

# At The Intersection of Comic Books and Third World Working Conditions: Is It Time to Re-Examine The Role of Commercial Interests in the Regulation of Expression?

*by* DAVID KOHLER\*

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## I. Introduction

Something is wrong when the First Amendment can be interpreted to offer more protection to a comic book featuring worm-like creatures inspired by famous albino rock stars than to a letter to the editor debating the working conditions in Southeast Asian

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\* Director, Donald Biederman Entertainment and Media Law Institute and Professor of Law, Southwestern University School of Law. I would like to thank Cam Devore and Bruce Johnson for their helpful suggestions and support in the preparation of this article.

factories. But this is precisely the strange state of affairs wrought by two decisions of the California Supreme Court considering how the commercial nature of a message should be factored into the constitutional equation.<sup>1</sup> California is not alone; the degree to which commercial motives should affect First Amendment protection is a subject of ongoing debate.<sup>2</sup>

Thirty years ago, the United States Supreme Court first began seriously to address whether and to what extent the commercial purpose of a speaker should affect First Amendment analysis.<sup>3</sup> At the time, this was something of a revolution, as it had been previously accepted that purely commercial speech was constitutionally unprotected.<sup>4</sup> As it began to develop doctrine in this area, the Court announced a pronounced difference between the protection afforded to commercial and noncommercial speech, and warned of the potential danger in equating the two:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.<sup>5</sup>

While the Court spent a great deal of time and effort defining the kinds of interests that will support a restriction on speech which is labeled as "commercial," it gave scant attention to when speech should be so classified,<sup>6</sup> or, for that matter, why it is important to categorize speech as commercial or noncommercial in the first place.<sup>7</sup>

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1. Compare *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (upholding First Amendment defense) with *Kasky v. Nike*, 45 P.3d 243 (Cal. 2003) (rejecting First Amendment defense).

2. A number of commentators have argued that commercial speech should get little, if any, protection because it doesn't fit within any of the commonly accepted functions that animate the First Amendment. See Thomas Jackson & John Jeffries, *Commercial Speech, Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 7-8 (1979); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). Others have recognized the important role that commercial information plays in society and have argued for more expansive protection. See Rodney A. Smolla, *Information, Imagery and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

3. See *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 818-21 (1975).

4. See *Valentine v. Chrestensen*, 316 U.S. 52, 55-56(1942).

5. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

6. The most meaningful effort the Court has made to address the distinction is *Bolger v. Young Drug Prods.*, 463 U.S. 60, 65-68 (1983).

7. See *infra* Part II.B.

Just because a speaker may have a commercial motivation does not mean that the resulting expression is categorized as “commercial” and, thus, is entitled to less First Amendment protection than other kinds of speech. Many forms of commercially motivated expression are without doubt entitled to the full scope of protection offered by the First Amendment. There is no credible argument that the creator of a non-obscene pornographic web site or phone sex service is entitled to diminished constitutional protection simply because he is motivated to do so by a desire to profit.<sup>8</sup> Nor does a newspaper lose its constitutional protection from defamation because the claim arises out of an advertisement the newspaper ran purely for profit.<sup>9</sup> Movies, books, music, and other informational and artistic products are fully protected by the First Amendment notwithstanding their creation for profit.<sup>10</sup>

Most of the Supreme Court's commercial speech decisions have involved traditional forms of advertising exclusively designed to sell a particular product or service. With few exceptions, it has been almost a given that the kind of speech involved in these cases was of the less worthy variety, and no serious efforts have been made to look at the implications of the doctrine when less easily categorized expression is involved.

It appeared that the Court might address this issue during its 2003 term when it agreed to consider a civil suit against Nike over the accuracy of the company's efforts to defend its overseas manufacturing standards.<sup>11</sup> The Nike case, much of which involved forms of speech usually recognized to be of the fully protected variety, such as letters to the editor and the like, highlighted both the importance and difficulty of distinguishing commercial from fully protected speech under the current legal regime.<sup>12</sup> If Nike's speech about its factory working conditions were held to be commercial, applicable legal standards would have arguably subjected the company to strict liability for any false or deceptive statements, a standard very different from that applicable if the speech were found

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8. See *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Commcn's of Cal. v. FCC*, 492 U.S. 115 (1989).

9. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1974).

10. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-23 (1991); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

11. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003).

12. For an overview of Nike's challenged expression see Bruce E. H. Johnson and Jeffrey L. Fisher, *Why Format, Not Content Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243, 1245-49 (2004).

to be fully protected.<sup>13</sup> But was the speech purely commercial and how is that determination to be made? And even if it is nakedly commercial, why should such speech get less protection than other kinds of speech?

Unfortunately, *Nike* never resulted in a substantive decision; instead, it was dismissed on the grounds that the writ was granted improvidently.<sup>14</sup> So at least for the time being, the lower courts are left to struggle in their efforts to figure out how and when to factor commercial motives into the First Amendment equation. It is a struggle that cannot be resolved satisfactorily if we continue to adhere to the current approach: drawing categorical distinctions between commercial and noncommercial speech which are largely artificial, certainly unwieldy, and likely unworkable. Does it really make sense that a letter to the editor about an important social issue should receive only limited protection because of an underlying motive to sell athletic apparel, whereas a fanciful depiction of albino rock stars Johnny and Edgar Winter is fully protected even where used with an undeniable commercial motive to sell comic books? Can we really draw a principled line between the commercial and noncommercial in an environment where motives are increasingly mixed? Consider, for example, whether a feature television news magazine report about the finale of the hit reality show *The Apprentice* on NBC's *Dateline* should get less protection than the same feature on CBS because NBC also airs *The Apprentice* and, thus, has a direct commercial motive to promote the show to its viewers.<sup>15</sup>

This article examines how a speaker's commercial interests factor into evaluating First Amendment protection. Part II looks at how commercial motives have been treated in the First Amendment equation and considers certain flaws in drawing distinctions between commercially motivated speech and other kinds of expression. Part III considers the implications of a different approach that largely jettisons any attempt to draw broad categorical distinctions based on the underlying commercial motivation for communication and,

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13. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974); *Sullivan*, 376 U.S. at 283-84.

14. *Nike v. Kasky, cert. dismissed*, 539 U.S. 654 (2003).

15. See NBC becoming "Trump TV," available at [http://www.wndu.com/entertainment,032004/entertainment\\_24749.php](http://www.wndu.com/entertainment,032004/entertainment_24749.php) (last visited Oct. 23, 2005); cf. *O'Grady v. Twentieth Century Fox Film Corp.*, No. 5: 02 CV 173, 2003 WL 24174616 (E.D. Tex. Dec. 19, 2003) (characterizing as commercial speech interstitial television programming comparing documentary about Navy pilot with soon to be released motion picture).

instead, evaluates such expression in the same way that other kinds of fully protected speech are evaluated.

## II. Commercial Interests and the First Amendment

### A. The Relevance of Commercial Interests to First Amendment Protection

The case law has a schizophrenic quality when it comes to factoring in whether a commercial purpose affects the degree of First Amendment protection given to expression. Generally speaking, the cases can be loosely grouped into three categories.

First, there are the decisions involving traditionally pure forms of expression where any commercial motive pertains to the sale or distribution of the expression itself. Most forms of news and informational media fall into this category as do most genres of entertainment and art. Where traditionally pure forms of expression are involved, the speaker's profit motive is simply irrelevant. The Supreme Court has been clear that in these kinds of cases, the presence of a profit motive does not diminish constitutional protection.<sup>16</sup> Thus, speech of this sort which is defamatory,<sup>17</sup> invades one's privacy,<sup>18</sup> causes serious emotional distress,<sup>19</sup> or adversely affects minors<sup>20</sup> is entitled to considerable constitutional protection regardless of whether its motivation is to inform, enrich or simply profit.

Second are the cases involving various forms of traditional advertising and marketing where the commercial motive solely concerns the sale of products or services.<sup>21</sup> This body of law encompasses what has come to be known as the Supreme Court's

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16. See, e.g., *Sullivan*, 376 U.S. at 266; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

17. See, e.g., *Sullivan*, 376 U.S. at 254. *Sullivan* is a particularly apt example as it arose out the publication by the Times of an advertisement, not even the newspaper's expression of its own view.

18. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

19. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

20. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

21. Advertising designed to sell speech based products presents an interesting question of classification. Sometimes such advertising appears to be treated the same as the underlying speech while in other cases it is treated as commercial speech. Compare *Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781, 785-88 (Cal. Ct. App. 1999) (book advertising commercial speech) with *Lacoff v. Buena Vista Pub'g, Inc.*, 705 N.Y.S.2d 183, 188-91 (N.Y. Sup. Ct. 2000) (book advertising fully protected). If one accepts the premise of this article, any distinction becomes less important, and I, therefore, do not address this issue in any detail.

Commercial Speech Doctrine, involving expression which does “no more than propose a commercial transaction,”<sup>22</sup> although it at times extends beyond that somewhat limiting characterization to more creative forms of promotion as well.<sup>23</sup> In this second category, the commercial purpose of the speaker has been the determinative factor in how much First Amendment protection will be extended. Although a number of justices appear open to reformulating their views on the subject, current law extends a reduced level of First Amendment protection to this kind of speech. Laws aimed at restricting commercial expression will be sustained on a showing that they are supported by a narrowly tailored, substantial government interest,<sup>24</sup> whereas the same law aimed at fully protected expression would require the most compelling and least restrictive of justifications.<sup>25</sup> Similarly, constitutional defenses to civil claims arising out of speech which allegedly causes tortious injury, such as defamation<sup>26</sup> or the right of publicity,<sup>27</sup> may not be available where the speech is categorized as purely commercial.

Finally, there is what I will call mixed purpose speech, which can take at least two different forms. There are mixed speech products which incorporate informational or artistic expression into what are generally viewed as ordinary non-speech related products. Examples include T-shirts containing some kind of message or artistic design,<sup>28</sup> mass market prints and posters,<sup>29</sup> and what are often called collectibles.<sup>30</sup> This category also includes mixed message speech—speech where an independently relevant editorial message is closely

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22. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

23. *See, e.g., Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983) (pamphlets discussing venereal disease).

24. *See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n.*, 447 U.S. 557, 566 (1980).

25. *See, e.g., Consol. Edison Co. v. Pub. Service Comm'n.*, 447 U.S. 530, 538-39 (1980).

26. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir. 1990), *cert. denied*, 498 U.S. 816 (1990). The reasoning of *U.S. Healthcare* has been criticized by commentators and rejected by some courts. *See generally* STEVEN G. BRODY AND BRUCE E. H. JOHNSON, *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* § 7.2.1 (2d ed. 2005).

27. *See White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

28. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

29. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 639 (Cal. Ct. App. 1995).

30. *See Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002); *Martin Luther King, Jr., Ctr. For Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

connected at least indirectly to efforts by the speaker to sell some product. Nike's attempts to defend its Southeast Asian labor practices is the most recent and controversial example. Where this kind of mixed purpose speech is involved, the law is truly chaotic. Sometimes commercial purposes seem to matter and sometimes they do not. As I discuss more fully below, no dominant approach has emerged to define when and to what extent a speaker's commercial motive is relevant in this context. Some courts analyze these cases under the Supreme Court's commercial speech doctrine.<sup>31</sup> Others, particularly in the right of publicity and trademark arenas, have developed a different approach which tries to divine whether the speech is fundamentally commercial or expressive.<sup>32</sup> It is this central focus on the commerciality of the expression to define the degree of First Amendment protection to which I now turn, examining first, what I believe to be the central flaws in doing so, and second, why the preoccupation with such categorization is unnecessary and harmful.

**B. Problems with Continuing to Categorize Expression Based on the Speaker's Commercial Purpose**

The Supreme Court has offered two principal “common sense” justifications for distinguishing commercial and noncommercial speech.<sup>33</sup> First, it is said that commercial speech is ordinarily easier to verify than other kinds of speech and, second, it is more durable because its underlying profit motive reduces the likelihood the speaker will be deterred.

In their 1990 article, Alex Kozinski and Stuart Banner powerfully dissected these twin rationales, demonstrating that in fact they often do not support the distinction.<sup>34</sup> They pointed out that while these considerations may indeed support the easiest commercial speech cases, they bear little relevance to the more complex scenarios that are the acid test of any legal doctrine. For example, while a simple claim that one product is cheaper than another may well be easily verifiable and relatively immune from being chilled given the

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31. See, e.g., *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983) (informational pamphlets on sexually transmitted diseases contained commercial speech); *O'Grady v. Twentieth Century Fox Film Corp.*, No. 5:02 CV173, 2003 WL 24174616 (E.D. Tex. Dec. 19, 2003) (interstitial programming which promoted a motion picture found to be commercial speech).

32. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *Comedy III Prods.*, 21 P.3d at 797.

33. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

34. Kozinski and Banner, *supra* note 2, at 629-30.

seller's need to increase sales, Kozinski and Banner recognized that most real world situations are not nearly so neat.<sup>35</sup> Conversely, many kinds of fully protected speech are easily verifiable and unlikely to be deterred but still entitled to full constitutional protection.<sup>36</sup> One suspects, for example, that it would take a great deal to deter—or chill in First Amendment terms—the distribution of the Harry Potter books or movies given the hundreds of millions—indeed billions—of dollars in revenues that they generate.<sup>37</sup>

Perhaps equally important is a point not fully developed by Kozinski and Banner: the reasons advanced to support a categorical distinction between commercial and other kinds of speech often have little to do with the underlying interests being served by particular limitations on expression. Verifiability assumes a greater ability on the speaker's part to avoid error; durability assumes a reduced likelihood that the speaker will be deterred by fear of punishment for an honest mistake. At least where restrictions ban or severely limit expression that is not alleged to be false or misleading, it is difficult to see how these characteristics lend any support to distinguishing different genres of expression.

Most of the Supreme Court's commercial speech jurisprudence developed from regulations involving these kind of complete bans, and until recently, this fairly obvious point went largely unnoticed in the Court's opinions. Of late, however, the relevance of the proffered justifications to particular regulations has received some attention:

When a State regulates commercial expression to protect consumers from misleading, deceptive or aggressive sales practices . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, non-misleading 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.<sup>38</sup>

A plurality of the Court now appears willing to move at least some distance away from the kind of categorical distinctions that have

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35. *Id.* at 634-37.

36. *Id.* at 637-38.

37. See CNN.com, *Potter's still magic for J. K. Rowling*, (Nov. 14, 2002), available at <http://archives.cnn.com/2002/SHOWBIZ/movies/11/14/potter.rowling/index.html>.

38. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

governed commercial speech and impose a more searching review regardless of classification, at least where there is no question of the expression being false.<sup>39</sup> For the time being, however, a majority of the Court continues to adhere to the doctrine in its current form.<sup>40</sup>

Beyond these theoretical concerns, Kozinski and Banner also underscored the complexity—one might say futility—in trying to separate commercial from other kinds of speech. They recognized that commercially motivated speech often contains both commercial and non-commercial elements which can be very difficult to distinguish. A relatively simple example is music videos. As miniature programs, often containing significant artistic and entertaining elements, they are indistinguishable from much other video programming except for length and are a “form of expression we instinctively think of as deserving as much protection as full length films . . . .”<sup>41</sup> At the same time, they are without doubt created with a primary purpose to sell recorded music and market recording artists. So are they commercial speech or fully protected?

Moving beyond videos, Kozinski and Banner posited a whole range of what I call mixed message speech, some real and some imagined,<sup>42</sup> some closely connected to the sale of a particular product and some not,<sup>43</sup> but all very hard to distinguish from speech that is ordinarily thought to be entitled to full First Amendment protection.

The difficulty in telling commercial from noncommercial speech is of no small moment, as the development of much of our First Amendment doctrine has been driven by concerns about the inability to draw principled lines of distinction. In *Cohen v. California*,<sup>44</sup> for example, the Court was not much impressed with Mr. Cohen's choice of epithets to express his views about the draft, but it was impressed by the dangers it foresaw if it started down the road of distinguishing

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39. See *id.* In *Liquormart*, Justice Stevens, joined by Justices Kennedy and Ginsburg, expressed this view. See *id.* at 501-05. Justice Thomas expressed an even more expansive view. See *id.* at 528. Justice Scalia was enigmatic in stating that he “shared” some of Justices Stevens’ and Thomas’ views. See *id.* at 528.

40. Although basic doctrine remains unchanged for now, even those Justices favoring the status quo appear to agree that the test for determining whether the First Amendment protects commercial speech is today being “more searchingly” applied. 44 *Liquormart*, 517 U.S. at 531 (O’Connor, J., concurring in the judgment).

41. Kozinski and Banner, *supra* note 2, at 641.

42. Among other things, Kozinski and Banner discussed the use of “advertorials,” advertisements that discuss important public issues related to particular products or services. See *id.* at 643-44.

43. For example, a Phillip Morris promotion that offered free copies of the Bill of Rights but didn’t mention any product. See *id.* at 645-46.

44. 403 U.S. 15 (1971).

crude from refined speech.<sup>45</sup> For similar reasons, courts have refused to permit distinctions based on the quality of literature or art since there is no way to separate out that which contributes little without deterring much of what we value.<sup>46</sup> If this is so—and few would seriously argue the point, I suspect—it is fair to ask why we think courts will have any greater success when trying to separate commercial from other forms of expression.

One thing is certain: in the fifteen years since Kozinski and Banner wrote, the problems of categorizing this kind of speech have not gotten any easier. Indeed, continued media consolidation and the emergence of new technologies for the receipt and management of information and entertainment have, if anything, magnified the difficulties.

As media interests have continued to consolidate with the attendant demands of Wall Street for accelerated profit growth, companies increasingly look for creative ways to generate additional revenue.<sup>47</sup> One effect of this has been a lowering of traditional barriers between the creative/editorial and commercial sides of the business.<sup>48</sup> Further fueling the breakdown is technology. The dominant advertising medium—television—is in the throes of a paradigm shift in how it will have to make its money in a world populated by digital video recorders which obviate the need for viewers ever again to watch a traditional commercial.<sup>49</sup> On top of this, the internet is competing with traditional media for the attention of television viewers and newspaper readers, creating new options and

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45. *Id.* at 25 (“For, while the particular four-letter word being litigated here is more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.”).

46. *See, e.g.,* Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 454, 459 (Cal. 1979); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUSTON L. REV. 903, 909 (2003).

47. Ken Auletta has chronicled the effects of the increasing focus on synergy at two of the country’s leading media conglomerates: Times Mirror and Tribune Company. *See* KEN AULETTA, *BACKSTORY: INSIDE THE BUSINESS OF NEWS* 63-118 (2003).

48. *See id.* at 63, 73, 77, 87, 103.

49. *See* Stuart Elliott, *NBC and Mazda Jointly Promote New Lineups*, THE N.Y. TIMES, July 21, 2005, at C-5 (“The sponsored ‘First Look’ campaign offers another example of how major marketers are becoming involved in the entertainment programming of media companies. The goal is to tightly weave a brand or product into content and to counter consumers’ growing habit of zipping, zapping or otherwise avoiding traditional commercials.”); Ted Johnson, *Tivo-lution*, VLIFE, June/July 2004, at 54 (“About the only thing that can be agreed upon in the Byzantine world of media soothsaying is that something will change. That in and of itself has industries positioning and posturing so they won’t be the ones left behind when that day comes.”).

challenges in the consumption of information and entertainment. Consider a few examples of how all of this is playing out.

- In 2003, NBC aired a reality television series called *The Restaurant* about a celebrity chef and the making of his new eatery. The show was partly funded by the ad firm Magna Global USA which brought in Coors and American Express. It is not hard to figure what kind of beer was featured at the restaurant or what was the credit card of choice. But, *The Restaurant* is not an aberration:

This is what life is like in the new world of “branded entertainment” which is viewed as a possible solution for ad skipping. The idea, eventually, is to make a show that has advertising messages look almost like a commercial free show.<sup>50</sup>

- An on-line entertainment web site, Heavy.com, has a cartoon series entitled *Pimp My Weapon*. The inaugural episode was described by the Los Angeles Times:

Posing as a do-it-yourself TV show on the mythical “How-To Network,” the short video features two computer generated figures in gladiator garb demonstrating a wicked-looking chain sword. The muscle-bound-but-high-pitched host matter-of-factly discusses such benefits as the “comfy killing distance” and the “handy fire option” as he hacks at his co-host.<sup>51</sup>

The program incorporated no banner ads, pop-ups or other overt pitches, because the whole show was in a sense a pitch for Sony's video game *God of War* which provided the characters, sets and action, but not the dialogue.<sup>52</sup>

- In 1999, the *Los Angeles Times* devoted an entire issue of its Sunday magazine to the opening of the new Staples Center arena. The *Times* was a founding partner in the arena, paid \$3 million to advertise there, and agreed to publish annually a special section on the arena and split the advertising revenues of the section. The Sunday magazine was just such a section, being described by the *Times*' advertising director as a “promotional vehicle.”<sup>53</sup>

- The Host International company wanted to create a new line of airport bars based on the tavern made famous in the hit television show bearing its name: *Cheers*. Paramount, which produced and owned the rights to *Cheers*, liked the idea of an ancillary revenue

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50. Johnson, *supra* note 49, at 83.

51. Jon Healey, *Net Firm Focuses on Blurring the Line*, L.A. TIMES, June 2, 2005, at C1.

52. *Id.*

53. AULETTA, *supra* note 47, at 73. The agreement between the *Times* and Staples Center was heavily criticized by other media interests, particularly in regard to the failure of the *Times* to disclose the arrangement. *See id.*

stream, so it licensed Host to use various elements from the program. Among the features in the *Cheers* bars were animatronic figures of two of the most beloved characters in the show who were fictional patrons of the bar. The actors who had portrayed these characters felt the figures looked too much like them and objected to the perceived use of their identities on right of publicity grounds.<sup>54</sup>

So which of these examples involve commercial speech? None involved any overt sales pitch so they would not qualify under the Court's most predominant definition of commercial speech as that which does "no more than propose a commercial transaction."<sup>55</sup> Yet each had an unavoidable commercial character: each was motivated by a desire to sell, referred at least implicitly to a particular product, and involved a speaker with an economic purpose.<sup>56</sup> Yet just as unavoidably, each example had independent editorial or creative elements involving information of public concern or dramatic/comedic performances.<sup>57</sup> How do we decide which prevails, the commercial or the creative? And if one is to be preferred, why? We know from well established Supreme Court doctrine that we cannot base our decision simply on a profit-driven motive; otherwise, all kinds of expression that is fully protected would suddenly become subject to regulation in ways that few would find acceptable. But if such a motive coupled with these other elements (product reference and promotional component) is enough to make the speech commercial, much of what we see in motion pictures or on television today might also qualify<sup>58</sup>—or at least would present the kind of litigation risk than can deter expression as effectively as direct regulation.<sup>59</sup>

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54. See *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997).

55. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

56. See *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 67 (1983).

57. The hardest to see this in is the *Cheers* example, but as recognized by Judge Kozinski, "[t]he portrayal of the *Cheers* characters is core protected speech. Using Norm and Cliff dummies in a *Cheers*-themed bar is a dramatic presentation." *Wendt v. Host International, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting).

58. Examples abound of increasingly creative product integration into programming that ordinarily would be thought to be fully protected by the First Amendment. See, e.g., Caroline Wilbert, *Turner South to Plug Its Own Wares*, THE ATLANTA JOURNAL CONSTITUTION, June 10, 2004, at 1F.; NBC becoming "Trump TV," available at [http://www.wndu.com/entertainment,032004/entertainment\\_24749.php](http://www.wndu.com/entertainment,032004/entertainment_24749.php) (last visited Oct. 23, 2005).

59. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 n. 21 (1978); *New York Times Co. v. Sullivan*, 376 U.S. 254, 302-03 (1964) (Goldberg, J. concurring).

We do not know what the courts would do with the first three examples, as they have not been the subject of litigation. Ironically, however, the fourth example, which fits least comfortably within the Court's commercial speech framework, was in fact treated by the Ninth Circuit the same as traditional commercial advertising.<sup>60</sup>

Reliance on the notion that commercial speech is somehow categorically less worthy of First Amendment protection has continued to confound lower courts by forcing them to draw lines where lines cannot, or should not, be drawn. This stilted line drawing has taken two principal forms, neither of which is productive.

Many courts when faced with difficult cases like these strain to fit them into the Court's traditional commercial speech framework by cramming the proverbial square peg into a round hole. Courts in the Ninth Circuit, for example, were faced with a fashion article in *Los Angeles Magazine* that featured pictures of famous people that had been digitally altered to make it appear that they were wearing currently popular clothing.<sup>61</sup> One of the photographs was of the actor Dustin Hoffman from the movie *Tootsie*, where he played a male actor posing as a female actor. The magazine used a well known promotional photograph of Hoffman dressed as the female character, but it digitally superimposed a different dress on him. Some information about the dress was provided, but otherwise there was little editorial content. Hoffman sued for a violation of his right of publicity. The district court, looking at the absence of significant editorial content in the magazine article, determined that it involved commercial speech so the First Amendment presented no impediment to the claim.<sup>62</sup> The Ninth Circuit looked at the same article and saw speech of the fully protected variety.<sup>63</sup>

An even more perplexing case arose from a book that recounted the exploits of an investment club of elderly women known as the Beardstown Ladies. The Ladies' central claim to fame was that they had achieved better returns on their investments than most professional money managers. The problem was that they really had

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60. Although the Court in *Wendt* didn't explicitly declare the figures to be commercial speech, the cases it relied on to support its analysis involved commercial advertising. *See Wendt v. Host International, Inc.*, 125 F.3d 806, 810-13 (9th Cir. 1997).

61. The alterations were fully disclosed so there was no element of deception in this respect. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1188-89 (9th Cir. 2001).

62. *See Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 874-75 (C.D. Cal. 1999). The exact basis for the district court's conclusion is not clear, as it did not cite any authority in support of its ruling.

63. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d at 1184-86.

not. Their exceptional performance was the result of a computational error which only came to light after publication of the book. Since the book did not defame or invade anyone's privacy, it was fully protected by the First Amendment and not subject to any claim. Not to be deterred, creative lawyers brought false advertising suits based on the book jacket, which incorporated the Ladies' claim to high returns. A panel of the California Court of Appeal found the book jacket to be commercial speech, notwithstanding that the information came directly from the book to which it was attached.<sup>64</sup> A New York court reached precisely the opposite conclusion, holding the jacket to be fully protected just like the book.<sup>65</sup>

The difficulty here is not just limited to the interpretation of the scope of the Supreme Court's commercial speech doctrine. The notion that "commercial" expression is less worthy than other kinds of expression has spilled beyond more traditional advertising regulation to infect other forms of expression which under no reasonable formulation of the doctrine qualify as commercial speech. This has occurred mainly in right of publicity and trademark law. In these cases, courts do not even try to fit within the commercial speech framework, but instead have developed other approaches to determine if the expression possesses the requisite commerciality to defeat First Amendment protection. In a right of publicity case, the Missouri Supreme Court recently determined First Amendment protection based on whether expression is predominantly commercial.<sup>66</sup> The California Supreme Court has created a "transformative" test to make the same determination.<sup>67</sup> Other approaches also exist, all of which I discuss in more detail in Section III.B. of this article. The point I want to make for now is that devaluing speech because it is in some respect commercial has broader ramifications, which are antithetical to accepted First Amendment values.

Although it once had some currency, with the exception of obscenity and commercial speech, a categorical approach to First Amendment decision-making has largely been abandoned.<sup>68</sup> While

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64. *Keimer v. Buena Vista Books*, 89 Cal. Rptr. 2d 781 (Cal.Ct. App. 1999).

65. *LaCoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000).

66. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003).

67. *See Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

68. Until the 1960s, categories of speech encompassing the lewd, obscene, profane, libelous and insulting were said to lie outside the protective boundaries of the First Amendment. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). As Professor Rod Smolla has recognized, modern First Amendment cases have largely "repudiated"

obscenity law raises its own set of concerns, that category differs from commercial speech in two important respects. First, the kinds of expression that qualify even for consideration as obscene are more limited than what might be deemed commercial. Only explicitly sexual expression may be obscene,<sup>69</sup> whereas, an extremely broad range of speech may be commercial. Second, by definition, obscene speech is limited to that which lacks any serious artistic, literary, social, or political value,<sup>70</sup> whereas commercial speech may be chock full of such value. Do we really mean to say that the kind of non-obscene, but highly pornographic movies that litter late night cable television should get more First Amendment protection than say Nike's efforts to defend its labor practices in Asia, a subject of vigorous public debate?<sup>71</sup>

This absence of any limitation on commercial speech like that imposed on obscenity leads to the more important point that the concept of broadly devaluing such a diverse category of expression ignores the important place it occupies in our country's idea marketplace. It was not long ago that a successful presidential campaign was built on the mantra: "It's the economy, stupid." If commercial issues play such an enormously important role in our system, we should be encouraging the broadest possible range of expression about or related to them, and not penalizing it. It is undoubtedly true that certain kinds of commercial speech regulation serve some very important interests, but given how flawed our current system is for separating out those cases, is it not worth asking if a better way exists?

### III. An Alternative Approach

Not only is the current approach to commercial speech animated by a series of flawed assumptions, but it is also methodologically out of step with recent developments in First Amendment doctrine. This is illustrated by the Court's decision in *R.A.V. v. St. Paul*.<sup>72</sup> Faced in

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such an approach in favor of a more searching interest based analysis of restrictions on expression. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 160-61 (1992). Today only obscenity and commercial speech are still treated in such categorical terms. See RODNEY A. SMOLLA, *THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION* 17 (1999).

69. See, e.g., *Miller v. California*, 413 U.S. 15, 27 (1973).

70. See *id.* at 24.

71. See *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 811 (2000) (non-obscene sexually explicit cable channels entitled to full First Amendment protection.).

72. 505 U.S. 377 (1992).

that case with a category of speech, fighting words, generally thought to be completely outside the bounds of the First Amendment,<sup>73</sup> the Court nonetheless struck down a law which used content distinctions as the basis for punishing only certain kinds of expression falling into that category.<sup>74</sup> It was not that the state didn't have a sound basis for punishing the kind of speech involved in *R.A.V.*<sup>75</sup> But because those interests could have been served without making content-based distinctions, the Court required the state to take a more neutral approach.

One lesson of *R.A.V.* relevant to commercial speech is that proper First Amendment analysis should proceed from a critical and sensitive consideration of the particular characteristics of a restriction on speech, not from generalized content-based assumptions about an entire category which are applied regardless of their applicability or necessity in a particular context.<sup>76</sup> Even where there is an important or compelling government interest being served, if there is a way to approach the problem effectively without making content-based value judgments, we should ordinarily take it.

The notion that commercially motivated speech is less valuable than other speech seems at odds with the *R.A.V.* principle and diverts the focus in these cases from the most relevant considerations. Rather than asking how valuable a particular kind of expression is, First Amendment analysis ordinarily starts by examining the nature of the restriction the government is seeking to impose.<sup>77</sup> If a restriction

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73. See *Chaplinsky*, 315 U.S. at 571-72.

74. *R.A.V.* concerned a city ordinance prohibiting bias-motivated disorderly conduct. See 505 U.S. at 381-82. The Minnesota Supreme Court interpreted the ordinance as encompassing only that class of expression known as fighting words. *Id.*

75. The ordinance was designed to protect "basic human rights of members of groups that have historically been subjected to discrimination . . ." interests the majority conceded to be both compelling and furthered by the regulation. *Id.* at 395.

76. See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993).

77. As Professor Smolla aptly put it, "[c]ommercial speech . . . should presumptively enter the debate with full First Amendment protection. The theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything, disqualifies it." Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993). Smolla recognized that "[u]nless . . . speech violates some legally cognizable interest . . . [it] is protected." *Id.* at 787. The Court hasn't been entirely consistent on this point. Compare *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), quoting *Bridges v. California*, 314 U.S. 252, 269 (1941) ("No suggestion can be found in the Constitution that the freedom there guaranteed for speech . . . bears an inverse ratio to the . . . importance of the ideas seeking expression."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the First Amendment]") with *Dun & Bradstreet, Inc. v. Greenmoss*

makes distinctions based on the content of speech, we ordinarily become suspicious and demand the most compelling of justifications.<sup>78</sup> Conversely, neutral restrictions, not based on content and which affect speech incidentally, are less suspect and are given greater latitude. Content neutrality encompasses both generally applicable laws<sup>79</sup> as well as neutral restrictions on the time, place or manner of speaking.<sup>80</sup> Both kinds of limitations have historically been governed by standards that are virtually identical to those employed by the commercial speech doctrine.<sup>81</sup>

An exception to the extreme suspicion accorded to content-based restrictions has been recognized in some instances for speech that is alleged to be false or misleading. Restrictions on false speech, even when content-based, have been given more latitude than content-based restrictions aimed at speech which is not provably false. Most of the cases examining this principle have involved defamation claims,<sup>82</sup> but the Court has applied the principle in other contexts as well.<sup>83</sup>

Although no constitutional value exists in false statements of fact,<sup>84</sup> the Court has required the toleration of some falsity so that speakers are not unduly deterred out of fear of being punished for an honest mistake.<sup>85</sup> The question in these cases revolves around how much “breathing space”<sup>86</sup> must be given to someone who disseminates

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Builders, Inc., 472 U.S. 749, 759 n.5 (1985) (“This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others.”). With the exception of commercial speech, however, the kinds of speech the Court has devalued have been determined to have no significant value in terms of its contributing to public discourse. See *Dun & Bradstreet*, 472 U.S. at 759 (speech on matters of “purely private concern.”); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky*, 315 U.S. at 571-72 (fighting words). Even where it is offensive or vulgar, speech which plays any meaningful role in informing or enriching the idea marketplace is entitled to the full range of First Amendment protection. See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) (“one man's vulgarity is another's lyric.”).

78. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989).

79. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *United States v. O'Brien*, 391 U.S. 367 (1968).

80. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

81. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *Board of Trustees of the State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989).

82. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

83. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (false light invasion of privacy); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress).

84. See *Gertz*, 418 U.S. at 340.

85. See *id.* at 340-41.

86. *Sullivan*, 376 U.S. at 272.

arguably false speech. The mechanism used by the Court to regulate this is to require in some cases that a degree of fault be established in addition to proof of a factual error.<sup>87</sup> Whether and to what extent fault must be proved depends on a balancing of the respective interests at stake.

The Court has never defined precisely how this balance is to be undertaken, but it has offered some guidance. The balance of interests is to be conducted in the context of a particular kind of restriction. In other words, the rules that apply, for example, to defamation claims do not necessarily apply to other kinds of claims, although they may if careful analysis dictates that result.<sup>88</sup> Although each type of regulation requires a separate analysis within a given category, the balancing is not to be struck on a case by case basis. Because such an approach “would lead to unpredictable results and uncertain expectations,” courts instead “must lay down broad rules of general application.”<sup>89</sup>

In various contexts, three separate interests have been considered in determining what kind of accommodation must be made for false or misleading speech: the interests of the speaker,<sup>90</sup> the interests of the state in regulating,<sup>91</sup> and the interests of the public in receiving information.<sup>92</sup> The inquiry into the interests of the speaker has focused on the need for prophylactic protection sufficient to ensure that one will not unduly refrain from speaking as the result of the fear of liability over an honest error.<sup>93</sup> Inquiry into the state interest looks at a number of factors, including the harm that will result from erroneous speech and how great the need for protection is.<sup>94</sup> Finally, the interest of the public has been factored in by considering whether the speech that is to be restricted is of broad concern or of importance only to a small, narrow audience.<sup>95</sup>

The category of speech that I earlier defined as purely expressive is already approached in this way—that is, with extreme suspicion for

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87. See, e.g., *Gertz*, 418 U.S. at 343-48; *Time Inc.*, 385 U.S. at 389-90.

88. See *Time Inc.*, 385 U.S. at 390.

89. *Gertz*, 418 U.S. at 343-44.

90. *Sullivan*, 376 U.S. at 270-72.

91. See *Gertz*, 418 U.S. at 341.

92. *Sullivan*, 376 U.S. at 270-72 (First Amendment ensures wide open robust and uninhibited debate on public issues).

93. See *Gertz*, 418 U.S. at 339-41.

94. See *id.* at 341-45.

95. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985).

content-based distinctions and slightly more flexibility where false or misleading expression is involved—notwithstanding that it may be associated with a commercial motivation in many instances. Indeed, one of the seminal First Amendment cases of the modern era, *New York Times Co. v. Sullivan*,<sup>96</sup> arose out of a newspaper advertisement about civil rights abuses, a fact that did not diminish the level of protection to which the paper was entitled even though its motivation for publishing it was purely commercial.<sup>97</sup> The question to which I now turn is whether we can we approach the kinds of speech where commercial purpose has mattered in the same way without unduly compromising the government's ability to regulate the commercial marketplace?

#### A. Jettisoning the Commercial Speech Doctrine

The Supreme Court has addressed commercial speech regulation in a wide variety of contexts, ranging from the provision of abortion services<sup>98</sup> to the sale of liquor.<sup>99</sup> Its cases have usually involved expression that is easily categorized as traditional advertising, although in a few cases it has applied the doctrine to mixed message speech as well.<sup>100</sup> Significant governmental interests in protecting consumers can be implicated in these cases,<sup>101</sup> and it is important to consider whether those interests would be served as well by a system that did not seek to draw categorical distinctions based on the speaker's motivation. A good starting point is to ask how the government would have fared in the decided cases had it been unable to argue that its regulations were aimed only at a categorically less valuable form of expression. Would such an approach provide sufficient flexibility for the government to act where necessary to protect consumers from real and substantial abuse? The answer involves consideration of two different kinds of regulations.

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96. 376 U.S. 254 (1964).

97. *Id.* at 265-66.

98. *See Bigelow v. Virginia*, 421 U.S. 809 (1975).

99. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

100. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 63 n.4 (1983) (pamphlets discussing prevention of venereal disease and sexuality); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 559 (1980) (information concerning electricity use).

101. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (preventing minors from using tobacco products); *44 Liquormart*, 517 U.S. at 501 (protection of consumers from deceptive sales practices); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 568-69 (energy conservation and fair utility rates); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 461 (1978) (prevention of fraud and undue influence in choice of legal representation).

### 1. *True (or Non-False) Speech*

Most of the commercial speech cases considered by the Court have involved content-based regulations directed at speech that was true—or at least was not alleged to be materially false. Blanket prohibitions on advertising birth control,<sup>102</sup> legal services,<sup>103</sup> or the price of liquor<sup>104</sup> are defined expressly in terms of the content of the expression, and were we to treat them like other forms of noncommercial expression instead of creating a special category designated as “commercial,” they would be subject to strict scrutiny.<sup>105</sup> The fact is, however, that notwithstanding the application of the more flexible substantial interest test first articulated in *Central Hudson Gas & Electric v. Public Service Comm'n.*,<sup>106</sup> most of the Court's decisions—and in particular its most recent decisions—have overturned the challenged regulations. Since the Court began to grapple seriously with commercially motivated speech,<sup>107</sup> it has decided at least thirty commercial speech cases.<sup>108</sup> Twenty-two of

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102. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

103. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

104. See *44 Liquormart*, 517 U.S. at 484.

105. This, of course, assumes we don't retreat to the approach in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), which denied any First Amendment protection to speech of a commercial nature.

106. 447 U.S. 557 (1980).

107. The beginnings of serious efforts to address the relationship between commercial speech and the First Amendment usually dates to the 1975-76 period with the decisions in *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976). For purposes of this article, I also include the 1973 decision in *Pittsburg Press Co. v. Pittsburg Comm'n. On Human Relations*, 413 U.S. 376 (1973).

108. See *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n. v. United States*, 527 U.S. 173 (1999); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Peel v. Attorney Registration & Disciplinary Comm'n. of Ill.*, 496 U.S. 91 (1990); *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *Shapero v. Ky. State Bar*, 486 U.S. 466 (1988); *Bolger v. Young's Drug Prods. Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re RMJ*, 455 U.S. 191 (1982); *Posadas de P.R. Assoc's. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Metromedia, Inc. v. San Diego*, 453 U.S. 49 (1981); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Linmark Assoc's. v. Town of Willingboro*, 431 U.S. 85; *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Va.*, 421 U.S. 809 (1975);

these decisions struck down the challenged governmental restriction,<sup>109</sup> while only eight upheld the government's regulation.<sup>110</sup> Of these eight decisions in favor of the government, three involved the almost *sui generis*<sup>111</sup> field of professional advertising,<sup>112</sup> leaving five other decisions in which the Court has upheld commercial speech regulations,<sup>113</sup> and the continuing viability of two of these cases is at least subject to some question.<sup>114</sup> Moreover, notwithstanding its talk about granting government regulators more latitude with commercial speech, the Court seems to be applying the *Central Hudson* standard with a high degree of exactitude.<sup>115</sup> The point here is that most of the Court's commercial speech cases would have come out the same way, even if strict scrutiny were the standard.

But what about those cases where the Court has upheld government regulation of commercial speech? Can they be reconciled with an approach that does not categorically focus on the commercial purpose of the underlying expression? This is a question worth asking

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Pittsburg Press Co. v. Pittsburg Comm'n. on Human Relations, 413 U.S. 376 (1973).

109. See *Thompson*; *United Foods*; *Lorillard Tobacco*; *Greater New Orleans Broad.*; *44 Liquormart*; *Rubin*; *Ibanez*; *Edenfield*; *Discovery Network*; *Peel*; *Shapero*; *Bolger*; *Zauderer*; *In re RMJ*; *Metromedia*; *Cent. Hudson Gas & Elec.*; *In re Primus*; *Bates*; *Linmark*; *Carey*; *Va. State Bd. of Pharmacy*; *Bigelow*.

110. See *Glickman*; *Went For It*; *Edge Broadcasting*; *Fox*; *Posadas*; *Friedman*; *Ohralik*; *Pittsburg Press*.

111. See Kozinski and Banner, *supra* note 2, at 630

112. See *Went For It*; *Friedman*; *Ohralik*.

113. See *Glickman*; *Edge Broad.*; *Fox*; *Posadas*; *Pittsburg Press*. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), might also be read as implicitly upholding a commercial speech regulation. Although the Court overturned a billboard ordinance, largely because it favored commercial over noncommercial speech, the Justices were split on the rationale for doing so, and a majority would have sustained the ordinance in so far as it was directed to purely commercial expression. Again, however, resort to the commercial/noncommercial speech distinction was unnecessary. See *infra* note 119 and accompanying text. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) also presents an interesting classification issue. In upholding a trademark statute designed to protect the Olympics name and symbolism, the Court referred to the commercial limitations of the statute, but the case has broader implications, as the underlying expression challenged in the case clearly was not purely commercial, see *id.* at 535-36, and I do not include it. Like other decisions I discuss *infra* in Part III.B., the case is better thought of as a variation on *Zacchini v. Scripps Howard Broad. Co.*, 433 U.S. 562 (1977). See *San Francisco Arts*, 483 U.S. at 532-33.

114. The Court's reasoning in *Posadas* was expressly rejected by a plurality in *44 Liquormart*, 517 U.S. at 509-10, while Justice O'Connor's concurrence, which was joined by three other Justices, conceded that the Court now examines commercial speech regulation more searchingly than it did in *Posadas*. *44 Liquormart*, 517 U.S. at 531-32. The reasoning in *Edge Broadcasting* was at least implicitly called into question by *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

115. See *44 Liquormart*, 517 U.S. at 531-32 (O'Connor, J. concurring). See generally BRODY AND JOHNSON, *supra* note 26, at chapter 6.

because if a different approach would upend the results in a substantial body of Supreme Court precedent, it would at least raise a cautionary flag if not more.<sup>116</sup> With only one likely exception, however, First Amendment doctrine, apart from that developed specifically for commercial speech, can appropriately accommodate the kinds of cases in which the government has prevailed. All involved circumstances where, for one or more of four reasons not involving the categorization of speech as “commercial,” the government has been given broader latitude to regulate notwithstanding the impact on expression.

First, consider *Board of Trustees of the State University of N.Y. v. Fox*.<sup>117</sup> That case upheld a restriction prohibiting solicitation in dormitory rooms in New York State colleges. The Court addressed the regulation using the *Central Hudson* standard, the key issue being whether the test required that the regulator employ the least restrictive means for accomplishing its aims or whether a more flexible standard would apply. Resort to the *Central Hudson* test was unnecessary, however. The case likely could just as easily have been decided in exactly the same way by approaching it from the perspective of traditional time, place, and manner regulation, which employs standards that the Court recognized to be “substantially similar”<sup>118</sup> to those used in the *Central Hudson* test.<sup>119</sup> In fact, because some of the speech at issue in *Fox* arguably was not commercial, the

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116. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis embodies an important social policy. It represents an element of continuity in law . . . . But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision . . . .”).

117. 492 U.S. 469 (1989).

118. *Id.* at 477; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001). It is debatable whether in recent years the Court has applied the time, place, and manner standard with the same rigor it has injected into its commercial speech decisions. Professor William Van Alstyne has observed that time, place, and manner doctrine has been the subject of an “increasingly intolerant . . . ‘leveling down’ trend.” William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1646 (1996). Commercial speech doctrine, on the other hand, has of late been applied “in an openhanded rather than grudging way to new factual patterns addressed by the Court.” BRODY AND JOHNSON, *supra* note 26, at 6-2.

119. Billboard regulation is another area that fits comfortably within time, place, and manner regulation. In *Metromedia, Inc.*, 453 U.S. at 490, a plurality of the Court suggested that billboard restrictions or bans limited to purely commercial expression would be sustained against First Amendment challenge. *Id.* at 507. The ordinance was overturned on other grounds, however, but resort to the distinction was again unnecessary to promote the kinds of interests asserted by the government. Indeed, in a later case, the Court sustained a more content neutral sign ordinance by employing traditional time, place, and manner analysis. See *City Council of Los Angeles v. Taxpayers of Vincent*, 466 U.S. 789 (1984).

New York State university system advanced precisely such an argument, contending that since “the dormitories are not a public forum, and the restrictions constitute permissible ‘time, place, and manner’ limitation the regulation should be sustained in any event.”<sup>120</sup>

A second group of the Court's commercial speech cases may fairly be characterized at least in part as not involving any serious issue of general public concern. In a variety of contexts, the Court has expressed the view that the First Amendment applies with particular force to speech involving public issues, and where no such issue is implicated, the latitude for regulation is greater.<sup>121</sup> At least two of the Court's decisions upholding commercial speech regulations appear to have been animated at least in part by this consideration. In *Friedman v. Rogers*,<sup>122</sup> the Court upheld a Texas statute prohibiting the practice of optometry under a fictitious name, explaining that an optometrist who seeks to use a trade name “does not wish to editorialize on any subject, cultural, philosophical, or political” or “report any particularly newsworthy fact, or to make generalized observations even about commercial matters.”<sup>123</sup> Similarly, in upholding a ban on direct face to face solicitation of clients by lawyers, the Court observed in *Ohralik v. Ohio State Bar Ass'n*<sup>124</sup> that the appellant lawyer in that case “does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom . . . .”<sup>125</sup>

The third category of commercial speech cases where the Court has upheld government regulation involves expression which, in effect, aids and abets illegal activity. In *Pittsburg Press Co. v.*

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120. 492 U.S. at 474. The Court declined to address this issue as it was unnecessary to the decision and potentially involved additional legal and factual issues not addressed by the Court of Appeals. *Id.*

121. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

122. 440 U.S. 1 (1979).

123. 440 U.S. at 11. The Court went on to point out that “[h]ere, we are concerned with a form of commercial speech that has no intrinsic meaning.” *Id.*

124. 436 U.S. 447 (1978).

125. *Id.* at 458. In part because the solicitation in *Ohralik* involved a face to face encounter, it also can be said that the speaker lacked “any strong interest in the free flow of commercial information.” *Dun & Bradstreet*, 472 U.S. at 762. In contrast is *In re Primus*, 436 U.S. 412 (1978), where the Court validated direct solicitation of an indigent woman by an ACLU attorney where the purpose was to inform her of the right to sue for a compelled sterilization. In distinguishing *Ohralik*, the Court emphasized that the solicitation involved personal political beliefs and a desire to advance the ACLU's civil liberties objectives.

*Pittsburgh Commission on Human Relations*,<sup>126</sup> the Court upheld a regulation prohibiting a newspaper from running gender specific help wanted ads, and in doing so emphasized that “[d]iscrimination in employment is not only commercial activity, it is illegal commercial activity . . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”<sup>127</sup>

Indeed, quite apart from the commercial speech doctrine, courts have rejected First Amendment challenges to convictions predicated on expression designed to aid and abet criminal activity.<sup>128</sup>

Finally, there are the cases where a speech restriction is incidental to regulating non-speech related economic activity.<sup>129</sup> The cases fall into two categories—traditional regulation of professions and other comprehensive economic regulatory schemes. Typical of the former are the Court's decisions upholding restrictions on direct client solicitation by lawyers.<sup>130</sup> In regard to such professional behavior, which has “traditionally been subject to extensive regulation by the States,” the Court has been willing to allow somewhat more latitude in limiting attorney speech even where it could not be characterized as commercial.<sup>131</sup> Similarly, where a

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126. 413 U.S. 376 (1973).

127. *Id.* at 387. The Court has also mistakenly suggested that *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993), might fall into this class of cases as well. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996). *Edge* upheld provisions of the Communications Act that prohibited a broadcaster from airing state lottery advertising if the state in which it was located did not permit a lottery. It was true, as the Court pointed out in 44 *Liquormart*, that the statute in *Edge* “was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located,” but it was not at all clear that it would have been illegal for a resident of such a state to purchase a lottery ticket in another state where it was legal. Thus, in this respect *Edge* is unlike *Pittsburg Press*, where gender discrimination in employment was flatly prohibited regardless of where it occurred, and is more analogous to *Bigelow v. Virginia*, 421 U.S. 809 (1975), where the conduct—abortion—was illegal in the state where it was being advertised but legal in the state where the services would actually be provided.

128. *See* *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985) (Kennedy, J.); *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978), *cert denied*, 437 U.S. 906 (1978).

129. *See* 44 *Liquormart*, 517 U.S. at 499 (“[t]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked inextricably to those transactions.”).

130. *See* *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

131. *See* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (“the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard . . . [than that applicable to non-participants]”); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (“collaboration between counsel and the press as to information affecting the

restriction is incidental to and necessary to promote a comprehensive scheme of economic regulation, the Court has allowed broader latitude without regard to whether the particular expression can be categorized as commercial:

Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, . . . corporate proxy statements, . . . the exchange of price and production information among competitors, . . . and employers' threats of retaliation for the labor activities of employees. . . . Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.<sup>132</sup>

In these cases, speech is regulated in such a way that "there is no realistic possibility that official suppression of ideas is afoot."<sup>133</sup> Thus, for example, laws aimed at regulating proxy statements are aimed at ensuring fair and effective corporate governance, not with suppressing any particular views or devaluing any particular kind of expression. This kind of regulation contrasts with paternalistic restrictions of commercial speech that seek to promote some objective unrelated to the underlying economic activity.<sup>134</sup> Furthermore, the potential for idea suppression is far greater and consequently the degree of suspicion should be higher.<sup>135</sup> Of course, difficult questions may arise as to where to draw the line in these situations,<sup>136</sup> but for purposes of this article, the important point is that

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fairness of a criminal trial is not only subject to regulation, but is highly censurable . . ."). Thus, for example, a prior restraint may issue against an attorney participating in a case under a lesser showing that would be required for a member of the press covering the case. See *Gentile*, 501 U.S. at 1074.

132. *Ohralik*, 436 U.S. at 456; see *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470, 477 (1997) (upholding generic advertising order by Secretary of Agriculture regardless of whether *Central Hudson* satisfied).

133. *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992).

134. These cases fall into two categories. First, there are paternalistic regulations which limit speech as a surrogate for direct regulation of some social condition. See *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Other regulations in this category assume that consumers will act irrationally if provided with accurate information on a sensitive subject. See *44 Liquormart*, 517 U.S. at 484. The second category encompasses cases involving a wholesale devaluation of commercial speech for reasons unrelated to the underlying need for regulation. See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

135. Cf. *Virginia v. Black*, 538 U.S. 343, 384 (2002) (Souter, J., concurring in the judgment in part and dissenting in part) ("For whether or not the Court should conceive of exceptions to *R.A.V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R.A.V.* without a high probability that no 'official suppression of ideas is afoot.'").

136. To be sure, the Court has struggled at times to draw regulatory lines for speech

the line drawing process does not need to involve the broad categorization of expression as commercial or not.

Regardless of whether one agrees with how the Court has decided its commercial speech cases, when they are reviewed in their totality, I would suggest that there is only one case that simply cannot be reconciled with an approach that does not involve the categorical devaluation of commercial speech.: *Valentine v. Chrestensen*.<sup>137</sup> In *Valentine*, the Court upheld the conviction of a resourceful promoter of a submarine tour for violating a New York City anti-handbill ordinance. The Court proceeded from the premise that commercial speech was entitled to no protection at all, a view which has been emphatically rejected in later decisions.<sup>138</sup> It is doubtful that the Court would decide *Valentine* the same way today, even under the more forgiving commercial speech standard of *Central Hudson*.<sup>139</sup>

That the current body of Supreme Court case law can be accommodated were we to reject the broad categorization of speech as commercial does not fully demonstrate that such an approach is prudent. The Court has been selective in the commercial speech cases it has reviewed. Consequently, it is also important in evaluating whether to jettison current doctrine to ask if whether doing so would unduly restrict the ability of government to protect the public in areas not yet addressed by the Court. On its broadest level, that question presents so many possible permutations and combinations as to make a complete analysis almost impossible. Nevertheless, it is at least

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associated with economic activity. *Compare* *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 334 (1986) ( suggesting that power to regulate gambling necessarily includes ancillary power to regulate associated advertising) *and* *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (upholding restriction on state lottery advertising) *with* *44 Liquormart*, 517 U.S. at 509 (1996) (striking down restriction on liquor advertising and rejecting the reasoning of *Posadas*) *and* *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (striking down restriction on advertising gambling activities). In *44 Liquormart*, the Court suggested one limiting principle: “the State retains less regulatory authority when its . . . restrictions strike at the substance of the information communicated rather than the commercial aspect . . . .” 517 U.S. at 499 (*quoting* *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977)).

137. 316 U.S. 52 (1942).

138. *See, e.g.*, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758-62 (1976).

139. The Court has been particularly hostile to blanket bans on expression like that in *Valentine*. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 355 (1977) (blanket ban on lawyer advertising); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977) (ban on contraceptive advertising); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 92-92 (1977) (ban on “For Sale” signs). Nor has it permitted excessive weight to be placed on the commercial/noncommercial distinction. *See* *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-28 (1993).

worth examining. Consider, for example, a recent federal regulation of speech which I suspect most people would applaud and which arguably may be more difficult to sustain in the absence of current commercial speech jurisprudence: the implementation by the Federal Trade Commission of a nationwide do not call list prohibiting uninvited telephone solicitation of those who place their names on a national register.

I characterize the Do Not Call register as a difficult case because at least viscerally, the Commission's action seems reasonable, prohibiting an unwanted intrusion into the home, and carefully calibrated to serve that interest by applying only to those who affirmatively choose to opt in by placing their name on the list. The FTC's restriction, moreover, applies only to one method of speaking—direct telephone solicitation—and thus has much in common with the kinds of time, place and manner restrictions that the Court has suggested would be upheld under the more flexible substantial interest form of review.<sup>140</sup>

What is troublesome about the Do Not Call list from a First Amendment perspective is that the regulatory scheme is not entirely content neutral; it applies only to commercial solicitations, exempting calls for charitable or political purposes.<sup>141</sup> This feature of the law would seem to disqualify it from treatment as a mere restriction on the manner of speech,<sup>142</sup> although as discussed below, a particular feature of the FTC's limited jurisdiction may supply a neutral basis for the distinction.<sup>143</sup>

The FTC regulation does not seem particularly difficult to justify when judged under the *Central Hudson* test currently applicable to commercial speech and, in fact, was upheld on those grounds by the Tenth Circuit in *Mainstream Marketing Services, Inc. v. Federal Trade Commission*.<sup>144</sup> It is less clear that in its present form the Do Not Call register could withstand strict scrutiny analysis.

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140. See *Martin v. Struthers*, 319 U.S. 141, 148 (1943).

141. The Telemarketing and Consumer Fraud and Protection Act of 1994 defines “telemarketing” as calls “conducted to induce purchases of goods and services.” 15 U.S.C. § 6106 (4) (2000).

142. See, e.g., *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29 (1993). *But see San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 536-37 (1987) (suggesting that a statute prohibiting use of word “Olympic” in trade or advertising was a restriction on manner of speech.).

143. See *infra* text accompanying notes 152-57.

144. 358 F.3d 1228 (10th Cir. 2004)

In a similar context, the Supreme Court has struck down, in a variety of contexts, local regulators' attempts to restrict all in person, door-to-door solicitation of the home.<sup>145</sup> At the same time, the Court has cited with approval the concept of consumer opt in schemes as a potentially less restrictive way of regulating offensive door-to-door solicitation, but in these cases the Court appeared to be envisioning content neutral regulatory schemes; that is, regulations that allowed residents to forbid door-to-door solicitation regardless of its purpose.<sup>146</sup> It is not obvious from a First Amendment perspective why the FTC should be permitted to discriminate among speakers doing effectively the same thing as was done in the in-person solicitation cases solely on the basis of what they have to say.<sup>147</sup> As the Tenth Circuit recognized, it is true that the evidence before the Commission was that most of the problems with telephone solicitation involved commercial calls and that people tended to find these kinds of solicitations more offensive.<sup>148</sup> Perhaps this evidence, when coupled with the interest in minimizing invasions of privacy into the home,<sup>149</sup> would be enough to sustain the rule even if strictly scrutinized. Indeed there would be something ironic about striking down the law because

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145. See *Watchtower Bible & Tract Society of New York, Inc. v. Stratton*, 536 U.S. 150, (2002); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Martin v. Struthers*, 319 U.S. 141 (1943). The Court has not been entirely consistent in its treatment of restrictions on door-to-door solicitation. In *Breard v. City of Alexandria*, 341 U.S. 622 (1951), the Court upheld an ordinance that prohibited commercial solicitation. That challenge was brought by magazine solicitor and, thus, involved a category of speech usually associated with full First Amendment protection. To the extent the Court was animated by a distinction between commercial and noncommercial forms of solicitation, it is enough to note that it was decided in 1951, well before commercial speech was recognized to fall within the protective ambit of the First Amendment. See *supra* note 3 and accompanying text. To the extent that commercial concerns were not at work, considerable tension exists between *Breard*, on the one hand, and *Martin*, which the *Breard* Court distinguished but did not overrule, *id.* at 642-43, and subsequent cases such as *Watchtower Bible* and *Village of Schaumburg*, on the other hand, which take a dim view of restrictions on in-person solicitation.

146. See *Watchtower Bible*, 536 U.S. at 153, 168-69; *Village of Schaumburg*, 444 U.S. at 639; *Martin*, 319 U.S. at 147-49.

147. In *Rowan v. United States Post Office*, 397 U.S. 728 (1970), the Court upheld a postal service regulation requiring the removal of the names from mailing lists at the request of the recipient of any advertising offering for sale matter that the recipients, in sole discretion, believed to be erotic or sexually provocative. See *id.* at 730. Although the regulation defined its reach in terms of the content of the expression, the Court appeared to view the virtually absolute discretion vested in the mail recipient as removing any element of content based classification by the government. See *id.* at 737.

148. See *Mainstream Mktg.*, 358 F.3d at 1240-41.

149. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (“[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order . . . .”) (*quoting* *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

it did not restrict enough speech,<sup>150</sup> and the Supreme Court has been generally unimpressed by claims that speech restrictions are underinclusive.<sup>151</sup>

Nevertheless, it is troubling that the current content-centric structure of the Do Not Call register may be unnecessary. Just as it offered consumers the option of restricting commercial calls on either a general or a company specific basis, the FTC could be permitted to offer the option of restricting all unsolicited calls or only those which are commercial. It has not done so at least in part due to limits on its jurisdiction, which does not extend to nonprofit entities.<sup>152</sup> This jurisdictional limitation was recently cited by a divided Fourth Circuit panel as supplying a content-neutral basis justifying a distinction drawn by FTC regulations governing for profit, but not nonprofit, charitable telephone solicitors.<sup>153</sup> The panel's reasoning is not without appeal and could help to explain why the commercial telemarketing regulations should be upheld under the more flexible standards applicable to content neutral regulation. Yet an opinion dissenting from the panel's decision highlights a potential flaw in its reasoning:

The implications of this holding are staggering. If a regulation that places different restrictions on speech based upon the identity of the speaker can be upheld simply by relying on the jurisdiction of the agency, as the “neutral justification” for the distinction, this court will have created a perverse incentive for all legislative bodies. Congress can restrict speech, even unconstitutionally, so long as it does so by parsing jurisdiction between various agencies.<sup>154</sup>

At least a partial answer to this point is that such jurisdictional limitations will withstand First Amendment scrutiny only if they are animated by concerns unrelated to expression or the identity of

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150. See *Mainstream Mktg.*, 358 F.3d at 1238-39 (stating that “underinclusiveness . . . is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further.”).

151. See, e.g., *United States v. Edge Broad. Co.*, 509 U. S. 418, 434 (1993).

152. See *Nat'l Fed'n of the Blind v. Fed. Trade Comm'n.*, 420 F.3d 331, 335 (4th Cir. 2005). The Commission regulates telemarketing calls pursuant to two different statutes. Commercial telemarketing calls—those designed to induce the sale of goods and services—are regulated pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994. See *Mainstream Mktg.*, 358 F.3d at 1234-35 (10th Cir. 2004). In 2001, the definition of “telemarketing” was expanded by the Patriot Act to include calls regarding “a charitable contribution, donation, or gift of money or any other thing of value . . . .” See *Nat'l Fed'n of the Blind*, 420 F.3d at 338. As recognized by the Fourth Circuit, neither of these statutes altered the Commission's limited jurisdiction. *Id.* at 335-338.

153. *Nat'l Fed'n of the Blind*, 420 F.3d at 335.

154. *Id.* at 354.

particular classes of speakers.<sup>155</sup> Since a general jurisdictional grant limited to for profit companies does not seem to implicate any important interests protected by the First Amendment, the Commission's decision to regulate only telemarketers within its jurisdiction may be justifiable by reference to a more flexible standard of review.<sup>156</sup> What would not be permitted without substantially more justification is any attempt by the Commission to disfavor particular genres of expression or particular speakers within its purview.<sup>157</sup>

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155. Such an approach would distinguish the principal example used by the dissent which involved a hypothetical division of jurisdiction over political parties so that one party was subject to more onerous regulation than the other. As identically situated entities, it would be difficult to advance a persuasive, neutral reason for treating political parties differently. *Cf. Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down regulation of news racks on the grounds that they were similarly situated in terms of the government interest being served). On the other hand, nonprofit entities generally operate in a different sphere from profit making ventures. Of course, if it appeared that a seemingly neutral distinction was being used to punish or disadvantage a particular class of speakers, a different result would obtain. *See Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

156. There remain at least two problems with using the Fourth Circuit's reasoning to support more flexible review of FTC telemarketing regulations. First, the underlying statutes themselves may be content based and when taken together may disfavor certain categories of expression (sale of goods and services and charitable solicitations) while leaving others completely alone. Second, the Commission's own telemarketing rules treat for-profit charitable telemarketers differently from other commercial telemarketers, *see Nat'l Fed'n for the Blind*, 420 F.3d at 338, a distinction that seems difficult to justify in a world where commercial speech is not categorically devalued. Indeed, without substantial evidence demonstrating that for-profit charitable callers are less intrusive than commercial telemarketers, it is doubtful even under the current regime that such different treatment could be sustained. *See Discovery Network*, 507 U.S. at 424.

157. Professor William Van Alstyne has identified one potentially troubling consequence of equating commercial and noncommercial speech in the context of using public or quasi-public facilities. *See Van Alstyne, supra* note 118, at 1635. Such parity, Van Alstyne warns, might compel regulators more broadly to restrict the use of facilities for expression if they can no longer distinguish commercial from noncommercial uses. A particularly powerful example is news rack regulation, which was the subject of *Discovery Network*, 507 U.S. at 410 (1993), a decision which overturned a restriction on news racks used to distribute commercial speech. If local governments can no longer make such a distinction, Van Alstyne posits, they may well seek to control the proliferation of such devices by prohibiting all of them, an approach which a number of Justices have suggested would be permissible. *See Van Alstyne, supra* note 118, at 1640-43. Van Alstyne's point has considerable force, particularly in a legal environment which he recognizes has granted government more latitude in restricting the use of public forums. *See id.* at 1646.

At the risk of diminishing the very real concerns posited by Professor Van Alstyne, there are at least two possible responses to his point. First, the central problem here lies not with the leveling up of constitutional protection for commercial speech, but in the leveling down of the degree of protection offered to those using public facilities to express themselves. In other words, the latter phenomenon has occurred separately from the former, and the real solution is not in diminishing one kind of expression, but in

## 2. *False or Misleading Speech*

With restrictions on false or misleading speech, the Court has recognized that the interests of government in regulating are more consistent with the stated rationale for offering commercial speech less protection than other kinds of speech:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.<sup>158</sup>

The notion that greater latitude should be accorded to prevent deception isn't limited to commercial speech; as I discussed earlier, greater First Amendment latitude has been permitted in restricting false speech in a variety of contexts, not just where it is commercially motivated.<sup>159</sup> The central question in these cases is how much "breathing space" is required to make sure that a speaker will not be unduly deterred by the fear of liability.

The most common kinds of regulations involving false commercial speech are false advertising laws. Although they come in all shapes and sizes,<sup>160</sup> many have in common that they often impose liability strictly.<sup>161</sup> Few would argue that government interests in prohibiting false advertising would not qualify as sufficiently weighty to support some regulation. The questions are how much and under what circumstances? Do the competing interests at stake justify a strict liability approach? If so, should run of the mill product or

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validating all kinds. Second, it is not entirely clear that where there was a real need to limit access to public facilities choices could not be made that facilitated access in ways that served the broadest possible dissemination of information. For example, were there truly a need to limit the number of news racks in a particular location, a regulator might indeed grant favored access to the kinds of publications likely to disseminate the broadest range of information—in other words general circulation newspapers. As Professor David Anderson has recognized in arguing for a limited reading of the Press Clause of the First Amendment, the statute books are filled with laws discriminating in favor of the news media by granting preferential access where limits are required. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435-45 (2002). The White House press pool is a classic example.

158. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

159. *See supra* notes 82-97 and accompanying text.

160. On the federal level, Section 43 of the Lanham Act, 15 U.S.C. § 1125(a), and sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 52(b), provide various rights of action, both private and governmental, against false or deceptive advertising. *See generally* KENNETH A. PLEVAN AND MIRIAM L. SIROKY, *ADVERTISING COMPLIANCE HANDBOOK*, Chapters 1, 6 (2d ed. 1991). All fifty states also have laws regulating false advertising. *See generally id.*, Chapter 11; BRODY & JOHNSON, *supra* note 26, § 10:5.2.

161. *See generally* BRODY & JOHNSON, *supra* note 26, §§ 9:3, 10:5.2.

service ads be treated the same as the letter to the editor at the center of the Nike case?<sup>162</sup> The seeds of an answer, I believe, may be found in some of the Court's defamation cases.

In the defamation context, the Court has prescribed minimum fault requirements that limit states' ability to provide a remedy in most instances. At the risk of oversimplifying, public figures ordinarily must prove a publisher acted with actual malice while private figure defamation plaintiffs need only prove negligence, at least as a constitutional matter.<sup>163</sup> Since it began addressing this area, the Court has never expressly approved strict liability in any defamation case, although in one instance it has strongly implied that there is room for such an approach in the category of cases where no issue of public concern is involved. That case, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>164</sup> arose out of a false credit report, and it may present a useful framework for how to deal with false advertising cases.

The credit report in *Dun & Bradstreet*, although commercially motivated, was not the kind of speech that fit comfortably into the class of cases comprising the commercial speech jurisprudence. Yet the Court was clearly influenced by many of the same factors that often underlie that body of decisions. As in earlier defamation cases, the central issue in *Dun & Bradstreet* involved deciding the proper accommodation for the competing interests. The state's interest in compensating individuals for damage to reputation was the same in *Dun & Bradstreet* as it is in other cases. What differed was the First Amendment interest which the Court viewed as "less important" because the credit report did not, in its estimation, involve speech implicating an issue of general public concern which is "at the heart of the First Amendment's protection."<sup>165</sup> Whether speech involves a matter of public concern is to be determined by the "content, form and context" of the expression, and the Court emphasized three

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162. In a recent article, Bruce Johnson and Jeffrey Fisher make a convincing argument that within the context of the commercial speech doctrine, such distinctions should be based on format—traditional forms of advertising would receive less protection than more creative forms. See Bruce E. H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243 (2004). While Johnson's and Fisher's approach would represent an improvement over the current approach, it doesn't fully address the problem of devaluing important messages that are often contained within even traditional forms of promotion.

163. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

164. 472 U.S. 749 (1985).

165. *Id.* at 758-59.

principal considerations in determining that the credit report in *Dun & Bradstreet* did not.<sup>166</sup>

First was the fact that the “speech [was] solely in the individual interest of the speaker and its specific business audience.”<sup>167</sup> Second, because it was made available to only a few subscribers, “it cannot be said that the report involves any strong interest in the free flow of commercial information.”<sup>168</sup> Third, “the speech here, like advertising is hardy and unlikely to be deterred by incidental state regulation” because it was “solely motivated by the desire for profit.”<sup>169</sup> The Court also suggested that the credit report “arguably” was more objectively verifiable,<sup>170</sup> but it did not appear to rely much on this factor and with good reason; the information in the credit report in the case and how the defendant obtained it really did not differ in any material way from how the news media obtained information in those defamation cases mandating a more rigorous level of First Amendment scrutiny.<sup>171</sup>

While *Dun & Bradstreet* is perhaps not a model of clarity, the Court's reasoning does focus on factors that are relevant to the First Amendment inquiry unlike some of the commercial speech jurisprudence. And if it is applied with sensitivity to underlying First Amendment values, it offers a useful way to approach the false advertising genre.

In most false advertising cases it may also be said that the expression is solely in the interest of the speaker and its business audience. Product and service advertising is designed specifically to reach an audience of likely buyers for the benefit of the advertiser. It is also durable speech; advertising is a necessary component of the

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166. One danger in a standard based on notions of public concern is that it could prove so malleable and amorphous as to undermine First Amendment values. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 78-79 (1970) (Marshall, J., dissenting); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23.5 at 3-86-87 (2005). It is, thus, important that any such standard be interpreted in the kind of “spacious” way that promotes robust expression. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 135 (1992). At least in the area of defamation, where the concept is central to determining how much First Amendment protection is afforded, courts have largely avoided too cramped a view. See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 6.6 at 6-25 (3rd ed. 2005).

167. *Dun & Bradstreet*, 472 U.S. at 762.

168. *Id.*

169. *Id.*

170. *Id.* at 762-63.

171. The information at issue in *Dun & Bradstreet* was gathered by an employee's review of public records—in this case bankruptcy filings. *Id.* at 752. This is precisely how the news media frequently obtains information on a variety of subjects.

sales process and is less likely to be deterred than more optional forms of speech.<sup>172</sup> The difficulty in translating *Dun & Bradstreet* to the typical advertising context lies in the consideration of the free flow of commercial information. In this respect, advertising differs from *Dun & Bradstreet's* credit report. Advertising is ordinarily disseminated to a wide audience, at least compared to the five recipients of the *Dun & Bradstreet* credit report.<sup>173</sup> If we accept the notion that advertising is not to be categorically devalued merely because it concerns matters of commercial interest, then the *Dun & Bradstreet* methodology does not exactly fit.

There is, however, a characteristic of most product or service advertising which differs from the interests implicated by the credit report and which may justify treating the two in the same way. That difference has to do with verifiability, one of the traditional lynchpins of the commercial speech doctrine, and it helps explain both why ordinary product or service ads may be regulated without undue First Amendment concerns as well as why these kinds of ads should be treated differently from the kind of expression involved in *Nike* and its ilk which has created difficulty in the application of the commercial speech doctrine.

When a false advertising complaint challenges specific claims made about the price, quality or other particular characteristics of a speaker's product or service, the complaint involves both matters which are likely to be verifiable, and may fairly be said to be especially within the sphere of the advertiser's knowledge. In the context of accommodating the respective First Amendment interests in evaluating a restriction on false speech, these factors are relevant as the kind of normative considerations that have influenced the standard of liability in other areas, particularly defamation. Just as the Court has held it relevant that a public figure is less in need and less deserving of protection from false statements,<sup>174</sup> so too can it be said that an advertiser is less in need and less deserving of protection from specific claims it makes about its own products or services. Where claims involve matters not within the speaker's particular sphere of

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172. See generally David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad and the Ugly*, 83 OR. L. REV. 1203, 1218-19 ("With every newspaper edition, television news broadcast or internet website, editors and producers face a wide range of daily choices about what to include or exclude, and without much notice might well tend to avoid reporting that which is likely to bring with it potential exposure to significant liability or defense costs.").

173. See *Dun & Bradstreet*, 422 U.S. at 751.

174. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

knowledge, the interests would balance differently, leading to a different conclusion.<sup>175</sup>

To see how these various interests play out in the commercial speech context, consider the *Nike* case and a variation on it. Although the claim against Nike arose out of a variety of communications, it revolved around the company's response to claims that it treated its Asian workers poorly. In letters to the editor, editorial advertisements and other communications, Nike responded to its critics' charges by detailing some of the benefits it extended to its workers and characterizing its practices,<sup>176</sup> arguing that it was "doing a good job"<sup>177</sup> and "operating morally."<sup>178</sup> Under the approach I propose, these kinds of statements would not subject Nike to strict liability for two reasons.

First, they were made in a context where they cannot be said to be solely in the interest of the speaker and its business audience. To the contrary, the kind of speech in which Nike engaged was part of a broader public debate, not only over its particular labor practices,<sup>179</sup> but that of the apparel industry in general,<sup>180</sup> and as such is of interest to a far broader audience.<sup>181</sup> Louis Brandeis's famous admonition that "the fitting remedy for evil counsels is good ones"<sup>182</sup> is particularly relevant here. Issues like that implicated in *Nike* generate considerable public debate which ensures that all sides of the issue are ventilated.<sup>183</sup>

Second, the claims against Nike didn't relate to the particular characteristics of goods or services, and most of what Nike said

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175. For example, the justifications for diminished protection likely would not apply to defamation actions arising from claims by one competitor about another's products or service. See BRODY & JOHNSON, *supra* note 26 §§ 7.3.3, 7.3.4.

176. *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

177. *Id.*

178. *Id.*

179. See Johnson & Fisher, *supra* note 12, at 1245-49.

180. See, e.g., MSNBC.com, Sweatshop Journal (1998), available at <http://www.msnbc.com/Onair/NBC/dateline/time.asp>; CNN Interactive, Four chains bought from sweatshops that exploit workers (1997), available at <http://www.cnn.com/05/97/12/14/sweatshop.retailers/>.

181. Indeed, the complainant in *Nike*, Mark Kasky, did not even claim to be a consumer of Nike products and alleged no injury as a result of Nike's communications. See *Nike*, 45 P.3d at 243. The absence of any actual reliance or injury was the basis for the Solicitor General's argument that his claim should be rejected on First Amendment grounds. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Nike v. Kasky*, 539 U.S. 654 (2003), at 25-32, available at 2003 WL 899100 at \*21-\*26.

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

183. See generally Johnson & Fisher, *supra* note 12, at 1245-49 (describing the public debate surrounding Nike's statements).

involved the company's characterization of its labor practices, implicating the kinds of value judgments that can hardly be said to be particularly subject to objective verification. Outside of the commercial speech realm, such loose, figurative statements are ordinarily not subject to liability under any circumstances,<sup>184</sup> much less a standard which imposes sanctions strictly.

Contrast the facts in *Nike* with the case where the company makes specific representations in an advertisement about the quality or characteristics of its footwear; for example, a claim that a particular brand of athletic shoe has more cushioning than other brands which leads to fewer impact injuries. Such a claim is likely to be of more limited interest only to those people interested in buying or using Nike products who may lack the sophistication or information necessary to make an informed decision.<sup>185</sup> Second, it is durable; Nike needs to make such claims in advertising in order to prosper in the competitive and fickle athletic footwear market.<sup>186</sup> And finally, the claim is subject to the kind of proof that is likely to be within Nike's particular control. Thus, if false or deceptive, a regulation imposing strict liability should not meet with any constitutional impediment.<sup>187</sup>

The approach I am advocating largely avoids the kinds of troubling classification problems that arise in cases like *Nike* and *Bolger v. Young Drug Products*.<sup>188</sup> *Bolger* involved a statute that prohibited the mailing of unsolicited advertisements for contraceptives. That the statute was struck down by a unanimous

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184. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

185. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995); *In re R.M.J.*, 455 U.S. 191, 200 (1982).

186. See, e.g., Chris M. Abess, *The Footwear Industry: Stepping into the Future* (2004), <http://www.apparelandfootwear.org/data/Deloitte%20Article.pdf>.

187. A somewhat closer case than *Nike* is *Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), which was one of the examples used by Kozinski and Banner to demonstrate the futility of making broad categorical distinctions between commercial and noncommercial speech. That case arose out of an FTC complaint challenging claims made by an egg industry group that there was no scientific link between egg consumption and heart disease. The Commission determined the claim to be false and misleading. I characterize the case as closer than *Nike* because the specific claims made did, in fact, concern the particular characteristics of the promoter's product. However one may choose to characterize the verifiability inquiry in regard to that claim, it seems to me that the presence of a broader issue of public concern—whether egg consumption is harmful to one's health—would militate in favor of extending full protection to the expression, as it cannot be said that it was *solely* in the interest of the speaker and its business audience. I concede, however, that the potential malleability of the public concern inquiry could inject some doubt into close questions presented by cases like *Egg Nutrition*.

188. 463 U.S. 60 (1983).

Court is unremarkable; the law in question broadly prohibited any speech on an important public issue for reasons that were almost entirely paternalistic.<sup>189</sup> What is troubling about *Bolger* is the implications of how the Court reached its decision. Much of the expression at issue in *Bolger* was in the form of informational pamphlets distributed by a condom manufacturer discussing the desirability of prophylactics.<sup>190</sup> Despite recognizing that these pamphlets did not fit comfortably into its commercial speech model, as they could not be characterized as mere proposals for a commercial transaction, the Court nevertheless felt constrained to categorize them one way or the other as either commercial or not, notwithstanding that much of what they addressed involved important public health issues of widespread concern. It did so, moreover, in a way that established no meaningful standards and emphasized considerations largely divorced from what should be the overriding concerns. The Court found the pamphlets to be commercial for reasons having little to do either with promoting widespread public debate or protecting consumers, holding that the combination of the pamphlets being “advertisements,” referring in places to specific products and being motivated by economic considerations meant they were “commercial.”<sup>191</sup>

The need to cram the speech involved in *Bolger* into a one-size-fits-all commercial speech box leads to pernicious results. As illustrated by that case, speech in the real world often cannot be neatly categorized. Commercial and noncommercial elements may be inextricably intertwined, and as Kozinski and Banner recognized, speakers will employ constantly shifting and ever more creative means for disseminating their messages.<sup>192</sup> An approach that seeks to encompass all of these diverse means of expression within a single construct will necessarily be so vague and malleable as to provide no meaningful guidance and allow the kind of relativistic, results-oriented decision-making that the First Amendment should prevent.<sup>193</sup> Consequently, public debate on important issues may be

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189. *Id.* at 71-74. The Court has almost uniformly struck down this kind of paternalistic regulation. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-05.

190. *See* 463 U.S. at 62.

191. *Id.* at 66-67.

192. *See* Kozinski & Banner, *supra* note 2, at 645.

193. *Cf.* *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 785-87 (1996) (Kennedy, J., concurring in part and dissenting in part) (discussing how lack of clear standards results in subordination of long-term speech values to the “inequities of the moment,” ad hoc balancing with its resulting confusion and lack of judicial discipline,

skewed as companies seek to avoid the risks associated with potential lawsuits by constricting their comments.<sup>194</sup> The First Amendment, of course, presupposes precisely the opposite—that the public welfare is best served by ventilation of “information from diverse and antagonistic sources . . . .”<sup>195</sup>

The speech in *Bolger* could just as easily and far more sensitively been dealt with by the kind of interest based analysis discussed above.<sup>196</sup> *Bolger*, of course, involved no claims that the expression was deceptive and, thus, under the approach I am proposing would have been subject to strict scrutiny.<sup>197</sup> But what if the *Bolger* pamphlets had been challenged as being deceptive? Would an interest based approach provide sufficient regulatory flexibility? I believe it would.

The latitude accorded to the government in such a case would depend on what was being challenged. Where charges of deception arose from specific claims made about the quality or characteristics of Young's products, few impediments would exist to regulation. Where they involved more general or widespread concerns—say, for example, the importance of condom use in preventing the spread of the HIV virus—the standard for liability would, at a minimum, be significantly higher.

My purpose here is not to address every possible variation that might arise. The point is that First Amendment doctrine relating to the regulation of false speech is sufficiently flexible to accommodate legitimate commercial regulatory concerns without resorting to the creation of a separate one size fits all category for commercial speech. A more constitutionally sensitive interest based approach, moreover,

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and the lack of notice and fair warning to those who must predict how courts will respond to attempts to suppress their speech).

194. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 n. 21 (1978) (“[c]orporate management would not be willing to risk [those penalties] . . . . In addition, the burden and expense of litigating the issue . . . would unduly impinge of the exercise of the constitutional right.”). After the California Supreme Court's decision in *Nike*, companies were advised that “[u]nless and until the U.S. Supreme Court reviews *Kasky* . . . [t]he safest course may be to make no reference at all to one's products, services, or business operations—but that may amount to saying nothing at all when one's industry is under general attack.” Jonathan A. Loeb & Jeffrey A. Sklar, *Be Careful When Your Company Speaks*, AGS&K BUSINESS REPORT, available at <http://www.alschuler.com/showarticle.aspx?=&Show15> (visited Oct. 23, 2002); see Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 16 No. 21 ANDREWS DEL. CORP. LITIG. REP. 11 (2002); Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds*, FORTUNE, Sept. 2, 2002, at 102.

195. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

196. See *supra* notes 77-81 and accompanying text.

197. See *supra* notes 102-05 and accompanying text.

is likely to facilitate the kinds of open debate and dissemination of important commercial information that the First Amendment should protect.

### **B. Rethinking the Right of Publicity**

The Right of Publicity protects an individual's right to control selected attributes of identity in certain circumstances.<sup>198</sup> As a creature of state law, the precise contours of the right vary from jurisdiction to jurisdiction, but in most places it is limited to commercial uses, which are generally defined as those involving trade or advertising.<sup>199</sup> Commercial uses for right of publicity purposes are not necessarily coextensive with “commercial speech” as defined by the Supreme Court.<sup>200</sup> Many right of publicity cases do, of course, involve purely commercial uses of identity in advertising or promotion,<sup>201</sup> but in some places the right of publicity extends to things like sculptures, t-shirts and trading cards,<sup>202</sup> or mixed speech products, and informational expression with a promotional component, what I define as mixed message speech.<sup>203</sup> Both involve

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198. The right of publicity is generally recognized to have been derived from the seminal article on privacy by Louis Brandeis and Samuel Warren. Louis D. Brandeis & Samuel D. Warren, *The Right of Privacy*, 4 HARV. L. REV. 193, 195-97 (1890). Some jurisdictions still recognize a distinction between the right of publicity and a right of privacy against misappropriation of one's identity. A cause of action for the appropriation of name and likeness is intended to protect the dignitary interest of the plaintiff. A cause of action for a violation of the right of publicity is intended to protect the commercial interest of the plaintiff. See *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28.6 (4th ed. 2003). I refer to the right of publicity as encompassing both, and differences will be discussed only where relevant to the subject matter being addressed.

199. See generally Bruce P. Keller, *The Right of Publicity: Past, Present and Future*, 1207 PRACTISING L. INST. CORP. & PRAC. COURSE HANDBOOK SERIES 159 (2000).

200. See, e.g., *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-85 (9th Cir. 2001); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001).

201. See, e.g., *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395, 1396-97 (9th Cir. 1992); *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 57-58 (2d Cir. 2001); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 617-18 (S.D.N.Y. 1985).

202. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players' Ass'n.*, 95 F.3d 959, 967-68 (10th Cir. 1996) (trading cards); *Comedy III Prods.*, 21 P.3d at 811 (T-shirts); *Martin Luther King, Jr., Ctr. For Soc. Change, Inc., v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 698 (Ga. 1982) (sculpture).

203. See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 999-1000 (9th Cir. 2001) (promotional brochure one quarter of which was devoted to stories, news and other editorial features); *O'Grady v. Twentieth Century Fox Film Corp.*, No. 5:02 CV173, 2003 WL 24174616 (E.D. Tex. December 19, 2003) (interstitial programming about soon to be released movie aired during documentary that inspired film).

genres of expression going beyond pure advertising that don't fit neatly into current notions of commercial speech.<sup>204</sup>

In most right of publicity cases involving traditional forms of advertising and promotion, constitutional validity has been largely assumed. Very few of these decisions contain any meaningful discussion of the First Amendment implications of the right of publicity, and those that do dismiss constitutional arguments on the basis that because commercial speech is a lower form of expression, the First Amendment is no impediment to recovery.<sup>205</sup>

The law involving right of publicity claims directed at expression that can't easily be categorized as purely commercial is chaotic,<sup>206</sup> perhaps due in part to the fact that the Supreme Court has addressed the relationship between the right of publicity and the First Amendment only once, in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>207</sup> That decision arose out of unusual facts involving a carnival act by Hugo Zacchini, who billed himself as the "Human Cannonball." As his moniker suggested, Mr. Zacchini's act involved shooting him out of a cannon into a net some distance away.<sup>208</sup> Over his objection, a local television station recorded and broadcast on the evening news the entirety of Zacchini's performance.<sup>209</sup> He sued for a violation of his right of publicity.

Although the precise boundaries of its opinion are uncertain, as the Court didn't set forth any generally applicable rule of decision for similar cases,<sup>210</sup> it is clear that *Zacchini* does not immunize all or even most right of publicity cases from First Amendment challenge.<sup>211</sup> To the contrary, the Court emphasized the unusual nature of the facts presented, involving the appropriation of an entire performance, and made clear that it was dealing with a peculiarly compelling form of misappropriation:

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204. See Volokh, *supra* note 46, at 907.

205. See White, 971 F.2d at 1401.

206. See *infra* note 236.

207. 433 U.S. 562, 578 (1977).

208. *Id.* at 563.

209. *Id.* at 564.

210. See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §8:27 (2d ed. 2005) ("while the *Zacchini* majority and dissenting opinions have been picked apart word for word by the commentators, no clear message emerges and no general rule is discernable by which to predict the result of conflicts between the right of publicity and the First Amendment.").

211. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 956 (6th Cir. 2003) (describing *Zacchini* as "narrowly drawn"); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996) (describing *Zacchini* as a "red herring").

[t]he case before us is more limited than the broad category of lawsuits that may arise under the heading of ‘appropriation.’ Petitioner does not merely assert that some general use, such as advertising, was made of his name and likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.<sup>212</sup>

The Court's reasoning was predicated on two related interests that were present on these facts but which may not be nearly so compelling in many right of publicity cases. First, the particular wrong “vitally affects his [Zacchini's] livelihood . . .”<sup>213</sup> and presents a “substantial threat to the economic value of that performance.”<sup>214</sup> Second, drawing an analogy to copyright and patent law, the Court emphasized that the right of publicity as applied in the case “provides an economic incentive for [Zacchini] to make the investment required to produce a performance . . .”<sup>215</sup> These interests, the Court recognized, were “unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press” and presented the “strongest case for a ‘right of publicity’ involving not the appropriation of an entertainers reputation to enhance the attractiveness of a commercial product but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”<sup>216</sup>

*Zacchini* is best viewed not as a run of the mill right of publicity case at all— at least as right of publicity has come to be understood— but as a form of that narrow category of misappropriation recognized by the Court in *International New Service v. Associated Press*<sup>217</sup> which is designed to protect against unjust enrichment as the result of one's free-riding on the work of another. That case involved the lifting of factual news stories from AP bulletins by a competing news service. Since the information appropriated was purely factual, it was not subject to copyright protection, but the Court nonetheless recognized a remedy for the misappropriation. Although the precise boundaries of *Associated Press* are unclear,<sup>218</sup> the Supreme Court, and lower courts that have since recognized similar kinds of claims, have suggested two central factors. First, the misappropriation must be of the sort that threatens serious harm by direct competition to the

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212. *Zacchini*, 433 U.S. at 574, n.10.

213. *Id.* at 572, n.9.

214. *Id.* at 575.

215. *Id.* at 576.

216. *Id.*

217. 248 U.S. 215 (1918).

218. *See Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852 n.7 (2d Cir. 1997).

plaintiff in a primary market.<sup>219</sup> Second, the misappropriation must “so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”<sup>220</sup>

Such an interpretation of *Zacchini* not only comports with its expressed limitations but also is most consistent with current First Amendment jurisprudence. The right of publicity is, of course, a content-based law; its coverage is defined precisely in terms of the subject matter of the speech it seeks to restrict.<sup>221</sup> As discussed earlier in this article, unless subject to some exception to the general rule (for example, the commercial speech doctrine), such content-based restrictions will be sustained only under circumstances sufficient to withstand a high degree of scrutiny.<sup>222</sup>

The interests served by more common right of publicity cases often do not implicate the kinds of compelling concerns central to *Zacchini*. The right of publicity is designed primarily to compensate individuals for the infringement of the commercial value of certain attributes of their identity.<sup>223</sup> However, the value that one seeks to derive from a use of their identity may not arise so directly from the kinds of weighty considerations at work in *Zacchini*:

The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards. Any additional incentive attributable to the right of publicity may have only marginal significance. In other cases the commercial value acquired by a person's identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight<sup>224</sup> of the property and unjust enrichment rationales for protection.

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219. See *Associated Press*, 248 U.S. at 240-41; *Nat'l Basketball Ass'n*, 105 F.3d at 852; RESTATEMENT (THIRD) OF UNFAIR COMPETITION §38, cmt. C, at 412-13.

220. *Nat'l Basketball Ass'n*, 105 F.3d at 852; see *Associated Press*, 248 U.S. at 240-41.

221. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988). Moreover, as a law aimed purely at speech, the right of publicity should be subject to exacting scrutiny. See *Bartnicki v. Vopper*, 532 U.S. 514, 526-27 (2001).

222. See *supra* Part III.A.1.

223. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46, 47 (1995).

224. *ETW Corp. v. Jireh Publ'g, Inc.* 332 F.3d 915, 930 (6th Cir. 2003). In other words, the direct rewards of being a professional athlete or actor—fame, the thrill of compensation, direct lucrative compensation—provide enough incentive. See *Cardtoons, LLC v. Major League Baseball Players Ass'n*, 95 F.3d 959,973 (10th Cir. 1996) (“The incentive effect of publicity rights, however, has been overstated.”); Volokh, *supra* note 46, at 910 (“It's hard to believe that people would stop wanting to become political leaders, actors, or athletes if they were told that they would get less income from sales of T-shirts or prints.”).

Additionally, in some contexts, the right of publicity is said to serve the interest of redressing the humiliation or hurt feelings that can result from an unauthorized use of identity.<sup>225</sup> To the extent that right of publicity seeks to compensate for such generalized humiliation or distress, without any requirement that falsity be demonstrated, it would seem to be in conflict with cases like *Hustler Magazine v. Falwell*.<sup>226</sup>

Absent the kind of interests that animated *Zacchini*, the question then becomes whether a broader application of the right of publicity may be justified based on the commercial character of expression. I believe the answer is no. Indeed, even if one adheres to the basic notion that commercial speech is categorically less valuable, it is questionable whether the kinds of economic interests underlying publicity law would support a broad application of the right.

In *Cincinnati v. Discovery Network, Inc.*<sup>227</sup> the Court recognized that in order to sustain a restriction treating commercial and other kinds of speech differently, the government interests that underlie the restriction must at least have some relevance to the distinction being made.<sup>228</sup> Even if one were to accept the commercial speech doctrine in its current form, the right of publicity simply doesn't comport with this principle. First, to the extent individuals have an interest in being compensated for use of their identity, that interest is unrelated to any distinction between commercial and other kinds of speech, as the interest of the party seeking recovery would be equally present whether or not the underlying appropriation was for advertising or for some other kind of commercial exploitation which did not involve commercial speech.<sup>229</sup> Tiger Woods, for example, would have had the

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225. See, e.g., *Bi-Rite Enterprises v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983).

226. 485 U.S. 46 (1988) (holding that First Amendment considerations override intentional infliction of emotional distress claim arising from parody); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that First Amendment interests in reporting truthful information outweigh privacy interests). These decisions didn't involve commercial speech, but if one doesn't categorically devalue that genre of expression, the principles should have application to advertising uses unless outweighed by some other consideration.

227. 507 U.S. 410 (1993).

228. *Id.* at 424 (“Not only does Cincinnati's categorical ban on commercial news racks 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 that the city has asserted.”) (emphasis in original).

229. It is also worth noting that the interest of the individual to control and profit from use of his identity is quite different from the kinds of consumer protection interests that have animated the commercial speech doctrine. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (“When a State regulates commercial messages to protect

same general interest in being compensated for use of his image in a print<sup>230</sup> as he would for use of it in a television commercial. Second, and more important, the interests that most commonly have been offered to support different treatment of commercial speech from other speech—durability and verifiability—have little if anything to do with the right of publicity. That commercial speech may be more easily verified or is less subject to deterrence for fear of being sued over an honest mistake has little bearing on whether someone should be compensated for the economic value of their identity. Since right of publicity is designed to prevent all nonconsensual commercial uses, not just those involving some kind of factual error or deception,<sup>231</sup> that the speech may be more easily verifiable or less subject to deterrence is simply irrelevant. Finally, to the extent that commercial speech distinctions are animated by the need to protect consumers,<sup>232</sup> that interest too is inapplicable. The right of publicity protects individual economic interests, not broader concerns about the integrity of the marketplace.<sup>233</sup>

This is not to say that there is no room for any right of publicity. Even in a world where commercial speech is not categorically diminished, there are three contexts in which the right of publicity can be squared with the First Amendment. First, where there exists the kind of free-riding that has been recognized to be sufficient to support a misappropriation claim, *Zacchini* would permit a remedy, regardless of whether the speech involved were commercial or some other kind. Second, where the appropriation of one's identity has no relevance to an expressive or artistic message the right of publicity

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consumers from misleading, deceptive, or aggressive sales practices . . . the purpose of regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”)

230. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

231. Nevertheless, many right of publicity cases also incorporate false endorsement or association claims. These cases ordinarily allege tandem violations of both state law right of publicity and section 43(a)(1)(A) of the federal Lanham Act, which is designed to protect “consumers and competitors from a wide variety of misrepresentations of products and services in commerce.” *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 625 (S.D.N.Y. 1985) (quoting *CBS, Inc. v. Springboard Int'l Records*, 429 F. Supp. 563, 566 (S.D.N.Y. 1976)). Lanham Act claims require some proof that consumers are likely to have been confused, and the absence of any such requirement with the right of publicity means that it is a somewhat broader remedy than the Lanham Act. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). As I discuss below, this difference may be quite important from a First Amendment perspective, particularly one that does not seek to devalue commercially motivated speech based on facile categorizations. See *infra* Part III.B.3.

232. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

233. See, e.g., *Allen v. National Video, Inc.*, 610 F. Supp. 612, 625 (S.D.N.Y. 1985). See generally *MCCARTHY*, *supra* note 198, § 28:14.

may be viewed as consistent with First Amendment values. Third, false endorsement claims, which are increasingly brought in tandem with right of publicity claims, should also remain in some form. Remaining problematic are applications of the right of publicity where there is no serious issue of false endorsement and the manner in which courts address falsity claims in endorsement cases.

1. *The Limits of Free-Riding*

Over the last decade, courts have begun to pay more attention to how the underlying interests served by the right of publicity jibe with First Amendment values.<sup>234</sup> It is still true that in the context of more traditional advertising claims, constitutionality has largely been assumed.<sup>235</sup> Mixed purpose speech, on the other hand, has of late been receiving more First Amendment consideration, but there has yet to develop a consistent, coherent doctrine governing these kinds of claims.<sup>236</sup> This is so in part, I believe, because courts have been focusing on the wrong questions. Rather than looking at whether the underlying interests being served in a particular context are sufficiently weighty to withstand First Amendment scrutiny, as the Supreme Court did in *Zacchini*, courts have continued to be distracted by the degree of commerciality of the underlying expression which, for many of the reasons discussed in the previous section of this article,<sup>237</sup> leads one down the wrong path. To examine why this is so, this article first looks at more traditional advertising, and then considers mixed purpose speech implicating the right of publicity.

a. Advertising Uses

Most right of publicity claims challenging what may be viewed as traditional advertising or promotional uses of identity include claims

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234. See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 930-36 (6th Cir. 2003); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-87 (9th Cir. 2001); *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 968-77 (10th Cir. 1996).

235. See generally BRODY & JOHNSON, *supra* note 26, § 9:3, at 9-6 (2d ed. 2004).

236. At least six different approaches can be identified. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186-89 (9th Cir. 2001) (actual malice); *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970-77 (10th Cir. 1996) (balancing of interests); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987) (alternative avenues); *Rogers v. Grimaldi*, 875 F.2d 994, 999-1000 (2d Cir. 1989) (artistic relevance or explicit deception); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (predominant use); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (transformative use).

237. See *supra* Part II.B.

of false endorsement<sup>238</sup> and are discussed in the following section of this article.<sup>239</sup> Not all advertising-based right of publicity cases fall into this category, however. Consider, for example, *Oliveira v. Frito-Lay, Inc.*<sup>240</sup> In 1964 Astrud Oliveira, better known as Astrud Gilberto, recorded the Grammy-winning song *The Girl from Ipanema*. Thirty years later, Frito-Lay decided that the recording would serve as the perfect background music for a commercial promoting low-fat baked potato chips. The ad featured several famous models lounging by the pool looking crestfallen that their bags of low-fat Baked Lay's Potato Chips were empty. The camera panned to a shot of Miss Piggy, also reclining by the pool, eating the chips and passing the empty bags to the models, all the while singing along with Gilberto's recording playing in the background. Frito-Lay licensed the underlying composition and recording from the copyright owners, but it neither sought nor obtained Gilberto's permission to use her voice.<sup>241</sup> She sued claiming both false endorsement under the Lanham Act and violation of her right of publicity. The Second Circuit affirmed the dismissal of her endorsement claim, recognizing that under the circumstances no one could reasonably think that Gilberto was endorsing Lay's chips.<sup>242</sup> It did, however, allow the right of publicity claim to go forward because no element of false endorsement was required by the New York law under which the case arose.<sup>243</sup>

Such a result is unsound and should be prohibited by the First Amendment. This is certainly not the kind of case contemplated by *Zacchini*, as neither of the touchstones identified there were remotely

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238. See generally David Kohler, Michael M. Epstein & Robert C. Lind, *Has Celebrity Been Federalized? Section 43(A) of the Lanham Act as a Substitute for the Right of Publicity*, 2003 Media Law Resource Center Bulletin, No. 4, January 13, 2004, at 21-22; cf. *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) ("The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.").

239. See *infra* Part III.B.3.

240. 251 F.3d 56 (2d Cir. 2001).

241. *Id.* at 58.

242. *Id.* at 60.

243. *Id.* at 63-64. Frito-Lay defended under a statutory exception to New York's right of publicity law providing in effect that no such claim would lie where a party places his name or voice in the public domain in connection with the sale or disposition of a musical or artistic work. The issue turned on whether Gilberto had retained any contractual rights to the composition, and the court held that this issue could not be resolved at the motion to dismiss stage. *Id.* at 63-64. The outcome of that issue does not change the constitutional analysis, however. Any right Gilberto retained pursuant to an agreement would be enforceable by her against the other party to the contract. The right of publicity would provide a separate and independent right as to a non-contractual party who might not even be aware of any of the claimant's contractual rights.

present. Gilberto was presumably compensated for recording *The Girl from Ipanema*, and there simply is no credible argument that use of the recording in this context would threaten her livelihood.<sup>244</sup> Nor was there any suggestion that the right Gilberto asserted was necessary to provide the economic incentive to perform; the only conceivable interest Gilberto had was in being compensated for her position as a cultural icon resulting from the popularity of the song,<sup>245</sup> a value that is ancillary to the attribute of identity on which she made her living—her voice. Gilberto's interest is no different from the interest every celebrity has in compensation any time someone trades off their iconic status.<sup>246</sup> We do not permit celebrities to restrict authors from writing about them,<sup>247</sup> nor do we limit the right of filmmakers to make movies or documentaries about their lives.<sup>248</sup> The motives behind these kinds of activities may be no less commercial than Frito-Lay's motive to sell its potato chips through a creative and humorous ad, and unless we are going to start making the kinds of value judgments about expression that the First Amendment ordinarily prohibits, it's difficult to see how such cases can stand.

Not only is protecting identity in cases like this unnecessary to encourage creation, such protection may actually stifle innovation and undermine creativity. By extending the right of publicity to protect a celebrity's general iconic status, the right may, in some cases, conflict with other core intellectual property interests. In Gilberto's case, the owners of the copyright in the composition had a direct interest in exploiting the work, an interest that Gilberto's claim, if sustained, would block. A similar problem was presented by the

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244. Were ancillary revenue streams important to Gilberto, she certainly could have protected herself by insisting on contractual guarantees before the song was released.

245. Indeed, central to Gilberto's claim was that she had become famous as *The Girl from Ipanema* and that the song had effectively become her trademark. *Id.* at 60. The Court of Appeals rejected her claim because it would stretch the definition of trademark too far. *See id.* at 63.

246. A similarly misguided example of a celebrity's iconic status defeating a First Amendment defense is *Clark v. America Online, Inc.*, No. CV-98-5650 CAS (CWX) 2000 WL 33535712 (C.D. Cal. Nov. 30, 2000). The case arose from a promotional mailing by AOL targeting members of the American Association of Retired Persons that stated: "If you danced to the Beatles, cruised in a Thunderbird, or tuned into Dick Clark, you have earned . . . 100 hours [of free Internet service]." *Id.* at \*3-4. Clark's name was used to define an era which he and those targeted by the promotion were part of. Any interest he had in being paid for this use was far removed from his livelihood as a television and music personality. The opinion makes not a single reference to *Zacchini*, and includes little First Amendment analysis. *See id.* at \*22-27.

247. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

248. *See, e.g.,* *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536 (Ct. App. 1993).

Ninth Circuit's broad extension of the right of publicity in *White v. Samsung Electronics America, Inc.*<sup>249</sup> to encompass virtually any use that evokes a celebrity's persona. Dissenting from denial of a rehearing en banc, Judge Kozinski recognized the important point that "overprotecting intellectual property is as harmful as under protecting it [because] . . . overprotection stifles the very creative forces it's supposed to nurture."<sup>250</sup> In a celebrity-driven culture like ours, the ability to reference those who often play a central role in shaping ideas, setting trends and influencing behavior is necessary to promote creative freedom. As is the case with other forms of intellectual property, because the right of publicity is imposed "at the expense of future creators,"<sup>251</sup> it is critical that its reach be limited to instances where the countervailing interests are directly and immediately threatened.

Cases like *Oliveira* and *White* stand in contrast with those that do directly threaten the kinds of fundamental interests identified in *Zacchini*. For example, one who offers his services as a fashion model seeks to profit directly from the exploitation of some element of his identity.<sup>252</sup> Value here is derived directly from the characteristic of identity that is being exploited, not secondarily from general fame or some other activity with which the person is associated. If a model's likeness cannot be protected in this context, his or her livelihood can be severely compromised, if not destroyed, and the incentive to make an investment in the endeavor potentially will be lost.<sup>253</sup>

Alternatively, consider cases where famous singers have successfully sued over advertising uses of sound-alike performers who imitate their voice and singing style.<sup>254</sup> These cases, unlike *Oliveira*, also may directly implicate "the very activity by which the entertainer acquired his [or her] reputation in the first place."<sup>255</sup> If such a practice were not actionable, why would someone hire, for example, Bette

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249. 971 F.2d 1395 (9th Cir. 1992).

250. *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

251. *Id.* at 1516.

252. *Cf. Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (recognizing that unconsented use of fashion model's photograph "stripped [Toney] of the right to control the commercial value of her identity.").

253. The problem is particularly acute with non-celebrity models who may not be able to allege a claim of false endorsement. *See Albert v. Apex Fitness, Inc.*, 44 U.S.P.Q. 2d 1855, No. 97 Civ. 1151(LAK), 1997 WL 323899 (S.D.N.Y. 1997).

254. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1092 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

255. *Zacchini v. Scripps-Howard Publ'g. Co.*, 433 U.S. 562, 576 (1977).

Midler, when for a fraction of the cost they could free-ride by getting someone else who sounded just like her and aped her style?

b. Beyond Pure Advertising

If there are problems with application of the right of publicity to forms of expression that qualify as purely commercial speech, they pale in comparison to the chaos that currently reigns when the right of publicity comes into conflict with expression that simply does not fit within the Supreme Court's commercial speech jurisprudence.<sup>256</sup> Currently, there have emerged no fewer than six tests to judge when the First Amendment comes into play and how much protection it offers.<sup>257</sup> The central problem arises from a focus on evaluating the worth of the expression being challenged rather than the underlying interests being served by the right of publicity. Consider two recent decisions by the highest courts of California and Missouri involving the use of celebrities as inspiration for comic book characters. In California, the publisher of the comic book *Jonah Hex* was sued when it introduced two half man-half worm creatures known as Johnny and Edgar Autumn which were inspired by the real life albino rock musicians Johnny and Edgar Winter.<sup>258</sup> The claim was dismissed by the California Supreme Court applying a test that extends First Amendment protection against right of publicity claims to uses of identity that are transformative.<sup>259</sup> Shortly thereafter, the Missouri Supreme Court faced a virtually identical claim involving the comic book *Spawn*, except that the new character was inspired by a professional hockey player.<sup>260</sup> This time the court upheld the claim because it believed that the use of identity here "predominantly exploits the commercial value of an individual's identity . . . ."<sup>261</sup>

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256. Some courts simply avoid the issue by classifying mixed purpose speech as commercial. See *O'Grady v. Twentieth Century Fox Film Corp.*, No. 5:02 CV173, 2003 WL 24174616 (E.D. Tex. Dec. 19, 2003) (television interstitials contrasting documentary and soon to be released motion picture); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (photograph of plaintiffs used to illustrate 700 word story on surfing in a magazine primarily designed to build retailer's brand awareness).

257. See *supra* note 236.

258. See *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003).

259. *Id.* at 477-80. According to the California Supreme Court, the "inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* at 477.

260. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

261. *Id.*

The courts in these cases took different approaches to reconciling the right of publicity with the First Amendment, but both fundamentally focused on the commerciality of the underlying speech, assuming that if the requisite economic motive were present, the speech should somehow lose constitutional protection.<sup>262</sup> The defects in Missouri's approach are most obvious. Whether the *Spawn* comic book's "metaphorical reference . . . has very little literary value compared to its commercial value" is precisely the kind of inquiry the First Amendment prohibits—or at least should prohibit. As Professor Volokh recently observed, many forms of fully protected literary or audiovisual works derive their value from use of a famous person's identity, and "[F]irst Amendment law . . . hasn't distinguished, and shouldn't distinguish high art . . . from low . . . just as it hasn't distinguished high literature from low."<sup>263</sup>

California's approach, although more protective, and more carefully reasoned, is also misguided. The transformative use approach was first articulated in *Comedy III Productions v. Gary Saderup, Inc.*,<sup>264</sup> which arose out of a realistic portrait of The Three Stooges that was reproduced onto T-shirts and prints. Although purporting to eschew any reliance on the "quality of the expression,"<sup>265</sup> by focusing as it did on discerning whether the expression was primarily for "commercial gain,"<sup>266</sup> the court made effectively the same mistake the Missouri Supreme Court made by creating an approach which will be difficult to apply consistently and which devalues expression for reasons that cannot be reconciled with the underlying First Amendment values.<sup>267</sup> The problems that lie

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262. Right of publicity cases focus on "whether the use of a person's name and identity is 'expressive,' in which case it is fully protected, or 'commercial,' in which case it is generally not protected." See *id.* at 373-74; *Winter*, 69 P.3d at 478 ("[W]hen an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the author's right of free expression is subordinated by the right of publicity.").

263. Volokh, *supra* note 46, at 909; see *Winter v. New York*, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

264. 21 P.3d 797 (Cal. 2001).

265. *Id.* at 809.

266. *Id.* at 806-07.

267. For a comprehensive criticism of California's transformative test, see F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003).

ahead with the California approach were signaled by a footnote in *Saderup* which acknowledged:

[I]t could be argued that reproduction of a celebrity likeness for non commercial use--e.g., t-shirts of a deceased rock musician produced by a fan as a not-for-profit tribute is a form of personal expression and therefore more worthy of First Amendment protection.<sup>268</sup>

Although the court declined to decide this issue, the conflict highlights a central flaw in its approach: why should two instances of identical expression be treated differently simply because only one is motivated by a desire to profit? And if it is the case that a difference exists, should a report on CNN, a profit-making enterprise, get less protection than an identical report on non-profit PBS? Certainly we know this latter proposition flies in the face of fundamental First Amendment principles, and I suggest that the former does, too.

The flaws in the California (and Missouri) approach derive from a misinterpretation of the scope of *Zacchini*. Although appearing to recognize that *Zacchini* was “not an ordinary right of publicity case,”<sup>269</sup> the California Supreme Court went on to conflate the limited interests in protecting against the loss of creative incentive through free-riding that were central to *Zacchini* with a far broader notion of unjust enrichment that “derives primarily from the fame of the celebrity depicted.”<sup>270</sup> This latter interest arising from the general iconic status of a celebrity is one that *Zacchini* appeared to reject as sufficient to trump the First Amendment when the Court explained that it was not validating claims which derive generally from an “entertainer's reputation.”<sup>271</sup> In the particular context of *Saderup*, *Zacchini* would protect the interest of The Three Stooges in their comedic performances—the very activity from which their fame derives—but it would not protect ancillary interests deriving from their general fame as entertainers, such as an artistic drawing of their likeness when used in non-deceptive ways.

Parodying baseball players on humorous and often biting trading cards,<sup>272</sup> using famous albino rock musicians<sup>273</sup> or hockey players<sup>274</sup> as

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268. 21 P.3d at 808, n.9.

269. *Id.* at 806.

270. *Id.* at 810.

271. *Zacchini v. Scripps-Howard Publ'g Co.*, 433 U.S. 562, 576 (1977).

272. *See Cartoons, L.C. v. Major League Baseball Players' Ass'n.*, 95 F.3d 959 (10th Cir. 1996).

273. *See Winter v. DC Comics*, 69 P.3d 475 (Cal. 2003).

274. *See Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

inspiration for comic book characters, and selling kitschy prints or statues featuring celebrities<sup>275</sup> all involve forms of expression that seek to profit from the fame of others. From a First Amendment perspective, the important question in such cases is whether a restriction on speech is necessary to prevent the destruction of fundamentally important motivational interests of the sort identified in *Zacchini*, not whether and to what extent the speaker is seeking to profit. This approach is consistent with core notions of First Amendment analysis where speech gives way to content-based laws only in the most limited and compelling circumstances. The approach of the courts that continue to devalue speech based on vague notions of commerciality in order broadly to protect the ancillary financial interests of celebrities is at odds with those First Amendment interests.

## 2. *Gratuitous Uses*

In addition to claims that implicate the kind of free-riding concerns at issue in *Zacchini*, the Second Circuit in *Rogers v. Grimaldi*<sup>276</sup> has suggested that the gratuitous misuse of one's identity might also trump First Amendment considerations. The *Rogers* standard asks in the first instance whether the use of someone's identity in a work has relevance to some artistic (or informational) expression. If it does, then no liability attaches unless the work is explicitly misleading as to a false endorsement.<sup>277</sup> The kind of gratuitous use of celebrity identity addressed in *Rogers* can be analogized to the utterance of defamatory speech involving no issue of public concern; neither implicates values at the core of the First Amendment.<sup>278</sup>

If applied correctly, the *Rogers* approach has something to commend it. Consider, for example, the use of Tiger Woods' name in connection with two different hypothetical promotional messages:

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275. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Martin Luther King, Jr. Ctr. For Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

276. 875 F.2d 994 (2d Cir. 1994). *Rogers* arose in the context of a movie title, but other courts have applied its principles in other circumstances as well. See *Parks v. LaFace Records*, 329 F.3d 437, 448 (6th Cir. 2003); *Mattel, Inc. v. MCA Records*, 296 F.3d 899 (9th Cir. 2003), *cert. denied*, 537 U.S. 1171 (2003); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664-65 (5th Cir. 2000).

277. *Rogers*, 875 F.2d at 999.

278. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-60 (1985).

Tiger Woods doesn't drive a Ford Explorer, but if he did, we think he'd love the car.

Tiger Woods doesn't endorse our cars, but he does drive a Ford Explorer.

If we assume that both statements are entirely accurate<sup>279</sup> and neither implies a false endorsement,<sup>280</sup> should Woods nevertheless have a right of publicity action as to either? Strictly in terms of the interest analysis discussed in the preceding section,<sup>281</sup> the answer would be no. Both promotions use Woods' name in their iconic sense only; neither would constitute the kind of free-riding that threatens his incentive to perform in his chosen line of work as a professional golfer. Yet there is a significant difference between these promotions. In the first, the use of Woods' name is entirely gratuitous; it is used simply to attract attention, not to impart any useful information or make any kind of artistic statement. The second is slightly different; it tells us what kind of car Woods drives, which may be important to some potential purchasers who are influenced in their purchasing decisions by what leaders of popular culture do. Under the *Rogers* approach, it seems to me that the second promotion would be protected while the first wouldn't, a result that has some appeal and seems consistent with the First Amendment.

The difficulty with the *Rogers* line of reasoning lies not in its analytical consistency with First Amendment values, but with its potential for misuse; in at least two recent decisions, this element of *Rogers* has been applied in ways that appear designed to reach particular results that might be viscerally appealing but which are at odds with the First Amendment. *Parks v. LaFace Records*<sup>282</sup> arose out of a song by OutKast entitled *Rosa Parks*, the lyrics of which featured a reprise referring to Parks' refusal to move to the back of a segregated bus during the civil rights movement.<sup>283</sup> Although adopting the *Rogers* artistic relevance test,<sup>284</sup> the court, in what can fairly be described as a strained application of the standard, determined that use of Parks' name was irrelevant since the song wasn't about Parks

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279. Of course, in the real world we know neither of these statements is correct. Tiger Woods, in fact, has an endorsement deal with Buick. See *Woods Uses Familiar Formula 2 Weeks Before a Major*, N.Y. TIMES, July 28, 2005, at C26.

280. The first hypothetical is a variation on one discussed in *Cardtoons, L.C. v. Major League Baseball Players' Ass'n.*, 95 F.3d 959, 967-68 (10th Cir. 1996), which the Tenth Circuit Court of Appeals characterized as not implying a false endorsement.

281. See *supra* Part III.B.1.a.

282. 329 F.3d 437 (6th Cir. 2003).

283. The line in the song was "Everybody move to the back of the bus." *Id.* at 442-43.

284. See *id.* at 450.

or her heroic stance.<sup>285</sup> A similarly cramped reading of *Rogers* is found in *O'Grady v. Twentieth Century Fox Film Corp.*,<sup>286</sup> where the court permitted a military hero's claim to proceed, in part on the grounds that there was an issue of fact as to whether interstitial programming that contrasted a soon to be released movie inspired by the plaintiff's story with a documentary of the real events was sufficiently related to the plaintiff.<sup>287</sup>

A standard based on what is a matter of public concern has been criticized as being too amorphous and having the potential for the kind of unpredictable results oriented decision-making that is anathema to the First Amendment.<sup>288</sup> Yet in practice, that generally has not turned out to be the case, at least in the area of defamation, where the concept is central to the degree of protection that is accorded to speech.<sup>289</sup> Courts have largely taken to heart the Supreme Court's admonition that judges should avoid becoming too involved in such matters for fear of inhibiting editorial freedom.<sup>290</sup> Although the *Rogers* court characterized relevance as imposing only a "low threshold,"<sup>291</sup> it remains to be seen whether the concept of gratuitousness also will be handled in a way that avoids stifling creativity or editorial choice, but at least the early returns are not promising.

### 3. *False Endorsement*

Finally, as discussed at some length earlier in this article, the element of falsity can affect how the respective interests balance where First Amendment values are implicated. Falsity, of course, is not an element of the right of publicity, but it has played a role where such claims are met with a constitutional defense. A number of courts, particularly in New York and California, have reasoned that proof of falsity coupled with the requisite showing of fault can

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285. See *id.* at 452-53. The reference was intended to suggest that other musical acts were inferior to OutKast and should, therefore, metaphorically move to the back of the bus. However, the notion of inferiority was precisely what Parks was protesting when she refused to relinquish her seat, and while the OutKast allusion is exponentially more trivial, it is hardly unrelated in any artistic sense.

286. No. 5:02 CV173, 2003 WL 24174616 (E.D. Tex. Dec. 19, 2003).

287. See *id.* at \*29.

288. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 78-79 (1970) (Marshall, J., dissenting); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23.5 at 3-86-87 (2005).

289. See SACK, *supra* note 166, § 6.6.

290. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

291. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1994).

override any defense under the First Amendment.<sup>292</sup> A leading commentator has strongly criticized this approach as “bizarre” because it imports into the right of publicity “an element wholly foreign” to the tort.<sup>293</sup>

Whether or not one views the importation of falsity into the right of publicity as appropriate or not,<sup>294</sup> the issue will remain, as many, if not most, right of publicity cases incorporate tandem claims of false endorsement under section 43(a) of the Lanham Act where falsity is a central element of an action.<sup>295</sup> Thus, the question becomes whether and under what circumstances proof of a false endorsement will suffice to trump the First Amendment.

The willingness of courts to factor First Amendment interests into the Lanham Act has largely depended on whether a claim arises from commercial speech or the more fully protected variety. Cases involving speech categorized as purely commercial have ordinarily refused to account for First Amendment values.<sup>296</sup> Where fully

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292. See, e.g., *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001); *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123 (2d Cir. 1984); *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983); *Davis v. High Soc. Magazine, Inc.*, 457 N.Y.S.2d 308 (N.Y. App. Div. 1982). More recently, New York appears to have retreated from permitting falsity to resurrect a right of publicity claim. See *Messenger v. Gruner & Jahr Printing and Publ'g.*, 727 N.E.2d 549 (N.Y. 2000).

293. MCCARTHY, *supra* note 198, §8:85.

294. Professor McCarthy's objection to importing falsity into the right of publicity has considerable analytical force. The interest primarily underlying the publicity right—protection of an individual's right to profit from use of their identity—has nothing to do with falsity. This interest is equally present whether or not the use is accurate or not. For example, Tiger Woods' economic interest in the print of him that was the subject of *ETW Corp. v. Jireh Publ'g., Inc.*, 332 F.3d 915 (6th Cir. 2003) exists regardless of whether distribution of the work implies that he endorsed it. Where falsity is an element of a cause of action, its presence or absence is closely related to the interest being protected. Defamation, for example, protects only unjustified harm to reputation. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Accordingly, such claims are limited to statements that implicate this interest—that is, which if false would wrongfully hold the person up to public ridicule or disgrace. See generally SACK, *supra* note 166, § 2.4.1. The right of publicity has no such limitation, and it may apply even to expression which places the claimant in a favorable light. See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996); *Martin Luther King, Jr., Ctr. For Soc. Change v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982). The lack of any limiting principle with the right of publicity has the potential to swallow up these other kinds of actions, a result that would be of dubious constitutional validity. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

295. See Kohler, et al., *supra* note 238, at 21-22.

296. See, e.g., *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), *cert. denied*, 534 U.S. 945 (2001); *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992).

protected speech is the subject of a claim, courts have been more willing to impose significant constitutional barriers.<sup>297</sup>

False endorsement claims may bear some similarity to false advertising claims involving assertions about the quality or character of goods or services made or sold by a speaker. In one sense, a false endorsement claim may be viewed as a representation about a characteristic of the speaker's product or service, and whether the representation is true should be fully within the speaker's knowledge. Often, however, these cases present a twist which can complicate the analogy to more typical false advertising claims.

While a claim of endorsement may be direct and obvious, and the inquiry into its accuracy relatively simple and straightforward, this is not always the case, particularly when mixed-product speech or more creative forms of advertising are involved.<sup>298</sup> Where the endorsement is not explicit, the central question is not so much about the characteristics of the speaker's product or service, but rather how the message is likely to be perceived by consumers.<sup>299</sup> At least where an implication of endorsement is unintended, the answer to this question may well not be particularly within the sphere of the speaker's knowledge, and in this sense the cases more closely resemble defamation or disparagement cases where the speaker often has no more access to the underlying issue of perception or accuracy than does the plaintiff. The significance of this is that at least one of the key factors advanced in support of a rule allowing broader regulation of false commercial speech—verifiability—often may not operate in some false endorsement cases with the same force as it does in other kinds of false advertising cases involving specific claims about a speaker's goods or services.<sup>300</sup>

Equally important, in these types of ambiguous endorsement cases, the durability factor also may not operate as powerfully. Commercial advertising about the particular qualities of one's product or service is often a necessary part of doing business. Sellers have little choice but to promote their products and thus may be less

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297. See, e.g., *Hoffman*, 255 F.3d at 1186; *Rogers v. Grimaldi*, 875 F.2d 994, 998-99 (2d Cir. 1989).

298. See, e.g., *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997) (whether use in a themed bar of animatronic robots depicting characters in television program suggested endorsement by actors who played the characters); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925, 928 (6th Cir. 2003) (whether depiction of golfer in a print suggested he endorsed the product).

299. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992).

300. See *supra* notes 174-175 and accompanying text.

susceptible to being deterred. Right of publicity cases—particularly those involving the use of someone's identity in mixed speech products—often involve activity that is more creative and, importantly, more optional. Frito-Lay could easily have used a less well known song than *The Girl from Ipanema* and still made its point. Gary Saderup could have drawn a more abstract version of The Three Stooges and still made a nice T-shirt. The existence of alternatives in these cases makes it more likely that the process of creation and expression will be corrupted by a rule that imposes liability too strictly.<sup>301</sup>

The law as it presently exists in the purely commercial context usually addresses questions of implied endorsement using a multi-factor test to assess whether consumers are likely to have been confused by the use.<sup>302</sup> Where fully protected uses of persona are implicated, some courts have focused instead on the subjective intent of the speaker through application of the actual malice standard first developed in the context of defamation cases.<sup>303</sup> There are important differences between these two approaches. Where the multi-factor approach is employed, the inquiry is objective—would a reasonable consumer likely be confused—and the answer is usually for the jury to decide.<sup>304</sup> Actual malice is considerably more protective of First Amendment values and unmeritorious cases are more readily disposed of through pre-trial motions, sparing the defendant the uncertainty and cost of a trial.<sup>305</sup>

Although there are significant differences between these approaches, reconciling them in a world where the commerciality of the expression is not the central distinguishing factor does not necessarily portend a sea change in how most false endorsement cases will ultimately be resolved. It is possible, I believe, to account for the underlying First Amendment breathing space needed in false endorsement cases while protecting consumers from being unduly misled<sup>306</sup> by adopting a two level approach.

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301. See Kohler, *supra* note 172, at 1218-19.

302. See, e.g., Parks v. LaFace Records, 329 F.3d 437, 447-48 (6th Cir. 2003); White v. Samsung Elecs. America, Inc., 971 F.2d 1395, 1400-01 (9th Cir. 1992).

303. Cf. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 935 (6th Cir. 2003); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185 (9th Cir. 2001).

304. See, e.g., White, 971 F.2d at 1399-1401; Allen v. National Video, Inc., 610 F. Supp. 612, 627-29 (S.D.N.Y. 1985). While the defendant's intent is among the factors considered, it is not the dispositive factor. See White, 971 F.2d at 1400-01; Allen, 610 F. Supp. at 628.

305. See generally SACK, *supra* note 166, §§ 5.4.2, 16.3.1.2.

306. Concern about the integrity of the marketplace is the central concern of the Lanham Act, not compensating individuals for the commercial value of the identity. See,

Initially, the question should be whether there is an explicitly misleading use of identity as outlined by the Second Circuit in *Rogers v. Grimaldi*.<sup>307</sup> Since the accuracy of the underlying content is unlikely to be in dispute in such cases, one who uses words designed explicitly to mislead the consumer can hardly claim innocence.<sup>308</sup> In effect, in the context of a false endorsement claim, an explicitly misleading use of another's identity is tantamount to a knowing falsity and should present no serious First Amendment problem.<sup>309</sup>

Where the implication of endorsement is not obvious, the question becomes more difficult. Do First Amendment concerns require that the law shield even the unscrupulous operator who is clever enough to disguise their message? Creative or ambiguous uses of identity may have the potential to inform, entertain, and mislead all at the same time. This is so whether the use is purely commercial,<sup>310</sup> mixed,<sup>311</sup> or even purely expressive.<sup>312</sup> Compare, for example, the Ninth Circuit's decision in *White v. Samsung Electronics America*,<sup>313</sup> a case involving speech that was clearly commercial, with the Sixth Circuit's analysis in *ETW Corp. v. Jireh Publishing*,<sup>314</sup> which involved artistic speech that was of the mixed variety and held to be entitled to full constitutional protection.

*White* arose out of a television commercial for Samsung, an electronics company, that used a humorous takeoff of a futuristic version of the popular game show *Wheel of Fortune* to deliver a message of innovation and lasting quality. The commercial featured a

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*e.g.*, *Allen*, 610 F. Supp. at 625. To the extent individual interests predominate, such as protecting reputation or not being shown in a false light, those interests do not differ from those protected by defamation or false light invasion of privacy, and should not be treated any differently.

307. 875 F.2d 999 (2d Cir. 1994).

308. *Rogers* was concerned with the issue in the context of titles and gave as examples of explicit deception titles falsely incorporating someone's name into the title or phrases expressly suggesting endorsement, such as "an authorized biography." 875 F.2d at 999. The *Rogers* approach has since been expanded beyond titles, *see supra* note 276, and it is not difficult to imagine examples of explicitly misleading works in other contexts. A particularly deserving example can be found in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), which involved a Tom Waits voice impersonator who delivered an express endorsement of the product.

309. *Cf. Allen*, 610 F. Supp. at 629 ("Having gone to great lengths to evoke plaintiff's image, defendants must do more than pay lip service to avoiding confusion.").

310. *White v. Samsung Elecs. America, Inc.*, 975 F.2d 1395, 1400-04 (9th Cir. 1992).

311. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925-29 (6th Cir. 2003); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

312. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185-87 (9th Cir. 2001).

313. 975 F.2d 1395 (9th Cir. 1992).

314. 332 F.3d 915 (6th Cir. 2003).

robot in the role of the letter turner on the show, a role most famously, though not exclusively,<sup>315</sup> filled by Vanna White. White sued under the Lanham Act, claiming that the ad implied that she endorsed Samsung products.

*ETW* involved the sale of mass market prints created from a painting by artist Rick Rush that featured the world's leading golfer Tiger Woods among a pantheon of golfers who had won The Masters golf tournament. Among other things, Woods' suit alleged that sale of the prints carried an implication that he endorsed them.

White prevailed, while Woods lost, not because of any real difference in the culpability of the respective defendants' conduct, but due to the different levels of protection accorded commercial and artistic speech. Yet is that really a distinction that has any relevance to the differing outcomes in these cases? Was Samsung's very clever ad really any more commercial than Rush's mass produced prints? Did the artistic merit in Rush's work contribute that much more to the idea marketplace than the message of innovation contained in the Samsung ad? Or did the underlying commercial purpose of the Samsung ad so diminish its value as a parody of White and Wheel of Fortune as to render its own creative merit meaningless? These are questions about which reasonable people can differ, but perhaps precisely because of that, they are the kind of questions that we should not need to ask in evaluating the constitutional appropriateness of a standard of liability.

To be sure, a legitimate interest exists in protecting consumers from being misled by false implications of endorsement, but that truism begs a very important question: is that interest adequately served by making categorical distinctions between commercial and other kinds of speech,<sup>316</sup> and are there other methods of protecting that interest that are less damaging to First Amendment values? As to protecting consumers from being misled, the commercial/noncommercial distinction is both under and over inclusive. It is under inclusive because, as illustrated by the comparison of *White* and *ETW*, the distinction fails to catch a number of cases where there may be some false implication of endorsement in the context of speech having what can be viewed as somewhat marginally communicative value but which, nonetheless, is protected

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315. The original letter turner on Wheel of Fortune was Susan Stafford, who occupied the role from 1975 to 1982. See The Internet Movie Database, <http://www.imdb.com/name/nm0821345> (last visited November 15, 2005).

316. See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-26 (1993).

fully by the First Amendment. It is over inclusive because it penalizes an unprotected class of cases like *White* which disseminate a significant message and employ creative artistry that is largely indistinguishable from the protected class of expression.

Perhaps more important, not only is drawing the distinction an unhelpful way to separate the wheat from the chaff, but it is unnecessary as well. Were the application of the more First Amendment friendly actual malice standard likely to result in advertisers being given carte blanche to misuse celebrities' identities in advertising by misleading the consuming public, I might have real reservations about suggesting its adoption.<sup>317</sup> That is unlikely to be the case, however, for several reasons. Although the basic inquiry here is subjective—did the speaker intend to convey a false endorsement—at least in the context of most advertising, a naked assertion by an advertiser that an implication of endorsement was unintended would be unlikely to carry the day absent some persuasive, non-gratuitous explanation as to why a celebrity's identity was used. Actual malice can be proved circumstantially,<sup>318</sup> so in the case of a pure advertisement, it would, for example, be fair to consider evidence that “use of celebrity endorsement in television commercials is so well established by common custom that a jury might find an implied endorsement in [an advertisers'] use of the celebrity's name which would not inhere in a newspaper . . . .”<sup>319</sup> Also relevant in the advertising context would be the kind of objective factors that are currently used to gauge likely consumer reaction.<sup>320</sup> Such customs when evaluated in the context of the relevant circumstantial factors would likely make it difficult for advertisers to trade brazenly off of celebrity persona in ways that are likely to mislead the public. Absent some credible, non-deceptive informational or artistic basis for using a celebrity's likeness, an advertiser “having gone to great lengths to evoke [a celebrity] image . . . must do more than pay lip service to avoiding confusion.”<sup>321</sup> The difference would be that objective circumstantial factors would not necessarily be dispositive,

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317. I refer predominantly to celebrities because most cases are brought by famous people. This is not always the case, however, and where the plaintiff is not a public figure, it is possible that the balance of interests might favor a less demanding standard such as negligence. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

318. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667-68 (1985).

319. *Abdul-Jabbar v. Gen. Motors Corp* 85 F.3d 407, 413 (9th Cir. 1996).

320. See, e.g., *id.*

321. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 629 (S.D.N.Y. 1985).

particularly when negated by a credible countervailing interest, such as the need to evoke another's identity for the purposes of parody, as in *White*.

The standard has the advantage of being relatively simple and straightforward. It does not seek to make value judgments about the quality of the expression, distinguishing, for example, high art from low. It also provides significant "breathing space" for the creative process, but does not allow the use of identity in ways that are intended to mislead the public. In short, it would adequately protect the public from real harms without unduly impinging on First Amendment interests to avoid imaginary ones.

#### IV. Conclusion

A little more than 85 years ago, the Supreme Court began grappling with how much latitude to give the government in restricting advocacy it found threatening to public order.<sup>322</sup> At first, the Court proceeded cautiously, allowing the creation of broad categories of speech that were deemed to present a clear and present danger of bringing about some substantive evil the government wanted to prevent.<sup>323</sup> Over the next 50 years, the Court's approach to this issue evolved, in fits and starts,<sup>324</sup> to the point where the government's ability to restrain expression it considers dangerous is now significantly constrained.<sup>325</sup>

The history of the Court's approach to commercial speech bears some similarity. Initially, the government was given relatively unfettered authority to regulate. Thirty years ago, the Court began to retreat from its earlier position by extending limited but real protection to such expression. The development of commercial speech doctrine evolved through periods of apparent expansion and then contraction leading ultimately to the current state of play, which tends to view the First Amendment expansively.<sup>326</sup>

Although some members of the Court have begun to challenge the conventional wisdom that a primarily commercial purpose makes expression somewhat less worthy of protection, commercial speech

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322. See *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

323. See *Schenck*, 249 U.S. at 47; *Debs*, 249 U.S. at 211.

324. Compare *DeJonge v. Oregon*, 299 U.S. 353 (1937) with *Dennis v. United States*, 341 U.S. 494 (1951).

325. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

326. See BRODY & JOHNSON, *supra* note 26, Chapter 6.

doctrine has yet to be brought in line with modern First Amendment doctrine as it relates to most other forms of expression. My purpose in writing is to suggest that perhaps it is time to take the final step. The problems of classification that have emerged with mixed purpose speech will only grow more difficult in a world where neat distinctions are increasingly elusive and the reasons for making them in the first place are increasingly irrelevant. While the approach I suggest will not magically eliminate hard or controversial decisions, it will, I believe, lead to more predictable and consistent First Amendment decision-making that is more in line with the approach followed in virtually all other cases.