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Foreword: To America's Tomorrow—Commerce, Communication, and the Future of Free Speech

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FOREWORD: TO AMERICA'S TOMORROW—COMMERCE, COMMUNICATION, AND THE FUTURE OF FREE SPEECH

*Ronald K.L. Collins**

To Steve Shiffrin, whose passion for freedom reminds us that life without dissent is worthless, even if we must suffer some because of it.

Communication is a hallmark of life. Remove it and only naked existence remains, or worse still, death. We live by words—and signs and symbols and sights and sounds. Each time we communicate, we engage not only the principle of liberty, but also the fact of life itself. How we use that fact of life or abuse that principle of liberty depends on what values we as a people hold dear. Still, free communication is, and whenever possible should be, the default position. We start there, with free communicative interaction, not forced silence. The First Amendment is thus both a sign of freedom and a guarantor of it.

Some think that life cannot default to communicative liberty. There are, they say, too many types of expression that simply cannot be countenanced in a just society. The risks of such freedom, we are told time and again, are simply too great. This argument is, I think, too facile; to accept it as gospel is to confuse the vast and wondrous sea with its rare and risky riptides. For the everyday experiences of communication—those trillions and trillions of expressive transactions—far outnumber the relatively few instances in which a just society need exercise censorial power.

* Scholar, First Amendment Center, Washington, D.C. Decades ago I was introduced to the world of the First Amendment by a law review colleague, Steve Shiffrin. It was a wondrous beginning and has been a wonderful ride, one that has yet to run its course. For that alone, I am indebted to Steve. Speaking of debts, I owe yet another one to Dave Skover for his much welcome comments on this Foreword. And special thanks go as well to Professor James Weinstein and Dean Ellen Aprill who made this Symposium, and the conference that preceded it, possible.

In the America of our times, let us celebrate expressive freedom—that liberty to speak as we think, to think as we please, to sing and dance as we wish, to paint as we like, to assemble as we want, to worship as our consciences will, to hear or see what we want, and to howl at a world gone mad. Let us speak to power with fists held high and protest at the altars of the righteous with irritating irreverence. May we revel in our freedom with wild and proud abandon. After all, we are *Americans*!

True, we live in the shadows of history. At times that history has been a "legacy of suppression"[1]—times when tyrants intoxicated with power silenced anyone who did not bend to their will. No wonder that when we think of the horrific excesses of suppression we revere a Madisonian vision of free speech freedom that elevates political expression to the highest rung of First Amendment protection.

Revere that yester-year ideal as we might, we can no longer lay claim to the earth from which it sprang. Neither law nor its ideals can be frozen in Proustian frames. For ours is a new world, a brave new world.[2] And in that world, commerce is a lodestar of life and law.[3] Our freedom is inextricably linked to it; the dye of advanced capitalism cannot be removed from the solution in the beaker of life of modern America.[4] Hence, communication, too, is connected to commerce. Like it or not, *that* fact has profound consequences for any system of freedom of expression that aspires to protect a liberty at once relevant and at the same time robust.

The Liberal Divide

To what extent, if any, can liberalism endorse the ever-burgeoning commercial speech agenda without forsaking its credentials as a progressive movement? For example, can liberalism

1. The phrase is that of my late friend Leonard W. Levy, who combined a great knowledge of constitutional history with an abiding love for constitutional freedom. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS, at vii–xix (1985). From Len I learned a lesson he in turn had learned as a young man: "Frankfurter taught me to criticize my most cherished beliefs by demanding valid evidence for any proposition." LEONARD W. LEVY, RANTERS RUN AMOK: AND OTHER ADVENTURES IN THE HISTORY OF THE LAW 58 (2000). If I have departed from any of my previously held views, I have done so in that spirit—and I reserve the right to do so again!

2. *See* RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 3–7 (Carolina Academic Press, 2d. ed. 2005) (1996) [hereinafter DOD2].

3. *See id.* at 67–135.

4. *See id.* at 69–199.

retain its commitment to a spirited humanitarian ethic, its special sensitivity to the underclass, and its protective paternalism while at the same time defending the communicative agenda of colossal corporations? These are not rhetorical questions; they are tough questions for liberals long wed to free speech principles. Years ago, such questions caught the attention of a few contemporary liberals, especially Professor Steven Shiffrin.[5] Even so, the day of any *concerted and organized* phalanx of liberal opposition to commercial expression has yet to dawn. Why?

One answer: liberals are conflicted. On the one hand, they value First Amendment freedoms and are therefore hesitant to yield power to government to censor expression. On the other hand, they have long believed that the wellbeing of people should not be trumped by the vicissitudes of corporate constitutionalism. In other words, liberals are of two minds when it comes to commercial communication.

As contemporary liberals ponder this matter, let none forget that the modern commercial speech doctrine owes its birthright to able ACLU lawyers such as Melvin Wulf, who successfully argued *Bigelow v. Virginia*,[6] and talented Ralph Nader progressive liberals such as Alan Morrison, who successfully argued *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[7] That is, the commercial speech doctrine that was once rejected by liberal jurists—including Justices Hugo Black and William O. Douglas[8]—was revived by a new generation of liberal lawyers.

Ironically, the one who first pointed modern liberals to the idea that commercial speech conflicted with traditional liberalism was none other than the late conservative William Rehnquist. He did so

5. To be precise, it caught Professor Shiffrin's attention some 23 years ago. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1984) [hereinafter Shiffrin, *Away from a General Theory*]; *see also* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 33–40, 53–54 (1999) [hereinafter SHIFFRIN, DISSENT, INJUSTICE]; STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 52–55, 82, 105, 106, 152, 209–10 (1990) [hereinafter SHIFFRIN, FIRST AMENDMENT].

6. 421 U.S. 809 (1975). Alan Morrison, of Public Citizen, filed an amicus brief supporting the commercial speech claim.

7. 425 U.S. 748 (1976).

8. See their votes in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by Virginia Pharmacy*, 425 U.S. at 758–61. *But see* Cammarano v. United States, 358 U.S. 498, 513–15 (1959) (Douglas, J., concurring).

in his dissent in a landmark commercial speech case[9] argued by a noted liberal.[10] In his *Central Hudson* dissent, then-Justice Rehnquist declared:

> The Court [today] returns to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.[11]

Later, Justice Rehnquist added this cautionary note: "[T]he Court unlocked a Pandora's Box when it 'elevated' commercial speech to the level of traditional political speech by according it First Amendment protection . . . ."[12] And it was Justice Antonin Scalia, that *pater* of modern constitutional conservatism, who almost a decade later scaled back some of the then-emerging constitutional protection afforded to commercial expression. With a nod from Justice Rehnquist and others, in *Board of Trustees of the State University of New York v. Fox*[13] Justice Scalia boldly declared: "Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[14] And on that scale, as weighed by conservatives such as Justices Scalia and Rehnquist, commercial expression was quite often "subordinate" to any variety of competing government values.[15]

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9. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 583–606 (1980) (Rehnquist, J., dissenting).

10. Telford Taylor successfully argued the case for the Appellant. *See generally* Richard Severo, *Telford Taylor, Who Prosecuted Top Nazis at the Nuremberg War Trials, Is Dead at 90*, N.Y. TIMES, May 24, 1998, at A37 (describing Telford Taylor's life and accomplishments, including his involvement as the chief prosecutor in the Nuremberg trials). Burt Neuborne, of ACLU fame, filed an amicus brief on behalf of Long Island Lighting Co.

11. 447 U.S. at 589 (Rehnquist, J., dissenting) (citation omitted).

12. *Id.* at 598.

13. 492 U.S. 469 (1989).

14. *Id.* at 477 (quoting Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978)).

15. *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding state bar rules prohibiting direct mail solicitation of accident victims); City of Cincinnati v. Discovery Network, 507 U.S. 410, 430–31 (1993) (upholding local ban on the distribution, via news rack, of "commercial handbills," with Scalia, J., joining majority opinion); *id.* at 438–46 (Rehnquist, J., dissenting); S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987) (upholding limits on commercial and promotional uses of the word "Olympic"); Posadas de

To some it would seem curious, to say the least, that such conservatives would embrace a free speech jurisprudence with FDR New Deal overtones and that liberals would distance themselves from it.[16] But alas, *fortuna* turned the tables yet again as conservative Justices came to embrace commercial expression while liberals raised a lance against it. Just consider the 2001 case of *Lorillard Tobacco Co. v. Reilly*.[17] There the Court, by a 5-4 vote, struck down Massachusetts's regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. The lineup: Justices O'Connor, Rehnquist, Scalia, Kennedy and Thomas for the majority with Justices Stevens, Souter, Ginsburg and Breyer in dissent. Meanwhile, Justice Thomas wanted to ratchet up protection for commercial speech by urging a "strict scrutiny" standard in such cases.[18]

Things took yet another ideological back flip when *Nike, Inc. v. Kasky*[19] came before the Court. In that case, the Justices were confronted with the issue of whether a multi-national corporation that engaged in sweatshop practices abroad could be silenced by a consumer activist seeking to punish the company for its allegedly misleading public relations responses to its critics.[20]

In the high Court, Nike had the best liberal representation one could imagine—Professor Laurence Tribe of Harvard Law School, Walter Dellinger (former Hugo Black clerk and former acting Solicitor General in the Clinton Administration), and Thomas Goldstein, then of Goldstein & Howe. The sage constitutionalist, the seasoned scholar turned skillful lawyer, and the boy wonder of

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Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986) (upholding Puerto Rico's ban on promotional advertising of casino gambling); Friedman v. Rogers, 440 U.S. 1, 19 (1979) (upholding limits on optometric trade names); *Ohralik*, 436 U.S. at 456, 468 (upholding limits on lawyer solicitation).

16. In this regard, Bruce Johnson makes an important point: "So, the development of the commercial speech doctrine reflects the changes in models of economic regulation, moving from a New Deal-based government regulation system to a system based more on free markets and deregulation." Bruce E.H. Johnson, *First Amendment Commercial Speech Protections: A Practitioner's Guide*, 41 LOY. L.A. L. REV. 297, 303 (2007).

17. 533 U.S. 525 (2001).

18. *Id.* at 572 (Thomas, J., concurring); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring).

19. 539 U.S. 654 (2003).

20. The full account of the case and the story behind it are set out in Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case That Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965, 968–1024 (2004) [hereinafter Collins & Skover, Nike].

Supreme Court litigation were the trio that Nike hoped would change its fortune.

On the other side of the liberal divide, Marc Kasky, the consumer activist, received amicus support from such noted liberals as Alan B. Morrison and David Vladeck of the Public Citizen Litigation Group, Professor Erwin Chemerinsky, then of the University of Southern California School of Law, and Professor Tamara R. Piety of Oklahoma University of Tulsa College of Law.[21]

After *Nike* was argued the Court withdrew jurisdiction in the case. Notably, only Justice Stephen Breyer, joined by Justice Sandra Day O'Connor, offered a First Amendment defense for Nike, albeit a most limited one.[22]

What *Nike* reveals is that both liberal lawyers and their liberal counterparts on the Court were all over the ideological map when it came to vouchsafing the free speech rights of the mammoth corporation. That fact alone speaks volumes about the breadth of the divide in the liberal community when it comes to First Amendment protection for commercial speech and corporations.

"The most powerful actors in our society—largely corporations—are now wielding the First Amendment in ways that often seem counter to [progressive] goals."[23] So warned the editors of *The Nation* in July of 1997 in a Symposium entitled *Speech & Power*. The problem, in the progressive eye, was that yesterday's free speech principles had become today's power principles—for the powerful. The First Amendment, so the charge ran, had become yet another weapon in the arsenal of the captains of commerce, a weapon to be used against the powerless. For that arsenal, *Nike* was a case marked with dangerous potential.

For others, the *Nike* controversy had less to do with corporate power than with constitutional principle. After all, the argument went, the great marketplace-of-ideas principle[24] is betrayed when

21. *See id.* at 990, 998–99.

22. *See Nike*, 539 U.S. at 665–85 (Breyer, J., dissenting); Collins & Skover, Nike, *supra* note 20, at 1014–19.

23. Editorial, *Speech & Power: Is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 11.

24. Years ago, Shiffrin expressed his reservations about the marketplace principle. *See* STEVEN SHIFFRIN, *Marketplace of Ideas*, *in* THE FIRST AMENDMENT 53, 53 (1990) ("Milton spoke of a free and open encounter; Holmes spoke of the competition of the marketplace. A recurrent problem in First Amendment cases is that these two notions are not the same.").

corporate critics hurl barbs but corporations can't speak back. Moreover, could the First Amendment meaningfully exist in a capitalist culture without safeguarding corporate speech? Believing not, many noted free speech advocates saw great potential in *Nike*. That is, they hoped the case would become the *New York Times Co. v. Sullivan*[25] counterpart for commercial speech.

And then there is the troublesome trio of compelled exaction cases—*Glickman v. Wileman Bros. & Elliott, Inc.*,[26] *United States v. United Foods, Inc.*,[27] and *Johanns v. Livestock Marketing Ass'n*.[28] Here again, liberal Justices voted in every which doctrinal direction, with Justice David Souter consistently voting to sustain all such First Amendment challenges and Justices Stephen Breyer and Ruth Bader Ginsburg voting to deny all such claims in the same cases.

There you have it. Remarkably, in the span of a single lifetime we have witnessed the following progression:

- *Liberal* justices *denying* First Amendment protection to commercial expression;
- *Liberal* lawyers *defending* such expression;
- *Conservative* justices *denouncing* commercial speech;
- *Conservative* justices *defending* it;
- *Liberal* justices denouncing the contemporary commercial speech doctrine as implemented by conservative and libertarian jurists;[29]
- *Liberal* lawyers *fighting amongst themselves* over whether to protect the commercial speech of corporations;
- A *liberal* justice[30] *defending* the First Amendment rights of a multi-national corporation charged with exploiting its workers; and

25. 376 U.S. 254 (1964).

26. 521 U.S. 457 (1997).

27. 533 U.S. 405 (2001).

28. 544 U.S. 550 (2005).

29. For a discussion of libertarian jurists, see Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990), and Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993). As of this date, only Alex Kozinski is a judge, but Professor Banner's day may come. On the merits of their arguments, compare DOD2, *supra* note 2, at 122–28. and Ronald K.L. Collins & David M. Skover, *The Psychology of First Amendment Scholarship: A Reply*, 71 TEX. L. REV. 819, 827–30 (1993).

30. Of course, there is an irony here in the case of Justice Breyer, who despite his reputation as a "liberal" has the worst First Amendment voting record on the current Court when it comes to

- *Liberal* justices *fighting amongst themselves* over whether to protect commercial speech rights in compelled exaction cases.

Troubling as these facts are, the conceptual problems associated with commercial expression extend beyond the boundaries of ideologies.[31]

Definitional Dilemmas

Several of the articles in this Symposium suggest the need for a degree of definitional clarity about this type of expression. That is: *how precisely can courts define "commercial speech" if it is to be regulated differently from political speech*?

This question is far more complex than usually thought, for the domain of commercial expression is immense. In this regard, Professor James Weinstein makes a telling point: "[T]he large range of speech regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract, negligence and fraud" all exist without much of a "hint of interference from the First Amendment."[32] In other words, there is, as Ronald Dworkin has observed, a "vast range" of commercial speech acts (and others, too) "that are plainly not protected by the First Amendment."[33] Hence, unless one is prepared to untie such bodies of law from their historical moorings, there will be a need to define "commercial speech" with far more precision than it has heretofore received. For example, could there not be a range of *categories* of commercial speech that might be subject to different levels of constitutional

expression cases. *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191 (2001), *updated at* http://www.law.ucla.edu/volokh/howvoted.htm (last visited Oct. 12, 2007).

31. While thus far I have focused mainly on liberals and liberalism, there is, to be sure, also division among conservative thinkers re the value of commercial speech in our system of free expression, though I wonder whether the divide is as great as that among liberal thinkers. Conservative critics of commercial speech include William Rehnquist, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting), Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971), and Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 22 n.43, 39–40 (1986).

32. James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 141 (2007).

33. Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 21 n.15 (discussing campaign finance laws).

scrutiny?[34] Having said that, it is useful to remember that the tendency of our modern system of free expression is, by and large, to expand the domain of protected expression.[35]

Another point to consider is that *speech in our modern communicative system is seldom one-dimensional, i.e., seldom simply "political" or "commercial" or "scientific" or "entertainment."* Literally, we often communicate mixed messages. This should not be surprising in a highly commercial-entertainment mass communication culture such as ours. Of course, messages that mix commercial speech with other kinds of expression[36] make for definitional complexities. And then there are those messages that are largely imagistic, artistic, or emotive and have little meaningful informational content.[37] Moreover, there is the *Nike* problem[38] as to when, if ever, a for-profit corporation can enter the marketplace of discourse without its message being categorically labeled as commercial expression and thereby subject to greater government censorship.

In all of these respects, and others, the *Bigelow-Bolger* definitions[39] of commercial speech seem, yet again, inadequate to resolve such analytical problems. That is, their definitional criterion—speech that proposes a "*purely* commercial transaction"[40]—is hardly applicable to many of today's methods of mass

34. *See* Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127 (2007).

35. For example, one need only consider the relatively recent First Amendment protection of speech in judicial elections. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002). Here, too, one witnesses the all-too-predictable impact of commerce on such expression. *See, e.g.*, Robert Barnes, *Judicial Races Now Rife with Politics: Corporate Funds Help Fuel Change*, WASH. POST, Oct. 28, 2007, at A1.

36. *See* DOD2, *supra* note 2, at 9–33, 69–97.

37. *See id.* at 99–119.

38. *See* Collins & Skover, Nike, *supra* note 20.

39. *See* Bigelow v. Virginia, 421 U.S. 809, 820–22 (1975) (stating that commercial speech does no "*more* than *simply* propose a commercial transaction") (emphasis added); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 (1983) (noting that "our decisions have recognized 'the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'") (citation omitted). Notice that *Bolger* did not qualify its definition the way *Bigelow* did when Bigelow used terms such as "purely" or "simply." *See also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

40. *Bigelow*, 421 U.S. at 821–22 (emphasis added); *see also Virginia Pharmacy*, 425 U.S. at 762 (speech that "does 'no more than propose a commercial transaction'" (citation omitted) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n On Human Relations, 413 U.S. 376, 385 (1973))).

commercial advertising. Until this problem is addressed with some more calibrated definitional criteria, attempts to regulate "commercial speech" will often be underinclusive or overinclusive. (Be that as it may, Professor James Weinstein nonetheless embraces these definitions—i.e., speech that "does '*no more* than propose a commercial transaction'"[41]—as a tenet of his own First Amendment jurisprudence.[42])

Beyond such definitional considerations, there are also other concerns. For example, to what extent does the *profit motive*, standing alone, deny commercial expression a greater measure of protection than it might otherwise receive? Assume, for example, that two people trafficked in sexually explicit content on the Internet, one for profit, the other for mere pleasure. A variation of this question recently surfaced in oral arguments in *United States v. Williams*.[43] Now the response may be that absent a profit motive there is no commercial speech. Hence, such speech would be protected unless it was deemed to be obscene. But what if a for-profit Internet service provider posted that same content (assuming it was non-obscene) on the Web? Would that be regulated as middle-tier protected commercial expression or would such expression receive *more* protection owing to the fact that the ISP should be deemed a press entity, thus entitling its expression to greater constitutional safeguards?[44]

All of this would make even Heraclitus's[45] head spin. It is against that backdrop that we come to this Symposium in honor of

41. *Virginia Pharmacy*, 425 U.S. at 762 (emphasis added) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

42. *See* Weinstein, *supra* note 32, at 133 n.3. Under that view, much of modern commercial advertising would seem to fall outside of such definitional boundaries, if only because such advertising does *more* than propose a commercial transaction. *See, e.g.*, DOD2, *supra* note 2, at 88–89, 114. Assuming such advertising is not false or misleading, and does otherwise fall within any categories of First Amendment exceptions, how would Professor Weinstein analyze such speech as a First Amendment matter? What level of First Amendment scrutiny would be employ and why? Might such creative forms of, say, lifestyle advertising, be akin to artistic expression? If so, how would he analyze such expression under the First Amendment?

43. Transcript of Oral Argument at 23–24, United States v. Williams, No. 06-694 (U.S. Oct. 30, 2007), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-694.pdf.

44. Regarding the question of profit-motivated expression, see *infra* text accompanying notes 75–81.

45. Heraclitus was the Presocratic philosopher who maintained that nothing endures but change. *See* W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY: THE EARLIER

Steven Shiffrin. Before saying more about the Sympo-sium's main topic, a prefatory note is in order.

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There is, to put it mildly, something strange about *honoring* Professor Shiffrin by way of a symposium on, of all things, commercial speech. It would be rather like honoring Walt Whitman with an Adam Smith award. If Steve were to be duly honored, it would be instead by way of a symposium on dissent[46]—robust and romantic dissent. Until that day comes, however, perhaps it might be enough, in the fighting spirit of the First Amendment, to have a vigorous debate over the value, if any, of commercial expression.

The Scholars (and *Paters*): Shiffrin, Emerson, Meiklejohn et al.

It is well to point out that Steve Shiffrin's famous essay, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*,[47] was a response to the work of someone he greatly admired—Thomas I. Emerson, the famed First Amendment and civil rights law scholar.[48] Emerson's idea was "to apply a comprehensive and effective theory of the First Amendment to the various problems that arise in the operation of the free expression system."[49] That general theory was one he ventured to apply in his famous tract *The System of Freedom of Expression.* Such general theorizing about the First Amendment prompted a respectful dissent from Professor Shiffrin.[50]

PRESOCRATICS AND THE PYTHAGOREANS 449–53 (1967); *see also* FRAGMENTS: THE COLLECTED WISDOM OF HERACLITUS (Brooks Haxton trans., 2001).

46. Interestingly enough, a recent law review piece links the protection of commercial expression with the dissent principle. *See* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892, 1899–1912 (2007); *see also* Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 323 n.30 (2007) [hereinafter Seana Shiffrin, *Compelled Association*]. Over a decade-and-a-half ago, Steve Shiffrin discussed the relationship between dissent and commercial expression. *See* STEVEN H. SHIFFRIN, FIRST AMENDMENT, *supra* note 5, at 209–10 nn.174–76.

47. Shiffrin, *Away from a General Theory*, *supra* note 5.

48. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); *see also* 1 NORMAN DORSEN, PAUL BENDER & BURT NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976).

49. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970).

50. In the interest of clarity, I should be more specific and make clear that I am referring to Professor *Steven* Shiffrin. As for Professor *Seana* Shiffrin, she notes: "To Steve's mild chagrin,

Notably, by Emerson's own concession, his system of protective expression did *not* apply to "commercial activities."[51] In the hands of one of Emerson's many students, C. Edwin Baker, that casual aside paved the way for a breathtaking proposition, namely, that "a *complete* denial of first amendment protection for commercial speech is not only consistent with, but is *required* by, first amendment theory."[52] Sympathetic as Shiffrin has been to some of Baker's arguments in this arena, he has declined the invitation to endorse such views *in toto*.[53] That is, he refused to be categorical, opting instead to be *contextual*. What that meant was that he neither embraced a general theory to protect nor rejected a constitutional shelter for commercial speech. Rather, and with his trademark modesty, he noted:

> I offer neither a bold new methodology, nor any creative "solution" to the commercial speech problem here. It is precisely because the problem is so difficult that both courts and commentators have been groping to find their way. If I have a contribution to make, it is to show why this difficulty exists, why the commercial speech problem is in fact many problems, and why the small questions will not go away.[54]

Indeed, and as Shiffrin had emphasized years earlier, "the wisdom of first amendment jurisprudence is its recognition that the interests promoted by the first amendment are numerous and that

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my attraction to philosophical thinking comes hand in hand with an instinct toward trying to locate general, unifying principles." Seana Shiffrin, *Compelled Association, supra* note 46, at 318.

51. EMERSON, *supra note 49, at 19–20.*

52. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (emphasis added). The "denial" it seems turned out to be less than entirely "complete." *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment, in* CONSTITUTIONAL GOVERNMENT IN AMERICA 45, 92–93 (Ronald K.L. Collins ed., 1980) [hereinafter Baker, *Scope*] ("[I]t may be difficult to determine whether the commercial publisher and distributor, the more typical defendant in an obscenity prosecution, manifests a liberty interest or a market-enforced profit motive. However, the first amendment protects one particular industry—the press—from regulations relating to its product on a fourth estate theory and on the basis of the conclusion that generally its product, print or speech, contributes importantly to its recipients' liberty while not itself being coercively or violently destructive."). For a discussion of Baker's "liberty interest" in obscenity, see Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1390–94 (1994).

53. *See* Shiffrin, *Away from a General Theory*, *supra* note 5, at 1245–51 ("Criticizing Baker's Approach").

54. *Id.* at 1216.

government abridgements of speech impact on those interests in different ways."[55] In other words, more than a quarter-of-a-century ago Professor Shiffrin anticipated the controversy that would divide liberals (and others), and offered some sage advice for resolving such conflicts. Even so, and as this Symposium so vividly details, the controversy continues to play out in a variety of complex ways.

Like the progressive lawyers who reinvigorated commercial speech in the modern area, Steve Shiffrin is most comfortable protecting certain forms of commercial expression that involve "informational advertising."[56] Such expression, in his guarded argument, "should get a measure of First Amendment protection."[57] By stark contrast, Erwin Chemerinsky, a constitutional liberal, is nowhere as grudging in his willingness to safeguard commercial speech. "Is there a compelling reason," he asks, "for stopping particular speech? And if there's not a compelling reason, then we should allow all of the speech to go forward."[58] No hierarchies, no categories, no speaker-based distinctions—that is, no abridgements of any kind absent a showing of some demonstrable compelling interest to abridge expression.

Kathleen Sullivan, another liberal (with libertarian leanings), actually fortifies Professor Chemerinsky's rather generous protection for commercial speech by assigning a *value* for doing so. "[W]hen we tell people what they can hear or read, or listen to, or watch," she admonishes, "we're doing it to prevent ideas from reaching and influencing them . . . ." By that measure, she adds, "commercial speech does occupy the same world as other kinds of speech when we fear government intervention to be paternalistic, to tell us what to

55. Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA, *supra* note 52, at 9, 28. *Contra* Laurence H. Tribe, *Toward a Metatheory of Free Speech*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA, *supra* note 52, at 1–7.

56. *See* Steven Shiffrin, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), *in Thoughts on Commercial Speech: A Roundtable Discussion*, 41 LOY. L.A. L. REV. 333, 336 (2007). For Shiffrin's critique of *Virginia Pharmacy*, see SHIFFRIN, DISSENT, INJUSTICE, *supra* note 5, at 40–41.

57. Shiffrin, *supra* note 56, at 336.

58. Erwin Chemerinsky, Dean of Donald Bren School of Law, University of California, Irvine, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), *in Thoughts on Commercial Speech: A Roundtable Discussion*, *supra* note 56, at 337.

think, to engage in thought control, to intervene between our thoughts and our actions."[59]

It is at this juncture where Shiffrin proudly waves the old liberal flag of paternalism.[60] After all, he is, by his own admission, "an old-fashioned paternalist."[61] If not for such paternalism, he reminds us, the Securities and Exchange Commission would be barred from policing the content of proxy materials in corporate elections.[62] Moreover, if not for such paternalism, the Food and Drug Administration could never regulate what companies can or cannot say about drugs.[63] Precisely such nuanced paternalism, if you will, finds learned application in David Vladeck's contribution to this Symposium, wherein he skillfully argues that reasonable minds might well pause before guaranteeing the commercial speech rights of corporations to engage in direct-to-consumer ads for risky pharmaceutical products such as Vioxx and Celebrex.[64] The recent alarm over cold medications for children, which had been marketed to the tune of $50 million annually, buttresses Vladeck's cautionary admonition.[65]

As for a one-test-suits-all kind of jurisprudence, the Court has never, Shiffrin reminds us, adopted a compelling state interest test in all kinds of speech cases. That is, classification of the kinds of expression involved informs the test to be employed. Witness, for example, the law of defamation, where a compelling state interest

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59. Kathleen M. Sullivan, Professor of Law at Stanford Law School, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), *in Thoughts on Commercial Speech: A Roundtable Discussion*, *supra* note 56, at 338.

60. *See, e.g.*, SHIFFRIN, DISSENT, INJUSTICE, *supra* note 5, at 37–38 (arguing how, in certain areas of the law, paternalism is both permitted and encouraged).

61. *See* Kathleen M. Sullivan & Steven Shiffrin, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), *in Thoughts on Commercial Speech: A Roundtable Discussion*, *supra* note 56, at 346.

62. *See* Shiffrin, *Away from a General Theory*, *supra* note 5, at 1231. But even in this area, and consistent with Shiffrin's eclectic approach, he points out there is some room for possible First Amendment intervention. *See id.* (explaining that "the SEC editing proxy materials on the basis of what is true or false on matters of domestic and foreign policy should at least cause first amendment eyebrows to lift.").

63. *See* Shiffrin, *supra* note 56, at 338–39.

64. *See* David C. Vladeck, *The Difficult Case of Direct-to-Consumer Drug Advertising*, 41 LOY. L.A. L. REV. 259, 274–76 (2007); *see also* David C. Vladeck, *Devaluing Truth: Unverified Health Claims in the Aftermath of* Pearson v. Shalala, 54 FOOD & DRUG L.J. 535 (1999).

65. *See* Rob Stein, *Cold Remedies Are Unproven for Children, FDA Panel Says: Group Advises Against Use in Kids Younger than Age 6*, WASH. POST, Oct. 20, 2007, at A1; Rob Stein, *Children's Cold Remedies Raised Questions for Years*, WASH. POST, Oct. 26, 2007, at A1.

test is not employed in some contexts.[66] Moreover, it is well to recall that one of the mainstays of First Amendment jurisprudence, the doctrine against prior restraints, does *not* apply to commercial expression.[67] But is that not simply another way of saying that in such instances the government does indeed have a compelling interest in invoking prior restraints in the commercial speech context? Put another way, is the state's interest not sufficiently compelling whenever food and drug advertisers make false claims about their products, claims likely to cause real harm? By contrast, in the political arena such falsehoods can receive constitutional protection.[68] Is the lesson, then, in all of this that Shiffrin has it right, that categories of speech do matter and that constitutional tests must vary depending on the context? Or does Chemerinsky have the better argument that no matter the category or context, whenever the government has a compelling interest, it may regulate or even ban otherwise protected expression, regardless of the constitutional vernacular employed?

For Professor Shiffrin, commercial expression "should be lower in the hierarchy of First Amendment values than other forms of speech."[69] That claim troubles Professor Sullivan. We live "in a new world," she stresses. And in that world, commercial speech is often "continuous with, and perhaps indispensable to, the flow of speech in the rest of society."[70] Is this but another way of saying, or suggesting, that in today's America communication is often inseparable from commerce?[71] If so, what flows from that fact about the liberty Americans enjoy daily in their highly commercialized

66. *See* Shiffrin, *supra* note 56 at 338–39.

67. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72, 771 n.24 (1976); Near v. Minnesota, 283 U.S. 697, 716 (1931) (envisioning the possibility of constitutionally permissible prior restraints in "exceptional cases"); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1048 (2nd ed. 1988) (noting the "certainty" that can "ordinarily be obtained in the context of prepublication restraints on the publication of . . . commercial advertisements" as a possible justification for prior restraint of false statements).

68. *See, e.g.*, Rickert v. State, 168 P.3d 826, 832 (Wash. 2007) (striking down a law that barred political candidates from deliberately making false statements regarding their opponents). On the larger topic of a "constitutional right to lie," see Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 184–88 (2005).

69. *See* Shiffrin, *supra* note 56, at 336.

70. *See* Sullivan, *supra* note 59, at 340.

71. *See* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993) (expanded in DOD2, *supra* note 2, at 67–135).

world? To move the argument a step further, can one reasonably devalue the coin of commercial expression without at the same time devaluing the currency of modern capitalism? If not, wholesale attacks on commercial speech are, in effect, attacks on American capitalism per se.

Just such an attack was long ago leveled by one of the principal theorists of liberal free speech jurisprudence, Alexander Meiklejohn, a proud paternalist who championed the value of self-governance. His views on this subject merit repetition:

> On the whole, the "liberties" of what we call "Free Enterprise" are, I think, destructive of the "freedoms" of a self-governing society. The unregulated self-seeking of the profit-makers is much more dangerous in its effect upon the morality and intelligence of the citizen than that *participation in regulatory action* for the common good to which free enterprise has so often shown itself hostile.[72]

By that normative measure, protecting commercial expression is largely *outside* the domain of the First Amendment and more accurately within that of the liberty guarantee of the Fifth and Fourteenth Amendments. In this sense, such thought somewhat resembles that of another old liberal, Justice Hugo Black,[73] who saw commercial expression outside the ambit of core speech.[74]

At the risk of unintended misinterpretation, I think such critiques of commercial expression go to the heart of the capitalist state—the *for-profit corporation*.[75] However intended, they war, at bottom, with the life we have come to know in the modern commercial

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72. Malcolm Sharp, *Foreword* to ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, at xv–xvi (1960).

73. Justice Black's view of due process was, apart from the 14th Amendment's use in the incorporation doctrine, quite limited. *See, e.g.*, HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 23–42 (1969); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873, 877, 879 (1960); Hugo L. Black & Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 563 (1962); *see also* GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 205–69 (Lexington Books 2005).

74. Recall Justice Black's vote in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

75. Regarding free speech principles and for-profit corporate speakers, Professor Schauer has observed: "The interest of the speaker is recognized not primarily as an end but only instrumentally to the public interest in the ideas presented. As a result the motives or corporate status of the speaker are almost wholly irrelevant." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 159 (1982).

state.[76] Hence, it should come as no surprise that the corporate perpetuator of much of the life in that state should be signaled out for condemnation. For some, like Professor Tamara Piety, corporations should have no First Amendment rights.[77] Here again, she does not mean *all* corporations. Like Professor Baker, Professor Piety would exempt both *non-profit* corporations and *media* for-profit corporations from the scope of her argument.[78] While I find such distinctions analytically and culturally troublesome, I suspect the idea is to root out as much of the evils of corporate expression as textually possible, duly mindful that the "press" finds explicit mention within the forty-five words of the 1791 guarantee. If so, is this not the triumph of the old formalism over the new realities of our modern commercial media culture? I raise this question as someone sympathetic to several of the same concerns about the dangers of the new corporate constitutionalism.

Ever the lover of contextual and analytical gradations, here is how Professor Shiffrin weighs in on this matter: "[M]edia speech is not—*with narrow exceptions*—commercial speech."[79] Hence, unlike commercial expression generally, corporate for-profit media expression may often be entitled to a generous measure of First Amendment protection, but not categorically so, and this despite the toll it wreaks on elevated principles of rational discourse.[80] I wonder whether, if Professor Shiffrin examined today's commercial media culture more critically and extensively, he might not wish to rethink this entire matter.

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76. *See generally* SAMUEL P. NELSON, BEYOND THE FIRST AMENDMENT: THE POLITICS OF FREE SPEECH AND PLURALISM 84 (2005) ("Aside from a full-blown critique of capitalism . . . it is difficult to understand why profit-oriented speech should be singled out for . . . strong criticism.").

77. *See* Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 193–98 (2007) [hereinafter Piety, *Market Failure*]; *see also*, Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. (forthcoming 2008). For one reply to such arguments, see Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 86–92 (2007) [hereinafter Redish, *Commercial Speech*].

78. Presumably, that would include, as in Baker's scheme, for-profit media corporations that trade in explicit sexual expression of all kinds short of those deemed by a court to be legally obscene.

79. Shiffrin, *supra* note 56, at 342.

80. *See* DOD2, *supra* note 2, at xxiii–xxx, 1–65.

Under the Piety-Baker-Shiffrin logic, is a for-profit corporation that produces jug wine ads entitled to *any* First Amendment protection when it simply provides truthful advertising information about the cost of its product?[81] If not, why? Perhaps paternalism[82]—we as a society care too much about the plight of alcoholics to subject them to ads that entice them to drink ever more and more. But does not such a rule infantilize the rest of us and thereby deprive us of useful information about a product that can be consumed in moderation? If so, how much of such paternalism will liberals and conservatives tolerate? That is, how far should the "vice" exception to the First Amendment extend? To advertising about cigarettes,[83] fast foods,[84] sugary foods, and dietary supplements? What about gas-guzzling automobiles? How about ads for violent video games for kids?[85] Or what about ads for the most destructive kind of product that daily drains the Madisonian mind?—commercial television.[86] That is, the "logic" of much of commercial television is contrary to the logic of an enlightened, self-governing Madisonian society.

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81. Shiffrin, *supra* note 56, at 343. There are, to be sure, other reasons why some maintain that certain corporations should have no First Amendment commercial speech rights.

82. *See* Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 396–407, 422–49 (2001).

83. *See* Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988). On this point, Shiffrin reveals how his First Amendment jurisprudence is linked to his paternalism: "Four hundred thousand people die every year because they smoke tobacco. Tobacco advertising reaches children, and there are brand favorites among children with respect to cigarettes. Should we have a compelling state interest test with respect to that?" Shiffrin, *supra* note 56, at 344–45.

84. *See* Piety, *Market Failure*, *supra* note 77, at 221–23 (noting unwillingness to invoke paternalism to outlaw such foods, while receptive to limiting commercial speech rights regarding such products).

85. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) (striking down such a law). It should be noted that video games are, like television generally, a medium of communication. By that measure, they would be exempt from the Baker "press exception" to his argument. In this regard, recall his argument in Baker, *Scope*, *supra* note 52, at 92–93.

86. *See* Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1105 (1990), *expanded and revised in* DOD2, *supra* note 2, at 1–65; *see also* Sharp, *supra* note 72, at xvi. In our critiques of the entertainment, commercial, and sexual cultures in *The Death of Discourse*, we discussed any variety of "problems" and responses, all related to the subject of expression. While we were bold and satirical at times, the careful reader should note that we never took a final position on a particular First Amendment "problem" or response. We left that task to our reader. DOD2, *supra* note 2, at 249 ("You be the judge.").

Virginia Pharmacy[87] and its progeny notwithstanding, much of American advertising has moved well beyond the informational model that rests at the heart of the informed consumer rationale espoused by Justice Harry Blackmun. Martin Redish realized that very point thirty-seven years ago.[88] In that sense, as illustrated in *The Death of Discourse*, the "logic" of much modern advertising cannot be easily anchored in the harbor of Madisonian notions of an enlightened electorate.[89] Hence, the commercial speech debate, as evidenced by the arguments tendered by the likes of Sullivan and Redish, often moves beyond that information rationale for constitutionally protecting such expression.

Whatever one makes of such rationales, the drift of the Baker and Piety argument (if their views can be incorporated together) is that the problems of commercial speech can largely be reduced if only *courts* withdraw constitutional (federal and state) protection from commercial speech, however defined. But in our highly commercial-entertainment culture, can we reasonably expect that enough *lawmakers* will, in the first instance, routinely enact enough meaningful laws to stem the tide of commercial speech? On that score, it is worth noting that the rather rare consumer statute that allowed Marc Kasky to sue Nike has since been amended out of existence.[90] My point: what evidence do we have that the people of modernist America would freely abandon their consumerist ways and embrace the reformist agenda of Baker and Piety? I fear, as noted elsewhere,[91] that such reforms could be seen as authoritarian in today's highly commercial culture. Such a response, or one derivative of it, finds predictable expression in Professor Redish's declaration: "It is time to recognize opposition to commercial speech protection for what it all too often is: a form of ideological hostility

87. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); *accord* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 445 (1971) [hereinafter Redish, *Marketplace*].

88. *See* Redish, *Marketplace*, *supra* note 87, at 433 ("A cursory examination of current television and periodical advertising reveals that in practice, comparatively little commercial promotion performs . . . a purely informational function.").

89. *See* DOD2, *supra* note 2, at 67–105.

90. *See* Carolyn Said, *Proposition 64: Citizens' Right to Sue Limited*, S.F. CHRON., Nov. 4, 2004, at C1. The amended law is CAL. BUS. & PROF. CODE §§ 17200–17210 (Deering 2007).

91. DOD2, *supra* note 2, at 35–45.

to the premises of capitalism and commercialism."[92] While one need not embrace that categorical characterization,[93] it is an understandable response to the Baker and Piety variety of categorical denials of constitutional protection for a class of communication.

Professor Shiffrin's more nuanced jurisprudence, by contrast, seems better suited to grapple with the tension between the reformist agenda and the consumerist posture of life in modern America. Again, it is important to note that though he would not place commercial speech on the mantle of its political counterpart, he is, nonetheless, open to *some* measure of protection for economic expression. Without attempting to predict just how far he might venture down that road, it may suffice to suggest that his paternalist hand would withdraw First Amendment protection whenever some *harm* might or would occur without such intervention. (I will say more about the *harm principle* later in this Foreword.)

For now, it is enough to remember that where harm is the measure, any variety of *values*[94] comes into play in discerning its very existence. Such value considerations (normative inquiries, if you will) define both our notions of what is harmful, and thus unprotected, and what is vital to our system of free expression, and thus protected. The normative side of such definitional questions is explored in Professor Robert Post's discerning contribution[95] to this Symposium. Starting with the proposition that "the First Amendment does not protect 'speech as such,'" he stresses that the speech we shield from abridgment is expression that "serves relevant First

92. Redish, *Commercial Speech*, *supra* note 77, at 130–31.

93. Such a bold statement, of course, is in need of a measure of nuance. For one can attack particular absolutist-like applications of the commercial speech doctrine and yet remain "loyal" to the realities of the modern capitalist marketplace. Nonetheless, it is salutary to note that advanced capitalism typically tends to excesses of all sorts, thus increasing the likelihood of paternalist responses.

94. Shiffrin made this very point:

> [T]he line between true and false speech is not bright . . . . Misleading speech is a half-breed, true in form and even in effect for many, but false in the impressions it creates for others. All language misleads some people to some extent. How many are too many and how much is too much are questions of policy and degree. The distinction between the true and the misleading is normative.

Shiffrin, *Away from a General Theory*, *supra* note 5, at 1218–19.

95. Robert Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169 (2007) [hereinafter Post, *Viewpoint Discrimination*].

Amendment values."[96] However we define those values—and here, for example, the gulf between Martin Redish and James Weinstein is exceedingly vast—there is also the analytical concern of *how and to what extent* different kinds of expression serve different kinds of values. Or as Post puts it:

> Because different forms of speech will serve these values in different ways, constitutional protection will extend differently to different forms of speech. It therefore makes little sense to speak of speech as being "fully" protected; what matters is that speech receive the forms of protection necessary to guarantee that it will continue to serve relevant First Amendment values.[97]

Fair enough. But first identifying such values and then applying them is—as Alexander Meiklejohn discovered when he had to retool his rationalist, public discourse, free speech theory[98]—no small feat. In that regard, and reminiscent of Meiklejohn's predicament, Professor Post's own information-based, rationalist-grounded ideal of public discourse[99] seems at odds with the culture in which America today finds itself. A line from his response to Professor Redish is revealing in that respect: "*It is a mistake to conflate democracy with libertarianism.*"[100] Of that line alone one could readily write a book. But in the interest of intellectual modesty, permit me to tease out a few random thoughts.

By Professor Post's own measure, I suspect he might want to qualify that assertion. Here are a few examples I humbly offer for consideration, replete with my own qualifications in italics:

1. It is a mistake to conflate *American constitutional* democracy with libertarianism.
2. It is a mistake to conflate *traditional American constitutional* democracy with libertarianism.

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96. *Id.* at 175 (quoting Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting)).

97. *Id.*

98. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; *see also* William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

99. For a critique of Professor Post and others who hold to his public discourse theory, see LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 139–45 (2005).

100. Post, *Viewpoint Discrimination*, *supra* note 95, at 175 (emphasis added).

3. It is a mistake to conflate *traditional American constitutional* democracy with *contemporary* libertarianism.
4. It is a mistake to conflate *traditional American constitutional* democracy grounded in *Madisonian notions of political enlightenment* with *contemporary* libertarianism.

The italicized qualifications, which I suppose are generally faithful to Professor Post's vision of the First Amendment, clarify the narrowing scope of what I take to be his understanding of what free speech in modern America should be. If I am basically right on this score, then these conclusions might well follow from such thinking:

1. It is accurate to conflate contemporary American commercial-based democracy with contemporary notions of libertarianism.
2. It is a mistake to conflate contemporary American commercial-based democracy with Madisonian notions of political enlightenment.
3. Contemporary American commercial-based democracy is antithetical to Madisonian notions of political enlightenment.
4. To attempt to impose Madisonian notions of political enlightenment on America's contemporary commercial-based culture would be either futile or tyrannical (or, at least, seen as such).

In all of this, one must not be oblivious to the obvious—namely, that today's America is not that of yesteryear, let alone that of our glorified notions of that period. The culture and the Court have moved far beyond the paradigm of *Central Hudson*'s rationalist, informational function[101] ideal of the First Amendment. And while Professor Post may applaud[102] the limited protection afforded to commercial speech in *Board of Trustees of the State University of New York v. Fox*,[103] here, too, that is neither the constitutional[104] nor the cultural norm of our times.

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101. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

102. *See* Post, *Viewpoint Discrimination*, *supra* note 95, at 177–78.

103. 492 U.S. 469, 477 (1989) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

104. *See, e.g.*, 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 496 (1996). It is noteworthy that nowhere in Professor Post's thoughtful response to Professor Redish does he once refer to or cite *44 Liquormart*. In that regard, it is well to note what the author of the *Fox* opinion, Justice Antonin Scalia, had to say in *44 Liquormart*: "I share JUSTICE THOMAS's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.

Enter next Professor James Weinstein, whose astute contribution to this Symposium posits a theory similar, at times, to Post's when it comes to commercial speech. Early on in his article Weinstein states: "I count myself among those who favor capitalism, market solutions, and free trade, but who do not believe that commercial speech is entitled to 'full' First Amendment protection."[105] Since no category of expression could be entitled to *full* First Amendment protection,[106] unless very narrowly defined, such a concession may seem obvious. But unlike Post, it appears, Weinstein *is* nonethless willing to protect truthful informational commercial expression either along the lines currently employed by the Court or as a matter of Fifth and Forteenth Amendment substantive due process.[107] In his words: "While the First Amendment provides an *acceptable source of protection* for this interest, grounding a right to receive commercial information in the *liberty provision* of the Fifth and Fourteenth Amendments would, in my view, more accurately reflect the essence of the interest involved."[108]

While Weinstein is uncertain about the contours of his free speech views—for example, what about largely non-cognitive lifestyle advertising or artistic expression?—he is quite certain of the following: "[B]ecause *ordinary* commercial speech is not a constitutive part of the speech by which we govern ourselves, it is not entitled to the rigorous protection primarily reserved for public discourse."[109] Still, such speech, in Weinstein's view, can have real value: "I do believe . . . that ordinary commercial advertising can significantly promote individual economic decision-making and, thus, undue restrictions on this speech can interfere with individual

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I also share JUSTICE STEVENS's aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." 517 U.S. at 517 (Scalia, J., concurring in part).

105. Weinstein, *supra* note 32, at 135 n.8.

106. For example, even political discourse is subject to time, place, and manner restrictions and could even be barred if it was intended and likely to produce imminent lawless action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), or if it was defamatory, malicious and made concerning a public official, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

107. Beyond what is set out in this Foreword, I base the assumptions mentioned above on recent conversations with Professor Weinstein.

108. Weinstein, *supra* note 32, at 150 n.71 (emphasis added).

109. *Id.* at 150 (emphasis added) (footnote omitted) (citing Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115–20 (1993)).

autonomy protected by the Constitution."[110] So, as noted above, he is willing to protect certain forms of commercial expression. In that qualified regard, he is no paternalist liberal: "[S]uppressing *speech* for [certain] paternalistic reasons might well be unconstitutional even if the speech is not part of public discourse."[111]

It is that *public discourse* component that is central to Professor Weinstein's thinking; and it is there where he parts company—quite sharply—from Professor Redish concerning the centrality of commercial expression in our First Amendment jurisprudence. The "position that ordinary commercial speech should be afforded less protection than political expression," says Weinstein, "flows from the view that the core First Amendment value is democratic self-governance, not, as Redish believes, self-realization."[112] Hence, when it comes to "public discourse," "rigorous" protection is the rule insofar as it best fosters our "commitment to democratic self-governance."[113] Of course, for that public discourse to remain viable, it ought not be undermined by the corruptive influences of a culture wed to entertainment and commercialism. But on that score, Weinstein parts company from Post et al. in allowing for some viable measure of constitutional protection for commercial expression as it operates in our modern culture. Never mind that his old lodestar is clouded by the new skies in which it finds itself.

Beyond the firmament of such matters, the papers in this rich Symposium raise a variety of other important issues. For example, one may wonder whether the views espoused by Baker, Piety, and Post, among others, do not in some way compound some of the very problems of which they complain. That is, to the extent that such views are premised on amoral, profit-maximizing notions of market players, they may actually encourage the continuation of such a transactional system infused with all sorts of different expressive components. The articulation of this problem finds perceptive commentary in Professor Seana Shiffrin's contribution to this Symposium.[114] In her own words:

110. *Id.* at 150 n.71.

111. *Id.* at 165–66 (footnote omitted).

112. *Id.* at 139.

113. *Id.* at 144.

114. *See* Seana Shiffrin, *Compelled Association*, *supra* note 46.

> I'm not sure it is wise or desirable to adopt a theory that if publicly known, accepted, and implemented would not only treat market actors as amoral, but would encourage market actors—whether producers, advertisers, or consumers—to adopt this as a self-conception (that is, to think of themselves as amoral, apolitical agents).[115]

But do not categorical theories that *deny* First Amendment protection to commercial and corporate expressive transactions (including those of supporters of the organic farming movement[116]) help to promote amoral kinds of behavior in the marketplace? They say, in effect, to the players in that market that since commercial expression is devoid of any meaningful or elevated value, it is best to accept that notion and compete in the market accordingly. Contrast such Machiavellian notions of commercial competition with Seana Shiffrin's salutary counsel:

> If our lives are going to be dominated by a more decentralized market, then we should encourage morally motivated market activity and recognize forms of market activity that attempt to moralize the market from within, given the absence of a well-organized, coherent, comprehensive form of external morally motivated regulation.[117]

Hence, by this liberal measure certain compelled subsidization of speech cases[118]—like those involving organic farmers forced to subsidize advertisements antithetical to their values—should be viewed as violating the First Amendment, the regulatory holding of *Glickman v. Wileman Brothers & Elliott, Inc.*[119] notwithstanding. This would be so even if the organic farmers were commercial corporations and even if their messages were, in good part, profit motivated.

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115. *Id.* at 325.

116. *See id.* at 324–25.

117. *Id.* at 325.

118. The doctrinal/theoretical exchange between Professors Sullivan and Post concerning these cases is exceptionally rich, and worthy of careful study. *See It's What's for Lunch: Nectarines, Mushrooms, and Beef—the First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359 (2007).

119. 521 U.S. 457, 477 (1997) (upholding compelled payment by fruit growers of generic fruit growing ads).

Seana Shiffrin's "more accommodationist approach" (vintage Shiffrin) is premised on the assumption that "the correct First Amendment analysis is *not* dictated purely by the sort of speech at hand, but on a variety of non-speech-related factors."[120] Accordingly, the fact that an entity's "moral and political speech appear[s] in market garb"[121] does not alone settle the First Amendment question. And why not? Consider Professor Seana Shiffrin's explanation: "These enterprises are not best understood as amoral business aiming to maximize profit. They are attempting to integrate, express, and infuse moral and political concerns into commercial interactions: by transforming the market from within through political activism *achieved in part through commerce.*"[122]

I am not entirely sure whether there is enough conceptual "wiggle room" in Professor Post's understanding of commercial speech and the First Amendment[123] to countenance constitutional protection of such corporate commercial claims. If not, that might prompt some who subscribe to such views to pause. By the same token, were such corporate commercial claims to find sanctuary under some application of his views, this might prompt others to consider the potentially troublesome ramifications of signing onto them *sans* reservation.

Such uncertainties about Professor Post's own vision of the First Amendment do not, of course, deny the value of his stinging critique (and Professor Weinstein's, too) of runaway notions of a *full-First-Amendment-protection* understanding of what our national Constitution ought to protect within the realm of commercial expression. If Justices Hugo Black and William O. Douglas could not soundly defend First Amendment absolutism in the context of political expression, how then can Justice Thomas and his followers fare any better in the context of commercial expression? But that criterion need not be our only measure. For let none forget that

120. Seana Shiffrin, *Compelled Association*, *supra* note 46, at 327 (emphasis added).

121. *Id.* at 322.

122. *Id.* at 325–26 (emphasis added).

123. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood," 40 VAL. U. L. REV. 555 (2006); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195; *see also It's What's for Lunch*, *supra* note 118 (Professor Post stating that . . . .).

Justice Black's so-called absolutism made Justice Brennan's near-absolutism seem sensible. Something of the same may be happening in the commercial speech doctrinal arena, too.

Whatever the doctrinal direction of the commercial speech cases, one thing seems clear: Governmental paternalism of the kind championed in *Posadas*[124] and *Fox*[125] is far less likely to win the day in the Supreme Court than it was decades ago. If this is true, what does this portend for the regulatory state championed by liberals of the past?

Modern Liberty: On Libertarianism

Talk of government paternalism—and the prospect of an endless array of pestering *paters*—troubles libertarian lawyers like Bruce Johnson,[126] libertarian academics like Charles Fried[127] (and Kathleen Sullivan[128]), and libertarian First Amendment theorists like Martin Redish, the intellectual godfather of modern commercial speech scholarship.[129] Like the free-spirited William O. Douglas, who changed his mind about not protecting commercial speech,[130] they maintain that the Constitution was "designed to take the government off the backs of people."[131] True to that principle, they are nowhere as divided or equivocal about protecting commercial expression as their liberal counterparts.

Generally speaking, I think Professor Fried quite astutely depicts the larger set of issues at work in this debate concerning commercial speech. And I think he does that best in his recent book, *Modern Liberty*,[132] a book that made even the liberal Anthony Lewis "rethink

124. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 (1986) (upholding restrictions on casino advertising).

125. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 485–86 (1989) (allowing potential restrictions on college campus advertising by lower courts).

126. *See* Johnson, *supra* note 16.

127. *See* Charles Fried, *Philosophical Underpinnings of the First Amendment*, 41 LOY. L.A. L. REV. 329 (2007).

128. *See, e.g.*, *It's What's for Lunch*, *supra* note 118, at 365–67, 369, 381 (noting Professor Sullivan's somewhat playful use of the term "Stalinism" to refer to government paternalism).

129. *See* Redish, *Marketplace*, *supra* note 87.

130. *See* Cammarano v. United States, 358 U.S. 498, 513–15 (1959) (Douglas, J., concurring).

131. WILLIAM O. DOUGLAS, THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 8 (1980).

132. CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT (2007).

the nature of liberty."[133] Early on in that work, from which the key ideas of his Symposium remarks derive, Fried observes: "The greatest enemy of liberty has always been some vision of the good."[134] And without loading the dice, is that not the case here, too? If liberals wish to restrict tobacco advertising, it is because they wish to do something about centuries of cancer-killing products. So, too, if they opt to regulate alcohol advertising, it is because they are duly sensitive to the savaging effects of alcoholism in America. By the same token, if they seek to control messages about unhealthy food, it is because they have seen countless cases of cholesterol-related deaths. And if liberals are particularly concerned about the impact of all of the above on our minority communities,[135] it is because they want life's forgotten ones to experience an equal measure of the good life. Put another way, their notion of free speech is informed not only by individual liberty but also by the collective good, to which they are inclined to give greater weight than their libertarian counterparts. Is it, then, that collective vision of the good that, in Fried's words, makes them "enem[ies] of liberty"? Is their unwillingness to let liberty be defined, in great measure, by the demands and joys of the marketplace what renders them unsure about the First Amendment as we know it today?

At the conceptual core of modern liberty is the belief, not without warrant, that there is an important connection between commerce and that freedom of the mind that coats the canvas of our lives in awe-inspiring, life-affirming color. Though the liberty deriving from it may be tagged "new," the idea is an old one. A page of Medici history illustrates this larger point—Professor Fried's point as earlier formulated by Tim Parks:

> During the thirteenth and fourteenth centuries, a web of credit was spun out across Europe, northward to London, east as far as Constantinople, west to Barcelona, south to Naples and Cyprus. At the heart of this dark web of *usura* lay Florence. But in the same period, and above all in the century that followed, the Tuscan city also produced some

133. *See id.* (appearing on the dustjacket and praising Fried, while commenting that Lewis nonetheless "disagreed" with some of Fried's points).

134. *Id.* at 17.

135. *See* GEORGE HACKER, RONALD COLLINS & MICHAEL JACOBSON, MARKETING BOOZE TO BLACKS (1987) (foreword by Barbara Jordan).

> of the finest painting and architecture the world has ever seen. Never had stone blocks been cut more smoothly, never were finer paradises painted on church walls. In the Medici family in particular, the two phenomena—modern banking, matchless art—were intimately linked and even mutually sustaining . . . . With *usura* we have the Renaissance, no less.[136]

This is not to deny the excesses of Medici capitalism, historical or contemporary, but to stress instead how commerce can be vital to civilization and the advancement of a culture of spirited and artistic freedom. One does not have to open the casket of *Lochner*[137] to concede that point. So, too, one need not discount the corrosive effects of modern commercialism to appreciate such things.

The fact is as simple as it is complex: we are Americans; modern liberty is our creed. It is a liberty that, despite itself, has produced everything from the wondrous words of Jack Kerouac[138] to the magic of Stephen Sondheim[139] to the amazing photography of Annie Leibovitz[140] to the poignant journalism of Nat Hentoff,[141] to those creative Geico Gecko commercials[142] . . . and beyond. "America," as my late friend Max Lerner used to say, "is a pretty good God-damn country." Phrased differently, it may be the best of all evils, if only because it is hard to imagine a vibrant system of freedom of expression like ours in Castro's Cuba, or Putin's Russia, or Jintao's China, or even in Brown's Britain.

All of capitalism's many faults notwithstanding, many liberals nonetheless love their modern liberty. So when the Government

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136. TIM PARKS, MEDICI MONEY: BANKING, METAPHYSICS, AND ART IN FIFTEENTH-CENTURY FLORENCE 2 (2005). The Italian term *usura* did not necessarily connote usury as understood today, but rather the charge of any interest, no matter what amount, on a loan of money.

137. Lochner v. New York, 198 U.S. 45 (1905).

138. *See, e.g.*, JACK KEROUAC, ON THE ROAD (Penguin Books 1976) (1959); *see also* Jack Kerouac, *After Me, the Deluge*, CHI. TRIB. MAG., Sept. 28, 1969, at 20 ("[I]f it hadn't been for western-style capitalism . . . I wouldn't have been able or allowed to hitchhike half broke thru 47 states of this Union and see the scene with my own eyes . . . .").

139. *See, e.g.*, STEPHEN SONDHEIM, SUNDAY IN THE PARK WITH GEORGE (RCA Records 1984).

140. *See, e.g.*, ANNIE LEIBOVITZ, A PHOTOGRAPHER'S LIFE: 1990–2005 (2006).

141. *See, e.g.*, NAT HENTOFF, THE NAT HENTOFF READER (2001).

142. *See, e.g.*, The Geico Gecko, http://www.youtube.com/watch?v=acCfnwTpdxU (last visited Oct. 12, 2007).

starts to "abridge" their communicative freedom they buck, and buck again. Sure, they grant, there must be a few limits. Justice Clarence Thomas's hints to the contrary,[143] they likewise realize that commercial speech can never *really* be on the *same* plane as political speech. Yet, the tendency, at times constrained, should move in that general direction, they urge.

For other liberals, however, that tendency signals constitutional and cultural catastrophe. Understandably concerned about the potentially de-civilizing effects of modern capitalism and its impact on our system of freedom of expression,[144] they are increasingly inclined to give up on the First Amendment as a way of countering such excesses. That is, rather than protesting and petitioning against the captains of commerce and the Huxleyan[145] world they have ushered in, more and more liberals prefer instead for government to silence commercial messages. Even if this were possible in a highly capitalist culture such as ours,[146] it does not bode well for the spirit of the First Amendment to argue that *the only way to save free speech is to silence free speech.* There is something curious in maintaining that our system of freedom of expression operates best when it cabins the mind of our citizenry in the case of a certain class of messages. His early tendencies to the contrary,[147] I think Alexander Meiklejohn sensed the futility of his original free speech jurisprudence; he realized its inability to function in a modern capitalist society when he extended his theory of free speech to include artistic expression,[148] which in our culture is quite regularly

143. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518–19 (1996) (Thomas, J., concurring in part).

144. *See* DOD2, *supra* note 2, at 9–33, 69–105, 139–77.

145. *See id.* at 3–7.

146. *See id.* at 107–19.

147. *See* Sharp, *supra* note 72, at xv–xvi.

148. *See* Meiklejohn, *supra* note 98, at 255–57. Zechariah Chafee flagged the problem with Meiklejohn's free speech jurisprudence as early as 1949. *See* Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 899–900 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT (1948) (noting the "most serious weakness in Mr. Meiklejohn's argument" as including his failure to include literary and artistic expression as well as failure to protect speech related to one's knowledge of "economic forces")).

linked to commerce. But something more is at stake here than futility, important as that point is.[149]

That something is a willingness, call it a Camusian struggle,[150] if you will—to affirmatively enlist the First Amendment to battle the captains of commerce. If liberals believe that commercial messages actually harm people, then why not counter such messages? While some liberals may hesitate to take the credit, preferring instead to don paternalist garb, others in the liberal camp should celebrate the fact that at the end of the day our system of freedom of expression *did* indeed expose the all-powerful Nike to be guilty of abhorrent sweatshop practices.[151] Nike's attempt to buy its way out of the sun of truth failed miserably. Is that not reason for liberal hope? Is that not reason enough to believe that dissent—the voices of counter-speech—can sometimes prevail?[152] Perhaps. Still, legions of liberals believe otherwise; they want to restrict much protection for commercial expression. But why?

Enter Martin Redish, whose views on commercial expression are often seen as either a denunciation of the modern liberal state or a celebration of the modern libertarian state. His contribution to this Symposium, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*,[153] is surely his boldest statement on the topic to date. A few sample passages from that article illustrate his ever-increasing frustration with liberals who insist on treating commercial speech as the "stepchild of the First Amendment."[154]

- *Viewpoint discrimination.* Many scholarly attacks on commercial speech either constitute or facilitate or come close to encouraging a "form of viewpoint regulation," which is tantamount to suppression "based on the regulators' subjective disagreement with or disdain for the views being expressed."[155]

149. *See* Collins & Skover, Nike, *supra* note 20, at 1032 n.300.

150. *See* DOD2, *supra* note 2, at 216.

151. *See* Collins & Skover, Nike, *supra* note 20, at 975.

152. This is not, of course, to deny that dissent itself can sometimes be co-opted in a highly commercial culture. *See* DOD2, *supra* note 2, at 115–17.

153. Redish, *Commercial Speech*, *supra* note 77.

154. *Id.* at 67.

155. *Id.* at 69 & n.8.

- *Content neutrality.* Viewpoint discrimination against commercial speech is *per se* antithetical to basic notions of a core First Amendment precept, content neutrality. For such discrimination is "ultimately grounded in distaste for what commercial speech facilitates and represents, in a manner wholly unrelated to a properly value-neutral approach to First Amendment interpretation."[156]
- *Political-Commercial speech dichotomy.* Theories that ground the First Amendment in political speech, and thereby discount the value of commercial speech, ignore the relationship between the two: "[S]peech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government. Both private and collective self-government are grounded in identical normative concerns about self-development and self-determination."[157]
- *Corporate identity and the First Amendment.* Attempts to deny First Amendment protection to corporations *qua* corporations ignore a fundamental tenet of our free speech jurisprudence: "If one assumes that the values of free speech can be fostered by the receipt, as well as by the communication, of expression, then it should logically make no difference whether the speaker itself deserves the benefits of the constitutional protection."[158]

In all of the above ways, and others, Professor Redish strikes out against his liberal critics: In one way or another, all of their views are "grounded in the decision maker's preference for particular political or ideological value preferences that would, in the decision maker's view, be threatened or undermined by the extension of constitutional protection to commercial speech."[159]

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156. *Id.* at 108.

157. *Id.* at 81 (footnote omitted). I'm not quite sure what to make of the notion of "private self-government." I would have thought that the notions of *private* and *government* are conceptually different creatures. Be that as it may, for a further elaboration of Redish's views on commercial speech and democratic values, see MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 14–62 (2001) [hereinafter REDISH, MONEY TALKS].

158. Redish, *Commercial Speech*, *supra* note 77, at 87 (footnote omitted).

159. *Id.* at 109.

As one who has been at the barrel end of Professor Redish's rhetorical pistol,[160] I can readily understand why some liberals (like Shiffrin, Post, Weinstein, Piety and Baker, among others) would distance themselves from his bold libertarian views. And while I find certain tenets of those views quite troublesome,[161] and likewise share some of the reservations of his Symposium critics,[162] I nonetheless think that Redish has leveled several significant broadsides against certain liberals who, on the one hand, defend robust expression and, on the other hand, reflexively draw away from that principle in the case of commercial expression. This is even more problematic given the realities of commerce and culture in today's America. In light of the last fact, I wonder if time is not on Martin Redish's side, at least in some general sense.

The Harm Principle

In that tumble of talk that we call discourse about commercial expression, I think the crucial question comes down to this: *just how much "harm" will we tolerate before we permit the government to "abridge" commercial speech?* In one way or another, *harm* is the governing principle that most often limits expression. From the law of speech crimes (e.g., threats, conspiracy, fraud), to the law of civil wrongs (e.g., copyrights, invasion of privacy), to the law of sexual expression (e.g., child pornography), to the law of imminent danger (e.g., fighting words), to regulatory law (e.g., insider trading), the principle of harm defines the parameters of protection. Admittedly, we do tolerate certain harms, as in the case of hate speech[163] or specific kinds of defamation against public officials or figures.[164] But generally speaking, the more attenuated the harm, or the greater the

160. *See* DOD2, *supra* note 2, at 49.

161. *See* DOD2, *supra* note 2, at 47–65, 100–01; Ronald K.L. Collins & David M. Skover, *The First Amendment in Bold Relief: A Reply*, 68 TEX. L. REV. 1185 (1990).

162. *See* Post, *Viewpoint Discrimination*, *supra* note 95; Seana Shiffrin, *Compelled Association*, *supra* note 46; Weinstein, *supra* note 32.

163. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

164. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Gertz v. Welch, 418 U.S. 323 (1974). For a criticism of such cases, see Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 232 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (discussing the harm caused by defamation against public officials and public figures).

improbability of its real and substantial actuality, the more the expression in question is likely to be protected.

While I understand that there are, to be sure, some nagging analytical questions—for example, what exactly qualifies as *speech*?[165]—I think the harm point takes us further down the road to liberty than abstract discussions of First Amendment values[166] tethered to antiquated notions no longer realizable in our commercial culture. Mindful of the fact that the devil dwells in the details, let me nonetheless chart out some ideas about how we might consider *harm* and the values connected to it.

On the one hand, when commercial speech is clearly synonymous with "theft by deception,"[167] such expression is entitled to no constitutional protection. And the closer commercial speech nears that paradigm of prohibition, the more likely it may be suppressed. Here the property principle, if you will, runs counter to unchecked commercial communication. So, too, when commercial speech clearly leads to actual injury by deception.[168] Generally speaking, any form of regulatory law (civil or criminal) that would bar or punish such expression does so to protect us from intentional, reckless, or even negligent acts that cause real harm to real people. Insofar as any form of libertarian expression runs afoul of that standard of consumer protection, it also risks suppression. Here the preservation principle, if you will, runs counter to unchecked commercial communication.

On the other hand, the more would-be regulators attempt to censor commercial speech along the lines of the *Posadas*[169] principle of paternalism, the more likely they are doomed to constitutional failure, especially where the underlying information is factually true as in *44 Liquormart*.[170] Simply witness the fact that Justice John Paul

165. *See* Post, *Viewpoint Discrimination*, *supra* note 95, at 174–75; *see also* REDISH, MONEY TALKS, *supra* note 157, at 66–96.

166. While any notion of harm is, of course, informed by normative judgments, I nonetheless think the harm principle provides a clearer lens by which to make analytical calls. On that count, I concede, I may be splitting conceptual hairs.

167. *See* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 177 (2004).

168. For example, cigarette ads that claim that smoking does not cause cancer.

169. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340–48 (1986) (upholding restrictions on casino advertising).

170. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–16 (1996) (striking down law regulating alcohol advertising); *see also* United States v. Caputo, Nos. 06-3612 & 06-3619, slip

Stevens, the Court's stalwart liberal, urged "rigorous review"[171] in such cases. Justice Ruth Bader Ginsburg, another liberal, agreed.

The harm principle can, of course, be read broadly. We see examples of this in everything from Catharine MacKinnon and Andrea Dworkin's views on the "harms" of pornography[172] to Justice Stephen Breyer's views on the "harms" to the "structural democratic governing process"[173] as reasons for reining in speech protections. By such criteria, if the governing value of the First Amendment were, say, *rational discourse*, then speech that undermined that value could be said to be "harmful." That very scenario is what David Skover and I labeled Huxleyan harm[174]—a harm most difficult to cure in our entertainment-commercial culture. The problem with defining harm in such broad ways is that it all too readily invites oppression.

While the above conceptual sketches may delineate the general First Amendment spectrum for many, there is certainly room for debate. Though granting that, let me move the discourse to the next level. Spectrum analysis of the kind I have outlined above begs an important question, namely, what about that vast gray area in between? It is because of that enormous and complex area that most members of the Court have rejected "full" protection for commercial expression.[175]

A few "easy" examples might help to illustrate my general point. Consider, in that regard, the following:

- Clearly fraudulent commercial messages.
- Clearly misleading commercial messages.

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op. at 7 (7th Cir., Feb. 27, 2008) (discussing the "anti-paternalist view of Virginia Citizens Consumer Council and the cases that followed in its wake").

171. *44 Liquormart*, 517 U.S. at 501 (Stevens, J., plurality opinion joined by Kennedy & Ginsburg, JJ.).

172. *See* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds., 1997). Regarding the "harms" of racist speech, see MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

173. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39–55 (2005). *See generally* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225–28 (1997) (Breyer, J., concurring in part).

174. *See* DOD2, *supra* note 2, at 3–45.

175. *See* Weinstein, *supra* note 32, at 134–136 (listing justices opposed to "full" protection for commercial expression).

- Clearly dangerous commercial messages.[176]
- Commercial messages clearly encouraging unlawful conduct.

In all of this, must the harm be *actual*? *Imminent*? *Substantial*? *Clearly demonstrable*? But what about advertising messages in which the actual harm is far more attenuated, as in the following examples?:

- Truthful commercial messages about the price of cigarettes.
- Truthful commercial messages about the alcohol content of beer.
- Truthful commercial messages about gambling.
- Truthful commercial messages about "gentlemen's clubs."
- Truthful commercial messages about abortion or condoms.

What if the commercial message is true *as far as it goes*, but more information is needed to be *fully* informed? In such situations, should the government *compel* a counter or explanatory message? If so, what are the criteria for doing so? Mindful of such Meiklejohnian-like concerns,[177] bear in mind that all information (as Plato's Socratic dialogues demonstrate) is always incomplete when it comes to ferreting out the truth. But when is truth sufficiently incomplete to rise to the level of real harm? That is, if the harm principle triggers government censorship, how do we define such harm? (It is odd that, to the best of my knowledge, no one has yet offered any extended analysis of the relationship between speech and harm as the harm principle relates to various kinds of expression.)

The difficulty of defining harm in the commercial speech arena is evidenced by the difficulty of defining *misleading speech*—a category of expression most would deem to be harmful in the commercial context. In Professor Rebecca Tushnet's thoughtful contribution[178] to this Symposium, she skillfully points out that definitional debates are not confined to language ambiguities about phrases such as "Glass Wax" or "not tested on animals" or "Made in

176. For example, a commercial message regarding the use of a legal drug with serious side effects.

177. *See generally* MEIKLEJOHN, *supra* note 148 (examining the foundations and structure of free speech theory and criticizing Justice Holmes's theory of free speech as insufficient).

178. Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007).

the U.S."[179] While such examples of language confusion are problematic enough for her, they do not exhaust the possibilities of problems. For once norms—political, religious, cultural, and economic—are openly poured into the beaker of commercial speech analysis, the resulting mix could puzzle even Lewis Carroll. Already, as Professor Tushnet observes,[180] we have consumer-protection-like laws surfacing in the doctor-patient abortion context.[181] Ironically, here conservatives seek to devalue commercial speech while liberals seek to enrich it.[182]

Once the definitional brush has been cleared, it may be possible to consider spectrum of harm questions more openly.[183] Whatever value such harm considerations may have, their worth must also be measured by the extent to which they find some, if any, application to commercial speech penumbras. By that I mean that there are certain ancillary issues related to the commercial speech inquiry—issues that cannot so readily be confined to invitations to engage in commercial transactions. In this regard, Bruce Johnson makes an important point:

> The indeterminacy of the commercial speech doctrine surfaces in private causes of action in odd ways, such as in tort claims of misappropriation, right of publicity claims, statutory claims under trademark law and the Lanham Act, and even certain claims arising under copyright laws and the fair use doctrine.[184]

While some of the contributions in this Symposium—particularly those by Tushnet, Vladeck and Johnson—alert us to such matters, their full scope has yet to be explored in connection with any First Amendment jurisprudence of commercial expression.

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179. *Id.* at 232, 234, 238. Ideologically speaking, are not such anti-abortion "informed consent" laws the flipside, of sorts, of the pro-choice claim raised and vouchsafed in *Bigelow v. Virginia*, 421 U.S. 809, 811, 829 (1975)?

180. Tushnet, *supra* note 178, at 236–37.

181. *See* S.D. CODIFIED LAWS § 34-23A-10.1 (2007).

182. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 974–80.

183. I say "more openly" to allow for the real possibility that such considerations may be taken into account at the definitional stage.

184. Johnson, *supra* note 16, at 305–306; *see also* Ann K. Wooster, *Annotation, Protection of Commercial Speech Under First Amendment Supreme Court Cases*, 164 A.L.R. FED. 1 (2000).

After the din of the ideological debate quiets down, and after the doctrinal and conceptual waters clear a bit, and when definitional hurdles are confronted, Steve Shiffrin's perceptive insights regarding those irksome "small questions"[185] can help us greatly in grappling with many of the issues I have flagged. Just where exactly that will leave us, of course, is another matter. But for now, it is best to leave well enough alone.

Recognizing the Law of Commercial Expression

Since this Symposium is in honor of my dear friend Steve Shiffrin, it is fitting that I end this Foreword on a romantic, albeit dissident, note.

In *Poetry as Insurgent Art*,[186] Lawrence Ferlinghetti (the famed poet who a half-century ago fought to print Allen Ginsberg's *Howl*[187]) counsels: "Reinvent America and the world."[188] Given the source and the message, I suppose Steve would heartily agree with the rebellious poet, with a nod to old Walt Whitman, to be sure.

With that as a touchstone, perhaps now is the time to lay to rest old paradigms, doctrines, and all other roadblocks to the path of resourceful new thinking. For surely, there is much to be gained by leaving the disjointed domain of commercial speech doctrine with its rules in search of a rationale.[189] In this rubble of rules, the inventive few can brave into the breach and, in the spirit of the great bard, strip their sleeves and show their scars as they create their world anew. And then, looking back, let them say: "[T]hese wounds I had on Crispin's day."[190] Aww, Steve, does it get any better than that my friend?

Well, enough with the poetry, now onto the law . . . and to the splendid Symposium that follows. In this extended Foreword I have offered a few embryonic ideas—no general theory, to be sure!—that might be helpful in thinking about what follows. Such offerings

185. Shiffrin, *Away from a General Theory*, *supra* note 5, at 1216.

186. LAWRENCE FERLINGHETTI, POETRY AS INSURGENT ART (2007).

187. ALLEN GINSBERG, HOWL AND OTHER POEMS (City Lights Books 1956). Regarding the struggle to publish HOWL, see HOWL ON TRIAL: THE BATTLE FOR FREE EXPRESSION (Bill Morgan & Nancy J. Peters eds., 2006). *See also* RONALD COLLINS & DAVID SKOVER, MANIA: THE MADCAP STORY OF THE LIVES THAT LAUNCHED A GENERATION (forthcoming 2008).

188. FERLINGHETTI, *supra* note 186, at 10.

189. *See, e.g.*, Johnson, *supra* note 16, at 303–11; Note, *supra* note 46, at 1894–99.

190. WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 4, sc. 3.

notwithstanding, the richness of the various contributions to this Symposium will prove immensely valuable to anyone genuinely interested in the First Amendment and its future in American culture and constitutional law.