

**THOUGHTS ON COMMERCIAL SPEECH:
A ROUNDTABLE DISCUSSION*
(FEBRUARY 23, 2007)**

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Erwin Chemerinsky & Kathleen M. Sullivan*[†]

RONALD K.L. COLLINS: Welcome. It's been thirty years, give or take. It's been a long time, but it's nice to be back. Before we begin today's program, just a couple of things. First of all, I would like to thank a person who had a very big hand in putting this all together with me, and that is my friend and colleague, Jim Weinstein. Whatever the measure of success of this conference, it will be due in large measure to Jim's insight, hard work, and real dedication; he's just a wonderful person to work with. I'm happy to share, and be sharing this conference with him, so again, thanks, Jim. A person who moved mountains, many of them, to make this possible: Ellen Aprill. I really think it's not an exaggeration to say that it could not have happened without Ellen Aprill's dedicated and very resourceful, and always helpful, assistance. So, a big "thank you" to her. And to the Dean, David Burcham, who, without his assistance, without his support, and without his real commitment to this, and to honoring Steve Shiffrin, it would have been impossible as well, so thank you.

The year was 1976; the case was *Virginia Pharmacy*.¹ The United States Supreme Court rendered an opinion in what is routinely seen as the case that heralded, at least in a full sense, the

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1. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Commercial Speech Doctrine into the world of the First Amendment. Of course there were other cases before that, but this was the big one. And it's noteworthy to recall that case was argued by one of David Vladeck's colleagues, Alan Morrison of Public Citizen. So the Commercial Speech Doctrine is brought to us by public interest advocates—if you will, for lack of a better word, “Nader types”—at least at a time when it had a different connotation. Also, in that case, there was a man named Philip Kurland, of the University of Chicago, who submitted a brief on behalf of the Association of National Advertisers.² So what you had were public interest advocates working with advertisers to promote what came to be known as the Commercial Speech Doctrine.

By 1980, the Supreme Court rendered its opinion in *Central Hudson Gas & Electric Corp.*, and it was Justice William Rehnquist writing in dissent arguing against the First Amendment claim.³ And he wrote, “The Court today returns to the bygone era of *Lochner v. New York*.”⁴ Well, there you have it, the conservative Rehnquist writing in dissent—and whom does he draw upon to support his position that there should be no protection for First Amendment speech? Well, none other than the liberal C. Edwin Baker. Well, Rehnquist, continuing in that sense, added, “Today the Court unlocks a Pandora's Box when it elevates commercial speech to the level of traditional political speech by according it First Amendment protection.”⁵ So here you see the conservative Rehnquist aided and abetted by the scholarship of C. Edwin Baker, the liberal scholar, leading an attack on the Commercial Speech Doctrine.⁶

Well, that Pandora's Box to which Rehnquist referred was open like never before in the year 2003, in a case called *Nike, Inc. v. Kasky*.⁷ Pandora's Box is really the right metaphor because, what do we see? Who is representing Nike? Well, the liberal Laurence Tribe and the liberal Walter Dellinger. And who is opposing Nike? Well,

2. Brief for Ass'n of Nat'l Advertisers, Inc., *Va. Pharm.*, 425 U.S. 748 (No. 74-895).

3. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n* 447 U.S. 557, 583–06 (1980) (Rehnquist, J., dissenting).

4. *Id.* at 589 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

5. *Id.* at 599.

6. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

7. 539 U.S. 654 (2003).

the liberal Alan Morrison,⁸ the liberal David Vladeck,⁹ and the liberal Erwin Chemerinsky.¹⁰ I mean, you have liberals on both sides. Talk about being schizophrenic.

Well, this panel, in particular in this conference more generally, will explore the commercial speech paradox. More specifically, we will examine questions like the following three: To what extent does the corporate identity of a speaker determine the level of First Amendment protection to be afforded? And, as David Skover and I have written in *The Death of Discourse*,¹¹ to what extent is it possible in our highly commercial culture to clearly demarcate commercial speech on the one hand from political speech on the other hand? And finally, to what extent, if any, can liberalism endorse the commercial speech agenda without forsaking its credentials as a progressive movement?

Today, we are fortunate to begin our discourse with four especially knowledgeable and engaging people. Erwin Chemerinsky is from Duke University. He's a nationally noted constitutionalist and a Supreme Court litigator of the best ranks. So, welcome, Erwin, and thank you for being here. Professor Kathleen Sullivan is here from Stanford University, and like Gerald Gunther before her, she combines thoughtful jurisprudence with a mastery of doctrine. I think we're very fortunate to have her with us. Thank you for participating today. As for Adam Liptak of *The New York Times*, he's the legal affairs writer there. And, like Anthony Lewis before him, he brings a wealth of knowledge and insight to his writing. Welcome, Adam. Finally, the man of the moment, Steve Shiffrin from Cornell, the Walt Whitman, if you will, of the legal academy. More about Steve later. And there you have it. Shall we let the discourse begin?

ADAM LIPTAK: I think I'm going to start the discourse by moving up to the grown-ups table. [Laughter] Well, thank you so much for organizing this, and for having us and for having the opportunity to

8. Brief of Amicus Curiae Public Citizen, *Nike*, 539 U.S. 654 (No. 02-575).

9. *Id.*

10. Amicus Curiae Brief in Support of Respondent by Members of the United States Congress, Representatives Dennis J. Kucinich, et al., *Nike*, 539 U.S. 654 (No. 02-575), 2003 WL 1844684.

11. RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (2d ed. Carolina Academic Press 2005).

honor Steve. It's very nice for me to take a break from a for-profit, publicly traded company's work that is nonetheless, apparently, fully protected by the First Amendment. [Laughter] As you know, we spend our days manufacturing consent. But, unlike some other corporations—and we'll explore this question—we seem to have maximum First Amendment protections. I guess I want to start the conversation with a metaphor that Steve uses, an organizing principle I guess, and ask the questions: Through what lens ought we look at this question of "What is commercial speech?" Does it turn on the identity of the speaker or the nature of the thought expressed? Steve often starts with the image of the dissenter. How, if we organize our First Amendment thinking around the notion that dissent is what wants to be protected the most, does that inform our thinking about commercial speech?

STEVEN H. SHIFFRIN: First I would like to say, as I will say, I think, several times in the conference, that I am very honored and very grateful for those who have put this conference together. As to the substantive issues, I have argued that the First Amendment should be especially concerned about protecting and promoting dissent, about protecting those who would speak out against existing customs, habits, traditions, institutions and authorities. If one looks at commercial speech through that lens, it seems clear to me that commercial speech should be lower in the hierarchy of First Amendment values than other forms of speech. I think one can also say it should be lower in the hierarchy of First Amendment values because of the—in the case of corporations in particular—lack of a liberty interest of the speaker. I also think that if one has a politically centered conception of the First Amendment, that commercial speech should be lower in the hierarchy of First Amendment values. The last point I would make is that this area is highly complicated, with many different factual situations, and that there are some circumstances in which I think, particularly in informational advertising, that commercial speech should get a measure of First Amendment protection.

LIPTAK: Erwin, is that the right metaphor? Is the marketplace of ideas a competing metaphor for organizing this?

ERWIN CHEMERINSKY: I think I get to be the first speaker at the conference to disagree with Steve Shiffrin. [Laughter] Let me start by saying how wonderful it is to be part of this terrific conference. As I said to David Burcham, it is great to be home and a part of celebrating and honoring Steven Shiffrin.

I think I disagree with everything that Steve just said. [Laughter] I certainly accept that dissent is an important part of the First Amendment, but I don't think it's the central, and certainly not the only, purpose of the First Amendment. The First Amendment also protects speech that agrees with and supports the government. It supports speech that enriches us, but has nothing to do with the political process. Wonderful art and wonderful music may not be about dissent, but they are still protected by the First Amendment. And it even protects speech that degrades or debases us. I believe that sexual speech, hate speech even, has a place in the First Amendment.

I also disagree with his premise that it's good to have a hierarchy of speech, saying we want the most value, a little bit less value, and a little bit less value than that. That's why I don't like starting with the distinction based on who the speaker is, or even what's commercial or noncommercial speech. It seems to me that the question is: is there a compelling reason for stopping particular speech? And if there's not a compelling reason, then we should allow all of the speech to go forward. The marketplace of ideas metaphor has a lot of strengths, but I think the idea is that the First Amendment should protect all speech unless there's a compelling reason for stopping it.

LIPTAK: Let me follow you just a little bit, because my sense is that you're not averse to finding that compelling interest in a whole range of situations.

CHEMERINSKY: Not at all. But I think that's the right question. To me the question is: is there an extraordinarily important reason for stopping speech in a particular case? When we get to it, I'll say I think in the *Nike* case¹² there was a reason for wanting to hold Nike liable. But I think when you start talking about a hierarchy of speech

12. *Nike*, 539 U.S. at 654.

you're really obscuring the question. And the question is: is there a reason for stopping this speech, under these circumstances?

LIPTAK: Kathleen, where do you fit in on this spectrum?

KATHLEEN M. SULLIVAN: Well, I agree with the thanks to the conference organizers, very much. [Laughter] That part we're in total agreement about on. After that, I associate myself a bit more with Erwin than with Steve. Let me turn the telescope around and give an additional reason to see commercial speech as appropriately protected by First Amendment values. And that is, fear of the government. We fear government for speech more than markets; we have an anti-paternalism principle for government telling us what to think and say in a way that we don't have an anti-paternalism principle for government telling us how many hours we can work, or what wages we can receive, in part because we're afraid of government manipulating ideas and engaging in thought control as a means of serving other values. And when we tell people what they can hear or read, or listen to or watch, we're doing it to prevent ideas from reaching and influencing them. That has a different valence than the direct regulation of conduct.

And so I think 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 think, to engage in thought control, to intervene between our thoughts and our actions. And it may be that there are all kinds of, as Erwin says, good content-neutral reasons to regulate speech sometimes. For example, because corporations know a lot more than we do about the harm their product is causing, there's been an asymmetry of information and that ought to be corrected. But I tend to support speech-enhancing ways of correcting those problems, like disclosure obligations, rather than leveling down through silencing speech.

LIPTAK: Go ahead, Steve.

SHIFFRIN: A few comments. We agreed over the telephone that we wouldn't have a debate here, but here we have three law professors, so we'll be saying some things, I think, that might contradict what others say. As to our fear of government, and our opposition to anti-

paternalism, it is the case that the Securities and Exchange Commission, when dealing with corporations, engages in paternalism. It doesn't trust consumers to be able to make decisions as to the buying of products without policing the market. The Federal Trade Commission engages in paternalism. And it's, I would say, a fixed part of our jurisprudence. The Food and Drug Administration regulates what drug companies say. So that, when we're talking about false statements by corporations, it just happens to be the case that paternalism is at the center of what we do. It is not at the margin.

Secondly, I would say with respect to Erwin saying there should be a compelling state interest, I need to know why. We do not have a compelling state interest for all speech. In the area of defamation, even with respect to *The New York Times*, there is a balancing of reputation and press. Sometimes *The New York Times* gets very heavy protection; sometimes it does not get as much protection. If a private person sues *The New York Times* in a defamation case, the private person only has to show negligence.¹³ With respect to whether a hierarchy of speech is appropriate, it would radically change First Amendment doctrine to say that there is not a hierarchy. Speech is protected under the First Amendment, except when it is not. [Laughter] And there are many categories of speech that are not protected. And many of them are not protected because they are considered to be lower in the hierarchy of First Amendment values than other forms of speech.

Finally, I would like to agree with Erwin. [Laughter]

SULLIVAN: But you can't. [Laughter]

SHIFFRIN: No, I searched very hard, and I was able to find one thing I could agree with. Which is that I believe that there is a multiplicity of values that underlie the First Amendment. You cannot reduce it to a single value. I do think that protecting the practice of dissent, which I do not regard to be a value, is extremely significant. But I agree that there is a multiplicity of values. And I think when you look at those values, commercial speech, across the range of values, doesn't maximize them to the same extent as other forms of speech.

13. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)

SULLIVAN: Well, I'd like to challenge the idea that commercial speech is somehow lower value. I thought Steve was going to suggest that commercial speech should be less protected because it emanates from corporations, and we mistrust corporations in a way we don't mistrust Walt Whitman, for example. But now that he's laid the gauntlet down about value of speech, I do want to challenge that a bit. Let's remember some things about patronage and things of beauty. The Sistine Chapel wasn't painted from the idea of a single artist. It was given patronage by the church. Lots of great works were the result of financial sponsorship. And, indeed, *The New York Times* is one of them. *New York Times Co. v. Sullivan*, to which you just alluded, was about an advertisement.¹⁴ That's what created the special First Amendment protections against libel. It was not the editorial department. It was not the news department. It was not the brilliant legal commentary of Adam Liptak, which would never need First Amendment protection because it's already perfect. [Laughter] But it was about an advertisement. And, in fact, advertisement is what sells *The New York Times*. It's what sells broadcast. Of course, we're in a new world where we had an Internet for a while that wasn't advertisement-driven but now increasingly is. So, let's think about commercial speech as sort of continuous with, and perhaps indispensable to, the flow of speech in the rest of society.

Second, commercial speech may be of value to people. When Public Citizen litigated *Virginia Board*,¹⁵ it was making the point that true drug prices may be more important to a pensioner than any latest information about the Libby trial¹⁶ or other national news like the Anna Nicole Smith trial.¹⁷ And the slogan of the first Clinton campaign in *The War Room* was "it's the economy, stupid."¹⁸ So the notion that economic decisions are not important to people, that

14. *Id.*

15. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

16. *United States v. Libby*, 495 F. Supp. 2d 49 (D.D.C. 2007) (finding the President's commutation of former vice presidential advisor Scooter Libby's prison sentence did not affect his probation); *United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007) (finding that there were not substantial questions of law or fact sufficient to warrant the release of defendant Scooter Libby pending his appeal).

17. *Marshall v. Marshall*, 547 U.S. 293 (2006) (holding that the federal bankruptcy claims of Anna Nicole Smith were not precluded by the decisions of a state probate court).

18. *THE WAR ROOM* (McEttinger Films 1994).

commercial speech is less valuable, ignores both the institutional role of advertising in keeping the whole rest of the free speech system going, and the individual value to listeners that commercial ads can have. And after all, Walt Whitman has been mentioned, and his contemporary John Stuart Mill said it is not for government to decide that poetry is better than pushpin. And it is not necessarily consistent with the relativism you would impose upon speech for political purposes to say that we can decide: “Well, commercial speech, that’s not of high value.” So I’m all with you on harms, but I’m not with you on the valuation of speech that puts commercial speech lower than other forms of speech. Advertising may be a kind of late twentieth-century art form in its own self.

LIPTAK: Maybe we can pause for a moment and make sure we’re talking about the same thing. We’re talking about commercial speech, but I’m not sure each of us has the same idea of what it is we’re talking about when we talk about commercial speech. I don’t know that most people would think that the civil rights advertisement that was at the root of the *Times* against Sullivan was commercial speech in the sense of proposing or advocating a commercial transaction.¹⁹ Is that all we’re talking about? Or are we talking about any sort of speech that a corporation makes? Are we talking about any speech about economic matters? Are we talking in *Nike v. Kasky*,²⁰ about only pro-Nike practice speech but not critical of Nike practice speech? Maybe I could ask each of you to sketch out what it is that we’re talking about when we use the phrase “commercial speech.”

CHEMERINSKY: The Supreme Court, only once, has attempted a definition of commercial speech, as in *Bolger v. Youngs Drug Products Corp.*²¹ There the court said three factors together were enough to make it commercial speech. They said first, “Is it an advertisement?” Second, “Does it concern a product?” And third, “Does it stem from economic motivation?”²² Now I don’t think that’s exhaustive of everything that’s commercial speech, but I think

19. *N.Y. Times Co.*, 376 U.S. at 274.

20. 539 U.S. 654 (2003).

21. 463 U.S. 60 (1983).

22. *Id.* at 66–67.

it's a good starting point for commercial speech. I would certainly reject that it's commercial speech just because it comes from a corporation. Obviously, every newspaper and every magazine, including its editorial content, is coming from a corporation. Every book is likely published by a corporation. So that can't be it. Now, as with any line-drawing, there are going to be hard cases. And we could talk about the ads that Nike took out. Or, what about the ads that Mobil Oil takes out on the editorial pages of *The New York Times*? And so on. But I think *Bolger* at least gives us starting point in defining the phrase "commercial speech."

LIPTAK: Do we accept that premise that that's what we're talking about?

SULLIVAN: I will sell you X good or service for Y price is the limit of the definition. I would not extend it to non-advertising speech by corporations or any speech that's motivated principally by patronage or sponsorship or financial gain because that would cover far too much. Every book published by a for-profit publisher is motivated by commercial gain. So it's got to be the narrow definition Erwin describes.

SHIFFRIN: As I said earlier, I think there are many problems. I would start with the point that I think we would all agree on, that media speech is not—with narrow exceptions—commercial speech. Why do we distinguish business corporations from media corporations? Ed Baker, I think, got it right, when he said that the product of the press is the speech; unlike *Virginia Pharmacy*, where the product is drugs.²³ A second factor is that the press has a checking function to perform, and it seems to me, gets protection because of that. I think there's a difference between informational advertising that is true and between false advertising which receives no protection.

I think this whole topic is much broader than proposing a commercial transaction. That is simply focusing essentially on commercial advertising. The larger question we are facing is how we deal with corporate speech in general. Corporate speech is outlawed in some contexts. For example, corporations generally

23. 425 U.S. at 748.

can't even engage in corporate expenditures with respect to political campaigns, which is centrally protected speech. *The New York Times* can, however, for the reasons that I discussed.

Two other comments: Kathleen mentions how important it is for consumers to be able to know what drug prices are. I think that, although it was the main case before the Supreme Court, is a somewhat atypical example. I'll give one at the other end of the spectrum, which is drawn from *44 Liquormart, Inc. v. Rhode Island*.²⁴ Instead of calling up the image of the aged person who needs drugs in order to survive, we get the image of the alcoholic looking for the cheapest bottle of jug wine.

SULLIVAN: It was vodka. [Laughter]

SHIFFRIN: If there's a First Amendment difference there, I do not spy it. [Laughter] But I would say again, that if there's a range of First Amendment values, commercial speech, it seems to me, doesn't have, for example, the sort of speaker liberty other forms of protected speech have. As to John Stuart Mill, John Stuart Mill did not think commercial speech should be protected; nor did the United States protect commercial speech until *Virginia State Bd. of Pharmacy*.²⁵ And somehow we thought we had a democracy.

CHEMERINSKY: I again want to disagree with some of what Steve said.

SHIFFRIN: I'm shocked. [Laughter]

LIPTAK: You don't have to preface it each time. [Laughter]

CHEMERINSKY: First, I'm very skeptical of trying to draw distinctions among corporate entities, saying a media corporation is treated differently from a non-media corporation. When you think of something like Time Warner and all that it holds, I wonder whether it's a media or non-media corporation. I start wondering, what if a media corporation is engaging in advertising to consume more of its

24. 517 U.S. 484 (1996).

25. 425 U.S. at 748.

product? Is it then functioning as a media or non-media company? Lest you think this is a hypothetical, just watch any TV station and how many of its ads are about watching more programs on that TV station. Or I remember the huge controversy here in Los Angeles about an insert to the *Los Angeles Times* when Staples Center was about to open.²⁶ Is it functioning as a media company or not a media company there?

The second thing that I think is a lot of what Steve says is about the situations where there may be a compelling interest in restricting corporate speech. I believe there is a compelling interest in stopping corporate campaign contributions. It's not because it's not speech; it's not because it's commercial speech; it's because that's a place where there is a compelling interest. I certainly believe that false advertising should be prohibited. Not because it's not speech, but to me, that's because there is a compelling interest. Now we can disagree whether that's a compelling interest. But to me, that's the appropriate question.

Finally, as to the *Liquormart* example, I don't think it achieves what Steve wants it to.²⁷ I think for some individuals, being able to purchase alcohol with a limited budget may be very important to their happiness. Now we may not make those choices in our own lives, or respect their choice much, but it's tremendously paternalistic that because we don't care as much about cheap vodka, it's not important in somebody else's life. So I think that it does show exactly what Kathleen was saying, which is what Justice Blackmun said, that commercial speech can be very important in a person's life, and that's why it is something where there should be a compelling interest test used.

SHIFFRIN: I would say that a good example that one might focus on to determine whether one should have intermediate scrutiny with respect to informational advertising or a form of strict scrutiny which Erwin is sort of flirting with—he has a different, not the usual conception of compelling state interest—would be tobacco advertising. Four hundred thousand people die every year because

26. See David Shaw, *A Business Deal Done—A Controversy Born for the Record*, L.A. TIMES, Dec. 20, 1999, Special Section, Part V, at 1.

27. *44 Liquormart, Inc.*, 517 U.S. at 484.

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? As to the difference between political and commercial speech, of course there are line-drawing problems, but that doesn't mean you don't make the distinction. The Federal Trade Commission has to make a distinction between commercial speech and non-commercial speech. And it has to be able to distinguish between media advertising that counts as commercial speech and that which doesn't.

LIPTAK: Let's talk about cigarettes for a second, because it's such a hard case. Ought the government be able to regulate truthful advertising about a lawful product?

SULLIVAN: No. And in fact, tobacco is a great illustration of the point that even for commercial speech, more speech, good counsel, will drive out evil. There's no clearer example of more speech driving out pernicious advertising than tobacco. If you all recall, there was once tobacco advertising on television. What eliminated it was the fact that right of reply and equal time requirements, administered by the then-FCC, permitted the American Cancer Society, the American Lung Society, and other groups to put on counter-advertisements, where you would see on one ad: this is the Marlboro Man, he looks pretty cool on his horse and in his boots and spurs. And then the American Cancer Society would show you: this is the Marlboro Man's lungs. Well, it didn't take many of those ads to lead tobacco, voluntarily, to remove tobacco advertising on TV because it couldn't do battle with counter advertising that showed negative health effects. So where government has not only the power to permit commercial speech, but also the power to provide, through its own advertising, contrary messages, there cannot be control of speech. That's one point.

Two is that if government wants to regulate the underlying activity, it should do so directly, by prohibiting the activity; limiting the activity; enforcing the activity as engaged in by minors; by taxing the heck out of the activity, instead of entering into a sweetheart deal with the tobacco companies that enables them, through the state settlement, to make twice as much money as they need to pay the state tax. In other words, Justice O'Connor and Justice Thomas are

surely right in *44 Liquormart, Inc.* that the state always has a direct alternative to engaging in paternalism through taxation, prohibition, and counter-propaganda.²⁸ And under those circum-stances it's very difficult to see why the state should be able to prohibit, or limit, the truthful advertisement of a legal product.

SHIFFRIN: It's not difficult for me to see why.

SULLIVAN: Because you're an old-fashioned paternalist. [Laughter]

SHIFFRIN: Yes, I am. [Laughter]

SHIFFRIN: I believe that when 400,000 people die every year, taking efforts to prevent that from happening, if called paternalism, is a good thing. And I agree that there are measures that can be taken. Increased taxes could lead to black markets. Outlawing tobacco surely would lead to black markets. It is true that counter speech is effective; it would be more effective to have counter speech and to outlaw tobacco advertising. It seems to me that maximum efforts to protect public health would be desirable, and I would argue that it would also meet Erwin's compelling state interest test.

CHEMERINSKY: Good question. I'm going to come down with Kathleen, though, for a different reason. I think when you go strict scrutiny it's not only, "Do you have compelling interest?," but "Is this necessary to achieve it?" Nobody is less sympathetic to the tobacco companies than I am, having had a father who died of lung cancer and who became a smoker at a very young age. I very much would love to see anything to put the tobacco companies out of business, but I also believe the First Amendment protects their right to advertise. I agree with Steve that there's a compelling interest. The question is: is banning ads necessary to achieve it? Well, first, I don't think the evidence shows that banning ads really will stop children from smoking. Second, I believe that counter-speech is more likely to be effective. Also, neither Kathleen nor Steve talked about a slippery slope argument that I'm concerned about. If we can say we can ban tobacco ads because smoking is bad, and we can ban,

28. *Id.* at 530–31 (O'Connor, J., concurring); *id.* at 524 (Thomas, J., concurring).

say, liquor ads because drinking can be abused, can we ban ads for fast food because they might be high in trans fats? Can we ban ads for products like potato chips that have a lot of salt because that increases blood pressure? I'm not sure where the stopping point is if we're saying that this is really necessary to achieve a compelling interest. And so, again, I think that if you could show me this would work and no other alternative would work, then I'm with you Steve, but I don't think the evidence is there.

SHIFFRIN: Two hundred and sixty-five billion dollars are spent on advertising. That, it seems to me, contributes to exactly the kind of citizens who are materialistic, hedonistic, not much caring to participate in politics, and the value of commercial speech, it seems to me, is problematic. Would all children not engage in smoking? No, of course not. Would there be advantages in banning cigarette advertising? Cigarette companies advertise because they believe that it is going to help their product. It's not just a matter of brand switching. And the slippery slope: some of the examples that Erwin gave are examples that are directed to children. And I don't see a good argument for protecting companies who advertise to children with respect to such products. Beyond that, I think corporate power is significantly strong enough in this country that one need not worry that a whole lot of products are not going to be able to advertise, and if it did happen I don't see the harm.

LIPTAK: What's lurking behind some of these arguments, I think, is the sense that corporations are terribly powerful, and simply the volume and amount of the speech that they can put out is going to overwhelm the counter-arguments. And that people, having heard one point ten times and the other point only once, will tend to think that the point they heard ten times is correct. And I'm not sure how to think about that. But I do think that that's part of what people who are pro-regulation are afraid of. Kathleen, how does that jibe with your anti-paternalistic thinking?

SULLIVAN: Well, I tend to be a strong supporter of the notion of corporate free speech, in part because I don't start from an individualistic, romantic dissent notion of freedom of speech with exclusivity. I think Steve Shiffrin's book is a wonderful

contribution to the dialogue—to the discourse—on First Amendment values with respect to that value. But I think the First Amendment protects other values beyond dissent, and I agree with Erwin on that point. One of the things that it protects is simply a system of free flow of information that's essentially determined through private interactions, in which the underlying markets are regulated, but we generally try to assume that the ideas are not. Now, I'm not saying that you can't combat the evils that Steve described. I'm just saying that you should lexically prioritize regulation of conduct through prohibition and taxation over regulation of speech. That should be an extreme last resort. And I don't think we're anywhere near a demonstration of such governmental, systematic efforts to prevent children from smoking, and appropriate tax measures, that we're at the point of last resort. So I basically support corporate freedom of speech to contribute to the system and flow of free information. That's a systemic and a holistic approach, rather than an individualistic and dissenter's approach. I think the principal answer is, really, corporate speech should be presumptively protected unless and until the particular harms you suggest are manifested.

LIPTAK: Let's talk about the *Nike, Inc.*²⁹ case for a second; the great missed opportunity to bring some coherence to this area. Having heard what Erwin said so far, I would not necessarily, knowing only that, have predicted that he would turn up on the anti-Nike side of that decision. Erwin, why don't you sketch out for us a tiny bit about the case, and then your thinking about it?

CHEMERINSKY: Sure. Hopefully everybody is already familiar with it. Nike was accused of using sweatshop labor in foreign countries, and it then decided to respond.³⁰ It responded in part by taking out ads in major newspapers denying that it used sweatshop labor. It also sent letters to university presidents; it organized some op-ed pieces.³¹ Kasky is a resident here in California. He sued under California law. He sued Nike for damages. He said that Nike was engaged in false commercial advertising.³² Basically, Kasky argued

29. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

30. *Id.* at 656.

31. *Id.*

32. *Id.*

that Nike was engaged in unfair business practices in the terms of the California statute. Nike moved to dismiss on First Amendment grounds. The superior court sided with Nike.³³ The California Court of Appeal sided with Nike.³⁴ But the California Supreme Court reversed.³⁵ The California Supreme Court said what Nike was engaged in was commercial speech.³⁶ The Supreme Court has long said that false commercial speech is not protected by the First Amendment. The California Supreme Court remanded the case back to the superior court for a trial as to whether Kasky's allegations in his complaint were true.³⁷ Remember all of this was essentially on a demurrer. It was Nike moving to dismiss the case.

The United States Supreme Court granted Nike's petition for review.³⁸ It was briefed and argued in the Supreme Court. Then on the very last day of the 2003 term, I think to everybody's surprise, the Supreme Court dismissed the case—cert had been improvidently granted.³⁹ Justice Stevens wrote an opinion suggesting that Kasky didn't meet the Article III requirements for standing.⁴⁰ Also, there wasn't a final judgment in the case. So the underlying issue remained unresolved. That's the quick sketch of the case.

In terms of why I chose to write a brief on the Kasky side, on behalf of members of Congress, I do believe that there's a compelling government interest in stopping false commercial speech.⁴¹ I think Nike was very much engaged in commercial speech. It was trying to sell a particular product. It met that *Bolger* test that I mentioned.⁴² Think of it this way: Should a tuna company be able to falsely say that it uses only dolphin safe tuna? Should a cosmetic company be able to falsely say that it doesn't test its product on animals? Should a lettuce company be able to falsely say that it's selling you only organic lettuce? Should a poultry company

33. *Id.*

34. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854 (Ct. App. 2000).

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

36. *Id.* at 258.

37. *Id.* at 262.

38. *Nike, Inc. v. Kasky*, 537 U.S. 1099, 1099 (2003).

39. *Nike, Inc. v. Kasky*, 539 U.S. 654, 654 (2003).

40. *Id.* at 661–63.

41. Amicus Curiae Brief in Support of Respondent by Member of the United States Congress, Representatives Dennis J. Kucinich, et al., *Nike*, 539 U.S. 654 (No. 02-575).

42. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66–67 (1983).

be able to falsely say that it only slaughters chicken in a kosher manner? To me, had the Nike side won, then there'd be no way to stop all of those false claims that are enormously important to consumers. California has a law that says that a company can't falsely say that it's union-made.⁴³ A company can't falsely say that its goods are made by the blind.⁴⁴ What we were trying to do is to protect the ability of the government to have exactly those kinds of laws.

SULLIVAN: But what Nike was saying went far beyond a simple branding of a product as union-made. These were long, infomercial-type advertisements which covered the topics of sweatshops, covered the topics of labor standards, covered topics in discursive prose that went far beyond a simple advertisement. It may have been directed, ultimately, at saving the company's profits, but it wasn't just a commercial claim about a commercial sale. It was a broader claim about corporate behavior that is part of a dialogue on human rights standards and whether or not the United States can insist upon exporting the same standards through American companies abroad, as it imposes at home. That's a part of a broader political debate. It can't be the case that you can allow Nike to be falsely accused by people of doing things it hasn't done without giving it a chance to fight back. That violates Marquess of Queensberry rules.⁴⁵ It puts one hand behind the corporation's back. And there is one way to answer. Erwin says there would be no way to stop the company from making these false claims. There is a way. Run an ad or file an investigative reporting story that shows it to be false. There are many ways consistent with freedom of speech that are possible, just not possible through government fiat.

LIPTAK: Think about it from my simple-minded reporter's perspective. This issue is in the news—whether Nike is operating

43. CAL. LAB. CODE § 1012 (West 2003).

44. CAL. BUS. & PROF. CODE § 17522 (West 1997).

45. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating on free speech grounds a law banning symbols of racial hatred). The Court stated, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392; see also Ross Rosen, *Perspective: In the Aftermath of McClellan: Isn't it Time for the Sport of Boxing to Protect its Participants?*, 5 SETON HALL J. SPORTS L. 611, 613-14 (1995) (discussing the Marquess of Queensberry rules).

sweatshops abroad is in the news. I call on Mr. Kasky and he can say anything he wants, short of defamation. I call up the chairman of Nike and, under the rule Erwin is proposing, he's profoundly chilled.

CHEMERINSKY: The rule that I'm saying is that factual statements by a manufacturer, with the intent of increasing sales, should be defined as commercial speech. I don't think it depends on whether it's in prose or how long it is, because if a company wants to take out a long ad saying, "we don't use animals for testing our cosmetics," and they write it as a long paragraph, and it's false, and it's about increasing sales, I think that that's still commercial speech. There's a difference between an ad, which is what Nike was taking out, and talking to you, Adam, as a reporter. In terms of the last thing Kathleen said—because I think this is really important—she says, "well, there's other ways to be able to stop this. Take out your ad yourself." How are others going to know whether or not Nike is using sweatshops? You can't go there. How are you going to know whether the cosmetics company is really testing on animals or not? How are you going to know whether the tuna company is really catching tuna in a dolphin-safe way? The company that's engaged in that speech has knowledge that competitors can't have, and consumers can't have. That's why we need the government to be regulating false commercial speech.

SHIFFRIN: I have a slightly different take on this. I agree that the fact that there are other ways should not decide this, just as I think with respect to liquor. By the way, the favorite ad of eight-year-olds is Budweiser. But just as with respect to liquor and tobacco, that there are alternatives, I do not believe that the perfect should be the enemy of the good. With respect to this, if the Securities and Exchange Commission were regulating the very same statements made by Nike as, for example, in a registration statement, the statements would be subject to strict liability. They would not be protected. Despite the fact that it strikes me that the statements are both commercial and political, it is not the case that these statements were put forward as a part of a dialogue about what humane standards around the world should be. Nike was describing what it was doing. It is true that those people who are interested in humane standards around the world could look at the statements and say, "Oh, that's relevant to

the question.” But it is, as Erwin said, put forward in order to sell its products.

Now the interesting question for me is this: the Securities and Exchange Commission could surely regulate this if it were part of a registration statement and use strict liability. Should Kasky have to show negligence in order to recover? Can strict liability apply here? And what difference does it make that you have a private plaintiff or attorney general as opposed to an administrative agency? It seems to me that there is a legitimate concern that a lot of plaintiffs could bring actions against Nike that could have a chilling effect on its speech. But it’s not in the record in the Nike case. The statute has been on the books for more than seventy years. And it seems to me, therefore, that before that record is built, I would say that strict liability would be appropriate for private attorney generals bringing an action under that statute.

SULLIVAN: If you live in Erwin’s and Steve’s world, you’re going to relegate to commercial speech not only false statements of fact by a corporation, but anything that could be construed as misleading because the big difference between commercial speech and other speech is not the regulation of falsity. There are other ways to go after falsities through ordinary fraud statutes as long as there’s intent. The big difference is that consumer protection laws can go after things denominated commercial speech for mere misleadingness. We don’t do that for political speech. Recall *Brown v. Hartlage*.⁴⁶ You can’t sue the governor for fraud when he says in the election campaign, “I won’t take a salary if you elect me,” and then he does. There isn’t enough prison space for misleading statements in political campaigns to be prosecuted as fraud. So Erwin and Steve are loading the dice here by implying that there is any finding of falsity as to what Nike said, which there isn’t because it was dismissed on the pleadings, as Erwin said. So everyone’s assuming the conclusion here about false statements of fact. But you’re also underselling your position. You would remove from constitutional protection statements by corporate officers that could be construed as misleading, which is pretty much every quarter’s analyst call that could be subjected to a misleadingness standard. And that’s not what

46. *Brown v. Hartlage*, 456 U.S. 45 (1982).

the SEC does, but under your First Amendment world it could. And surely that would chill speech and dry it up and leave the consumers knowing less about how the company did that quarter than in the world in which that is presumptively protected and commercial speech strict liability is limited to advertising understood as a statement: “Buy my product, *X* services, *X* goods, for *Y* price.”

SHIFFRIN: Kathleen, I’m proud to say, and I hope I’m right, that you live in the same world that Erwin and I do. [Laughter]

SULLIVAN: This only happened to me when I moved to California. [Laughter]

SHIFFRIN: And I believe that that world, and probably everyone on this panel, knows more about the FTC than I do, but I believe the FTC is able to enforce actions against deceptive and misleading statements. Now it may be that you think that part of the FTC jurisdiction should be eliminated, but it is a part of our world.

SULLIVAN: No, I’m saying that to the extent that jurisdiction exists it applies to speech that’s not presumptively protected, and you’re broadening the realm of speech that’s not presumptively protected. The FTC regulates advertising and brand labels that are false and misleading. It compels a lot of speech to avoid false and misleading impressions. And that’s all different from the normal First Amendment world, but it applies to consumer sales. You’re suggesting, I think, that regulation may apply to anything a corporation says, going far beyond the label on its product, the advertising for the sale of its product, anything the corporation says that’s designed to increase sales—which is pretty much anything a corporation ever says, since even the nonprofit activities of a corporation are designed to create brand loyalty and consumer goodwill and increase sales. Very few corporations are sponsoring the Mobil Masterpiece Theater or the opera broadcast because they love opera. They’re doing it to create good name recognition. So your definition “any speech that is engaged in to increase commercial sales” is too broad because it’s all corporate speech.

Now let’s give the other side its due. You might say, “Corporate speech is different because corporate speech is not a

public good. We protect political speech because it's a public good. When somebody says it, it's out there to be borrowed by anybody, whereas corporations can internalize the benefits of advertising." This is the Posner argument against protecting commercial speech. But I don't think that's what you're saying. You're saying that this speech is of lesser value because it's a corporate speaker and corporations are dangerous. And I don't agree with that. And I don't think you've defined a line that's enforceable.

SHIFFRIN: One quick point, and then Erwin can have lots of time. The kinds of statements that Kathleen is worried about have to be included in registration statements with the SEC, even if they have enormous political significance. And when they are included, if they are false, they are subject to strict liability. So I think it's already a part of our discourse. That's why I think the question is the SEC versus the private attorney general.

CHEMERINSKY: Kathleen, I think what you did was misstate my position and then attack the misstatement. Let me go back to what I said. I said that factual statements by a manufacturer to increase its sales are commercial speech. I didn't say anything by a corporation is commercial speech. At the outset I rejected the corporate/non-corporate distinction. Now with regard to *Nike Inc.*, I actually think it's an easy case that it's commercial speech. And I go back to the definition that Adam asked me for at the beginning, I evoked *Bolger v. Youngs Drug Products Corp.*⁴⁷ Is it an advertisement? And let's at least focus on the ads that Nike took out saying it didn't use sweatshop labor. Does it concern particular products? Nike was trying to sell very identifiable products. And third, does the speaker have an economic motivation? From that definition, what Nike was doing was commercial speech. Now you're absolutely right that there never was a trial in *Nike, Inc.* But as you know, in any demurrer or motion to dismiss, the allegations of the complaint are taken as true. Kasky alleged that Nike was intentionally engaging in false statements to increase the sale of the products. I believe that if so, it's not protected. Finally, to the Securities and Exchange example that we're talking about: I think that there is a compelling

47. 463 U.S. 60 (1983).

interest in protecting investors, in making sure that they have accurate information. The Securities and Exchange Commission can punish false statements in registration documents because there is such an important government interest at stake.

LIPTAK: I'm going to ask the audience to collect its thoughts, collective thoughts or individual thoughts, and ask some questions in just a moment. But let me ask one final question myself, anticipating something in a really interesting keynote address that Professor Redish is going to give tomorrow: Why is not the rule that both Steve and Erwin are sketching out in the *Nike* case a form of viewpoint discrimination? And if it is, should we care? Anyone?

SHIFFRIN: I'm responding to Professor Redish tomorrow, so I might just wait to do that. [Laughter]

LIPTAK: I say that only because, having read the statement—

SHIFFRIN: It's a very good paper.

LIPTAK: It's a very powerful thought that assuming, as most of us do, that viewpoint discrimination is *the* pernicious structural problem that First Amendment law means to avoid, if you take the two sides and only prohibit the corporation from talking about these things, but not the critic or dissenter, you've really rearranged First Amendment jurisprudence. But perhaps we'll leave this point for another time.

SHIFFRIN: Well, I guess I can't resist. [Laughter] It is often written that viewpoint discrimination is never permitted. This is what Easterbrook said in the *Hudnut* case.⁴⁸ In the meantime, obscenity is not protected. And what is an appeal to a prurient interest? Appeals to good old-fashioned, healthy sexual interests are protected. But if it's morbid and shameful, that's not protected. Works of serious literary, artistic, political or scientific value are protected. Judges are licensed to determine what's of serious literary, artistic, political and scientific value. The fair use provision distinguishes between some types of speech and other types of speech as being more valuable

48. *Am. Booksellers Ass'n. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

than others. That implements a form of point of view discrimination. I think if you look at the exceptions to First Amendment protection, they are riddled with point of view discrimination, so the doctrine is: “We will prevent point of view discrimination, except when we won’t, and then we’ll call it an exception to First Amendment protection.”

CHEMERINSKY: I want to agree with Steve.

SHIFFRIN: I’m shocked.

CHEMERINSKY: I’m agreeing. I’m agreeing.

LIPTAK: What a lovely thing.

CHEMERINSKY: I also think it’s important—even if you use the label that it’s viewpoint discrimination—we still have to recognize that there is a compelling government interest in stopping classic false advertising. Listerine saying, “We kill cold germs.” Consumers can’t do the study themselves to know whether Listerine really kills cold germs. There may not be a competitor out there, or the competitor may want to benefit from the false advertising, so it doesn’t want to expose that it’s false. We need to protect consumers. Now this is one example, but we can go through the whole range of instances where consumers lose, and can even be injured, by false commercial speech. Now we can talk about whether we think that what Nike did was false commercial speech or not, but my point is that even if you regard it as viewpoint discrimination, there’s still a compelling interest in stopping false advertising.

LIPTAK: But when consumer reports does a study on Listerine, it’s subject not to strict liability but almost certainly to an actual malice rule. Yet, Listerine itself has a completely different falsity standard applied to it.

CHEMERINSKY: That’s true because Listerine is engaging in it to sell a product. And I think that we, as a society, have a compelling interest in stopping manufacturers and businesses from engaging in false advertising to sell their products. There is a compelling interest

in protecting consumers from the harms they might suffer, including the waste of money if there isn't that kind of protection. That's why the Supreme Court, starting with *Virginia State Board of Pharmacy*, has always said false advertising isn't protected by the First Amendment.⁴⁹

[End of Discussion]

49. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

