Advertising:
Exploiting the First Amendment

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TABLE OF CONTENTS

INTRODUCTION

In 1940, F. J. Chrestensen brought a former United States Navy submarine to New York City and moored it at a State pier on the East River. He prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee.

As he attempted to distribute the handbills on the city streets, the city's Police Commissioner advised him that the Sanitary Code forbade the distribution of commercial and business leaflets, but that there was no law against handbills devoted to "information or public protest."

Ever resourceful, Mr, Chrestensen printed a new double-faced handbill, on one side advertising the opportunity to visit the submarine and on the other, "a protest against the action of the City Dock Department in refusing wharfage facilities at a city pier for the exhibition of his submarine."

The Police Commissioner was not impressed. He restrained Mr. Chrestensen from distributing his new handbill. Mr. Chrestensen went to court and obtained an injunction based upon his claim that the city ordinance violated his First Amendment rights.

Mr. Chrestensen's case eventually made its way to the United States Supreme Court. Undoubtedly, he expected to win because, just three years before, the High Court had struck down a city ordinance that prohibited the distribution of handbills or other circulars upon a city's sidewalks, streets and parks. *Schneider v. State,* 308 U.S. 147 (1939).

But he lost. Justice Owen Roberts, writing for a unanimous Court, reaffirmed its earlier holding, observing "that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion." But this case, he stated, involved "commercial advertising," and "the Constitution imposes no ... restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

One year later, the Court faced another city ordinance prohibiting the distribution of handbills, this time directed against door-to-door solicitations. In striking down the ordinance as applied to a Jehovah's Witness, Justice Hugo Black noted at the outset that the ordinance had not been "directed solely at commercial advertising." *Martin v. Struthers,* 319 U.S. 141, 142 n. 1 (1943).

Justice Black, therefore, found the ordinance subject to First Amendment scrutiny and concluded that it violated the Free Press right of the homeowner to decide whether or not he would receive the Jehovah's Witness message. *Id.*, 319 U.S. at 143-44.

Eight years later, the Court upheld a city ordinance prohibiting door-to-door sales "of goods, wares and merchandise," even as to the sale of magazine subscriptions. Invoking the "commercial speech" doctrine of the *Valentine* case, Justice Stanley Reed observed that the First Amendment protects "advocates of ideas," not "solicitors for gadgets or brushes." *Breard v. Alexandria,* 341 U.S. 622, 641 (1951).

The magazine sellers attempted to escape application of the "commercial speech" doctrine because the ordinance burdened the free flow of ideas contained in the magazines. Justice Reed rejected this contention, claiming that, while magazines contained ideas, the door-to-door canvassing for

subscriptions was "selling" not "advocacy," and, therefore, fell outside the protection of the First Amendment. *Id.,* 341 U.S. at 641-45.

For twenty-four additional years, the Court followed this distinction between advocacy and sale, leaving the civil authorities free from constitutional restraint to regulate commercial advertising of goods and services. By the mid-1970's, however, the Court first revised its "commercial speech" doctrine, and then abandoned it, subjecting to First Amendment examination state and federal statutes governing the sale of goods and services.

COMMERCIAL SPEECH: REVISED

Prior to *Roe v. Wade,* the New York State legislature liberalized its abortion laws. In order to take full advantage of their new market position, New York abortion providers began to advertise their services outside the state.

One of those providers, Women's Pavilion, placed an ad in the Virginia Weekly published and circulated in Charlottesville, Virginia:

> *UNWANTED PREGNANCY. LET US HELP YOU. Abortions are now legal in New York. There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST. Contact WOMEN'S PAVILION 515 Madison Ave. or call any time (212) 371-6670 or (212) 371-6650. AVAILABLE 7 DAYS A WEEK STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.*

Virginia Weekly's managing editor, Jeffrey C. Bigelow, was duly prosecuted and convicted for violation of a Virginia statute making it a misdemeanor for anyone to sell or circulate any publication to encourage or prompt the procuring of an abortion which at that time was illegal in Virginia.

On appeal to the Virginia Supreme Court, Bigelow 's First Amendment defense was dismissed on the ground that the advertisement "was of a purely commercial nature." From this ruling, Bigelow appealed to the United States Supreme Court.

In an opinion written by Justice Harry Blackmun, the Court reversed. In doing so, the Court reinterpreted the "commercial speech" doctrine as previously articulated in *Valentine v. Chrestensen* and applied in *Breard v. Alexandria.*

Justice Blackmun reviewed *Valentine* and concluded that the ruling of that case is not "authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge." *Bigelow v. Virginia,* 421 U.S. 809, 820 (1975).

Rather, he claimed, *Valentine* only stood for the proposition that advertisements that propose a commercial transaction - and nothing more - are outside First Amendment protection. This reading of the case enabled Justice Blackmun to modify the Court's "commercial speech" doctrine so as not to apply it to commercial advertisements that contain "factual material of clear 'public interest.'"

Examining the ad, Justice Blackmun found that two lines - "Abortions are now legal in New York. There are no residency requirements." - contained "information of potential interest and value to a diverse audience - not only to readers possibly in need of the services offered, but also to those with ... a genuine interest in the subject matter or the law of another State and its development, and to readers seeking reform in Virginia." *Id.,* 421 U.S. at 822.

Thus, Justice Blackmun concluded, the ad was not "unnewsworthy" and, therefore, the publisher's interests "coincided with the constitutional interests of the general public." Having so concluded, Justice Blackmun invented a new rule to govern commercial advertising when coupled with information of general public interest:

> *Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest .... To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas. Id.,* 412 U.S. at 826.

Justice William Rehnquist, joined by Justice Byron White protested this revision of the Court's precedent. First, Justice Rehnquist rejected Justice Blackmun's claim that the advertisement was more than a proposal for a commercial transaction:

> *This was a proposal to furnish services on a commercial basis, ... and it is no different from an advertisement for a bucket shop operation ... which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws. Id.,* 421 U.S. at 831.

Second, he disputed Justice Blackmun' s reading of *Valentine* . That case, he recalled, dealt with the effort of an advertiser to add to "a classic commercial proposition directed toward the exchange of services ... a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Id.,* 421 U.S. at 831-32.

Without question, Justice Blackmun ignored these facts and this disposition in *Valentine* in order to subject the abortion services advertisement to First Amendment scrutiny. No doubt also, abortion politics on the Court played a significant role in Justice Blackmun's revised version of the commercial speech doctrine. For the line-up of the Court in *Bigelow* was exactly the same as that in *Roe v. Wade.*

COMMERCIAL SPEECH: OVERRULED

It did not take Justice Blackmun and his colleagues long to take the next step. One year after *Bigelow,* the Court had before it a Virginia statute prohibiting all price advertising for prescription

drugs. Not only did the Court subject the law to First Amendment examination, it found the prohibition unconstitutional. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 48 L.Ed 2d 346 (1976).

This time, Justice Blackmun could not use the *Bigelow* formula, for the statute on its face simply prohibited advertising the price of prescription drugs. Moreover, he observed:

> *Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Id.,* 425 U.S. at 761.

Having conceded that the law and the facts were so limited, Justice Blackmun had no choice but to discredit the *Valentine* precedent. And he did just that. Drawing on the marketplace of ideas rationale embraced by the Court in the obscenity cases, Justice Blackmun concluded that speech which does no more than propose a commercial transaction does contribute to the exposition of ideas.

First, he found that the "free flow of commercial information" was "indispensable" to "the proper allocation of resources in a free enterprise system." From this proposition he reasoned that such a free flow was "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." Hence, Justice Blackmun concluded, all advertising for the sales of goods and services makes some contribution to "enlighten[ed] public decision making in a democracy," the central goal of the First Amendment. *Id.,* 425 U.S. at 762-65.

This time only Justice Rehnquist objected to the Court's discard of its longstanding doctrine that commercial advertising lay outside the pale of the First Amendment. He chided Justice Blackmun's endorsement of laissez-faire economics, asserting that "there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." *Id.,* 425 U.S. at 784.

Justice Rehnquist also warned that the Court's new doctrine could not "possibly be confined to pharmacists but must likewise extend to lawyers, doctors and all other professions." *Id.,* 425 U.S. at 783. Finally, he reminded the Court that its most vocal First Amendment champion, former Justice Hugo Black, had endorsed the proposition that the First Amendment does not apply to merchants' touting of their wares and services. *Id.,* 425 U.S. at 788.

Undeterred by this critique, Justice Blackmun pressed forward forging new rules specially tailored to the Court's view of the needs of the commercial marketplace and the constitutional demands of the marketplace of ideas.

COMMERCIAL SPEECH: NEW RULES

As for the commercial marketplace, Justice Blackmun conceded that the traditional rules against fraudulent, deceptive and misleading advertising or the advertising of illegal goods and services are legitimate. Thus, he concluded that "the First Amendment ... does not prohibit the State from

insuring the stream of commercial information flow cleanly was well as freely." *Id.,* 425 U.S. at 771 -72. On the other hand, he claimed that the First Amendment did prohibit a State from adopting a policy that "suppress[ed] the dissemination of concededly truthful information about an entirely lawful activity ...." *Id.,* 425 U.S. at 773.

Justice Blackmun did not bother to explain how these new rules governing commercial speech could be reconciled with existing First Amendment doctrine. He left that to Justice Potter Stewart whose concurring opinion wrestled with the relationship of these new rules with settled First Amendment law.

Justice Stewart first likened commercial speech to libel, noting that the First Amendment does not protect "false statements of fact in libel cases." *Id.,* 425 U.S. at 777. At the same time, Justice Stewart was not about to apply the Court's new rules governing libel to commercial speech. For those rules required proof of fault as a condition for recovery, whereas a rule of strict liability governed false, deceptive and misleading commercial advertising.

First, Justice Stewart attempted a factual distinction between libel and commercial speech. As to the former, he opined, the press must often put out stories about people without having time to conduct the necessary background research to insure a publication without factual error. By contrast, he claimed, "a commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them." *Id.,* 425 U.S. at 777.

Second, Justice Stewart observed, there is a difference in the world of ideas and the world of products and services. As for ideas, there is no such thing as a "false one;" hence the First Amendment demands a rule that protects statements even if they include "inaccurate assertions of fact" in order not to chill "ideological expression" so essential to the marketplace of ideas. *Id.,* 425 U.S. at 779-80.

As for the "promotion of goods and services," Justice Stewart asserted, "factual claims contained in commercial ... advertisements ... may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of the truth." Thus, laws holding commercial advertising to a strict standard of truth would actually promote "the flow of accurate and reliable information" and, thereby, enhance the marketplace of ideas. *Id.,* 425 U.S. at 780-81.

In his dissent, Justice Rehnquist questioned the assumption that truth-telling and the suppression of illegal activities were the only legitimate interests that the State had in the regulation of commercial advertising. For example, he asked, could not the State suppress certain kinds of advertising in order to discourage the purchase of liquor and cigarettes? *Id.,* 425 U.S. at 781.

Indeed, Justice Rehnquist continued, does not the State have an interest in discouraging the overuse of prescription drugs? Surely, he answered, there are sufficient dangers attending their widespread use so that they "simply may not be promoted in the same way as hair creams, deodorants, and toothpaste." *Id.,* 425 U.S. at 788.

While Justice Rehnquist's plea fell on deaf hears in the *Virginia Pharmacy* case, the Court gradually

moved in his direction in the 1980's with the development of a four-part test indicating that the government could regulate commercial speech for reasons other than truth-telling and illegal activities.

In *Central Hudson Gas v. Public Service Commission of New York,* 447 U.S. 557 (1980), Justice Lewis Powell stated that commercial speech must first be shown not to be misleading and not concerning an illegal activity in order for it to warrant First Amendment protection. Once it qualifies under this standard, then the state may regulate it if the state has a substantial interest in the regulation, and the regulation directly advances that interest, and there is no lesser restriction that could advance that interest.

Six years later, Chief Justice Rehnquist seized upon this four-part test to uphold a Puerto Rican statute that legalized certain forms of casino gambling, but prohibited any advertising of that gambling to Puerto Rican residents. The Court reasoned that the dangers of casino gambling were sufficiently great to justify Puerto Rico to protect its own citizens from them. *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328 (1986).

The Chief Justice's inroad upon the Court's commercial speech precedents lasted for ten years. Then, on May 13, 1996, the Court struck down a Rhode Island statute banning liquor price advertising in the state. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. --, 134 L.Ed 2d 711 (1996).

With the Chief Justice concurring in the decision, it was left to Justice Antonin Scalia to question the validity of the Court's novel jurisprudence extending First Amendment protection to the advertising of goods and services.

ADVERTISING - CONTEXT

From 1792 until 1975 - a 183-year period, no one understood the First Amendment freedoms of speech or press to have limited the power of civil government to regulate commercial advertising. In 1942, when the issue first came before the United States Supreme Court, it unanimously concluded that "the Constitution imposes no ... restraint on government as respects purely commercial advertising." *Valentine v. Christensen,* 316 U.S. 52,54 (1942).

Even Justice Hugo Black, one of the Supreme Court's greatest champions of the First Amendment, agreed that the Speech and Press Clauses did not apply to laws designed and enforced to implement a commercial advertising policy. See *Breard v. Alexandria,* 341 U.S. 622, 649 n. 1 (1951) (Black, J. dissenting).

In 1975, however, the Supreme Court changed its mind, ruling that the Speech Clause afforded constitutional protection to commercial advertising. *Bigelow v. Virginia,* 421 U.S. 809 (1975). By 1996, the Court was of the unanimous opinion, that the First Amendment protected commercial advertising so long as the advertising in question was not prohibited because it was false or misleading or because it promoted an illegal product or service. See *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. ---, 134 L Ed 2d 711, 723 (1996).

To protect such "truthful" and "lawful" commercial advertising, the Court has devised a weighing formula to balance the right of the people to know against whatever interest that the state has

claimed in favor of its regulation.

The Court's balancing test has led it into a thicket of advertising policies ranging from prohibitions against lawyer soliciting to restrictions on gambling and liquor advertisements. See, *e.g.*, *Bates v. State Bar of Arizona,* 433 U.S. 350, 53 L.Ed 2d 810 (1977); *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328 (1986); and *Rubin v. Coors Brewing Co.,* 514 U.S.---, 131 L.Ed 2d 532 (1995).

The Court's latest foray concerned a Rhode Island statute banning liquor price advertising. The Rhode Island authorities defended the ban on the ground that it promoted "temperance and ... reasonable control of the traffic in alcoholic beverages." *44 Liquormart Inc., supra,* 134 L.Ed 2d at 728, n. 14.

Insisting that the First Amendment required Rhode Island authorities to demonstrate "that the advertising prohibition ... directly advances the State's substantial interest in promoting temperance," the Court required that the State demonstrate that its "price advertising ban will significantly reduce alcohol consumption." *Id.,* 134 L.Ed 2d at 728-29.

Armed with this high standard, the Court refused to accept in justification of the law the elementary proposition that the ban on price advertising was likely to keep prices higher than would prevail in a completely free market and that, consequently, demand would be "somewhat lower whenever a higher, noncompetitive price level prevails."

Farced to marshall more specific evidence on the causal connection between its ban and the volume of alcohol consumption, the state had difficulty proving anything more than that the ban might reduce the purchases of liquor by "temperate drinkers of moderate means." To this, the Court countered:

> *The abusive drinker will probably not be deterred by a marginal price increase and ... the true alcoholic may simply reduce his purchases of other necessities. Id.,* 134 L.Ed 2d at 729-30.

Finally, the Court dismissed the state's claim because it had failed to show "what price level would lead to significant reduction in alcohol consumption," much less the amount that "prices would decrease without the ban."

Having found the claimed causal connection between the price ban and the amount of alcohol consumption to be wholly speculative, the Court ruled that the First Amendment's commitment to the free flow of information in the marketplace of ideas prevailed over the state's concerns about temperance.

Concurring in the judgment, Justice Antonin Scalia expressed reservations about the Court's having extended the First Amendment to commercial advertisers. Referring to his dissent in *McIntyre v. Ohio Elections Comm'n.,* 514 U.S. ---, 131 L.Ed 2d 426 (1995), he suggested that the Court ought to reexamine its doctrine in light of the original constitutional text and history of the Freedom of Speech Clause.

If the Court should accept Justice Scalia's challenge, it would discover that its commercial speech doctrine is based upon a faulty constitutional premise. In addition, it would find that its rules governing commercial speech are in conflict with other doctrines based upon the same faulty premise. Finally, it would be forced to conclude that the constitutional text of the First Amendment cannot possibly be construed to support the role that the Court has assumed in the commercial speech cases.

FAULTY PREMISE

In its commercial speech cases, the Court has endorsed the premise that the First Amendment Freedom of Speech Clause created a "free marketplace of ideas." *Bigelow v. Virginia, supra,* 421 U.S. at 826. That marketplace, the Court concluded, must be open to "the free flow of commercial information," as it is to the free flow of political, social, and other information of general interest, in order for the people to make "intelligent and informed" decisions. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748,764-65 (1976).

By relying upon this marketplace rationale, the Court reached back to a theme that had been initially introduced by Justice Oliver Wendell Holmes, Jr. In 1919, in his dissenting opinion in *Abrams v. United States,* 250 U.S. 616, 630 (1919), Holmes wrote:

> *... [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.*

What is remarkable about this passage is that Holmes cited no constitutionally relevant authority for it. Nor could he, for Holmes pruned off both constitutional text and history and grafted onto the Constitution a pragmatic legal and political philosophy totally foreign to that of the founders.

What Holmes actually embraced was a marketplace theory first enunciated by John Stuart Mill in *On Liberty,* a book published in 1859, sixty-eight years after the ratification of the First Amendment. Stone, Seidman, Sunstein & Tushnet, *Constitutional Law* 1017 (2d ed 1991).

Mills's work was not, by design, an effort to ascertain what the Freedom of Speech Clause of the American Bill of Rights meant. But this did not deter Holmes, whose evolutionary philosophy of law was rooted in "man's experience," not logical deductions from first principles.

Nor did this fact deter Holmes's disciple, Harvard Law Professor Zechariah Chafee from popularizing the Holmes thesis:

> *...[T]he meaning of the First Amendment did not crystallize in 1791 .... Into the making of the constitutional conception of free speech have gone, not only man's bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than*

> *his habitual felicity. "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.*" Chafee, *Freedom of Speech* 32 (1920).

By adopting an evolutionary view of constitutional law, Holmes and Chafee provided an entirely different rationale for the meaning of Freedom of Speech than the one provided by James Madison, the Bill of Rights principal draftsman.

Madison stated that the Freedom of Speech guarantee rested upon the *a priori* principle that the people retained civil sovereignty. Thus, the Clause prohibited any law the purpose of which was to defend the nation's sovereignty by preserving the current government's reputation or its existing form. Laws prohibiting seditious libel and stirring up sedition were, therefore, forbidden by the Freedom of Speech Clause. See Titus, "The Freedom of Speech: An Introduction," *The Forecast* (Sept. and Oct. 1995).

In the very case in which Holmes launched his pragmatic theory, Holmes could have relied upon the Madison view. The defendants in the case had been convicted under a seditious libel statute. Refusing, however, to be bound by the constitutional text, and its preceding historical context, Holmes relied upon events that had transpired afterwards:

> *I wholly disagree with the argument of the Government that the First Amendment left the law of seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying the fines that it imposed.*

Having relied upon experience, not upon first principle, Holmes's new rationale actually diminished the protection that the Freedom of Speech Clause gave to the people. He advised that a law prohibiting seditious libel could be constitutional if it were applied "to check the expression of opinions [that] so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams, supra*, 250 U.S. at 630 —.

Under the Holmes view, then, only academic discussion of ideas was absolutely protected. All other exchanges of ideas were to be examined to determine if they created a clear and present danger to the stability of the existing government. See, *e.g.*, *Gitlow v. United States,* 268 U.S. 652, --- (1925) (Holmes, J. dissenting).

Under the constitutional theory of Holmes, the Court became the superintendent of the marketplace of ideas. As superintendent, its duty was to examine the facts to determine if there was sufficient danger to government security to justify denial of access to that free marketplace. *Dennis v. United States,* 341 U.S. 494 (1951).

Later, the Court embraced Holmes's constitutional pragmatism and his theory of a marketplace of ideas to explain its rulings in other areas. At first, the Court utilized the Holmes theory to explain the inapplicability of the Freedom of Speech clause. See, *e.g.*, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, ns. 4 & 5 (1942).

Later, the Court used the Holmes approach in order to extend the Freedom of Speech Clause beyond its original design, to protect obscenity, libel and slander, and, as stated above, commercial speech. See *Roth v. United States,* 354 U.S. 476, 484-85 (1957) and *Gertz v. Welch,* 418 U.S. 323 (1973).

FAULTY PRINCIPLE

Having wrenched the Freedom of Speech Clause from its textual and contextual moorings, the Court is free to devise rules of its own making in the obscenity, libel, and commercial speech areas. But it has not done so consistently with the asserted principle.

According to Justice Holmes, the free marketplace of ideas is designed to allow entry to every idea because "the ultimate good desired is better reached by free trade in ideas - that the best test for truth is the power of the thought to get accepted in the competition of the market."

Clearly, this principle demands that no idea may be denied entry into the marketplace on the ground that it is false or misleading, but only on the ground that it has not been put forward into that marketplace.

This understanding of the free marketplace of ideas was embraced by Justice Lewis Powell who wrote on behalf of a Court majority in a 1973 libel case:

> *Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. Id.* at 339-40.

Pragmatic considerations, however, have constrained the Court from following this principle to its logical conclusion. For example, the Court has excluded from the marketplace ideas that fail to meet the Court's definition of obscenity. Why? According to Justice William Brennan, "the lewd and the obscene ... are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in morality ..." *Roth v. United States, supra,* 354 U.S. at 485.

So no matter how true an obscene idea, the Court - as gatekeeper of the marketplace of ideas - will not let it in. On the other hand, if the idea is a libelous one, then the Court has a different set of rules.

All false defamatory opinions get into the marketplace; but false defamatory statements of fact are excluded if, as to public officials or public figures, the communicator of those statements knew them to be false, or recklessly disregarded their truth or falsity. Or if those statements did not defame a public official or a public figure, they are excluded if the communicator was negligent as to their truth or falsity.

How does the Court explain this complex set of rules? Again, it has decided that such "utterances ... are no essential part of any exposition of ideas." *Gertz v. Welch, supra,* 418 U.S. at 340.

As for commercial advertisements, the state may exclude all false and misleading statements, whether they be of opinion or of fact, even if the advertiser believes them to be true. Only Justice

Potter Stewart has bothered to explain this rule in light of the different one prevailing in the defamation cases:

> *The principles recognized in the libel decisions suggest that the government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally know the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertisers's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc., supra,* 425 U.S. at 777.

Is this really true? Of course not. There are any number of commercial advertisers who do not have any better access to the real facts than the press. And there are any number of products about which the seller has just as much difficulty ascertaining the truth as does one about a person's activity.

Even if Justice Stewart's distinction between defamatory statements and commercial advertising were true, so what. What does the relative difficulty of ascertaining the truth have to do with whether an idea ought to have access to the people so that they can make up their own mind about the truth of what is being said? Isn't that the central idea of the free marketplace principle?

In fact, the different rules of entry into the marketplace have nothing to do with the claimed principle that the people have a right to determine the truth for themselves. To the contrary, the different rules reflect the different values that the Court has put upon community morality, individual reputation, and commercial marketing. And those values are not derived from the First Amendment.

The truth is that the Court cannot abide by its own principle of a free marketplace of ideas. But this has not deterred it from playing the gatekeeping role that it has assumed for itself. Nor has it deterred the Court from superintending the marketplace after an idea is allowed entry.

FAULTY ROLE

After an idea gains entry into the marketplace, the Court simply will not keep its hands off. Instead, it must oversee the market to make sure that it is functioning in the way that the Court wants it to function.

Thus, the Court decides questions of fact in defamation cases, determining whether there is sufficient evidence of fault in order to allow an idea to move without the "chilling effect" of potential liability.

Likewise, in commercial speech cases, the Court has decided the kind of speech that should take place in a given market.

For example, in the *Rhode Island* case, the Court decided that Rhode Island could accomplish its

temperance goal by fixing retail prices or raising them by direct taxation, or limiting purchases as they do with prescription drugs or engaging in an educational campaign to reduce problem drinking. *44 Liquormart, Inc. v. Rhode Island, supra,* 134 L.Ed 2d at 730.

As for fixing prices, or raising taxes on liquor or limiting purchases, would not each of those means of encouraging temperance have some kind of adverse impact on the marketplace of ideas on the price of liquor?

If prices are fixed, for example, then there would be no marketplace of ideas about liquor prices, other than that the state has fixed them. If purchases are limited, like prescription drugs, then would not this rule limit the marketplace of ideas concerning liquor prices?

As for the Court's suggestion that the state launch an educational campaign, what in the First Amendment leads the Court to that alternative?

The point is that the Court's supervision of the marketplace of ideas appears to reflect more its views about Rhode Island's temperance policy than about the First Amendment.

Moreover, the Court's entry into the marketplace to supervise it strays far beyond the explicitly stated purpose of the First Amendment. That Amendment reads in the negative: "Congress shall pass no law ..." This negative command constitutes a limit not only upon the legislature, but on the Court. As this Clause gives no power to Congress to legislate on behalf of freedom of speech or of the press, this Clause confers no power on the Court to create a free marketplace of ideas.

Yet that is exactly what the Court has done in the obscenity, libel and commercial speech areas. It has set itself up as the final arbiter of the relative importance of government policy and established the Court's own policy of a free marketplace of ideas. Its rules governing the resolution of the conflicts are not derived from the First Amendment but from its own policy preferences.

In the process, the Court has transformed a constitutional legal limitation on government power into one of fact. Instead of searching for the legal meaning of freedom of speech, the Court spends its time assessing the claimed factual basis for a government policy disconnected from the principle embodied in the Freedom of Speech Clause.

CONCLUSION

It is time for the Court to renounce its illegitimate role in the commercial speech cases and to return to the business of applying the Freedom of Speech Clause according to its original design.

Other writings by Herbert W. Titus:

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