a Free-Speech Firestorm*, THE CHRONICLE OF HIGHER ED., *available at* http://chronicle.com/weekly/v51/i24/24a01001.htm (February 18, 2005). The infamous "little Eichmanns" essay which sparked the Churchill controversy, originally written shortly after September 11, 2001, was mentioned in opinion pieces published in the Hamilton College campus newspaper, where Professor Churchill was to speak in February 2005. A later Hamilton newspaper article was picked up by the *Syracuse Post-Standard*. The same morning the *Post-Standard* article was published, a link to the article was published on a "widely read conservative Weblog." As more and more blogs added links to the newspaper article, Professor Churchill's essay became a national controversy. *See id*.

[18] *See* Jeffrey Selingo, *Facing Down the E-Maelstrom*, THE CHRONICLE OF HIGHER ED., *available at* http://chronicle.com/weekly/v51/i34/34a02701.htm (April 29, 2005).

> It used to take days or weeks, if ever, for an incident simmering on a campus to ignite into a full-fledged controversy. But now, thanks to e-mail—and, more recently, blogs—news about even minor campus dust-ups is disseminated much more quickly, and well beyond the bounds of the college or local community.

Id. *See also* Smallwood, *supra*, noting that primarily as a result of blog postings, Hamilton College received some 8,000 e-mails regarding Professor Churchill (just prior to his later-cancelled speaking engagement at Hamilton).

[19] Rosenberg, *supra* note 3.

[20] Michael Gorman, *Revenge of the Blog People!*, LIBRARY J., *available at* http://www.libraryjournal.com (February 15, 2005).

[21] Seelye, *supra* note 14.

[22] From one perspective (not addressed in this paper), internal blogs provide an excellent means for employees to communicate with each other regarding projects.

[23] Kirkpatrick & Roth, *supra* note 4.

[24] *Id*.

[25] Baker & Green, *supra* note 5.

[26] *The HBR List*, *supra* note 4.

[27] *See* http://fastlane.gmblogs.com.

[28] http://fastlane.gmblogs.com/about.html.

[29] *See* http://scoble.weblogs.com.

[30] *See Chief Humanising Officer*, ECONOMIST, February 12, 2005. *See also* Kirkpatrick & Roth, *supra* note 4.

[31] Tom Zeller, Jr., *When the Blogger Blogs, Can the Employer Intervene?*, N. Y. TIMES, *available at* http://www.nytimes.com (April 18, 2005). However, Microsoft reportedly dismissed a contractor after the worker posted on his personal blog pictures of Apple iPods (a rival product to Microsoft's portable music player) being delivered to a Microsoft loading dock. *See Blog-linked Firings Prompt Calls for Better Policies*, CNN.COM, *at* http://www.cnn.com (March 6, 2005). Microsoft based the dismissal on the fact that the contractor had described a building in his posting, violating security policy. *Id*.

[32] For an example of an apparent indirect sponsorship of a blog, *see* http://300c.blogspot.com, a blog devoted to the Chrysler 300c automobile, authored by Chrysler 300c "owner and enthusiast" Lee Odden. Mr. Odden is also the president of the public relations firm Misukanis & Odden. *See* http://www.misukanisodden.com/about.php.

[33] *See, e.g.*, Baker & Green, *supra* note 5.

> [Y]ou cannot afford to close your eyes to [blogs], because they're simply the most explosive outbreak in the information world since the Internet itself. And they're going to shake up just about every business—including yours. It doesn't matter whether you're shipping paper clips, pork bellies, or videos of Britney in a bikini, blogs are a phenomenon that you cannot ignore, postpone, or delegate. Given the changes barreling down upon us, blogs are not a business elective. They're a prerequisite.

Id. *See also* Brian Steinberg, *Corporate Marketers Try Out Blogs*, WALL ST. J., May 3, 2005, at B8 ("[C]ompanies are embarking on the delicate task of turning 'corporate blog' from an oxymoron into the latest channel for direct marketing to customers and prospects."). But the push for business blogs does have its detractors. "'The hype comes from unemployed or partially employed marketing professionals and people who never made it as journalists wanting to believe … there's going to be this new revolution and their lives are going to be changed.'" Tom Zeller, Jr., *A Blog Revolution? Get a Grip*, N. Y. TIMES, *available at* http://www.nytimes.com (May 8, 2005), *quoting*, Nick Denton, publisher of Gawker Media (which publishes a number of blogs).

[34] *The HBR List*, *supra* note 4.

[35] *See, e.g.*, Steinberg, *supra* note 33 ("Screen Savers" insert).

[36] Kirkpatrick & Roth, *supra* note 4.

[37] *Id*.

[38] *See*, Nate Mook, *MS Taps Bloggers to Promote Longhorn*, BETANEWS, *at* http://www.betanews.com/article/MS_Taps_Bloggers_to_Promote_Longhorn/1115049500 (May 2, 2005).

[39] *Id*.

[40] *The HBR List*, *supra* note 4.

[41] *See* FTC Policy Statement on Deception (Oct. 14, 1983) (emphasis added). *See also* 15 U.S.C. § 45 (2004) (making unlawful unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce). *See also, e.g.*, N.Y. GEN. BUS. LAW §§ 349 & 350 (McKinney 1988); TEX. BUS. & COM. CODE ANN. § 17.12 (West 1987); FLA. STAT. § 501.201, *et seq*. (2005) (which is to be construed liberally, Rubin v. MasterCard Int'l., 342 F.Supp.2d 217, 220 (N.Y.S.D. 2004)); *infra* notes 123-125 and accompanying text.

[42] *The HBR List*, *supra* note 4.

[43] *See, e.g.*, *supra* notes 12-14 and accompanying text.

[44] *See* Adam Cohen, *The Latest Rumbling in the Blogosphere: Questions About Ethics*, N.Y. TIMES, *available at* http://www.nytimes.com (May 8, 2005) ("Defenders of the status quo argue that ethics rules are not necessary in the

blogosphere because truth emerges through 'collaboration,' and that bias and conflicts of interest are rooted out by 'transparency.'").

[45] *See supra* notes 27 & 28 and accompanying text. The GM FastLane blog has adopted the following code of ethics:

1. We will tell the truth. We will acknowledge and correct any mistakes promptly.
2. We will not delete comments unless they are spam, off-topic, or defamatory.
3. We will reply to comments when appropriate as promptly as possible.
4. We will link to online references and original source materials directly[.]
5. We will disagree with other opinions respectfully.

Id., *citing* Charlene Li's blogger code of ethics (*at* http://forrester.typepad.com/charleneli/2004/11/blogging_policy.html).

[46] Abrams v. U.S., 250 U.S. 616, 630 (1919) (dissenting).

[47] GEOFFREY R. STONE, PERILOUS TIMES 8 (2004).

[48] *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[49] Bigelow v. Virginia, 421 U.S. 809, 826 (1975). *Bigelow* expressly rejected the interpretation of a previous Supreme Court case, Valentine v. Chrestensen, 316 U.S. 52 (1942), that commercial speech is afforded no constitutional protection. *Bigelow*, 421 U.S. at 819-20.

[50] *Bigelow*, *supra* at 826 (citations omitted).

[51] *See supra* note 41 and accompanying text.

[52] Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977) (citations omitted).

[53] Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85, 98 (1977).

[54] Bd. of Trustees of the State Univ. v. Fox, 492 U.S. 469, 477 (1989).

[55] 455 U.S. 191, 203 (1982) (citations and footnote omitted) (advertising for professional services).

[56] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495-500 (1996) for an overview of the evolution of the Supreme Court's commercial speech doctrine. *See also* Appendix at the end of this paper for a summary listing of the major U.S. Supreme Court commercial speech cases (plus two additional non-Supreme Court cases).

[57] *Supra* note 49 at 53.

[58] *Id*. at 54 (emphasis added).

[59] *See Bigelow*, *supra* note 49 at 819-20. *See also* Pittsburgh Press Co. v. Human Relations Comm'n, 415 U.S. 376 (1973) (advertising of illegal activities is not protected by the First Amendment); and Friedman v. Rogers, 440 U.S. 1 (1970) (professionals can neither advertise nor practice under trade names).

[60] The local ordinance specifically provided: "'This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.'" *Valentine*, *supra* note 49 at 53, n1.

[61] *Id*. at 55. The Supreme Court has also ruled that the opposite can be true—a political protest does not become commercial speech merely because it is in the form of a paid advertisement. *New York Times Co*, *supra* note 48 at 265-66 (1964). "The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id*., *citing* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[62] *Supra* note 49 at 818 (citations omitted).

[63] *Id*. (citations omitted).

[64] *Id*. at 822. The speech at issue in *Bigelow* was an advertisement by a New York City organization in a Virginia weekly newspaper announcing that it would arrange low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York (where abortions were legal and there were no residency requirements), for which the newspaper's editor was convicted of violating a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the processing of an abortion. *See id*. at 811-813.

[65] *Id*. at 825, though the Court did state that advertising "may be subject to reasonable regulation that serves a legitimate public interest." *Id*. at 826. "The First Amendment, of course, is applicable to the States through the Fourteenth Amendment." *Id*. at 811, *citing*, Schneider v. State, 308 U.S. 147, 160 (1939).

[66] *Bigelow*, *supra* note 49 at 830 (dissenting).

[67] *Id*. at 831.

[68] 425 U.S. 748 (1976).

[69] *Id*. at 760-61.

[70] *Id*. at 761.

[71] *Id*. (citations omitted).

[72] *Id*.

[73] *Id*. at 773 (footnote omitted). For the proposition that states may not prohibit advertisements of otherwise legal activities, *see, e.g.*, *Linmark Assoc., Inc.*, *supra* note 53 and *Bates*, *supra* note 52.

[74] *Supra* note 68 at 772, n.24.

[75] *Id*. at 787-88 (dissenting). Justice Rehnquist continued expressing his concerns over elevating advertisements to First Amendment protection in *Bates v. State Bar of Arizona*:

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

Supra note 52 at 404 (dissenting).

[76] 447 U.S. 557 (1980).

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

[78] *Id*. at 563-64 (citations and footnote omitted).

[79] *Id*. at 564.

[80] *Id*. at 566.

[81] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 767 (1993).

[82] *See*, Greater New Orleans Broad. Ass'n, Inc. v. U.S., 527 U.S. 173, 183 (1999).

[83] *Id*. at 183-84.

[84] *See id*. at 188.

[85] Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 434 (1993) (concurring).

[86] *Id*. at 431.

[87] *Central Hudson*, *supra* note 76 at 591 (dissenting).

[88] *Id*. at 598.

[89] *Id*.

[90] *Supra* note 55.

[91] *Id*. at 203 (citation and footnote omitted).

[92] 463 U.S. 60, 65 (1983) (citations and footnote omitted).

[93] *See, e.g.*, *supra* notes 60 & 61 and accompanying text.

[94] *See, e.g.*, *supra* note 64 and accompanying text.

[95] *See generally supra* note 70 and accompanying text.

[96] *Central Hudson*, *supra* note 76 at 561 (emphasis added).

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

[98] *Id*. at 562. The context of the Court's ruling may help explain the breadth of its perspective of commercial speech. *Central Hudson* involved a New York Public Service Commission ban of promotional advertising by electric utilities in an effort to limit consumer demand for utility services; hence the state was attempting a social goal by prohibiting certain advertising.

[99] *Id*. (citations omitted).

[100] *Id*. at 572 (concurring).

[101] *Id*. at 579 (concurring) (footnote omitted).

[102] *Id*. at 580.

[103] *Id*.

[104] *See supra* note 92 at 62.

[105] *See id*. at 66.

[106] *Id*. at 66-67 (citations and footnote omitted).

[107] *Id*. at 67.

[108] *Id*. at 68 (citation and footnote omitted).

[109] *Id*. at 81 (concurrence) (citation omitted).

[110] *Id*.

[111] *Id*. at 81-82 (footnotes omitted).

[112] *Id*. at 82-83 (citation and footnote omitted).

[113] 487 U.S. 781, 796 (1988).

[114] *Supra* note 54 at 473-74.

[115] *Id*. at 474.

[116] *Id*.

No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Id.

[117] *Id*. at 474-75 (citations omitted).

[118] *See Riley*, *supra* note 113.

[119] *See* In re Primus, 436 U.S. 412 (1978) for an example of noncommercial speech by a non-profit organization and its attorney.

[120] Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995).

[121] *Id*. at 494 (citation and footnotes omitted).

[122] *Id*.

[123] 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003).

[124] CAL. BUS. & PROF. CODE § 17200, *et. seq.* (2005) (unfair competition); CAL. BUS. & PROF. CODE § 17500, *et. seq*. (2005) (false advertising). *See Kasky*, *supra* at 249-50.

[125] CAL. BUS. & PROF. CODE § 17204 (2005); *Kasky*, *supra* note 123 at 249.

[126] *Kasky*, *supra* note 123 at 250 (citations omitted).

[127] Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854 (Cal. App. 2000).

[128] *Kasky*, *supra* note 123 at 256.

[129] *Id*.

[130] *Id*. at 258.

[131] *Id*. at 260.

[132] *Id*.

[133] Nike, Inc. v. Kasky, 539 U.S. 654 (2003). The Court dismissed the writ on the basis that: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257; (2) neither party had standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions applied with special force to this case. *Id*. at 657-58.

[134] Verdicts and Settlements, 26 NAT'L. LAW J. 16 (2003).

[135] *See, e.g.*, *44 Liquormart*, *supra* note 56 at 498-99.

[136] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring).

[137] PHILIP KOTLER, MARKETING MANAGEMENT 605 (9th Ed. 1997).

[138] *See id*. at 623.

[139] *See id.* at 625.

[140] *Id*. at 617.

[141] *See generally, Getting the bug: Justin Kirby explains how online viral marketing can help those brands without a "wow" factor by creating entertainment and provoking debate*, BRAND STRATEGY, July 2004, at 33.

[142] *See supra* note 28 and accompanying text.

[143] While these three scenarios mention actual companies, blogs, and issues of public concern, they are still merely conjecture and not based on actual occurrences.

[144] *See* Nat'l Comm'n on Egg Nutrition v. F.T.C., 570 F.2d 157 (1977) (promotions by a trade association constituted commercial speech).

[145] *See, e.g.*, David Welch & Dan Beucke, *Why GM's Plan Won't Work*, BUSINESSWEEK, May 9, 2005, at 84.

[146] 418 U.S. 323, 339-340 (1974).

[147] *Id*. at 340.

[148] *Id*.

[149] *See, e.g.*, *supra* note 126 and accompanying text.

[150] *See generally* Brief for Petitioner at *40-43, Nike, Inc. v. Kasky (U.S. Feb. 28, 2003) (No. 02-575), 2003 WL 898993 (U.S.). *See also Nike, Inc. v. Kasky*, *supra* note 133 at 682-83 (Breyer, J., dissenting).

[151] *See, e.g.*, *44 Liquormart*, *supra* note 56 at 517 (Scalia, J., concurring in part and concurring in judgment) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it"); *Greater New Orleans Broad. Ass'n, Inc.*, *supra* note 82 at 197 (Thomas, J., concurring) ("the *Central Hudson* test should not be applied [in cases where the interest is merely to keep consumers ignorant] because such an interest is per se illegitimate"); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) ("Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."); and Thompson v. Western States Med. Ctr., 535 U.S. 357, 389 (2002) (Breyer, J., dissenting) ("[A]n overly rigid 'commercial speech' doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections.").

[152] *Greater New Orleans Broad. Ass'n, Inc.*, *supra* note 82 at 184 ("[T]here is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.") *Accord*, *Lorillard Tobacco Co.*, *supra* at 554.

[153] This modified analytical framework only encompasses for-profit businesses. It can be legitimately argued that non-profit businesses have true charitable, public service, and religious purposes, and therefore do not have overriding pecuniary interests behind their messages. *See generally In re Primus*, *supra* note 119.

[154] Brief for Petitioner, *supra* note 150 at *22.

[155] *See, e.g.*, Jennifer Mullen, *Performance-Based Corporate Philanthropy: How "Giving Smart" Can Further Corporate Goals*, PUBLIC RELATIONS QUARTERLY, Summer 1997, at 42 ("Corporations increasingly want added value for their charitable giving activities with creative strategies that produce tangible benefits.")

[156] *See, e.g.*, *Bd. of Trustees of the State Univ.*, *supra* note 54; *Lorillard Tobacco Co.*, *supra* note 151.

[157] *See generally New York Times Co.*, *supra* note 48 at 279-80 (applied to public officials). *See also* Nike's argument for an actual malice standard to be applied to its statements in *Kasky*, Brief of Petitioner, *supra* note 150 at *43-50.

[158] *See Cincinnati v. Discovery Network*, *supra* note 85 at 434 (Blackmun, J., concurring).

[159] *Supra* note 75 and accompanying text.

[160] *See supra* note 108 and accompanying text.

[161] *See supra* note 101 and accompanying text.