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# Citizens United and the Threat to the Regulatory State

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# *Citizens United* and the Threat to the Regulatory State

Tamara R. Piety\*

## INTRODUCTION

Although *Citizens United*<sup>1</sup> has been roundly criticized for its potential effect on elections,<sup>2</sup> its display of judicial immodesty (or “activism”),<sup>3</sup> and for its potential effect on employer/employee relations,<sup>4</sup> the effect which is likely to be the most profound, and perhaps most pernicious, is its potential impact on the commercial speech doctrine. This is an aspect of the opinion which has been largely overlooked. Most people seem to be unaware of this possibility. They think election law and the commercial speech doctrine are unconnected—everyone that is except those who have been working long and hard to accomplish the change it foreshadows. They are keenly aware of its implications.

Here is what they know. The rhetoric about corporate “citizens” in *Citizens United* bolsters arguments for treating commercial speech like fully protected speech.<sup>5</sup> And treating commercial speech like fully protected speech would severely limit the government’s ability to regulate commerce. A majority of the members of the current Supreme Court is sympathetic to the

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<sup>1</sup> *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (Jan. 21, 2010).

<sup>2</sup> See, e.g., Lawrence Lessig, *Institutional Integrity: Citizens United and the Path to a Better Democracy*, THE HUFFINGTON POST, Jan 22, 2010, [http://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c\\_b\\_433394.html](http://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c_b_433394.html).

<sup>3</sup> Thomas E. Mann, *Citizens United vs. Federal Election Commission is an Egregious Exercise of Judicial Activism*, BROOKINGS, June 14, 2010, [http://www.brookings.edu/opinions/2010/0126\\_judicial\\_activism\\_mann.aspx](http://www.brookings.edu/opinions/2010/0126_judicial_activism_mann.aspx). For a conservative response to this critique see Richard Garnett, *Citizens United and ‘Conservative Judicial Activism,’* NATIONAL REVIEW ONLINE (NRO), Jan. 21, 2010, <http://www.nationalreview.com/bench-memos/49335/i-citizens-united-i-and-conservative-judicial-activism/richard-garnett>.

<sup>4</sup> Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17 (2010), <http://yalelawjournal.org/2010/5/15/secunda.html>.

<sup>5</sup> See also Jeffrey D. Clements, *Beyond Citizens United v. FEC: Re-Examining Corporate Rights*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (November 2009), <http://www.acslaw.org/files/Beyond%20Citizens%20United.pdf>.

argument for full protection for commercial speech. The opinion in *Citizens United* reflects that. And it suggests that with the proper case (and the tobacco RICO case wasn't it), the Supreme Court may well either do away with the commercial speech doctrine altogether and declare that commercial speech should be treated as fully protected speech, or nominally retain the doctrine, but require strict scrutiny review.<sup>6</sup>

Either development (and they are really the same) would likely represent a serious obstacle to the implementation of many recent regulatory reforms and proposed reforms aimed at protecting the public from the sorts of harms that recent market failures in securities, banking, credit, and offshore drilling have imposed on the public. If that claim seems alarmist, it isn't. If the government cannot regulate commercial speech, it cannot regulate commerce. It is that simple.

## I. THE CONNECTION BETWEEN COMMERCIAL AND CORPORATE SPEECH

To the uninitiated, commercial speech law and campaign finance reform law might appear to be unrelated. Yet the two are, and always have been, closely linked. The commercial speech doctrine was established in 1976 by the opinion in *Virginia Pharmacy*.<sup>7</sup> It provided for limited protection for truthful commercial speech (a category that had previously not been protected at all) on the grounds that truthful commercial speech was important to consumers and thus critical to market function.

Only two years later the Court decided *First National Bank of Boston v. Bellotti*.<sup>8</sup> *Bellotti* involved a law prohibiting certain types of corporate political advertising if that advertising. The Court struck down the Massachusetts law announcing; "The inherent worth of the speech in terms of its capacity for informing the public *does not depend upon the identity of its source, whether corporation, association, union, or individual.*"<sup>9</sup>

This was a very different justification for protection. It focused on the *content* as inherently worthwhile and observed that the speakers' identity was irrelevant to the value of that content. It

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<sup>6</sup> What makes speech "commercial" is not well defined. See, e.g., Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004). But speech defined as commercial is subject to intermediate scrutiny under the *Central Hudson* test. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

<sup>7</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>8</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>9</sup> *Bellotti*, 435 U.S. at 777 (emphasis added).

was not long before this language, and other similar formulations of the same proposition from *Bellotti* began appearing in arguments in favor of full First Amendment protection for commercial speech. As recently as 2003 citations to *Bellotti* appeared in briefs supporting Nike in the *Nike v. Kasky*<sup>10</sup> case.<sup>11</sup>

The importation of language from *Bellotti* which focused on the identity of the speaker and the content of the speech, rather than on the interests of the listener, turned the commercial speech doctrine upside down. The commercial speech doctrine was justified on the grounds that the speech was valuable to listeners. Since the prerequisite for protection under the doctrine was that the speech be truthful, it was relatively unproblematic to assume that it is also valuable (although in some specific case speech may be truthful but not valuable). It is an entirely different proposition to conclude that speech is valuable simply because the speaker wants to issue it if that speaker is not a human being and cannot make a moral claim to expressive rights incident to his or her existence.

Use of *Bellotti*'s rhetoric, with its vague suggestion of some antidiscrimination principle, began to contribute to the transformation of the commercial speech doctrine. Thus, what had started as a fairly modest extension of First Amendment protection for *some* commercial speech because of its value to consumers/listeners,<sup>12</sup> accompanied by a fairly deferential judicial review, became refashioned as a doctrine under which commercial speech is protected because of its intrinsic value as "speech" and is accompanied by increased judicial skepticism.<sup>13</sup>

The change is undoubtedly due to a number of factors—general enthusiasm for deregulation during this period, a change in membership of the Court, the reluctance of progressives to challenge the antidiscrimination framing, a reflexive tendency to defend "freedom of speech" — maybe some or all of these factors. Whatever the cause, in just a few decades, governmental regulation of commercial speech has gone from an unremarkable aspect of

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<sup>10</sup> *Nike v. Kasky*, 539 U.S. 654 (2003) (*per curiam*).

<sup>11</sup> See, e.g., *Nike v. Kasky*, Brief of *Amicus Curiae*, Center for Individual Freedom in Support of Petitioners, 2003 WL 835292 at 23.

<sup>12</sup> Alan B. Morrison, *How We Got the Commercial Speech Doctrine: an Originalist's Perspective*, 54 CASE WES. RES. L. REV. 1189 (2004).

<sup>13</sup> See David C. Vladeck, *Lessons from A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1019 (2004). Although the Court in the recent decision in *Milavetz, Gallop & Milavetz v. U.S.*, 78 USLW 4197 (March 8, 2010), applying disclosure rules in the Bankruptcy Abuse Prevention and Consumer Protection Act to lawyers, employed a fairly deferential standard of review, I am not sure we can extrapolate from this fact to other commercial speech regulation since the Court has seemed willing to tolerate more regulation of attorneys' speech. See *Zauderer v. office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

Congressional power to regulate commerce, to an *almost* presumptively illegitimate abridgment of freedom of expression, with regulators on the defensive against aggressive First Amendment attacks.

In the latter part of the twentieth century deregulation and public/private partnerships were popular, largely on the strength of the argument that the market was the better source of solutions to many problems involving the distribution of resources and goods than “top down” governmental regulation. From this vantage point it is more difficult to make the case that the market alone is capable of restraining antisocial or harmful behavior and deregulation does not look quite as appealing. There is renewed interest in greater governmental oversight with respect to food and product safety, securities and banking, the environment and other areas where the unfettered market is inadequate to protect the public interest. Yet, the intellectual and legal apparatus that created both the commercial speech doctrine and which led to the decision in *Citizens United* may yet prop up *laissez-faire* even as its shortcomings have become manifest.

## ORIGINS

It was probably no coincidence that *Virginia Pharmacy* itself was decided after Justice Powell joined the Court. For many years Lewis Powell served as legal counsel to some of America’s largest businesses. He was a corporate lawyer whose background made him deeply familiar with the problems facing business in the late 1960s and early 1970s and he felt strongly that the free enterprise system in America was under assault. In his view this assault required a concerted and coordinated defense by business and trade organizations. To this end, in 1971, he wrote a memo to the chairman of the educational committee of the U.S. Chamber of Commerce Organization entitled “*Confidential Memorandum: Attack on American Free Enterprise System.*”<sup>14</sup> In his memo Powell outlined a multi-pronged plan by which American business could improve its standing with society in general and turn the tide of distrust that seemed (to him) to be the prevailing attitude toward business.

The memo was more than 6,000 words long and offered a number of specific suggestions. He advised industry to fund research, to sponsor discussions in university settings, to attempt to shape the content of the representations of business in the media

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<sup>14</sup> ROBERT A.G. MONKS, *CORPORACY: HOW CEOs AND THE BUSINESS ROUNDTABLE HIJACKED THE WORLD’S GREATEST WEALTH MACHINE—AND HOW TO GET IT BACK* 43-54 (2008).

through public relations, lobby Congress, fund strategic litigation and to offer draft legislation more hospitable to business.<sup>15</sup> These suggestions were undoubtedly influential, coming as they did from a lawyer of Powell's stature and connections. But when he came onto the Court, Powell was in a position to persuade his colleagues on the Court and to begin to translate the recommendations into reality.

From this vantage point, almost 40 years later, it seems industry followed all of Powell's recommendations. Certainly cases like *Nike v. Kasky* demonstrate this strategy in full flower. Numerous *amicus* briefs were submitted by industry lobbying organizations like the Association of National Advertising<sup>16</sup> and the National Association of Manufacturers,<sup>17</sup> as well as by some of the world's largest corporations like Exxon-Mobile and Microsoft<sup>18</sup>—all citing *Bellotti*. And many of those advocating for freedom for commercial expression are venerated figures in First Amendment litigation like Floyd Abrams, whose credentials as a civil rights litigator in this area lend credibility and respectability to these claims.<sup>19</sup> Similarly, many of the scholarly articles written which argue for more protection for commercial speech have been written by lawyers in practice,<sup>20</sup> suggesting that at least in some

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<sup>15</sup> For the text of the memo see the Reclaim Democracy web site which can be found at [http://www.reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html).

<sup>16</sup> See *Nike v. Kasky*, 539 U.S. 654 (2003) Brief of *Amici Curiae* the Association of National Advertising, *et. al.* in Support of Petitioners, 2003 WL 835112 at 8 (Feb. 28, 2003).

<sup>17</sup> See *Nike v. Kasky*, 539 U.S. 654 (2003) Brief for the National Association of Manufacturers as *Amicus Curiae* in Support of Petitioners, 2003 WL 835884 at 12-13 (Feb. 28, 2003).

<sup>18</sup> See *Nike v. Kasky*, 539 U.S. 654 (2003) Brief of ExxonMobil, *et. al.* as *Amici Curiae* in Support of Petitioners, 2003 WL 835523 at 9-13 (Feb. 28, 2003).

<sup>19</sup> Most recently Abrams has been representing the bond ratings agencies such as Moody's, in suits brought by angry investors in cases involving highly graded but now worthless mortgage-backed securities. The ratings agencies have argued that their ratings are protected opinion under the First Amendment. Abrams famously declined to say how much his firm was earning in fees in these cases noting only that "you'd fall off your chair." David Segal, *Suddenly, the Rating Agencies Don't Look Untouchable*, N.Y. TIMES (May 21, 2010), <http://www.nytimes.com/2010/05/23/business/23rating.html?dbk=&pagewanted=print>.

<sup>20</sup> See, *e.g.*, Charles H. Moellenberg, Jr. and Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech From Tort Liability*, 70 U. PITT. L. REV. 555 (2009) (Jones, Day); Charles Fischette, *The New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL'Y 663 (2008) (Covington & Burling); Bruce E. H. Johnson & Ambika K. Doran, *Amendment XXVIII? Defending Corporate Speech Rights*, 58 S.C. L. REV. 855 (2007) (Davis, Wright, Tremaine); Thomas C. Goldstein, *Nike v. Kasky and the Definition of*

cases, firms underwrite the cost in attorney billable hours needed to write these articles because they advance clients' strategic interests. There are relatively fewer clients paying for advocacy on behalf of consumers. And those which exist have far shallower pockets.

These efforts have had the effect of "moving the ball," of making freedom for commercial expression seem both inevitable and necessary, when it is neither. Perhaps because the *Virginia Pharmacy* case was brought by a consumer group and therefore seemed pro-consumer, it was not immediately apparent how the doctrine would benefit sellers. Indeed, it isn't clear that it was ever *really* consumers who were most harmed by governmental suppression of truthful commercial information. Rather, it was the entities with something to sell who had most to fear. If sellers could not engage in promotion they would be most directly harmed. But those interested in something other than truthful commercial speech had the most to fear from the specter of governmental regulation. And since so much advertising could easily be characterized as misleading (some psychologists have described advertising as mainly involving *misinformation*<sup>21</sup>), First Amendment protection for commercial speech was most valuable to speakers, not listeners.

The commercial speech doctrine gave constitutional cover to a wealth of commercial propaganda that could not, with the best will in the world, be described as "informational" on the grounds of the listeners' interests. The assumption of many observers seems to be that if speech is valuable to the seller it is necessarily valuable to the consumer. But this is clearly wrong. There is no necessary connection between value of promotion to the seller and status as information to the consumer. In fact it is clear that *false* information may sometimes be valuable to the seller and *harmful* to the consumer. Today consumers have much to fear from false or misleading commercial speech about harmful products. Yet *Virginia Pharmacy*, when combined with the robust notions of corporate personhood in *Bellotti*, and now *Citizens United*, threaten to undermine governmental ability to restrain false and misleading commercial speech.

## II. THE CORPORATION AS SPEAKER

Proponents of protection for commercial speech have argued that intermediate review for commercial speech (as

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*'Commercial Speech,'* 2002-2003 *Cato Supreme Court Review* 63 (2003) (Akin, Gump).

<sup>21</sup> Kathryn A. Braun & Elizabeth F. Loftus, *Advertising's Misinformation Effect*, 12 *APPLIED COGNITIVE PSYCHOLOGY*, 569 (1998).

opposed to strict scrutiny) represents invidious viewpoint discrimination.<sup>22</sup> As noted, this turns the *Virginia Pharmacy* on its head. *Virginia Pharmacy* focused on listeners' interest in the information, not the speaker's desire to communicate it. In contrast, the content discrimination argument foregrounds the speaker; it presumes, albeit indirectly, a human subject, who as a moral actor and an end in him or herself, should be protected from discriminatory suppression of his or her self-expression. It treats the speech rights as "belonging" to the *speaker* not as protected on *behalf* of the listener. This is because "content" doesn't matter in a vacuum.

There are only two reasons to be concerned about regulation of content. One is that the content is of value to listeners and listeners would be harmed if deprived of it—a tough sell if the content is false. The other is that suppression of the speech offends the human dignity of the speaker—a tough sell if the speaker isn't human.

If content is *harmful* to the listener, protection for it cannot be justified on the grounds of his interests. Just because speech is economically valuable to the *speaker* does not make it valuable to the *listener*. On the other hand, there is the argument, offered by Justice Brennan in *New York Times v. Sullivan*; we need to tolerate a certain amount of falsehood in order to derive the benefits of freedom of expression.<sup>23</sup> In this view everyone indirectly benefits from even falsehoods by virtue of the benefits of freedom of expression.

However, Brennan's rejection of an authoritative "test for truth" in the First Amendment was made *before* the Court had decided that *any* commercial speech was included under its protection, let alone speech that was false or misleading. No one can seriously doubt that the courts of law were regularly taken up with disputes about factual truth. And factual accuracy is critically important to the value of commercial speech and, indeed, to proper market function. It was this notion that justified protection for truthful commercial speech in the first place. It would be deeply ironic to expand the doctrine to cover any commercial speech at all simply because it is "speech."

On the second justification, the interests of the speaker, if the speaker is not a moral subject, which a corporation is not, protection for its speech cannot be justified on the grounds of its expressive interests. Of course there are arguments that a corporation is an entity which aggregates the interests of its human

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<sup>22</sup> Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOYOLA L.A. L. REV. 67, 69 (2007).

<sup>23</sup> *N.Y. Times v. Sullivan*, 376, U.S. 254, 271 (1964).

members.<sup>24</sup> Yet, the notion of derivative rights would seem to depend on what sort of corporation it is and distinguishing between corporations formed under the law to conduct a business versus those formed under the law as a non-profit corporation formed for the purpose of advocacy or a for-profit media corporation. The derivative rights argument is not entirely convincing, but to the extent it has any validity it still does not center First Amendment rights in the speaker itself, but in those it represents. The corporation itself has no “viewpoint” and no expressive interests. And shifting from the interests of the listeners to the notion of inherent value in content or viewpoint is a form of sleight-of-hand which transforms the thrust of the commercial speech doctrine. It treats the corporate speaker *as if* it were a moral subject possessing rights as an attribute of personhood.

While the Court has not gone so far as to suggest it is the speaker’s interests which justify protection for commercial speech, it has gotten perilously close to that in *Bellotti* and then again in *Citizens United* with the suggestion that distinctions between corporations and persons, (or between different types of corporations) are discriminatory.

But if a for-profit corporation is entitled to full First Amendment protection when it engages in political speech — speech which is in some sense peripheral to its existence — then it would seem the argument that full protection for its *core* expressive activity is even stronger. The core expressive activity of a for-profit corporation is commercial speech. If the Court is wary of attempting to distinguish between high-value and low-value speech, and wants to treat the for-profit corporation as a “speaker” with First Amendment rights, it makes full protection for commercial speech virtually inevitable. Based on the past use of *Bellotti* in commercial speech cases, we could have anticipated that *Citizens United* would start cropping up in commercial speech cases. And it already has.

### III. TOBACCO LITIGATION AND REGULATION

In *United States v. Philip Morris* the government sued the tobacco companies alleging a pattern of racketeering in various activities taken in concert to conceal from the public the health

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<sup>24</sup> See Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form* (February 1, 2010). U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-005; U of Michigan Public Law Working Paper No. 184. Available at SSRN: <http://ssrn.com/abstract=1546087> (discussing various theories of the corporation). The other theories, artificial entity and real entity do not confer on corporations any of the dignity of a moral actor accorded to human beings.

consequences of smoking, the health consequences of secondhand smoke, the addictive properties of nicotine, the deceptive marketing of “light” and “low tar” cigarettes as safer, marketing to children and several other deceptive, fraudulent or harmful practices.<sup>25</sup> After a lengthy trial the judge issued an opinion, largely in favor of the government, that was approximately 1,700 pages long and contained exhaustively documented findings of fact and conclusions of law.<sup>26</sup> This decision was upheld in 2009 by the Court of Appeals.<sup>27</sup>

The defendants petitioned the Supreme Court for certiorari claiming, (among other things) that the finding of liability violated the companies’ First Amendment rights. The petition was denied<sup>28</sup> but some of the arguments made are instructive. For example, in an *amicus* brief filed by the Washington Legal Foundation and the National Association of Manufacturers on behalf of the tobacco companies, the argument was made that the lower court overlooked an important fact; *i.e.*, that much of the misleading speech at issue was released in the form of editorials, op-eds, press releases, etc. These venues are traditionally protected by the First Amendment. And because all these communications involved issues of “public concern,” the brief argued the statements must be considered fully protected speech.<sup>29</sup> And it cited *Citizens United* as support for the proposition that the government could not discriminate on the basis of the identity of the speaker.

It pays to really focus on what this means. The government alleged and the court found that much of this “information” was knowingly false and misleading. The press releases and other so-called informational pamphlets (some of which were sent to school children), were developed by the defendants to *manufacture* a controversy where one did not exist. The problem was there *was* scientific consensus about the basic facts. As a consequence, the companies’ strategy, which was succinctly captured in an internal memo and widely reported on since, was the following: “*Doubt is our product* since it is the best means of competing with the ‘body

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<sup>25</sup> *U.S. v. Philip Morris USA*, 449 F.Supp.2d 1 (D.D.C. 2006).

<sup>26</sup> *Id.*

<sup>27</sup> *U.S. v. Philip Morris USA*, 566 F.3d 1095 (D.C. Cir., 2009), *petition for cert. filed*, 78 USLW 3501, 3523 (U.S. Feb. 19, 2010) (Nos. 09-977 and 09-1012), *cert. denied*, 79 USLW 3501 & 79 USLW 3523 (June 28, 2010).

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

<sup>29</sup> Brief of Washington Legal Foundation, *et. al. as Amici Curiae* in Support of Petitioners, *U.S. v. Philip Morris USA*, 566 F.3d 1095 (D.C. Cir., 2009), *petition for cert. filed*, 78 USLW 3501, 3523 (U.S. Feb. 19, 2010) (Nos. 09-977 and 09-1012), *sub nom. Philip Morris USA v. U. S.*, [http://www.nam.org/~media/2F3D289BE4C3487794D5AC2541D6135E/Philip\\_Morris\\_v\\_USA\\_S\\_Ct\\_03222010.pdf](http://www.nam.org/~media/2F3D289BE4C3487794D5AC2541D6135E/Philip_Morris_v_USA_S_Ct_03222010.pdf).

of fact' that exists in the mind of the general public."<sup>30</sup> It is important to be clear on what the defendants and their amici were asking for; they were asking for the constitutional right *to obfuscate* rather than to clarify public information about a product for which there is no safe level of use. This should put to rest any arguments that greater constitutional protection for commercial speech would not be used to protect false speech. It would.

Although the Supreme Court ultimately denied review of this case, the same arguments have been made in litigation over the legislation giving the FDA jurisdiction over the regulation of tobacco. In *Commonwealth Brands v. FDA*,<sup>31</sup> several tobacco companies (and related businesses) challenged the new law claiming its stringent restrictions on tobacco advertising and packaging violated the First Amendment. The District Court agreed in part and held that the law's ban on color and graphics in packaging and advertisements,<sup>32</sup> and its ban on references to FDA (which might imply governmental assurances of safety)<sup>33</sup> *did* violate the First Amendment because they were overbroad. This case is still in its early stages and it is likely that *Citizens United* will be invoked in any subsequent appeals.

Tobacco is a product which can wreak havoc on the health and welfare of the public, particularly when advertising of the product is either aimed at or peripherally effects children.<sup>34</sup> Cigarettes are not the only products on the market which present serious hazards to public health. Similar claims can be made about soft drinks, junk food, pharmaceuticals, and alcohol.<sup>35</sup> That does not mean that prohibition is the right response. But it does not follow from that observation that we are compelled to permit unrestrained *promotion* of dangerous products.

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<sup>30</sup> *U.S. v. Philip Morris USA*, 449 F.Supp.2d 1, 301, ¶ 726 (D.D.C. 2006) (quoting from internal Brown & Williamson document).

<sup>31</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 STAT. 1776 (2009).

<sup>32</sup> *Common Wealth Brands v. FDA*, 678 F. Supp. 512, 525-26 (W.D. Ky, 2010), [http://www.tobaccofreekids.org/pressoffice/district\\_court\\_opinion\\_01052010.pdf](http://www.tobaccofreekids.org/pressoffice/district_court_opinion_01052010.pdf).

<sup>33</sup> *Common Wealth Brands v. FDA*, 678 F. Supp. 512, 534-35 (W.D. Ky, 2010).

<sup>34</sup> See, e.g., Lois Biener & Michael Siegel, *Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference*, 90 AMER. J. OF PUB. HEALTH 407 (2000); Elizabeth A. Gilpin, et. al., *Receptivity to Tobacco Advertising Promotions among Young Adolescents as a Predictor of Established Smoking in Young Adulthood*, 97 AMER. J. PUB. HEALTH 1489(Aug. 2007).

<sup>35</sup> See, e.g., Kelly D. Brownell and Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died: How Similar is Big Food?*, 87 MILBANK QUARTERLY 259-294 (2009).

#### IV. THE CONSEQUENCES OF STRICT SCRUTINY

As the *Commonwealth* case demonstrates, even under the current intermediate scrutiny test, a great deal of advertising will be protected which is arguably of little, or even negative, informational value. Nevertheless, some observers will claim that increasing First Amendment protection for commercial speech will not impair the government's ability to regulate *false* speech. There are two problems with this claim.

First, much advertising does not make much in the way of factual claims that may be tested for their truth but it may still be misleading, such as when cigarette ads portray smokers as uniformly young, attractive and healthy.

Second, high procedural and evidentiary standards, like those in *New York Times v. Sullivan*,<sup>36</sup> will likely result in a *theoretical* ability to regulate, but little practical ability to do so. As prominent First Amendment scholar Fred Schauer recently observed, facts matter.<sup>37</sup> But where the judges are hostile to the general proposition of regulation, facts are also susceptible to being dismissed or minimized. This happened in *Citizens United* itself when the Court rejected the argument about the appearance of corruption of the electoral process where multinational corporations are permitted to participate on the same terms as individual citizens.<sup>38</sup>

#### V. CONCLUSION

The *Citizens United* opinion, with its rhetorical framing of corporations as a "citizens" provides ammunition for those arguing that commercial speech ought to receive full First Amendment protection. If the Court adopts this position it would threaten many of the regulatory initiatives of the last couple of years; the legislation aimed at the banking and financial sectors, regulation of junk food, limiting advertising directed at children, tobacco labeling and marketing, and a host of others. Given the disastrous corporate collapses of the last few years, the oil that spews daily,

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<sup>36</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>37</sup> Frederick Schauer, *Facts and the First Amendment*, 57 U.C.L.A. L. REV. 897 (2010).

<sup>38</sup> This decision is in some tension with the Court's earlier decision in *Caperton v. A.T. Massey Coal Co.*, that millions of dollars in campaign contributions to a judge from a litigant required the judge to recuse himself because "the probability of actual bias" rose to an unconstitutional level. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. \_\_\_, 129 S.Ct. 2252, 2265 (2010).

unchecked (and perhaps un-checkable) into the Gulf of Mexico and similar evidence that the market cannot be relied upon to protect the public, it is reasonable to ask whether respect for freedom of expression really makes us powerless to combat the amount of noise and false information that similarly spills virtually unchecked into the public consciousness under the current regime. It is difficult to imagine how much worse if all remaining legal checks were removed. In an early First Amendment case Justice Jackson warned the Court not to turn the Bill of Rights into “a suicide pact.”<sup>39</sup> But constitutional protection for commercial speech could do just that. Unregulated commercial activity poses severe threats to the public welfare, including widespread loss of life, loss of property and potentially severe economic disruption. The Court should heed Justice Jackson’s admonition and decline to extend broad First Amendment protection to commercial speech.

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<sup>39</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).