

## **A little clarity please: A lackluster commercial speech definition leads to wishy-washy First Amendment protection and sporadic legal decision**

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**Keywords:** First Amendment, Commercial Speech

*The First Amendment provides protection for speech, however this can be a bit tricky when speech is not clearly defined. Given the lack of these definitions, it is not surprising that the Court's treatment of "commercial speech" cases has varied over the years. Decisions have granted commercial speech no protection to some or qualified protection under the First Amendment as the Court ruled regulation of commercial speech should be unnecessary and people will act in their own best interest if they are well informed. The purpose of this paper is to analyze the various definitions of commercial speech and to investigate a few examples of how this ambiguous definition of commercial speech has led to inconsistent application of the law in lower courts. The article will provide a brief overview of the history of commercial speech doctrine, noting the change in commercial speech definition, and then some case-based examples will be presented as evidence of how the wish-washy attempt at defining commercial speech affects application of the law.*

## Introduction

The First Amendment provides protection for speech, however this can be a bit tricky when speech is not clearly defined. Given the lack of these definitions, it is not surprising that the Court's treatment of "commercial speech" cases has varied over the years. Decisions have granted commercial speech no protection (*Valentine v. Chrestensen*, 1942) to some or qualified protection under the First Amendment as the Court ruled regulation of commercial speech should be unnecessary and people will act in their own best interest if they are well informed (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 1976).

Black's Law Dictionary officially defines commercial speech as "communication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech," (p. 1407). However, the courts have had a harder time reaching such a concise definition. For example, the Court attempted to distinguish between commercial speech and other forms of speech by noting that commercial speech "occurs in an area traditionally subject to government regulation" (*Ohrlik v. Ohio State Bar Association*, 1978, p. 455-456).<sup>1</sup> To assist in determining when the Supreme Court should regulate commercial speech, the Court created the Central Hudson test ruling that commercial speech could be regulated when (1) it is unlawful or misleading, (2) government interest in regulation is substantial, (3) regulation directly advances that interest, and (4) regulation is not more extensive than necessary (*Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 1980, p. 561-671).

The Court has also allowed commercial speech to be restricted because of its content. For example, the government may have a vested interest in decreasing the number of children who start smoking. As a result, cigarette advertisers might face regulation in the kind of communication they can send, where they can send it, and who whom they can send it. While these censorship are almost unheard of, in regard to non-commercial speech, the Court has ruled that commercial speech has a "greater potential for deception or confusion in the context of certain advertising messages" (*Bolger v. Youngs Drug Products Corp.*, 1983, p. 65). As a result, and in an attempt to prevent misleading speech, content-based restrictions are often imposed on commercial speech.

It also appears that the regulation of commercial speech often occurs in ways, that if applied to other forms of speech, would meet resistance or be considered unconstitutional. For example, a corporation's speech might be regulated by laws (usually overseen by the Securities and Exchange Commission) that dictate how and when it communicates information to the press, relays current or future information to shareholders, or communicates with employees. In addition, corporations and businesses are often subject to labor and anti-trust laws, to name a few (*Shiffrin*, 1983). But, why is this the case? Why is it acceptable to treat commercial speech differently than other forms of speech?

The Court has ruled that this differential treatment be allowed because of the commonsense differences between commercial speech and other forms of speech. While never officially defining these differences, they appear to include the Court generally viewing commercial speech as being hardier, or less likely to be chilled or stifled by regulation than other

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<sup>1</sup> Case details are discussed on page 18.

speech, because it is essential for commercial profits. Thus, the difference is apparent in both the nature of the speech and the nature of the governmental interest (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 1976).

Closely examining the Supreme Court's commercial speech doctrine reveals that it is, often difficult to determine how the courts will rule. When discussing commercial speech cases, Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, and his law clerk Stuart Banner noted "Unless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner" (p. 631). The results are so confusing that some have argued the Court should simply do away with the commercial speech doctrine altogether and award commercial speech full First Amendment protection (Neuborne, 1980). Justice Clarence Thomas commented about the problems with defining commercial speech, and thus protection, when he said "I do not see a philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech. Indeed, some historical materials suggest to the contrary" (*Liquormart Inc. v. Rhode Island*, 1996, 522).<sup>23</sup>

## **Purpose**

The purpose of this paper is to analyze the various definitions of commercial speech and to investigate a few examples of how this ambiguous definition of commercial speech has led to inconsistent application of the law in lower courts. The article will provide a brief overview of the history of commercial speech doctrine, noting the change in commercial speech definition, and then some case-based examples will be presented as evidence of how the wish-washy attempt at defining commercial speech affects application of the law. This results in the following RQ: How has the Court's failure to clearly define commercial speech affected the First Amendment protection of commercial speech and application of law?

## **Commercial speech, an overview**

### *Definition*

Over the years, the Court has applied various vague definitions to commercial speech. The term commercial speech, as a constitutional doctrine, was first used by a U.S. Supreme Court in 1942 during *Valentine v. Chrestensen*. Kozinski and Banner (1990) argued that the Constitution holds no reference to commercial speech and that the Supreme Court created the category during this case when it "plucked the commercial speech doctrine out of thin air" (p. 627).

It appears that the ruling that speech suggesting a commercial transaction should be differentiated from other forms of speech was arrived at with little fanfare as the Court upheld a city ordinance prohibiting distribution on the street of commercial and business advertising matter in the form of handbills. The ruling found the communication to be purely commercial

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<sup>2</sup> *Liquormart Inc.* and a Massachusetts liquor distributor filed this action seeking a declaratory judgment that Rhode Island laws banning the advertisement of retail liquor prices except at the place of sale violate the First Amendment. The ban was found unconstitutional because it did not directly advance the State's asserted interest in the promotion of temperance and was deemed more extensive than necessary to serve that interest.

<sup>3</sup> Comments such as these show more than just confusion as to how to apply the law. They also turn a blind eye to past decisions supporting the freedom of expression (and speech). These decisions have been based on the marketplace of ideas, or as Justice Oliver Wendell Holmes stated, the "best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States*, 1919 as cited in Teeter & Loving, 2004, p. 10). This shows, in the author's opinion, the Court's acceptance of the idea that messages should be free to reach the marketplace where educated people will then make informed decisions.

advertising, and thus linked it with commercial speech. As a result, it was subject to regulation and not protected by the First Amendment. The doctrine, for all intents and purposes made commercial speech exempt from First Amendment protections. This lasted in for more than twenty years.

During the civil rights movement, the Court begin to show displeasure with the Valentine (1942) ruling after a police commissioner sued the New York Times for publishing a political advertisement that was critical of Alabama law enforcement officers. In the resulting case, *New York v. Sullivan* (1964), the U.S. Supreme Court ruled that political criticism of public officials is protected by the First Amendment, even if it is paid for. What is interesting about the case is that while it protected funded political speech, it did not provide First Amendment protection to purely commercial advertising. Justice William J. Brennan, Jr. commented that the communication in question was

not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. (p. 267)

As such, *Times v. Sullivan* served to further differentiate commercial speech from other forms of speech.

However, in 1976, the Valentine ruling was overturned in as the Court decided that commercial speech did, indeed, deserve some, if yet a different degree of First Amendment Protection than did other forms of speech.<sup>4</sup> While no official justification was stated for awarding the protection, the Court articulated that people will act in their own best interest if they are well informed. As such, it was decided it was in the best interest of the public to open the channels of communication so that people were free to make their own decisions.<sup>5</sup> It appears that this lack of justification was the beginning of the commercial speech confusion.

Following *Valentine* being overturned in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court quickly became involved in many commercial speech cases—most of which appear to cautiously afford this form of speech greater protection under the First Amendment. During *Central Hudson Gas & Electric Corporation v. Public Service Commission* (1980), commercial speech was defined as “expressions solely related to the economic interests of the speaker and its audience” (p. 563). This broad definition was important as it was to be related to the communicator’s motives as opposed to the message content or the transaction proposed in the message.

Justice John Paul Stevens noted that because commercial speech is awarded less protection under the First Amendment than other forms of speech it is important to not leave the definition too broad in fear that speech that should be awarded greater constitutional protection

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<sup>4</sup> While the concept was addressed in previous cases, this was the first time the term “commercial speech” appears in court records.

<sup>5</sup> The Court noted, “It is a public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable (p. 765).

would be stifled. He went on to acknowledge two common, yet broad ways, that the Court has acknowledged commercial speech in the past 1) “an expression related solely to the economic interests of the speaker and its audience” and 2) “speech proposing a commercial transaction” (p. 561).

It was also during this case that the Court attempted to better define its understanding of when it was acceptable to regulate commercial speech. As a result, it developed the aforementioned four-pronged Central Hudson test to measure when government restriction on advertising was acceptable.

A few years later, during *Bolger v. Youngs Drug Products Corporation* (1983), the Court was primarily attempting to differentiate commercial speech from political speech—which garners absolute protection under the First Amendment. While not granting it absolute protection provided to political and artistic expression, the Court did rule that commercial speech warranted substantial First Amendment protection. The Court defined commercial speech as speech that “does no more than propose a commercial transaction,” (p. 66), implying that commercial speech is simply a category of speech containing proposed transactions between buyer and seller. The Court ruled *Youngs Drug’s* speech was commercial because their informational pamphlets were advertisements, referred to a specific product, and the company was mailing them for commercial reasons. It was stated that in isolation, no one of these three factors necessarily deemed commercial speech. However, when all three factors were present simultaneously they became commercial speech.

While the Court had defined qualifiers, or certain elements that must be present for speech to be considered commercial speech (*Bolger v. Youngs Drug Products Corp.*, 1983), it quickly fell back on the familiar *Virginia State Board of Pharmacy* (1976) definition in *Posadas de Puerto Rico Assoc., dba Condado Holiday Inn v. Tourism Company of Puerto Rico et al.* (1986). Puerto Rico’s Game Act of 1948 prohibited gambling parlors from advertising their facilities to the public of Puerto Rico. However, restricted advertising through publicity media is allowed outside Puerto Rico. These restrictions were found unconstitutional because, as Justice William Rehnquist stated, “this case involves the restriction of pure commercial speech which does no more than propose a commercial transaction” (p. 340).

Oddly, the Court removed “no more than” from the previously noted commercial speech definition leaving only “propose a commercial transaction” when ruling in *Board of Trustees of the State University of New York v. Fox* (1989, p. 481). The case, involved State University of New York (SUNY) and its campus police prohibiting American Future Systems, Inc. from selling its house wares at a party hosted in a student dormitory. Resolution 66-156 of the SUNY prohibited private commercial enterprises from operating in SUNY facilities. Court of Appeals found it unclear whether the resolution directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. As a result, the court therefore reversed and remanded to the trial court.

### **Problems in applying regulation**

As one can see, these cases, and subsequent commercial speech definitions focus on a variety of things including the motive of the communicator to make a profit, engage in a

commercial action, or the absence or presence of various advertising criterion. While the definitions may vary, the outcome is the same, the Court has no standard for defining or ruling in commercial speech cases. This has led to several problems, one of which involves the inability to appropriately, effectively, and equitably apply commercial speech regulations.

This is evident in many of the “higher profile” commercial speech cases, such as *Bigelow v. Virginia* (1975). A Virginia newspaper editor was convicted of violating a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the processing of an abortion after he published a New York City organization's advertisement announcing information about how to arrange low-cost placement for women with unwanted pregnancies in hospitals and clinics in New York (where abortions were legal).

The trial court had rejected the editor's claim that the statute was unconstitutional under the First Amendment and the Virginia Supreme Court subsequently supported the ruling that advertisement was purely of commercial nature and therefore had no protection. However, the Supreme Court ruled differently when they applied a lower degree of scrutiny. They found that the Virginia court had wrongly denied First Amendment protection. The Court ruled that solely on the basis of pure speech by ruling that simply because first because speech appears in the form of paid commercial advertisement does not mean it has no First Amendment guarantees.

While the *Biglow* (1974) decision appeared fairly supportive of the First Amendment protection awarded commercial speech, just one year later in the *Virginia State Board Pharmacy* (1976) ruling does not appear to be similar. The case involved consumers of prescription drugs bringing suit against the *Virginia State Board of Pharmacy* as they questioned the First Amendment constitutionality of a Virginia statute which deemed it was unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The court ruled that the statute was invalid as commercial speech was not wholly outside the protection of the First Amendment.

The problem with these cases, was that the Court never clearly stated the guidelines, levels of scrutiny, or definitions used for judging constitutionality of commercial speech cases, and thus, applying appropriate regulation. It appears that the Central Hudson test was created in an attempt to remedy this (1980). However, while the test assists in forcing decisions to be made on a rational basis, the lack of a true commercial speech definition continues to lead to inconsistent court decisions.

### **Confusion in the courts: A comparison of cases**

An excellent example of different ways that courts have ruled involving commercial speech cases involves “The Beardstown Ladies’ Common-Sense Investment Guide,” published by Buena Vista Publishing. The book chronicled how sixteen women, the Beardstown Ladies, formed an investment club in the 1980s. It was marketed as a “how to” book boasting that the women achieved an annual rate of return of 23.4% over a ten year period in their securities investments. However, in the late 1990s their annual return was questioned and found to be much lower (less than 10 percent). As a result of the factual inaccuracies, the book's publisher was sued in both a New York trial court and California appellate court—resulting in different outcomes.

In New York, consumers sued the publisher claiming deceptive trade practices and false advertising in *Lacoff v. Buena Vista Publishing, Inc.* (2000). The defendant tried to have the case dismissed, arguing that statements made on or in the book were protected by the First Amendment as noncommercial speech. The New York trial court held that despite their inaccuracies, the statements appearing on the book's cover, flyleaf, and introduction were noncommercial speech protected by the First Amendment.

The court noted that commercial speech—which does no more than propose a commercial transaction—is not afforded the same degree of First Amendment protection as noncommercial speech. Consequently, commercial speech may be regulated or proscribed based on its content and—if the speech is false or misleading—will not be protected at all. The court observed that the statements in the book might be considered hybrid speech, meaning they contained both commercial and noncommercial speech elements. Therefore, the court ruled the speech was entitled to First Amendment protection.

In California in *Keimer v. Buena Vista Books, Inc.*, (1999), consumers claimed Buena Vista Books had committed unfair trade practices when they placed false statements on the cover of the book. The trial court found that the statements were protected by the First Amendment. However, the appellate court rejected defendant's argument that the statements on the book and video were noncommercial speech. This was supported by using the requirements from the *Bolger* (1983) definition.

The court also evaluated the validity of the state's restrictions on commercial speech based on the Central Hudson Test. The court said the statements failed to meet the first factor because the book falsely reported the investment returns. As a result, the defendants were not entitled to any First Amendment protection. The court then found that the state's legislation had the right to restrict false and misleading commercial speech because (1) the state has a substantial interest in protecting the public from deceptive advertising, (2) the state's legislation designed to protect consumers directly advances this interest, and (3) this legislation is reasonably tailored to protect the public from false commercial speech.<sup>6</sup>

Another example of similar cases with different outcomes involves *Piazza's Seafood World, LLC v. Odom* (2006), *Benson v. Kwikset Corp.* (2005), *Native American Arts, Inc. v. Waldron* (2005). *Piazza's Seafood* (2006), addressed Louisiana's Cajun Statute, requiring products labeled "Cajun" to be from Louisiana. A problem arose when the plaintiff's catfish were actually identified as being from China. However, the court ruled that the law was unconstitutional, as the general consumer could understand the true origin. It was ruled that "Cajun" was only potentially misleading as applied to Chinese catfish. As a result, the company's right to use the adjective was protected.

Another similar case involves *Benson v. Kwikset Corp.* (2005). Kwikset was sued on behalf of the general public under claims the company had labeled products containing foreign-made parts or that were manufactured outside the United States as "Made in the U.S.A." The court found that the labels were commercial speech, and applied the Central Hudson test—the

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<sup>6</sup> The author asks, how can commercial speech cases be tried with any consistency when the courts are unable to determine what constitutes commercial speech—in the same case?

first part of which asks whether the speech being investigated involves lawful activity and are not misleading. The labels were found to be misleading.

After failing the first step, one would think this would be the end of the case, but the court continued and found that California had an interest in banning deceptive advertising and that court noted that suggesting merchandise was made in the United States is misleading unless the producer's manufacturing processes satisfy those of the statute.

However, in *Native American Arts, Inc. v. Waldron* (2005), upheld the ban on the use of the term "Indian" on items that are not made by Native Americans. The court upheld it against a First Amendment challenge as a trademark statute. But it also held that the Department of the Interior regulation holding that unqualified use of the term "Indian" or the name of an Indian tribe was misleading. As a result, the court described the regulation as making "Indian" the trademark for Indian-produced products.<sup>7</sup>

Again, the absence of definitional clarity often leaves the decision about whether speech is commercial or some other form of speech up to discretion of the individual courts and judges. Therefore there is no predictability. This is further compounded as, with the aforementioned cases, the speech is classified by the perceived intent of the communicator.

Following the courts established tradition of defining whether or not speech is commercial based on the perceived intent of the speaker, it is interesting to note the following cases. After an automobile accident, an Ohio lawyer contacted the parents of the injured person and then approached their daughter at the hospital and offered to represent her. This led to *Ohralik v. Ohio State Bar Association* (1978).

The court upheld a ban of in-person solicitation when the primary motive of the contact is the attorney's monetary gain. However, in *re Primus* (1978) the court held that when the attorney is motivated by the desire to promote political goals rather than monetary gain, the speech is considered political speech, rather than commercial speech, and is entitled to greater constitutional protection against state regulation.

## **Conclusion**

In order for the Supreme Court to support the Constitution—that Congress make no law infringing freedom of speech, it is the opinion of the author that many questions need to be answered with regards to commercial speech. First, the Court must decide if a corporation has the same free speech rights as a person? If the answer is yes, then they must decide if the First Amendment protection will apply to all corporations. In addition, the Court will need to address the issue of an "even playing field." Will corporations and individuals be treated as true equals—even as corporations often have greater access to finances and message distribution?

While no brief paper can address the multiple shortcomings of the commercial speech doctrine and the various inconsistencies that exist within the rulings in both the Supreme Court and the lower courts, it is evident that the current situation calls for a clearer definition of

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<sup>7</sup> This author finds these rulings (*Piazza's Seafood, Kwikset Corp, and Native American Arts*) a bit disturbing, as it appears that the courts are further expanding commercial speech doctrine to include intent to deceive. Do we ever truly know the intent of another communicator?



commercial speech. At the time this paper was written, the author was unable to find a chronological documentation of the change in the definition of commercial speech. In addition, while the failure to define commercial speech is often cited in the literature as a reason courts fail to rule in a consistent manner, the literature often fails to support this argument with examples of these erratic rulings. The cases that were chosen for this paper were selected for various reasons including their similar circumstances but different rulings, recent occurrence, and ability to exemplify application of regulation. This paper should serve as fuel for future research.

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