

The First Amendment as Battery Acid: Regulating False Advertising Versus Protecting Free Speech

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Commercial speech, speech that proposes a commercial transaction, has been easier for the government to regulate than political speech throughout the development of the modern First Amendment. Under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹ government may regulate truthful, nonmisleading commercial speech about lawful activity if the government interest served by the regulation is substantial, the regulation directly advances the government interest, and the regulation is no more extensive than necessary to serve that interest. This is in contrast to the rules regarding noncommercial speech, which even if false can only be regulated under much more limited circumstances.

The commercial/noncommercial divide has become increasingly controversial, with several Supreme Court Justices suggesting their willingness to abandon the distinction, given the importance of commercial speech to modern social, economic and even political life.² Sometimes it can even be difficult to tell the difference between commercial and political speech: What is an ad for an abortion clinic? What is an ad for McDonnell-Douglas praising the company's contribution to our nation's defense? Even when the line between commercial and political is fairly clear, the line between true and false remains difficult to draw, which creates greater problems as the courts impose more constraints on the ability of government to regulate false or misleading commercial speech. Distinguishing between commercial and noncommercial speech creates many line-drawing problems. The alternative, however, might be far less palatable, especially when we consider the range of commercial speech that is currently regulated to protect consumers against false or misleading claims. Both the specific – Food and Drug Administration (FDA) regulation of drug claims – and the general – false advertising law in its state and federal versions – are in jeopardy as courts expand protections for commercial speech.

I. *Central Hudson's* Other Problem

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¹ 447 U.S. 557 (1980).

² See *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2431 (2001) (Thomas, J., concurring in part and concurring in the judgment); *Greater New Orleans*, 527 U.S. at 197 (Thomas, J., concurring in the judgment); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. [], 501, 510-14 (1996) (joint opinion of Stevens, Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment).. This corresponds with a desire for increased protection for corporations in other ways, in both First Amendment contexts and beyond. In *McConnell v. FEC*, Justice Scalia in dissent argued that corporations are entitled to full First Amendment protection because they “best represent the most significant segment of the economy and the most passionately held social and political views. Corporations aren’t people, too – they’re better than people, and their participation in the economy entitles them to proportional participation in the polity. 124 S. Ct. 619, 725-26 (2003) (Scalia, J., dissenting).

[The basic problem: The appropriate First Amendment analysis of advertising laws would appear to come from the law of commercial speech, but, even assuming that law were coherent, the *Central Hudson* test for evaluating restrictions on commercial speech presupposes that the speech at issue is *truthful*. For years, courts and commentators have assailed the Supreme Court's commercial speech jurisprudence as incoherent at best and anathema at worst. The controversy, however, has focused on the test for regulating truthful, nonmisleading commercial speech. On the threshold issue of how one determines truth for constitutional purposes, the Supreme Court has been all but silent,³ and the academic literature generally little better.⁴ This is odd, since a large part of the modern regulatory state is devoted to controlling what companies may say to sell their products. The SEC, the FTC, the FDA, and numerous other state and federal entities scrutinize commercial speech for its truthfulness. The FTC, for example, has specific guidelines for claims spanning the yellow pages, including: appliances,⁵ automobile parts,⁶ business opportunities such as franchises,⁷ celebrity or expert endorsements,⁸ dietary supplements,⁹ food,¹⁰ "free" offers,¹¹ feather and down products,¹² funerals,¹³ fur,¹⁴ furniture,¹⁵ jewelry and precious metals,¹⁶ laser eye surgery,¹⁷ leather,¹⁸

³ The Supreme Court has done the most work distinguishing truth from falsehood and misleading statements in the lawyer regulation cases. [Cites] The Court is probably more qualified to assess deceptiveness in legal services than in most other fields it is likely to encounter.

⁴ See, e.g., Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 130 (1999) ("In most applications of *Central Hudson*, the first and second prongs of the test are not at issue. The first prong, concerning whether the speech involves a lawful activity and is not misleading, is generally uncontroversial."). But see Bevier; Troy, *supra*, at 130 (suggesting that the breadth of "misleading" is troubling to those who support more rigorous First Amendment protections for commercial speech).

⁵ See 16 C.F.R. § 305.

⁶ See 16 C.F.R. § 20.

⁷ See 16 C.F.R. § 436. In addition, 23 states also have business opportunity laws. See Federal Trade Comm'n, State Offices Administering Business Opportunity Disclosure Laws, available at <http://www.ftc.gov/bcp/franchise/netbusop.htm>.

⁸ See 16 C.F.R. § 255.5.

⁹ See Federal Trade Comm'n, Dietary Supplements: An Advertising Guide for Industry, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.htm>.

¹⁰ See Federal Trade Comm'n, Enforcement Policy Statement on Food Advertising (May 1994), available at <http://www.ftc.gov/bcp/policystmt/ad-food.htm>.

¹¹ See 16 C.F.R. § 251.

¹² See Federal Trade Comm'n, Down...But Not Out: Advertising and Labeling of Feather and Down Products, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/down.htm>

¹³ See 16 C.F.R. Part 453; Federal Trade Comm'n, Complying with the Funeral Rule, August 1995, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/funeral/index.htm>.

¹⁴ See Fur Products Labeling Act (Fur Act), 15 U.S.C. § 69 *et seq.*; 16 C.F.R. Part 301; see also Federal Trade Comm'n, In-FUR-mation: How to Comply with the Fur Products Labeling Act (Dec. 2000), available at <http://www.ftc.gov/bcp/online/pubs/alerts/furalert.htm>; Federal Trade Comm'n, Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts (December 1998), available at <http://www.ftc.gov/bcp/online/pubs/buspubs/thread.htm>. As is evident from the titles of the guides, the FTC tries to have a sense of humor about the regulations, though the results are probably more annoying to the regulated businesses than blandly informative titles would be.

¹⁵ See Federal Trade Comm'n, Guides for the Household Furniture Industry (promulgated Dec. 21, 1973; effective Mar. 21, 1974), Guide 1, available at <http://www.ftc.gov/bcp/guides/furniture-gd.htm>.

¹⁶ See 16 C.F.R. § 23; Federal Trade Comm'n, Guides for the Jewelry, Precious Metals, and Pewter Industries, available at <http://www.ftc.gov/bcp/guides/jewel-gd.htm>; Federal Trade Comm'n, In The

long distance telephone service,¹⁹ mail or telephone merchandise orders,²⁰ negative option plans (such as CD or book-of-the-month clubs),²¹ telemarketing,²² textiles,²³ tires,²⁴ U.S. origin claims,²⁵ vocational and distance education schools,²⁶ wedding gowns,²⁷ and wool.²⁸ Its authorizing statute gives it authority over any “unfair or deceptive acts and practices in commerce.”²⁹ State and federal laws also allow private parties to challenge other parties’ advertisements based on falsity of any kind, as long as it could affect consumers’ decisions.³⁰ Thus, regulation of truthful, nonmisleading speech is a very small percentage of government regulation of commercial speech. False

Loupe: Advertising Diamonds, Gemstones and Pearls, *available at*

<http://www.ftc.gov/bcp/online/pubs/buspubs/loupe.htm>.

¹⁷ See Lillian Gill & Dean C. Graybill, FDA and FTC Letter to Eye Care Professionals, *available at* <http://www.ftc.gov/bcp/guides/hhsftc.htm>.

¹⁸ See 16 C.F.R. § 24.

¹⁹ See Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000), *available at* <http://www.ftc.gov/os/2000/03/jpsada.pdf>.

²⁰ See Federal Trade Comm’n & Direct Marketing Ass’n, A Business Guide to the Federal Trade Commission’s Mail or Telephone Order Merchandise Rule (Jan. 1995), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/mailordr/index.htm>.

²¹ See 16 C.F.R. Part 425.

²² See 16 C.F.R. § 310; *see also* Federal Trade Comm’n, Complying with the Telemarketing Sales Rule (April 1996), What Does the Rule Require Sellers and Telemarketers To Do?, *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/tsr/whatdoes.htm>.

²³ See Textile Fiber Products Identification Act (Textile Act), 15 U.S.C. § 70 *et seq.*; 16 C.F.R. Part 303 (Textile Rules); 16 C.F.R. Part 423 (Care Labeling of Textile Wearing Apparel and Certain Piece Goods); *see also* Federal Trade Comm’n, Calling It Cotton: Labeling and Advertising Cotton Products, *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/cotton.htm>; Federal Trade Comm’n, Clothes Captioning: Complying with the Care Labeling Rule (April 2001), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/comeclean.htm>; Federal Trade Comm’n, Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts (December 1998), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/thread.htm>.

²⁴ See 16 C.F.R. 228.

²⁵ See Federal Trade Comm’n, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1997), *available at* <http://www.ftc.gov/os/1997/9712/epsmadeusa.htm>.

²⁶ See 16 C.F.R. § 254.

²⁷ See Federal Trade Comm’n, Wedding Gown Labels: Unveiling the Requirements, *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/wedgown.htm>.

²⁸ See Wood Products Labeling Act of 1939 (Wool Act), 15 U.S.C. § 68 *et seq.*; 16 C.F.R. Part 300; *see also* Federal Trade Comm’n, The Cachet of Cashmere: Complying with the Wool Products Labeling Act, *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/cashmere.htm> (visited Mar. 11, 2004); Federal Trade Comm’n, Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts (December 1998), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/thread.htm>.

²⁹ The Federal Trade Commission Act defines such acts as misleading or untruthful statements, unsubstantiated claims, or any advertising that causes substantial, unavoidable consumer injury without offsetting benefits to consumers or competition. See 15 U.S.C. § 45.

³⁰ The Federal Trademark Act of 1946 (the Lanham Act) allows competitors to file claims against false statements “in commercial advertising or promotion” that “misrepresent the nature, characteristics, qualities or geographic origin of . . . goods, services, or commercial activities.” 15 U.S.C. § 1125(a). Most states have some form of consumer protection law providing for both public and private enforcement. Some, like New Jersey’s, ban “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact.” N.J. Rev. Stat. § 56:8-2. Others, like California’s, prohibit specific deceptive activities. Cal. Civil Code § 1770.

and misleading speech is where the action is, and *Central Hudson*'s blanket endorsement of prohibiting such speech leaves many questions unanswered.

In recent years, the Court of Appeals for the D.C. Circuit has joined the issue, aggressively striking down FDA regulations on First Amendment grounds related to the FDA's high standards for acceptable truth, and in 2002 the Supreme Court, in *Thompson v. Western States Medical Center*, invalidated a law prohibiting pharmacists from advertising that they could compound drugs, creating individually tailored formulations, when compounding itself was legal. In response to the Supreme Court case, the FDA propounded a stunningly far-ranging series of questions for comment on the proper scope of its regulations. No longer is the FDA taking for granted that it can prohibit drug companies from claiming that their drugs work unless the FDA agrees with their interpretations of the evidence; in fact, the burden may be on the FDA to prove that health and efficacy claims are wrong before it can act. The numerous responses to the FDA's request for comments suggest that whatever consensus existed on regulation of drug claims may be breaking down, possibly because of growing competition from dietary supplements and so-called natural remedies.

The FDA's well-established regulatory apparatus, full of experts on its specialty, may nonetheless have difficulty surviving the new First Amendment. If even a narrow mandate and decades of expertise are insufficient to survive the new First Amendment rights of corporations, general advertising law faces even worse odds. Private lawsuits by competitors and consumers can cover any factual claim at all, generating even more disputes than drugs and supplements do, making it even more vulnerable to First Amendment challenges. As the arguments in the recent *Nike v. Kasky* case show, the current version of false advertising law is incompatible with the current First Amendment. And now that advertising law has been recognized by the Supreme Court as problematic, the pressure to work the law pure through application of the First Amendment may be irresistible. The question is, then, what a purified advertising law would look like.]

Unfortunately for those hoping for some further guidance, the Supreme Court recently dismissed *Nike* as improvidently granted. In *Nike*, a concerned citizen of California (or officious interloper, depending on how one sees Marc Kasky) sued Nike for allegedly making false statements about its contractors' labor practices in a variety of contexts, including letters to college presidents, press releases, and advertorials. Nike claimed that the complaint should have been dismissed because it was engaging in protected speech about matters of intense public interest. As with the fallout from *Thompson*, the volume of submissions to the Court, as well as their content, is evidence that false advertising law is extremely vulnerable to challenge under current First Amendment jurisprudence. The Court dismissed certiorari as improvidently granted because of concerns about the finality of the judgment, the standing of the parties, and the lack of clarity of the facts at this stage of the litigation, which had not progressed past a motion to dismiss. An examination of the many contested aspects of the case -- the facts that needed finding -- shows just how uncomfortably the law fits within traditional First Amendment jurisprudence.

The danger in deciding *Nike* in Nike's favor, as it almost surely would have been, was that there were no convincing rationales that let Nike freely claim that its labor practices were sound without imperiling an enormous part of the modern regulatory state.

The Court could have simply drawn a line: California's law goes too far by allowing Kasky to sue, but the traditional practices of the FDA, the SEC, and the FTC are fine. That this line would be illogical and unjustified is no practical barrier to drawing it.³¹ One problem with this response is that the First Amendment is quite charismatic; once First Amendment analysis is applied instead of rejected, some regulations are going to fail a court's scrutiny. In other words, law is full of contradictions that somehow remain stable, but courts tend to want to work the law in any particular field pure, and Nike's success in defining the relevant field as First Amendment law risked destabilizing all regulation of the truth of commercial claims, as has already begun to occur with the FDA.³²

II. The FDA: "Who is to decide when doctors disagree?"³³

The FDA oversees about \$1 trillion worth of products each year, nearly a quarter of the American economy.³⁴ It is the most popular regulatory agency, routinely achieving seventy-five percent public approval since the 1970s, more popular than Presidents Reagan and George H.W. Bush.³⁵ Furthermore, the public expects and trusts that the FDA is looking out for its health. Studies show that Americans generally believe that the pills and medicines they can buy have been tested for safety and approved by the FDA, even when that is not the case, as with vitamins and herbal supplements.³⁶

The First Amendment has been giving the FDA trouble on many fronts in recent years. In *Pearson v. Shalala*, for example, the DC Circuit invalidated the FDA's regulations for dietary supplement claims, particularly the requirement of "significant scientific agreement" before supplements were allowed to make health claims. The FDA was required to allow claims in most circumstances as long as the claims included a disclaimer.³⁷ Then, the Supreme Court joined the fray in *Thompson v. Western States Medical Center*.³⁸ *Western States* concerned compounded drugs, which are mixed by individual pharmacists or doctors to create a medication specifically for a patient, as opposed to ordinary, preformulated prescription drugs. The Food and Drug Administration Modernization Act of 1997 exempted compounded drugs from the FDA's

³¹ See *Eldred v. Ashcroft*.

³² Harry Kalven "celebrated the evolution of First Amendment doctrine over the course of the twentieth century as an example of the law working itself pure." OWEN M. FISS, *THE IRONY OF FREE SPEECH* 6 (1996) (citing Kalven's *A Worthy Tradition*). On the drive to work the law pure: Frank, J., concurring in *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952).

³³ P.T. Barnum adapted Alexander Pope's "Who shall decide when doctors disagree?" as part of his defense of the Fejee mermaid, one of his more notorious hoaxes. See PHILIP J. HILTS, *PROTECTING AMERICA'S HEALTH: THE FDA, BUSINESS, AND ONE HUNDRED YEARS OF REGULATION* 282 (2003)

³⁴ See HILTS, *supra* note --, at xiv. The FDA's authority is provided by the Food, Drug and Cosmetics Act, 21 U.S.C. §§ 301-397. The basic prohibition of the Act is against misbranded and adulterated food and drugs. Labeling requirements are also part of the Act. In 1938, pre-market approval for drugs was instituted, requiring proof of safety and efficacy before new drugs could be sold; the process was later extended to medical devices.

³⁵ See HILTS, *supra* note [], at 295 (noting that the first President Bush was, during the first Gulf War, briefly more popular than the FDA).

³⁶ See *id.* at 290.

³⁷ See *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999).

³⁸ 122 S. Ct. 1497 (2002).

standard drug approval requirements as long as the compounders did not solicit, advertise, or promote the compounding of any particular drug. The Supreme Court held that the law violated the *Central Hudson* test because, even if the advertising ban promoted a substantial government interest, it was more extensive than necessary to keep compounding from becoming large-scale and thereby circumventing the standard drug approval process.

After *Western States*, the FDA issued an expansive and perhaps alarming request for comments on First Amendment issues, covering essentially the FDA's entire jurisdiction:

1. Are there arguments for regulating speech about drugs more comprehensively than, for example, about dietary supplements? What must an administrative record contain to sustain such a position? In particular, could FDA sustain a position that certain promotional speech about drugs is inherently misleading, unless it complies with FDA requirements?
2. Is FDA's current position regarding direct-to-consumer and other advertisements consistent with empirical research on the effects of those advertisements, as well as with relevant legal authority?
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6. What arguments or social science evidence, if any, can be used to support distinguishing between claims made in advertisements and those made on labels? Does the First Amendment and the relevant social science evidence afford the Government greater latitude over labels?
7. Would permitting speech by manufacturer, distributor, and marketer about off-label uses undermine the act's requirement that new uses must be approved by the FDA? If so, how? If not, why not? What is the extent of FDA's ability to regulate speech concerning off-label uses?
8. Do FDA's speech-related regulations advance the public health concerns they are designed to address? Are there other alternative approaches that FDA could pursue to accomplish those objectives with fewer restrictions on speech?
9. Are there any regulations, guidance, policies, and practices FDA should change, in light of governing First Amendment authority?³⁹

The scope of the request can be explained in part by the ideological commitments of the FDA's current general counsel, Daniel Troy, who in private practice represented pharmaceutical and tobacco companies challenging, on First Amendment grounds, the FDA's right to regulate their offerings.⁴⁰ This sequence of events is evidence of the corrosive power of the First Amendment in action. Though the scope of the request for

³⁹ 67 Fed. Reg. 34942-44 (May 16, 2002). Press coverage noted the extremely broad scope of the requests. See, e.g., Chris Adams, *Looser Lips for Food and Drug Companies? Industries Pressure FDA To Relax Rules on Commercial Speech*, Sept. 17, 2002, at A4; William Castagnoli, *Rx Marketing Regulations Hang on First Amendment Debate*, MEDICAL MARKETING & MEDIA, Sept. 1, 2002, at 86 (comparing potential for change in FDA regulations to *Brown v. Board of Education* and *Roe v. Wade*).

⁴⁰ See Stacey Schultz, *Mr. Outside Moves Inside*, U.S. NEWS & WORLD REPORT, Mar. 24, 2003, at 63. But see Castagnoli, *supra* note [] (suggesting that the FDA may be collecting comments merely to make a record to defend current practices).

comments reflects the current administration's attitude towards government regulation of business, it is also ruthlessly logical.

Substantiation, the amount of proof a seller must have to make an advertising claim, is a particularly difficult issue. How true is true? In many cases, the government's position is that "mostly true" isn't good enough.⁴¹ The Federal Trade Commission has rules for advertising dietary supplements, developed in consultation with the FDA.⁴² Compared to the rules for prescription drugs, the rules for dietary supplements are almost nonexistent, but they still set a higher standard for truth than is generally required. Advertisers are not simply allowed to state that a product "may" have a certain benefit. If research substantiating the claim is not conclusive, then the advertiser may not state "studies show that our product may have health benefits." Instead, the advertiser must disclose the limitations of the current research and state that further research is necessary.⁴³

If truthful commercial speech receives heightened constitutional protection, or even the full protection accorded political speech, it becomes a matter of some urgency to distinguish truth from falsity, and courts must be careful to restrict government's attempts to label speech misleading. Two examples illustrate the potentially devastating scope of First Amendment protections for FDA regulations: the placebo effect and off-label uses for prescription drugs. It is well-known that telling people that they are being treated for a condition often improves that condition, even if the "treatment" is no more than sugar pills. The immediate effect of anti-depressants on many depressed patients seems to be the result of a placebo effect, because the medication itself takes several weeks to effect real physiological changes.⁴⁴ But the placebo effect is not limited to psychiatric conditions; it also applies to purely physical ailments – because there is no such thing as a purely physical ailment as long as the patient is conscious.⁴⁵ (There is evidence that the effect dissipates over time compared to that of pharmacologically active medication, but at least for short-term ailments, it is one of the doctor's best weapons.)

So if you tell someone that a drug works, it is more likely to work. The claim is true because it's been made. Although doctors rely on this useful fact on a regular basis, the government prohibits sellers from taking similar advantage.⁴⁶ Average consumers are

⁴¹ In addition to the examples discussed in the text, in Lanham Act cases, an advertisement stating that "tests prove our product works" may be enjoined if the tests do not prove what the advertiser says, even if the product actually works. *See, e.g.,* *Castrol Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir.1992); *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 436 (4th Cir. 1997). Likewise, one significant Supreme Court case involved a shaving cream that could "shave" sandpaper. On TV, however, real sandpaper looked like nothing but colored paper. The advertiser, therefore, rigged a demonstration using simulated "sandpaper" made of plexiglass covered with sand. The Supreme Court upheld the FTC's order barring the ad, even though the claim therein was true, because the demonstration was not technically true. *See* *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 376-77 (1965).

⁴² These are elaborations of the basic FTC position on truth in advertising, which is that advertisers must have adequate substantiation for all product claims. *See* *Advertising Substantiation Policy Statement*, 49 Fed. Reg. 30999, Aug. 2, 1984.

⁴³ *See* *Federal Trade Comm'n, Dietary Supplements: An Advertising Guide for Industry*, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.htm> § II.A.3 Example 10 (visited July 16, 2001).

⁴⁴ [cite]

⁴⁵ [cites]

⁴⁶ *See* *Federal Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1100 (9th Cir. 1994); ("[A]llowing advertisers to rely on the placebo effect would not only harm those individuals who were deceived; it

unlikely to care why a product works. Indeed, they are unlikely to *understand* why a product works – something that often baffles even pharmaceutical chemists.⁴⁷ There’s a visceral impulse to condemn a seller who uses the placebo effect, but it is real, and it is certainly better-evidenced than standard advertising pitches that a perfume or a beer will bring happiness and sex appeal – which, to the extent they are true, are also true only because consumers believe them. Yet it is hard to imagine a medical claim that is true only because of the placebo effect being found to be legitimate. If the First Amendment protects truthful commercial speech under most circumstances, we need a better reason than revulsion to ban such claims. And if we call placebo-based claims “misleading” in order to justify continued regulation, we stretch the concept of misleading speech far enough to encompass many other claims that courts have allowed sellers to make.

While the placebo effect might seem like a trick of human psychology that can be addressed by a simple exception to the rule, off-label uses present more troubling issues. In order to release a drug, a pharmaceutical company needs to convince the FDA that the drug is safe and efficacious for a particular condition, as shown through two large-scale, controlled and double-blinded studies. This is a rather high barrier. Once the drug has been approved, however, doctors are not required to prescribe the drug only according to its labeling. Botulinum toxin, or Botox, was first approved only for the treatment of disorders such as strabismus and blepharospasm. It gained fame for its off-label use in the treatment of ordinary facial wrinkles. Now that the FDA has approved Botox for cosmetic anti-wrinkle use, doctors are expanding its use to treat headaches and even obesity.⁴⁸ This is not unusual; off-label uses account for a significant proportion of all prescription drug consumption.⁴⁹ While the FDA claims no authority to prevent such uses, it does prohibit drug companies from advertising off-label uses to the public or to doctors.

The FDA’s rules regarding what manufacturers can do and say without being charged with misbranding under the Food and Drug Act were challenged in *Washington Legal Foundation v. Friedman*, and held unconstitutional using the test set forth in *Central Hudson* for the regulation of truthful, nonmisleading commercial speech.⁵⁰ The

would create a substantial economic cost as well, by allowing sellers to fleece large numbers of consumers who, unable to evaluate the efficacy of an inherently useless product, make repeat purchases of that product.”); *United States v. An Article ... Acu-Dot ...*, 483 F. Supp. 1311, 1315 (N.D. Ohio 1980) (claims of efficacy from placebo effect are “‘misleading’ because the [product] is not inherently effective, its results being attributable to the psychosomatic effect produced by the advertising and marketing of the [product]”); *Bristol-Myers Co.*, 102 F.T.C. 21, 336 (1983) (“The Commission cannot accept as proof of a product’s efficacy a psychological reaction stemming from a belief which, to a substantial degree, was caused by respondent’s deceptions. Indeed, were we to hold otherwise, advertisers would be encouraged to foist unsubstantiated claims on an unsuspecting public in the hope that consumers would believe the ads and the claims would be self-fulfilling.”); *cf. American Home Prods. Corp. v. Johnson & Johnson*, 436 F. Supp. 785, 799 n. 9 (S.D.N.Y. 1977) (“A claim concerning a drug’s effect made in lay advertising to consumers must be understood as representing that the effect will be experienced in humans and thus that it has some significance in a clinical context.”).

⁴⁷ [see Derek Lowe]

⁴⁸ See Linda Stahl, *Botox: It’s More Than Skin Deep*, *Louisville Courier-Journal*, Feb. 13, 2003 (available at <http://www.courier-journal.com/features/health/2003/02/hf-front-botox13-8845.html>).

⁴⁹ [cite]

⁵⁰ See *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *further proceedings* 36 F. Supp. 2d 16, *further proceedings sub nom. Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81 (D.D.C. 1999), *vacated*, 202 F.3d 331 (D.C. Cir. 2000).

government changed its position and stated that its manufacturer guidelines – regarding dissemination of peer-reviewed articles discussing off-label uses, sponsorship of continuing medical education seminars discussing off-label uses, etc. -- were simply safe harbors, rather than descriptions of the only acceptable way for manufacturers to behave. As a result, the DC Circuit vacated the district court’s ruling because there was no case or controversy,⁵¹ leaving the court on remand to comment that “[a]fter six years’ worth of briefs, motions, opinions, Congressional acts, and more opinions, the issue [of whether the FDA violates the First Amendment by penalizing drug manufacturers for sending scientific literature to physicians regarding off-label uses] remains 100% unresolved [The FDA’s revised guidance] specifically invites a constitutional challenge to each and every one of its enforcement actions.”⁵² The court strongly hinted that it would find those enforcement actions unconstitutional.⁵³

The district court’s predilections have only been enhanced in the succeeding years by *Western States*. If the FDA can’t prohibit advertising of lawfully compounded drugs, it will have difficulty prohibiting drug companies from stating that a study showed that a drug was effective against breast cancer, regardless of whether the drug was approved for breast cancer. The justification for prohibiting drug companies from talking about new uses for their drugs might be that consumers will be too easily misled by claims based on small or poorly-controlled studies. Yet such statements may be truthful, particularly when directed to doctors, who are sophisticated at interpreting medical claims and unlikely to be misled into thinking that off-label claims are as well-proven as FDA-approved claims.⁵⁴ Dietary supplements are allowed to make much less well-grounded claims for efficacy, as long as they state somewhere on their packaging that the FDA has not approved the advertising at issue.⁵⁵

The ban on off-label advertising does encourage drug companies to seek FDA approval for new uses, so they can promote those uses. But is that a legitimate government interest? If off-label claims are truthful, then the government interest is in keeping consumers in the dark until the government decides that the evidence is

⁵¹ See *Washington Legal Foundation v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

⁵² *Washington Legal Foundation v. Henney*, 128 F. Supp. 2d 11, 15 (D.D.C. 2000).

⁵³ See *id.* at 15-16.

⁵⁴ Courts have long held in trademark and false advertising cases that doctors are a sophisticated group, less likely to be confused by ambiguous claims than average consumers. See, e.g., *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 616 (6th Cir. 1999); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229-30 (3d Cir. 1990); *Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206-07 (1st Cir.1983); *Medical Economics Co., Inc. v. Prescribing Reference, Inc.*, 294 F. Supp. 2d 456, 465 (S.D.N.Y. 2003); *Pharmacia Corp. v. Alcon Laboratories, Inc.*, 201 F. Supp. 2d 335, 374 (D.N.J. 2002) (trademark); *Doral Pharmamedics v. Pharmaceutical Generic Developers, Inc.*, 148 F.Supp.2d 127, 138-39 (D.P.R.2001) (trademark); *Pfizer, Inc. v. Merial, Ltd.*, No. 00 CIV. 2881(JSM), 2000 WL 640669, at *3 (S.D.N.Y. May 18, 2000) (veterinarians); *First Health Gp. Corp. v. United Payors & United Providers Inc.*, 95 F. Supp. 2d 845, 851 (N.D. Ill. 2000) (hospitals); *Pfizer Inc. v. Astra Pharm. Prods., Inc.*, 858 F.Supp. 1305, 1328 (S.D.N.Y.1994) (trademark); *Barre-National, Inc. v. Barr Laboratories, Inc.*, 773 F.Supp. 735, 742, 745 (D.N.J. 1991) (trademark); see also FTC Policy Statement on Deception, <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> § III (Oct. 14, 1983) (“[A] practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.”). *Schering Corp. v. Thompson Med. Co.*, 209 U.S.P.Q. 72, 74 (S.D.N.Y.1979) (trademark).

⁵⁵ [Example from GNC: Based on a study of 26 patients, ...]

overwhelming; that doesn't seem like a strong justification for suppressing truthful commercial speech. Perhaps we could say that the FDA's expertise in evaluating medical claims is so far above that of average consumers and even average doctors (who after all may not be statisticians in their spare time) that it is justified in deciding that medical claims without sufficient proof are inherently misleading. That would require much more deference to the FDA than the D.C. Circuit has shown of late, but it's not inconceivable.⁵⁶ And, as the *Friedman* court pointed out, it would be inconsistent with the FDA's disclaimer of any attempt to regulate claims made for off-label uses by anyone other than drug companies, such as medical journals and individual practitioners who have experience with off-label uses.

Saving off-label regulations by allowing the FDA to determine what is misleading would, however, demonstrate that the definition of what is false or misleading is highly contestable. One way to state almost any claim that information is harmful to consumers is that the information, while perhaps technically true, will cause consumers to make bad decisions and is therefore misleading. That was essentially the government's claim in *Western States*, and it didn't work then.

The corrosive effect of a robust protection for commercial speech doesn't stop there; it threatens the entire structure of FDA regulation. If the FDA can't prohibit drug companies from advertising off-label, unapproved uses for approved drugs, why does it have the power to regulate claims of safety and, especially, efficacy in the first place?⁵⁷ Why should a manufacturer have to prove with two large, controlled, double-blinded studies that its drug treats headache pain, and then be able to make claims about sinus conditions with much less evidence? There is no logical difference between the first and second claim, when the requirements would be switched if the manufacturer sought first to sell the drug for sinus conditions and then for headaches. It's possible to imagine a system in which drug companies can make claims of safety and efficacy as long as they have no reason to know otherwise – in fact, that is the present regime for dietary supplements. But the present regime for dietary supplements also bars the FDA from keeping supplements off the market until the FDA proves that they are dangerous. That is a much more consistent scheme than one that allows almost all claims because of the First Amendment yet also prohibits sales of drugs until the FDA agrees with at least some of the claims. In other words, labeling requirements and control over the presence of drugs in the marketplace go hand in hand.

One response to these questions about labeling is that the FDA still has a choice: It could ban doctors from prescribing drugs for conditions not named on the label. That would not create a First Amendment problem, because only use would be affected. The First Amendment, one could say, forces hard choices; if we decide not to ban certain conduct, we cannot restrict speech as a halfway measure to allow but discourage it. This still does not explain why the FDA can require various disclosures on the label, or limit claims of efficacy to what the FDA agrees with – for example, for a drug approved for the treatment of high intraocular pressure, which causes glaucoma, some data suggested

⁵⁶ Cf. [McConnell on issue ads: Congress can determine that people are lying when they say that issue ads are uncoordinated, and, since coordinated campaign expenditures can be regulated, so can issue ads]

⁵⁷ See Castagnoli, *supra* note [] (“[The FDA] fears, more than anything else, that if unapproved products can be promoted, or new uses of approved products can be promoted without FDA approval, its authority to review new data submitted in manufacturer applications will be undermined.”).

that the drug was more effective in African-American patients, but the FDA did not approve that claim and so the manufacturer was not allowed to advertise the drug that way, even though it was allowed to say that the drug was generally safe and effective.⁵⁸ But maybe that's unconstitutional, too.

If all the FDA could do was ban or allow, pharmaceutical regulation would look a lot like the current regulation of dietary supplements. In practice, we wouldn't expect many bans, because of the political power behind the claim "we have a safe and effective treatment for your condition, but the FDA won't let us sell it," the kind of claim that led Congress to gut the FDA's power to regulate supplements in the first place.⁵⁹

The goal of the reformers is clear: to cut back FDA regulatory power so that it is limited to addressing proven frauds⁶⁰ – not, notably, to avoid falsity, which is a broader category, or to keep claims (or drugs) off the market in the first place. The First Amendment arguments correspond with a resurgence of substantive due process claims that also attempt to limit the FDA's ability to restrain the pharmaceutical trade.⁶¹ The line between speech and economic activity is hard to draw when the speech is part of the economic activity. The assault on the FDA's authority is one of the starkest examples of the use of the First Amendment to prevent economic regulations.

III. *Nike v. Kasky*: The Marketplace of Ideas and the Market for Shoes

“[I]f we reach the merits, and if we have to address it, we’re going to have to know what commercial speech is, I suppose.”⁶²

[Facts/allegations: Beginning in 1996, Nike was targeted by protesters claiming that it (actually, its subcontractors) underpaid and abused workers in developing countries. Nike launched a public relations counteroffensive, including letters to the editor, press releases, letters to college presidents who controlled lucrative athletic contracts, and so on. Nike's communications discussed general issues of globalization, suggesting that what looked exploitative from outside was welcomed by workers in developing areas, and also specifically defended the treatment of its subcontractors' workers. Marc Kasky believed that Nike was not telling the truth in those claims, so he sued, as California law allowed him to do.] Although lower courts dismissed Kasky's complaint on the ground that Nike's speech was fully protected by the First Amendment, a divided California Supreme Court reversed, holding that Nike's statements about its

⁵⁸ See [Pharmacia v. Alcon]

⁵⁹ [history of DSHEA; campaigns by supplement producers & sellers to get customers to write to Congress to save their vitamins from being banned]

⁶⁰ See, e.g., *Free Speech and the FDA*, WALL ST. J., Sept. 20, 2002, at A10 (arguing that FDA's First Amendment review should lead it to cut back substantially on regulation, which would not “impair the government's ability to prosecute actual cases of fraud”); Castagnoli, *supra* note [] (suggesting that best outcome of FDA review would be to let manufacturers make claims and prosecute “lies or partial truths ... after the fact,” based on rules governing “fraud and deception”).

⁶¹ The Washington Legal Foundation, for example, has filed suit arguing that the FDA's restrictions on experimental drugs violate the Fifth and Fourteenth Amendment liberty and privacy rights of terminally ill patients. See *Abigail Alliance for Better Access to Developmental Drugs v. McClellan*, No. [] (D.D.C., complaint filed July 28, 2003) (available at <http://www.wlf.org/upload/Abigail%20Alliance%20complaint.pdf>).

⁶² Oral argument transcript at 57, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575).

labor practices in press releases, letters to universities which had contracts with Nike, paid "advertorials," and letters to the editor were commercial speech. The Supreme Court granted certiorari to decide "(1) whether a corporation participating in a public debate may be exposed to liability for factual inaccuracies on the basis that its communications are 'commercial speech' because they might affect consumers' opinions about the company as a corporate citizen, thereby affecting whether consumers will buy the company's products, and (2) assuming arguendo the characterization of the communications at issue as commercial speech was proper, whether the First Amendment permits a state to subject such speech to the California legal regime, including private citizens acting as attorneys general without suffering personal injury, seeking substantial damages, even if the 'commercial speech' was a part of public debate over a matter of broader public interest."⁶³

[Other aspects of California false advertising law combined to make Kasky's claim especially weak. California law, like the federal Lanham Act and most state consumer protection laws, lacks any scienter requirement. Perfectly good-faith errors, if false, can lead to liability. In addition, California's standing requirement for consumer suits is minimal at best. Kasky had never bought a pair of Nike shoes, which does make his harm from Nike's alleged misstatements a bit hard to identify.]

Nike and its amici made a number of powerful arguments that the application of the California false advertising law to its conduct would violate the First Amendment. Unfortunately, some of the most intuitively persuasive arguments provide no distinction between Kasky's claims and those of any other false advertising plaintiff, or the government regulating drug claims or securities filings.

A. Defining Commercial Speech

Nike's main claim was that its letters were not commercial speech but political speech, whose truth or falsity was therefore not a matter for governmental determination. The commercial/political divide clearly produces hard cases, where a for-profit (or even nonprofit) entity weighs in on a matter of public interest with an opinion that just happens to coincide with its private interest. False advertising law increasingly confronts similar cases,⁶⁴ and more exotic instances are in the offing – when a manufacturer pays for product placement in a television show or movie, for example, do ordinary rules about the claims that can be made for the product apply?⁶⁵

⁶³ Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2555 (2003). [check]

⁶⁴ See, e.g., Proctor & Gamble, Co. v. Amway Corp., 242 F.3d 539, 552 (5th Cir. 2001) (although discussing religion is protected by the First Amendment, Amway distributor who spread rumor that competitor supported Satanism may have engaged in commercial speech); Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1120-21 & n. 8 (8th Cir. 1999) (advertiser's letter to customers stating that competitor's product posed a health risk was commercial speech, which "need not originate solely from economic motives"); Birthright v. Birthright, Inc., 827 F. Supp. 1114, 1138 (D.N.J. 1993) (advertising that misrepresented how donations to nonprofit were used was actionable under Lanham Act); Marcus v. Jewish Nat'l Fund (Keren Kayemeth Leisrael), Inc., 557 N.Y.S.2d 886, 889 (Sup. Ct. App. Div. 1990) (same result under New York law); cf. [United We Stand trademark case].

⁶⁵ [cites on product placement] When advertisers have not given permission and do not like the way their products are portrayed, they may bring suit. [Dickie Roberts and George of the Jungle 2] Although courts have to date been unwelcoming of such claims, whether styled as trademark infringement, dilution, or false advertising, the growing awareness among consumers that some products do appear in films by permission

The biggest problem with calling Nike's speech commercial was its effect on the balance between Nike and its critics. When antiglobalization forces condemn Nike for its labor practices, their speech – concededly noncommercial – is subject only to general libel laws, with their heightened standards of proof for speech directed against public figures, as Nike surely is. Absent malicious lies, Nike can't go to court to shut up the protesters. But under *Kasky*, Nike's response, if targeted to the consumers on whom it depends for economic survival, is commercial speech and must be truthful – as determined by a court – or Nike may be liable for large sums of money. One side gets to fight freestyle while the other is limited to Marquis of Queensberry rules, to use Justice Scalia's memorable analogy.⁶⁶

[Is this really viewpoint discrimination? Nonbusiness actors are not proposing a commercial transaction; they may not have either the motives to distort or the credibility attached to people speaking about their own products. It's also a little peculiar to call this viewpoint discrimination, where the gravamen is suppression of a particular message, when commercial actors may still tout their wares subject only to the requirement that their speech not be false or misleading.] There are other instances in which the government goes around tying one metaphorical combatant's hand behind its metaphorical back. For example, the FTC's Telemarketing Sales Rule,⁶⁷ promulgated pursuant to the 1994 Telemarketing Consumer Fraud and Abuse Prevention Act,⁶⁸ requires many disclosures by telemarketers about their identities and intentions, while recipients can lie, abuse and taunt the telemarketers at will, as many a humorist has noted. More seriously, some states have additional "no rebuttal" laws, requiring telemarketers to discontinue a call if at any point the customer gives a negative response to the offer.⁶⁹ Persuasion is not allowed, which seems like a serious First Amendment problem if the underlying speech is truthful and nonmisleading. Yet it is difficult to think of these laws as allowing one side to fight freestyle and requiring the other to comply with Marquis of Queensberry rules, because the sides are simply too different to justify the comparison.

The problem of distinguishing commercial from noncommercial speech, however, is not my main focus. My aim here is to show that even if we assume that the line can be firmly fixed, other doctrinal problems remain intractable under current First Amendment analysis.

B. Regulating Product Characteristics

The easiest of Nike's advertising-specific defenses to grasp is that the government lacks an interest in regulating statements about the conditions under which a product is

makes more plausible the claim that they will believe that a particular appearance is authorized by the manufacturer.

⁶⁶ See *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 392 (1992) (holding that, by banning only certain types of fighting words, targeting racist but not anti-racist speakers, a city violated the First Amendment; "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"). Scalia's pithy sentence understandably showed up in the *Kasky* briefs. [Chamber of Commerce Brief, at 16; National Ass'n of Manufacturers Brief, at 4].

⁶⁷ 16 C.F.R. § 310.

⁶⁸ 15 U.S.C. § 6101 *et seq.*

⁶⁹ See, e.g., Kan. Stat. Ann. § 50-670(b)(4); Ky. Rev. Stat. Ann. § 367.46953(3); Miss. Code Ann. § 77-3-603(c); Ore. Rev. Stat. § 646.611(1)(d); Wash. Rev. Code § 19.158.110(1)(b).

manufactured, as opposed to product characteristics.⁷⁰ This position attracted the endorsement of a number of *amici*, as well as Justice Brown in her dissent from the California Supreme Court's decision. Regardless of how ill-fed and ill-housed (or well-fed and well-housed) Nike's subcontractors' workers were, the shoes are the same, so the government interest in consumer protection should not extend to statements such as Nike's.

One could, of course, dispute the factual premise. Perhaps shoes made by distressed workers are more likely to be defective than shoes made by content workers. More significantly, this distinction is inconsistent with the basic premise of advertising regulation, which is that consumers should be able to fulfill their preferences, or have their preferences changed, and not be deceived. Giving the consumer a satisfactory product doesn't make up for deceiving her to close the sale, as the Supreme Court explained with reference to the link between trademark and general false advertising law:

[T]he seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public – the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and ... a misrepresentation for such an end is not permitted.⁷¹

Consumer protection is about more than consumer health, safety, or even pocketbooks. It includes the consumer's interest in getting what she paid for, whether that was cruelty-free beauty or low-calorie ice cream, whether or not her preferences are rational.⁷² Or, if that is not a sufficient government interest to suppress speech, we will have to get rid of rather a lot of regulation, including a healthy chunk of trademark law (for goods of equivalent quality). Conditions of product production that make a difference to consumers include "Made in America,"⁷³ "EPA approved,"⁷⁴ "dolphin-safe

⁷⁰ If false commercial speech is outside the protections of the First Amendment, then the strength of the government interest should not be relevant, assuming that there is a rational basis for the regulation. Yet if one has residual doubts about the commercial/noncommercial distinction, it may make sense to look for good reasons to regulate false commercial speech, at least in close cases.

⁷¹ Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 389 (1965).

⁷² See, e.g., *id.* at 387 ("The public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.") (citation omitted); JR Tobacco, Inc. v. Davidoff of Geneva (CT), Inc., 957 F. Supp. 426, 436 (S.D.N.Y. 1997) ("Although the broader context – the current trends within the cigar market – reveals that perhaps a number of people smoke cigars for sheerly cosmetic reasons and may very well be unable to distinguish a Cuban Cohiba from a JR Alternative, this cannot excuse the falsity of the statements contained in JR's brochure."); Peabody v. P.J.'s Auto Village, Inc., 569 A.2d 460, 462 (Vt. 1989) (where consumer would not have purchased car had she known that it was made by welding the front of 1974 Saab to the back of 1972 Saab, representation that car was 1974 Saab was material misrepresentation under Vermont law even though it had no undesirable consequence on reliability, safety or fair market value).

⁷³ See Federal Trade Comm'n, Complying with the Made In the USA Standard, *available at* <http://www.ftc.gov/bcp/conline/pubs/buspubs/madeusa.htm>; Federal Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1997), *available at* <http://www.ftc.gov/os/1997/12/epsmadeusa.htm>. Research suggests that this claim influences a substantial

tuna,"⁷⁵ "Union Made," "shade-grown coffee," and many others. The FTC regulates product endorsements by celebrities and other authorities, even though they often have no connection with product characteristics, because the FTC believes that endorsement matters to consumers.⁷⁶ Courts will enjoin commercials that falsely claim that one soda beat another in a taste test, again no matter how tasty the soda is.⁷⁷

Getting rid of those cases might be satisfactory to believers in a strong, libertarian First Amendment. But for them, the product characteristics/conditions of production division makes even less sense. What is a product characteristic? Consumers are probably better suited to determining that than courts; if a consumer finds information relevant to her purchase decision, then there is no non-paternalistic reason not to respect her preferences. Ironically, the distinction proposed by Nike and some of its *amici*, while superficially attractive, is far more regulatory at heart than a blanket prohibition on misleading consumers, since it requires government to decide what consumers should legitimately care about.

Relatedly, Nike suggested that product characteristics are more readily verifiable by an advertiser than conditions of manufacture in our modern, subcontractor economy. This, too, cannot be the law. Some product characteristics are almost impossible to verify, such as the relative performance of one analgesic compared to another, a topic that has generated decades of litigation among the competitors and the FTC.⁷⁸ Some conditions of manufacture are simple to verify.

C. Beyond the 30-Second Spot: Unusual Advertising Formats Become Usual

number of purchasers. See C. Min Han, *The Role of Consumer Patriotism in the Choice of Domestic Versus Foreign Products*, 28 J. ADVERTISING RES. 25 (1988).

⁷⁴ Performance Indust. Inc. v. Koos Inc., 18 U.SP.Q.2d 1767, 1771 (E.D. Pa. 1990) ("In today's environmentally conscious world, [false claims regarding EPA approval] are serious misrepresentations. Consumers these days seem to favor products that are environmentally benign and to disdain those that are environmentally harsh.").

⁷⁵ See 16 U.S.C. § 1385 (Dolphin Protection Consumer Information Act, defining "dolphin safe" and making it unlawful to deceptively claim "dolphin safe" status).

⁷⁶ See 16 C.F.R. § 255.5.

⁷⁷ [false preference claims; shampoo case].

⁷⁸ See, e.g., Sterling Drug, Inc. v. Federal Trade Comm'n, 741 F.2d 1146 (9th Cir. 1984); American Home Prods. Corp. v. Federal Trade Comm'n, 695 F.2d 681 (3d Cir. 1982); American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978); Am. Home Prods. Corp. v. Procter & Gamble Co., 871 F.Supp. 739, 761-62 (D.N.J.1994); American Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568 (S.D.N.Y. 1987); Upjohn Co. v. American Home Prods. Corp., 598 F. Supp. 550 (S.D.N.Y. 1984); American Home Prods. Corp. v. Abbott Labs., 522 F. Supp. 1035 (S.D.N.Y. 1981); McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517 (S.D.N.Y. 1980); F.T.C. v. Sterling Drug, Inc., 215 F. Supp. 327 (S.D.N.Y. 1963); In re Novartis Corp., No. 9279, 1999 WL 353248 (F.T.C. May 13, 1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000). Litigation over the best treatment for heartburn has likewise produced an entire subfield of false advertising law. See, e.g., Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578 (3d Cir. 2002); Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Procter & Gamble Co., 285 F.Supp. 2d 389 (S.D.N.Y. 2003); Glaxo Warner-Lambert OTC G.P. v. Johnson & Johnson Merck Consumer Pharmaceuticals Co., 935 F.Supp. 327 (S.D.N.Y. 1996); SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., 95 Civ. 7011 (HB), 1996 U.S. Dist. LEXIS 7257, at *43-45 (S.D.N.Y. May 24, 1996); SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 906 F.Supp. 178 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 943 (2d Cir. 1996) (table).

Justice Breyer noted that the materials at issue in *Nike* appeared outside of a traditional advertising format, focusing on a letter sent to numerous college presidents. The letter was, as he pointed out, different from a newspaper or television ad. But then, it was directed to a much smaller audience than a newspaper or television show: people who controlled college athletic budgets. False advertising law has had no difficulty finding similar letters to be commercial speech when they targeted small, specialized markets, and this makes perfect sense.⁷⁹ Along with direct mail, distribution of article reprints,⁸⁰ business cards,⁸¹ seminars,⁸² statements to trade publications,⁸³ and individual presentations by salespeople⁸⁴ have been regulated under false advertising law. The FDA

⁷⁹ See, e.g., *Coastal Abstract Serv., Inc. v. First American Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (where the relevant market consists of only a limited number of potential purchasers, a promotional presentation to a single customer may qualify as false advertising); *Mobius Management Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005 (S.D.N.Y. 1995) (letter to a single customer); cf. *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114, 1137-38 (D.N.J. 1993) (holding that a nonprofit organization's unlicensed use of trademark in fund-raising letters constituted false advertising). But see *Ultra-Temp. Corp. v. Advanced Vacuum Sys., Inc.*, 27 F. Supp. 2d 86, 92-93 (D. Mass. 1998) (letter to a single customer is not advertising); *Garland Co. v. Ecology Roof Sys. Corp.*, 895 F. Supp. 274, 279 (D. Kan. 1995) (same); *Goldsmith v. Polygram Diversified Ventures, Inc.*, 37 U.S.P.Q.2d 1321, 1326 (S.D.N.Y. 1995) (same); *American Needle & Novelty Inc. v. Drew Pearson Marketing, Inc.*, 27 U.S.P.Q.2d 1059, 1062-63 (N.D. Ill. 1993) (same).

⁸⁰ See *Semco, Inc. v. Amcast, Inc.* 52 F.3d 108, 113 (6th Cir. 1995) (reversing grant of summary judgment where article reprints containing false claims were distributed at trade shows); *Gordon and Breach Science Publishers S.A. v. American Instit. of Physics*, 859 F. Supp. 1521, 1532-45 (S.D.N.Y. 1994) (finding that dissemination of reprints of comparative survey constituted commercial speech), *later proceedings at* 905 F. Supp. 169, 180 (S.D.N.Y. 1995); see also Federal Trade Comm'n, Informal Staff Advisory Opinion 97-5 (July 31, 1997), available at <http://www.ftc.gov/bcp/franchise/advops/adv97-5.htm> (stating that reprints of media articles about franchisor's earnings are likely to be subject to FTC's franchise disclosure rules if franchisor gives them to potential franchisee; "[b]y disseminating copies of the news article ... the franchisor effectively ratifies the journalists's words as its own and, in so doing, converts the advertising article into an advertising piece"). But see *National Life Ins. Co. v. Phillips Publ., Inc.*, 793 F. Supp. 627, 644-45 & n.33 (D. Md. 1992) (advertisements accurately reporting portions of newsletter were not commercial speech because they were not included to aid in sale of product but as part of public controversy; thus change from newsletter to advertisement was constitutionally irrelevant).

⁸¹ See *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 796 (S.D.N.Y. 1997) (finding that manufacturer's dissemination of such things as business cards constituted advertising or promotion under the Lanham Act).

⁸² See *Federal Trade Comm'n v. Sage Seminars, Inc.*, No. C 95-2854 SBA, 1995 WL 798938, at *5 (N.D. Cal. Nov. 2, 1995) (representations made at seminars given throughout U.S. were "in or affecting commerce" for purposes of FTC Act).

⁸³ See *Fuente Cigar, Ltd. v. Opus One*, 985 F. Supp. 1448, 1456 (M.D. Fla. 1997) (finding that statement to trade publication, directed toward contested consumers, constituted advertising or promotion); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 594-95 (Ill. 1996) (car manufacturer's statement to *Car & Driver* magazine that manufacturer knew would appear as part of review of car could constitute consumer fraud under Illinois law); see also *Semco*, 52 F.3d at 113 (trade journal article written by the defendant's president primarily to tout the defendant's goods was commercial speech).

⁸⁴ See *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 776-78, 795 (S.D.N.Y. 1997) (addressing product claims made by individual Avon sales representatives); *Gordon & Breach Science Publishers S.A. v. American Inst. of Physics*, 905 F. Supp. 169, 180 (S.D.N.Y. 1995) (presentations addressed to relevant consumers were "advertising"); *National Artists Management Co. v. Weaving*, 769 F. Supp. 1224, 1229-36 (S.D.N.Y. 1991) (denying a motion to dismiss a false advertising claim because "speaking by telephone with a number of friends, acquaintances, and colleagues" can be construed as commercial advertisement).

regulates everything it calls “labeling,” which includes calendars, films, and the Physicians Desk Reference.⁸⁵

Justice Breyer offers no reason to have a small-market or press release exception to the law. Nor is Justice Breyer’s general attention to format appropriate, especially in a world in which advertising can take any form we can conceive and probably some we can’t.⁸⁶ The press releases that form part of the challenged materials in *Nike* are increasingly standard means of communicating directly with consumers, as companies know that material in their press releases will often be passed on without alteration by reporters,⁸⁷ or even read directly by consumers.⁸⁸ Indeed, press releases have latterly become common evidence in false advertising cases,⁸⁹ and have also played important roles in securities fraud cases.⁹⁰

⁸⁵ See C.F.R. § 202.1(k)(1)(2) (labeling includes “[b]rochures, booklets, mailing pieces, detailing pieces, file cards, bulletins, calendars, price lists, catalogs, house organs, letters, motion picture films, film strips, lantern slides, sound recordings, exhibits, literature . . . and references published (for example, the “Physicians Desk Reference”) for use by medical practitioners.”).

⁸⁶ Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); product placement; NYT article on “Pass the Courvoisier.”

⁸⁷ See “*Picking Up*” a Press Release Takes on New Meaning, PR News, Aug. 26, 2002; Ned Steele, *Interactive Press Releases on Web Change PR, Media Landscape*, O’Dwyer’s PR Services Report, Feb. 2001, at 39 (“It’s a commonly known ‘dirty little secret’ of journalism and PR that press releases too often get lifted whole, sometimes under a reporter’s byline, and published with scant, if any, editing or fact-checking.”). I am indebted to Seth Oltman’s research on the use of press releases to communicate directly with consumers.

⁸⁸ See Steele, *supra* note [], at 39. Yahoo!, for example, now mixes in press releases with other news for general readers. And Sears’ press release titled “Don’t Miss Deals on Holiday Gifts for the Entire Family” is plainly addressed to customers, not reporters. See http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/12-11-2003/0002074155&EDATE=Dec+11,+2003 (visited Mar. 11, 2004). A similar press release, “Practical Meets Romance: Think Outside of the Candy Box This Valentine’s Day,” uses phrases such as “You’ll feel the love,” “Wow your significant other, your mom or your daughter,” and “Put a little power in your man’s hand.” http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/02-06-2004/0002104638&EDATE=Feb+6,+2004 (visited Mar. 11, 2004).

⁸⁹ See, e.g., *Porous Media Corp. v. Pall Corp.*, 201 F.3d 1058 (8th Cir. 2000); *National Basketball Ass’n v. Motorola*, 105 F.3d 841 (2d Cir. 1997); *Lawman Armor Corp. v. Master Lock Co.*, 2004 WL 362210, No. Civ. A. 02-6605 (E.D. Pa. Feb. 27, 2004); *Enzo Life Sciences, Inc. v. Diogene Corp.*, 295 F. Supp. 2d 424 (D. Del. 2003); *Fedders Corp. v. Elite Classics*, 268 F. Supp. 2d 1051 (S.D. Ill. 2003); *Carell v. The Shubert Org.*, 104 F. Supp. 2d 236 (S.D.N.Y.2000); *First Health Group v. United Payors*, 2000 WL 549723 (N.D. Ill. 2000); *Ferrer v. Maychick*, 69 F. Supp.2d 495, 496, 496 n.2 (S.D.N.Y. 1999); *Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918, 936 (C.D. Cal. 1996); *In re Century 21-RE/MAX Real Estate Advertising Claims Litig.*, 882 F. Supp. 915, 929 (C.D. Cal. 1994); *Interactive Network, Inc. v. NTN Communications, Inc.*, 875 F. Supp. 1398, 1410 (N.D. Cal. 1995); see also Nancy L. Buc, *FDA Regulation of Food, Drug, Cosmetic, and Device Promotion*, in *ADVERTISING LAW IN THE NEW MEDIA AGE* 361, 366-67 (PLI 1999) (discussing FDA assertions of authority over press releases and fundraising letters featuring products in development). But see *Procter & Gamble v. Haugen*, 179 F.R.D. 622 (D. Utah 1998) (holding that statements about litigation in press releases were not closely enough connected to the sale of goods to constitute advertising or promotion within the meaning of the Lanham Act); *Gordon and Breach Science Publishers S.A. v. American Inst. of Physics*, 859 F.Supp. 1521, 1532-33 (S.D.N.Y.1994) (published surveys claiming that publisher’s scientific journals were more heavily cited than other publishers’ and press release about surveys did not constitute “commercial advertising or promotion”; underlying surveys were fully protected by the First Amendment). As *Procter & Gamble* and *Gordon &*

D. The Federal Government's Balancing Act

The Solicitor General of the United States filed a brief supporting Nike, though attempting to distinguish California's law from the various and sundry federal laws, including the Food and Drug Act, regulating false and misleading speech. The government's theory was an interesting one: It wasn't that there was anything (much) wrong with the substantive cause of action; the problem was that, under California law, any officious intermeddler could appoint herself a private attorney general and bring a false advertising action against a company, regardless of whether she herself had suffered any damage from the false advertising.⁹¹ The theory has some appeal, at least as an enhancer of the free speech risks of the cause of action; as a practical matter, we can expect more litigation, and thus more of a speech-deterrent effect, when anyone with a grudge and a willingness to risk the expense can litigate rather than forcing the government, with its always limited resources, to pick and choose what advertising to assail. But, as the Court pointed out at oral argument, by First Amendment logic a cause of action unsound in private hands is at least equally so in government hands. The Solicitor General suggested that the government was more to be trusted -- "I'm from the government and I'm here to help you" -- but, unsurprisingly, found little support in the case law for this proposition.

E. Strict Liability for Mistakes

[Scienter/strict liability as a serious problem. The FTC regulates advertising without regard to innocent intent,⁹² as do the Lanham Act⁹³ and many state consumer protection laws.⁹⁴ No matter how strong the First Amendment gets, we wouldn't expect

Breach indicate, it is the substance of the claim and not the presence of the claim in a communication designated a "press release" that controls courts' resolution of false advertising issues.

⁹⁰ See, e.g., *Marsh Group v. Prime Retail, Inc.*, 46 Fed. Appx. 140 (4th Cir. 2002); *ABC Arbitrage v. Tchuruk*, 291 F.3d 336 (5th Cir. 2002); *Nathenson v. Zonagen Inc.*, 267 F.3d 400 (5th Cir. 2001); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154 (2d Cir. 2000); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Stevelman v. Alias Research Inc.*, 174 F.3d 79 (2d Cir. 1999); *In re PLC Sys., Inc. Sec. Litig.*, 41 F. Supp. 2d 106 (D. Mass. 1999); *In re Biogen Sec. Litig.*, 179 F.R.D. 25 (D. Ma. 1997).

⁹¹ Colorado, Illinois and Kansas also do not require a showing of injury and causation as a precondition for a private action. See *Colorado Rev. Stats. § 6-1-113*; *Illinois Rev. Stat. ch. 121-1/2, ¶313* (private action for injunctive relief without proof of damage), *Kan. Stat. Ann. § 50-634* (consumer aggrieved by violation may bring an action, whether or not entitled to damages). Other states do not require proof that the consumer relied on the deceptive advertising for her claim to succeed. See, e.g., *Prishwalko v. Bob Thomas Ford, Inc.*, 636 A.2d 1383, 1388 (Conn. Ct. App. 1994) (no showing of individual reliance required).

⁹² See Advertising Substantiation Policy Statement, 49 Fed. Reg. 30999 (Aug. 2, 1984).

⁹³ See, e.g., *Proctor & Gamble, Co. v. Amway Corp.*, 242 F.3d 539, 552 n.26 (5th Cir. 2001); *American Broadcasting Co. v. Maljack Prods., Inc.*, 34 F. Supp. 2d 665, 677 (N.D. Ill. 1998).

⁹⁴ See, e.g., *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 937 (1st Cir. 1985); *Sergeant Oil & Gas Co. v. National Maintenance & Repair, Inc.*, 861 F. Supp. 1351, 1362 (S.D. Tex. 1994) (Texas Deceptive Trade Practice and Consumer Protection Act applies even where defendant had no reason to know its representations were false); *Maine v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 365 (Me. 1987); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454 (N.J. 1994); *Forbes v. The Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990); *State v. Ford Motor Co.*, 136 A.D.2d 154 (3d Dep't 1988), *aff'd*, 74 N.Y.2d

fraud law to disappear, but there is a big difference between good-faith mistake and deliberate deception, one that has made a First Amendment difference in other contexts. Why wouldn't it do so here? Even a negligence standard, urged by a number of the *Nike* briefs, would have immense consequences in false advertising law generally. [The Third Circuit recently adopted the rule that a claim made without any evidence one way or the other was false under the Lanham Act – is that negligence?] Not to mention the potential consequences for the FDA, the SEC, et cetera, where the logic requiring culpability instead of just absence of truth would apply equally.]

F. Problems of Proof

Perhaps more important than intent is the question of how one determines truth. If the standard for distinguishing truth from falsehood is too lax, then heightened protection for truthful speech will not be much comfort to advertisers, who must constantly risk legal challenges for speech that they believe to be truthful but regulators or competitors (and judges or juries) consider false or misleading. As the Supreme Court has intermittently recognized, it makes no sense to have a substantial difference in the protection accorded to true and false commercial speech but then no speech-sensitive standards for setting the boundary between true and false. Yet that is the current situation in false advertising law, as a brief survey of important presumptions and burdens of proof in the area demonstrates.

When the FTC determines that an ad claim is false, the courts defer to its judgment,⁹⁵ rather than conducting the kind of independent inquiry into the evidence that a robust judicially enforced First Amendment would require.⁹⁶ Matters are little better under the Lanham Act: When a court determines, usually on a motion for a preliminary injunction, that an ad claim is false, it will presume that consumers are deceived and enjoin the ad.⁹⁷ If, however, the ad is literally true but potentially misleading – that is, if it has multiple meanings, some of which are true and others false -- the plaintiff must show that a substantial number of consumers receive the allegedly false message.⁹⁸

495 (1989); *Williams v. Trail Dust Steak House, Inc.*, 727 S.W.2d 812, 814 (Tex. Ct. App. 1987). Some states prohibit deception and intentional omissions of material fact, implicitly confirming that intent is unnecessary for affirmative statements. *See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1521; Del. Code Ann. tit. 6, § 2511; 815 Ill. Comp. Stat. Ann. § 505/2; N.J. Stat. Ann. § 56:8-1; Tex. Bus. & Com. Code § 17.46(b)(23). *But see* S.D. Codified Laws Ann. § 37-24-1 (prohibiting knowing and intentional deceptive practices or omission of material fact); *In re Professional Financial Management, Ltd.*, 703 F. Supp. 1388, 1397 (D. Minn. 1989) (Minnesota law requires culpability, at least negligence); *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 262 S.E.2d 820, 823–24 (Ga. Ct. App. 1979) (requiring proof of intent to deceive); *Porras v. Bell*, 857 P.2d 676, 678 (Kan. Ct. App. 1993) (same); *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311–12 (N.M. 1991) (same); *Wade v. Jobe*, 818 P.2d 1006, 1016 (Utah 1991) (same).

⁹⁵ [cites]

⁹⁶ *See, e.g.*, [Bose v. Consumers Union; FCC cases, Turner & ownership limits].

⁹⁷ *See, e.g.*, *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1992); *McNeilab v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988).

⁹⁸ *See, e.g.*, *Novartis Consumer Health, Inc. v. Johnson & Johnson*Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 588 (3d Cir. 2002); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000); *Johnson & Johnson*Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992).

This regime has a number of weaknesses. First, as the courts recognize with misleading messages, falsity may not be understood. Because courts don't require evidence of deception when a claim is false on its own terms, we don't actually know whether consumers are deceived by any particular false claim. (The old advertising adage is that fifty percent of advertising dollars are wasted, but nobody knows *which* fifty percent.) We *do* know that consumers generally do a bad job of interpreting ads, misunderstanding over a quarter of the facts supposedly conveyed to them.⁹⁹ And such research is usually conducted in artificial contexts where the ads are more likely to be remembered; other studies demonstrate that consumers do a very poor job of remembering the ads they saw only the day before being asked.¹⁰⁰ Worse, we know that people misremember easily, especially when interpretations are suggested to them. In fact, it is possible to convince people that they liked a product that they specifically said they disliked by showing them positive reviews after asking their opinions (or vice versa, turning positive opinions negative); not only will their evaluations become more positive, they will insist that their initial opinions were also positive.¹⁰¹ So we don't know whether false claims actually reach consumers, which is a precondition for doing harm.

Even when the surveys exist to show that consumers receive a false message from an ambiguous claim, they are often far shakier than the kind of evidence that courts have rejected as sufficient to defeat a First Amendment right, particularly in the telecommunications area. Courts have long suspected "the survey researcher's black arts,"¹⁰² and it might be most accurate to say that consumer surveys are used to allow courts to reach the results they prefer – accepted if the court agrees with their conclusions, and discounted otherwise. One court's comment on the battle of the surveys, though more acidly phrased than most, demonstrates why courts feel relatively unconstrained to accept an interested party's survey evidence:

⁹⁹ See JACOB JACOBY & WAYNE D. HOYER, THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS 110-13 (finding that an average of 19% of messages in magazine ads were affirmatively misunderstood by consumers, while 16% of the messages weren't understood (readers answered "don't know" to questions that had been answered by the ads); no message was correctly conveyed to all readers, while only 3 of 1347 respondents completely understood all four readings on which they were quizzed). JACOB JACOBY ET AL., MISCOMPREHENSION OF TELEVISED COMMUNICATIONS 64-73 (1980) (finding that consumers misunderstood an average of 28.3% of messages in television commercial ads; 81.3% of consumers misunderstood at least some portion of those ads, and no ad was completely understood by every consumer); Jacob Jacoby & George J. Szybillo, *Why Disclaimers Fail*, 84 Trademark Reporter 224, 226 (1994) (listing reasons, including inattention and information overload, why consumers may not receive messages that are directed to them).

¹⁰⁰ [headache survey]

¹⁰¹ See GERALD ZALTMAN, HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET 182-83; see also *id.* at 12-13, 166-67, 180-81 (describing various successful experiments in manipulating memories about products or services); Kathryn A. Braun et al., *Make My Memory: How Advertising Can Change Our Memories of the Past*, 19 PSYCHOL. & MARKETING 1 (2002); Kathryn A. Braun, *Post-Experience Effects on Consumer Memory*, 25 J. CONSUMER RES. 319 (1999).

¹⁰² *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 416 (7th Cir. 1994). See also *L&F Products v. Procter & Gamble*, 845 F. Supp. 984, 995-996 (S.D.N.Y. 1994) (noting that survey experts "possess technical and linguistic skills" that can "structure the language and methodology of a survey to produce the most favorable possible results for a client"), *aff'd* 45 F.3d 709 (2d Cir. 1995).

It is difficult to believe that it was a mere coincidence that when each party retained a supposedly independent and objective survey organization, it ended up with survey questions which were virtually certain to produce the particular results it sought. This strongly suggests that those who drafted the survey questions were more likely knaves than fools. If they were indeed the former, they must have assumed that judges are the latter.¹⁰³

Yet another precondition for doing harm is that the false claim affect a consumer's behavior. If a claim does not persuade or attract a consumer, even if she receives it, then suppressing it doesn't prevent any harm. Even when courts demand proof that consumers *receive* a misleading message, they do not require further proof that the consumers be *deceived*, subject only to the qualification that false claims must be material – that is, must be the kind of claims that would in general matter to a consumer's decision, such as claims regarding price, efficacy, or safety.¹⁰⁴ Most claims of any note are presumed to be material;¹⁰⁵ moreover, even a tough materiality standard does not ask whether consumers believe the messages they receive. Consumers may be skeptical that one paint store's wares are the cheapest in town,¹⁰⁶ but the law will suppress that claim, if wrong, even if consumers didn't believe it and didn't act on it.¹⁰⁷ In sum, a presumption that false advertising causes harm is hard to square with the demands for persuasive, specific evidence that courts have made in other areas of speech regulation.

It should be no surprise that the remedies available for false advertising exhibit the familiar insensitivity to libertarian First Amendment demands. Courts and the FTC have broad authority to fashion injunctive relief,¹⁰⁸ and under the Lanham Act preliminary injunctive relief – relief before a full trial on the merits, also known as a prior restraint – is the most common form of injunctive relief. Injunctive relief under the

¹⁰³ American Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568, 582 (S.D.N.Y. 1987).

¹⁰⁴ See, e.g., William H. Morris Co. v. Group W. Inc., 66 F.3d 255, 257 (9th Cir. 1995) (Lanham Act); Thompson Medical Co., 104 F.T.C. 648, 816-17 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); Zine v. Chrysler Corp., 600 N.W.2d 384, 398 (Mich. Ct. App. 1999) (“a material fact for purposes of [Michigan law] would ... be one that is important to the transaction or affects the consumer's decision to enter into the transaction”).

¹⁰⁵ See FTC Policy Statement On Deception, 103 F.T.C. 174, 182-83 (presuming materiality for express claims, intentionally implied claims, omissions where the seller knew that an ordinary consumer would need the omitted information, and claims that significantly involve health, safety, or other matters with which reasonable consumers would be concerned, such as the purpose, safety, efficacy, or cost of the product or service; its durability, performance, warranties or quality; or findings by another agency regarding the product), *appended to Cliffdale Assocs.*, 103 F.T.C. 110 (1984).

¹⁰⁶ [Bevier etc.]

¹⁰⁷ See Novartis Corp. v. Federal Trade Comm'n, 223 F.3d 783, 787 n. 3 (D.C. Cir. 2000) (even an unsuccessful false claim may be enjoined); Castrol, Inc. v. Pennzoil Quaker State Co., No. Civ.A. 00-2511, 2000 WL 1556019, at *18 (D.N.J. Oct. 12, 2000) (enjoining a radio advertisement that was “not only inane, but insult[ed] the intelligence of the average consumer”); JR Tobacco v. Davidoff of Geneva, 957 F. Supp. 426, 436 (S.D.N.Y. 1997) (holding that falsity may be prohibited even if the sophisticated audience to which it is addressed is unlikely to believe it); American Home Prods. Corp. v. Abbott Labs., 522 F. Supp. 1035, 1042, 1045 (S.D.N.Y. 1981) (enjoining claim interpreted by consumers to have false meaning, though “most consumers appear to discount or disregard this intended meaning”; “skepticism ... does not affect the meaning itself or the fact that the meaning was conveyed”).

¹⁰⁸ See 15 U.S.C. § 1117; see also Porter & Dietsch, Inc. v. Federal Trade Comm'n, 605 F.2d 294, 304 (7th Cir. 1979) (“[The FTC] has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist”).

Lanham Act generally requires a showing of likely success on the merits and irreparable injury to the movant. But irreparable injury is usually presumed if an advertisement is false,¹⁰⁹ that is, if the movant is likely to succeed on the merits. This is, unsurprisingly, similar to the rule in trademark law, also governed at the federal level by the Lanham Act.

Central Hudson presupposes that false commercial speech may be banned. There is no such thing, under the First Amendment, as a false idea, but there are false facts. Still, knowingly false factual claims made in political speech, if not libelous, are protected from government sanction despite the damage they may do. (Like, for example, an invented list of Communists in the State Department.) The Court's justifications for regulating commercial speech more readily than political speech mostly focus on the robustness of commercial speech – companies want to make money and will therefore keep advertising even if advertising carries with it some risk of liability. Commercial speech also contains more verifiable factual claims -- at least according to the Court, whose members apparently don't watch much television these days; the average political commercial almost certainly contains more statements of fact than the average laundry detergent commercial.

In theory, then, commercial speech might be just as valuable to the polity as political speech, only easier to regulate for reasons unrelated to its value. But that doesn't seem sufficient to explain the different treatment of commercial speech. As noted above, factual claims in commercial speech can be extremely difficult to prove or disprove, so even if we assume that commercial speech has more factual claims per minute than political speech, that doesn't make it much easier to verify. And while advertising generally is hardy because companies want to make money, particular claims are extremely vulnerable to suppression and distortion because of regulation – if the government might come after a company for claiming its product works, maybe it's safer just to show the product surrounded by shiny happy people, as is the modern trend in advertising.¹¹⁰

Commercial speech might be different from political speech because the connection between false factual claims and concrete harm is more reliable than with political speech. In other words, the correlation between falsehood and harm closer to one because there are fewer steps between the ad and the checkout counter than between the stump speech and the polls. Or perhaps proof of falsity is less subject to biases against unpopular groups when commercial speech is at issue (though pharmaceutical companies might well wonder what solace that gives them). Or, at bottom, maybe commercial speech at the granular, factual level is not really as important as political speech, even if commercial speech generally has grave social, economic and political consequences. All these things might lead us to treat commercial speech differently, but they do seem based on empirical suppositions, not the kind of evidence that the Court has recently demanded when evaluating speech restrictions.

¹⁰⁹ See, e.g., *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 239 (2d Cir. 2001); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (noting “well-established presumption that injuries arising from Lanham Act violations are irreparable, even absent a showing of business loss”); *W.L. Gore & Assoc., Inc. v. Totes, Inc.*, 788 F. Supp. 800, 811 (D. Del. 1992).

¹¹⁰ See [criticisms by Bevier & Kozinski].

IV. Implications: Can This Regulatory State Be Saved?

[Deciding how truthful a claim must be might not be as important if we saw commercial speech only as useful to consumers – because it has an audience¹¹¹ – rather than as an independent right of the commercial entity – because there is a speaker.¹¹² *First National Bank of Boston v. Bellotti*¹¹³ defined the question before the Court as whether speech that would otherwise be constitutionally protected because it could inform listeners about a current political controversy could lose protection because it was spoken by a corporation. The Court therefore struck down a law that prohibited corporations from advertising on referenda that did not directly affect them economically. This question, however, is analytically equivalent to the question of whether corporations have free speech rights.¹¹⁴ The switch in emphasis to the corporation as speaker, though, buries the issue of what counts as “useful to consumers.” If we focus on the listeners, we can check whether they have actually benefited from a message, without even looking at whether the speaker intended to deceive.]

[False advertising law may be particularly vulnerable because it, unlike copyright and trademark, has no well-recognized property interest to which it can appeal as a counterweight to a free speech claim. *Eldred* shows the potential of defining an intangible interest as a property right – it magically moves from part of the marketplace of ideas to the actual marketplace, where it's all right to deny access to those who can't pay. Trademark law has self-consciously moved in the direction of property right, instead of consumer protection device, for decades. That may save it from the general contraction that appears imminent for other false advertising law.

Notably, the EU defines a business's property right in its reputation to include the right not to be spoken of at all, even truthfully. We could define Kasky's interest in not being deceived as a property right, though it's a little harder; we could with less strain define Converse's interest in competing against Nike on the merits as a property interest, part of its goodwill being its comparative position. But that has not been done, and false advertising law therefore lacks one of the most powerful rhetorical countermoves to a free speech claim.]

IV: Conclusion: The First Amendment as Battery Acid

Pearson and the FDA's comprehensive rethinking of its role may herald the future of much regulation of commercial speech. In the short and medium term, at least, what is likely to happen to advertising law is that it will get tied in knots, with courts striking down some regulations and upholding other analytically quite similar

¹¹¹ See *Board of Educ. Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 867 (1982) (“the Constitution protects the right to receive information and ideas”) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

¹¹² See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (“[W]here a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both.”).

¹¹³ 435 U.S. 765 (1978).

¹¹⁴ See Dean Alfange Jr., *A Perspective on the Free Speech Guarantee* 14 (unpub. Manuscript).

regulations. Incoherence is not necessarily an evil in itself; some incoherence is unavoidable in a system with multiple values. The real fear is that the distinctions courts rely on to stop the corrosion of First Amendment reasoning will be incoherent within their own framework, and therefore highly unstable as judicial compromises sustaining some parts of the regulatory state.

When the First Amendment is brought into a field to achieve a particular result, like allowing drug manufacturers to spread information that might give hope and assistance to victims of diseases with no FDA-approved treatments, the effect is to generate arguments that are corrosive of other structures, in a legal culture in which it is important to be able to distinguish one situation from another in order to treat them differently. In other words, we can't be confident that we'll be able to stop First Amendment reasoning where we want it. Even libertarians, who are not anarchists, want legal protection against fraud, but it's not immediately clear why rules against deliberate fraud are constitutional if free speech is an absolute and falsity alone can't justify suppression. The shift from caveat emptor to caveat vendor is a government policy choice, no less than the creation of a remedy for racial and sexual harassment is, adjusting the relations between private parties.¹¹⁵

Slippery slopes aren't inevitable, of course. The pressures not to draw the line between one kind of regulation and another may have conceptual, institutional, and/or political force, but counterpressures also exist. Thus, Fourth and Fifth Amendment privacy rights as claimed by businesses were eventually limited by the needs of the modern regulatory state.¹¹⁶ Perhaps a general anti-rights rhetoric can stem the First Amendment tide, as occurred historically with progressive jurists. Or perhaps another corrosive (basic?) right can be asserted in opposition to free speech, as with the classic tension between liberty and equality, though the content of that right is as yet unclear.

¹¹⁵ See *Federal Trade Comm'n v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937).

¹¹⁶ [Ken Kersch]